**Trial Techniques:**

**Opening Statements, Presentation of Evidence and Closing Arguments**

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Hollywood creates dramatic courtroom scenes, full of attractive lawyers, crafty witnesses, and smoking guns. Litigants shout at one another, and the judge bangs his gavel loudly. The courthouses of the south are never air-conditioned, and romances are kindled at counsel table. In real life, all of America watched as O.J. Simpson’s lawyers spun the wheels of justice, while Johnny Cochran inspired litigators everywhere to create rhyming catchphrases to carry the day. Unfortunately, the trials that take place in Georgia courtrooms are not so dramatic. The attractive cast is replaced with—well—us, and the judges barely raise their voices, much less hammer the bench. How, then, can you recreate the energy of Hollywood in a half-empty courtroom in Georgia?

Effective trial practice depends on much more than good evidence and smart lawyers. Whether you face a judge or a jury, every opportunity you have on your feet is another moment on stage. You must select your words carefully and speak them thoughtfully. This paper will explore strategies for making your best opening statements and conducting your finest witness examinations.

# OPENING STATEMENTS

***“Uh . . . everything that guy just said is bullsh\*t. Thank you.”***

***~Vinny Gambini, “My Cousin Vinny”***

Things worked out well for Vinny Gambini, but his opening statement left something to be desired. The opening statement is your first opportunity to present your client and your case to your audience. It should be well-planned, evenly delivered, and tone-setting. By the time you sit down, the trier of fact should be thoroughly familiar with your theory of the case and what evidence they can expect to hear to support it. More importantly, the trier of fact should already be pulling for you and your client.

First, establish a theme from the very beginning. Give the trier a simple framework to receive and coordinate the evidence as it is presented during the cases in chief. If you provide the trier with the appropriate theme, she will be better armed to recognize and retain the important evidence and disregard the rest.

Second, tell the trier a story, and tell it in an interesting and engaging way. Remember that you have lived with the facts of your case for months, sometimes years. The trier, however, especially if it is a jury, will be hearing these facts for the first time. The opening provides you with the opportunity to tell the story in the way that best advances your theory. Highlight the best facts, and convey the story in chronological order. Keep it simple, and whatever you do, make it noteworthy.

If there are key legal issues or principles that drive the case, take some time to weave them into the opening. This will give you an opportunity to explain the issues in terms that (a) the trier can understand; and (b) advance your theory. Once you’ve set your story up, it’s time to tell the story, and we do that on direct examination.

# Direct Examination

***“Ladies and gentlemen . . . a tap dance.”***

***~Bandleader, “Chicago”***

Direct examination is your chance to lead your witnesses through your story step by painstaking step. The idea is to allow the trier of fact to hear the story in the witnesses’ very own words. A direct examination *must* be thorough, but be concise, be clear, and above all else, be interesting. The dialogue between you and the witness should be seamless.

## Prepare the Witness.

In order to accomplish these goals, of course, you must prepare your witness. In fact, effective witness preparation can make or break your trial, no matter how solid your case. Begin by outlining the key testimony each witness will present—the points, if you will, that each witness should score for your case. From there, draft a comprehensive outline, including questions and answers in an appropriate, conversational tone. Instruct your witness to review the outline and think about how they will communicate with the trier of fact. Identify all of the exhibits a witness will review or authenticate, and provide them with advance copies of the documents so that they are familiar with the content.

Schedule an *in-person* meeting with the witness, and practice, practice, practice. Neither of you should sound rehearsed, but direct examination is no time for surprises. Explain to your witness the types of issues that might arise during his testimony, like objections, for example, and go over the questions you will ask to authenticate exhibits. Remind the witness that their attention should be focused on the trier of fact, and if you can, stand by the jury, so that the witness can look directly at them while answering your questions. Counsel your witness regarding his physical appearance as well. Instruct the witness to leave the Louis Vuitton, the Louboutins and the Cartier at home. Tailor your approach to your story.

## Tell the Story.

With the preparation complete, you are ready for the witness to present your case. You have promised the jury a story, and a story you must deliver. Do not let the mundane subject of the lawsuit prevent you from connecting with the trier of fact. Almost every situation can be analogized to someone else’s experience. Find a common thread, and weave it through every witness’s testimony. Return to the theory of the case again and again, until the trier of fact could tell the story herself.

That said, know when the trier has heard enough. In other words, if the horse is dead, stop beating it. While you may be perfectly capable of recognizing when the witness has said enough, remember that your witness may be relishing his opportunity finally to have his day in court. The witness stand is no place for emotional rants and soapboxes.

Still, allow your witness to be himself—humanize him. For better or for worse, trust is almost always influenced by how much we “like” another person. Maybe your witness is as naturally charming as Reese Witherspoon and endears herself to others without ever saying a word. More likely, your witness will need a little work to come across as natural and charismatic. Make sure you allow some room in the testimony for just enough personal information to remind the trier that the witness is just like him.

Finally, anticipate and neutralize the bombs opposing counsel intends to throw at your witness on cross. With few exceptions, you should be able to surmise the hot topics for cross-examination. If it is appropriate, and if it fits within your narrative, address those issues in advance. Allow the witness to discuss those issues on their own terms, and if you can, give the trier a reason to disregard the issue altogether.

## Show the Proof.

If your story relies on documents, it is critical that you understand how to authenticate a document. Even more important, you must understand the rules of evidence, and in particular, the dreaded hearsay exceptions.

### It Is What It Is.

The process of authentication sounds far more daunting than it actually is. Authentication is simply the process by which the witness establishes that the document is what it purports to be. Both the Georgia and Federal Rules of Evidence require that a document be authenticated as a condition of admissibility. Fed. R. Evid. 901; O.C.G.A. § 24-9-901. The state and federal rules regarding authentication are nearly identical in practice, and at the end of the day, all that is really required is “evidence sufficient to support a finding” that the item is what the proponent claims it to be. Fed. R. Evid. 901(a); O.C.G.A. § 24-9-901(a).

How can you prove that? You can certainly use live testimony, but be forewarned—few things cause a jury to lose interest more quickly than a witness confirming a document’s history. Keep it short. So long as a witness has knowledge of the matter, she may authenticate a document simply by testifying that it is what she claims it to be. Fed. R. Evid. 901(b)(1); O.C.G.A. § 24-9-901(b)(1). Witnesses with the appropriate foundational knowledge may even give their opinions regarding handwriting or voice identification. Fed. R. Evid. 901(b)(2),(5); O.C.G.A. § 24-9-901(b)(2),(5).

More often than not, however, you will not need to rely on live testimony. Many documents can be authenticated as public or business records, both of which are prescribed by the rules of evidence.

(a) Public Documents:

If you authenticate public documents, you can avoid the tedious testimony of a government employee whose only role is to answer a few questions about how and when a document was created and the ordinary course of business. A document is properly authenticated as a public document so long as there is evidence that the document either: (a) is authorized by law to be recorded or filed and is in fact recorded or filed in a public office; or (b) is a purported public record, report, statement, or data compilation, in any form, and is from the public office where items of this nature are kept. Fed. R. Evid. 901(b)(7); O.C.G.A. § 24-9-901(b)(7). You can skip even this process by taking the time to have the document certified or notarized. Fed. R. Evid. 902(1), (4); O.C.G.A. § 24-9-902(1), (4).

(b) Business Records:

Business records that are admissible under Rule 803(6)’s hearsay exception are self-authenticating if the proponent offers them via an affidavit or declaration that sets forth the requisites for the exception. Fed. R. Evid. 902(11), (4); O.C.G.A. § 24-9-902(11). Read the statutes carefully, however. Both the federal and state rules require advance notice of the intent to rely on this provision, as well as an opportunity for inspection.

### He Said She Said.

Nothing strikes fear in the hearts of lawyers more than a hearsay objection, and for good reason. Nobody knows what it is. If you master the rule, you are at a great advantage. The analysis is actually quite simple.

(a) Is It Hearsay?

Say it out loud: An out-of-court statement made by a declarant offered for the truth of the matter asserted. If the evidence does not meet each and every one of these requirements, it is not hearsay, and you can politely suggest that opposing counsel have a seat.

The quickest and most obvious way to defeat the hearsay objection is to establish that you are not offering the statement for the truth of the matter asserted. For example, a statement by a supervisor describing an employee as a “little stalker” is not hearsay and is admissible, not to prove that the employee was, in fact, a little stalker, but to show that the supervisor was aware of the employee’s conduct. Aside from these statements offered for something other than the truth, there are two types of statements that are *not* hearsay.

(1) Declarant’s Prior Statement:

The prior statement of a testifying declarant who is subject to cross examination is not hearsay under three circumstances. First, the prior statement is inconsistent with the declarant’s testimony and was given under oath. Fed. R. Evid. 801(d)(1)(A); O.C.G.A. § 24-8-801(d)(1)(A). Second, the prior statement is consistent with the declarant’s testimony and is offered in rebuttal of an implication that the declarant is lying or testifying due to an improper motive. Fed. R. Evid. 801(d)(1)(B); O.C.G.A. § 24-8-801(d)(1)(B). Third, the prior statement was one of identification of a person the declarant perceived at an earlier time. Fed. R. Evid. 801(d)(1)(C); O.C.G.A. § 24-8-801(d)(1)(C).

(2) Party Admission:

A party’s own statement offered against it by an opposing party also is not hearsay. Fed. R. Evid. 801(d)(2); O.C.G.A. § 24-8-801(d)(2). This provision applies to the party individually or someone acting in a representative capacity, as well as admissions by a person the party authorized to make a statement on the matter. Fed. R. Evid. 801(d)(2)(A), (d)(2)(C); O.C.G.A. § 24-8-801(d)(2)(A), (d)(2)(C). Adoptive admissions are admitted where “the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and whether there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement.” Fed. R. Evid. 801(d)(2)(B); O.C.G.A. § 24-8-801(d)(2)(B); U.S. v. Carter, 760 F.2d 1568, 1579 (11th Cir. 1985). Co-conspirator statements are admitted only where the statement was made both during and in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E); O.C.G.A. § 24-8-801(d)(2)(E). Statement of any agent or employee of the party are not considered hearsay where the statement is within the scope of the agent or employee’s relationship with the party. Fed. R. Evid. 801(d)(2)(D); O.C.G.A. § 24-8-801(d)(2)(D).

(b) Is There an Exception?

If you lose the first battle, arm yourself with a good knowledge of the various hearsay exceptions. They are numerous and varied.

(1) Rule 803:

Rule 803 provides a number of exceptions that are available to an attorney regardless of the declarant’s availability. Fed. R. Evid. 803; O.C.G.A. § 24-8-803. The drafters of the Rules felt that these exceptions were acceptable because the circumstances of the exceptions generally gave the statements “circumstantial guarantees of trustworthiness” sufficient to justify the admission of the statement even if the declarant did not appear at trial. Fed. R. Evid. 803 advisory committee’s note. The following are some of the most commonly used Rule 803 exceptions. It is important to note that the declarant must still be testifying from firsthand knowledge.

* Present Sense Impression: The hearsay rule does not exclude any statement describing or explaining an event or condition made while the declarant was still perceiving the event or immediately after. Fed. R. Evid. 803(1); O.C.G.A. § 24-8-803(1). For a statement to qualify as a present sense impression, it must meet three characteristics: (1) the declarant must have personally perceived the event described; (2) the declaration must be an explanation or description of the event rather than a narration; and (3) the declaration and the event described must be contemporaneous. U.S. v. Mitchell, 145 F.3d 572, 576 (3d Cir. 1998).
* Excited Utterance: An excited utterance is a statement relating to a startling event or condition made while the declarant was still under the stress of the event or condition. Fed. R. Evid. 803(2); O.C.G.A. § 24-8-803(2). Any such statement is excepted from the hearsay rule. Id.
* Then-Existing Mental, Emotional, or Physical Condition: This exception covers a statement made regarding the declarant’s contemporaneous state of mind or emotional, sensational or physical condition. Fed. R. Evid. 803(3); O.C.G.A. § 24-8-803(3). Examples given in the statute include intent, plan, motive, mental feeling, and pain or bodily health. Id. The statute expressly excludes any statement that covers the declarant’s memory, unless the statement related solely to the declarant’s will. Id. The statute also excludes any statement regarding the intent of another person.
* Recorded Recollection: This exception permits reading into evidence any record regarding a matter about which the witness once had knowledge but which the witness can no longer remember well enough to testify fully or accurately. Fed. R. Evid. 803(5)(A); O.C.G.A. § 24-8-803(5). The record must have been either made or adopted by the witness while the matter was still fresh in the witness’s memory. Fed. R. Evid. 803(5)(B). Additionally, the record must accurately reflect the witness’s knowledge. Fed. R. Evid. 803(5)(C). The memorandum or record cannot itself be made an exhibit under this exception unless offered by the other party. Fed. R. Evid. 803(5). This exception can be successfully utilized even where the witness does not recall making the record being used. Parker v. Reda, 327 F.3d 211, 214 (2d Cir. 2003). Note: This hearsay exception should not be confused with Rule 612, which permits an attorney to use a prior writing simply to refresh a forgetful witness’s memory but does not permit introduction of the writing into evidence. Fed. R. Evid. 612; O.C.G.A. § 24-6-612.
* Business Records: Business records will be admitted if certain conditions are met pursuant to Rule 803(6): (1) the record must have been made at or near the time of the matter it covers, Fed. R. Evid. 803(6)(A); (2) it must have been either made by or based off information transmitted by someone with firsthand knowledge, Id.; (3) the record must be of the sort kept in the regular course of business; and (4) it must have been the regular practice of the business to keep the manner of record being produced. Fed. R. Evid. 803(6)(B)-(C). Each of these conditions must be proven by testimony of a witness qualified to speak regarding the record. Fed. R. Evid. 803(6)(D). Finally, a record will not be admitted under this exception if the source of the information or the circumstances of the record’s creation indicate a lack of trustworthiness. Fed. R. Evid. 803(6)(E). The Georgia rule is framed slightly differently but has the same requirements. O.C.G.A. § 24-8-803(6).
* Public Records: Public records like police reports and other governmental investigations can also be admitted under a hearsay exception in certain circumstances. Fed. R. Evid. 803(8); O.C.G.A. § 24-8-803(8). Attorneys attempting to utilize this and the preceding exception will need to keep in mind the authentication requirements discussed in other chapters of the Rules.
* Character Reputation: Evidence of person’s community reputation is an exception to the hearsay rule, provided it also passes muster under the character evidence rules. Fed. R. Evid. 803(21); Fed. R. Evid. 404; O.C.G.A. § 24-8-803(21); O.C.G.A. § 24-4-404.

(2) Rule 804:

This Rule provides exceptions that are only available if the declarant is unavailable to testify at trial. Fed. R. Evid. 804; O.C.G.A. § 24-8-804. Under the Rules, unavailability means one of the following: (1) the declarant cannot testify because the court has found that the matter is privileged in some way; (2) the declarant refuses to testify; (3) the declarant says they cannot recall the matter; or (4) the declarant is dead or prevented from testifying due to some physical or mental condition. Fed. R. Evid. 804(a)(1)-(a)(4); O.C.G.A. § 24-8-804(a). Unavailability may also be found if the witness is beyond the court’s subpoena power. United States v. Marchese, 842 F. Supp. 1307, 1309 (D. Colo. 1994).

Once the declarant has been found unavailable, the statement will be admitted if the proponent offers it under certain, enumerated conditions. One of the most common is former testimony that (a) was given at a trial, hearing, or sworn deposition, and (b) is offered against a party that had the motive and opportunity to question the declarant at that time. Fed. R. Evid. 804(b)(1); O.C.G.A. § 24-8-804(b)(1). In civil cases, this exception is also available if the opportunity to question the declarant was available to a predecessor in interest. Fed. R. Evid. 804(b)(1)(B); O.C.G.A. § 24-8-804(b)(1).

Another common exception available under Rule 804 is a statement that is so against the declarant’s interest that a reasonable person would only have made it if the statement were true. Fed. R. Evid. 804(b)(3)(A); O.C.G.A. § 24-8-804(b)(3)(A). In a criminal case, any such statement must be corroborated by some other evidence or circumstances that give the statement a circumstantial guarantee of trustworthiness. Fed. R. Evid. 803(b)(3)(B); O.C.G.A. § 24-8-804(b)(3)(B).

As with Rule 803, the declarant’s statement must be based on firsthand knowledge. Fed. R. Evid. 804 advisory committee’s notes.

(3) Rule 807:

Rule 807 is called the “Residual Exception” but is also known to many practitioners as the “Necessity Exception.” This is the catch-all exception that a proponent who has been unable to get a statement admitted under any other exception can use as a last-ditch effort—provided, of course, that certain conditions are met.

Procedurally, this exception can only be utilized if the proponent gives any adverse parties notice of the particulars of the statement, including the declarant’s name and address. Fed. R. Evid. 807(b); O.C.G.A. § 24-8-807. Since the policy of the hearsay rules is to only admit evidence that is considered sufficiently trustworthy, any statement admitted under Rule 807 must be accompanied by equivalent circumstantial guarantees of trustworthiness as that given to the exceptions under Rules 803 and 804. Fed. R. Evid. 807(a)(1); O.C.G.A. § 24-8-807. The statement must be offered as evidence of a material fact, Fed. R. Evid. 807(a)(2), and its admission must “best serve” the interests of justice and the purposes behind the Rules. Fed. R. Evid. 807(a)(4); O.C.G.A. § 24-8-807(3). Additionally, the evidence must be “more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.” Fed. R. Evid. 807(a)(3); O.C.G.A. § 24-8-807(2). Frankly, this exception is a last resort; save it for truly exception circumstances.

# Cross-Examination

***“Did you order the Code Red?”***

**~Lt. Daniel Kaffee, “A Few Good Men”**

Lt. Daniel Kaffee definitely went rogue in his famous cross-examination of Col. Nathan Jessup. Every good lawyer knows that the real question was: “You ordered the Code Red, didn’t you?” And although he strongly suspected that Col. Jessup did, in fact, order the Code Red, Lt. Kaffee had no idea how Col. Jessup would answer that question. These are critical errors on cross-examination.

Like every part of trial, preparing for the cross-examination of adverse witnesses is critical. This preparation should start with a good deposition. Get the testimony and admissions you need for summary judgment, but do not stop there. You want to depose the witness thoroughly enough to both know exactly what to expect in response to every question you pose while they are on the stand and be able to object to any change in the witness’s narrative. If you do not know what to expect in response to a question, do not ask it.

Prepare a well-ordered outline including all your topics in advance. Using this outline, prepare tightly drafted, leading questions—questions that elicit nothing more than a “yes” or “no” answer. Use the outline and questions to build facts and admissions upon more facts and admissions until you reach your conclusion. Your outline should cross-reference the precise location in the transcript where the witness first answered the question.

At trial, do not allow the witness to expound on his answer, if you can prevent it. Take control, and it becomes as if you are actually doing the testifying with the witness merely nodding and agreeing. If a witness changes his or her story, you must be prepared to go through the proper steps to impeach that witness with his or her prior sworn testimony. An effective impeachment can make or break a case.

# CLOSING STATEMENTS

***“If it doesn’t fit, you must acquit!”***

***~*Johnnie Cochran**

Johnnie Cochran’s now infamous line from the O.J. Simpson trial was simple—it was short; it conveyed a message; it provided direction; and most importantly, it *rhymed*. It was, in a word, catchy. It reminded the jurors of a pivotal moment in the trial when the prosecution made a critical error, and it reinforced one of the defense’s primary theories. After 25 years, most of us still remember that phrase and the impact it had on the outcome of the trial.

The closing argument is the grand finale of your performance. It provides you the opportunity to remind the jury of your story—the story you promised to tell them in your opening statement, and the story the witnesses and documents told. At the same time, it offers the last opportunity for you to connect with the jury. Johnnie Cochran connected to the jurors with his snappy one-liners; other lawyers use anecdotes or hypotheticals. Whichever you choose, be careful that you are authentic, and stay true to the theory of your case which, by now, should be the juror’s view of the case as well. Use the jury instructions to your advantage. Highlight the ones that best suit your case; use demonstratives for emphasis; and explain how those instructions guide their deliberation.