

Trial Practice

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Trial Practice

- Working with Pro Se parties
- Creating your trial notebook



Trial Practice

Working with Pro Se Parties

All litigants want to know that they have been heard and feel they have been treated fairly.

When don't they feel like they got to tell their story or feel they were treated fairly, they won't respect the final decision because they feel they didn't get their day in court.

Help where you can.

- Send out reminders of deadlines and examples.
- Emails to all parties explaining what to expect at the hearing.
 - Order of presentation of evidence
 - Order of direct and cross examination

Try to refer to the Pro Se litigant by their surname (Mr. Smith, Ms. Smith, etc.), rather than by their role (Intervenor, Complainant, Respondent).

Tips or thoughts?

Trial Practice

Creating your trial notebook

The record is the lawyer's responsibility.
Think of what record you want to make
and then make it, even in the face of
objections or adverse rulings.

– Francis Smith (1910-2004), South Dakota Lawyer

Creating your trial notebook

- A trial notebook is (generally) a three-ring binder that organizes all the essential information you will need at trial.
- Keep in mind that notebooks are unique to you and your style and preferences.
- Tips
 - Don't make it too lengthy or complex.
 - Get advice from experienced colleagues. What have they found helpful?

Suggested Sections to Include

- Important statutes for quick reference
- Witness List
- Exhibit List
- Motions throughout the proceeding
- List of desired findings of fact
- List of common objections
- Cheat sheet for foundation
- Outline of direct examination questions
- Legal Theories

Witness List

- Print a sheet with all witnesses organized by party.
- Outline of questions for each witness.
- Make a note of any objections to a witness or testimony you wish to make.
- Don't be shy about asking for another party's witness list ahead of time.

Exhibit List

This will help you track exhibits and make sure you don't forget to offer yours.

Exhibit	Description	Witness	Stipulated?	Offered?	Admitted?
S1	Prefiled Testimony and Exhibits of Jon Thurber	Thurber			
S2	Prefiled Testimony and Exhibits of William R. Byrd, P.E.	Byrd			
S3	Prefiled Testimony and Exhibits of Jaclyn McGuire	McGuire			
S4	Prefiled Testimony and Exhibits of Hilary Morey	Morey			
S5	Prefiled Testimony and Exhibit of Tim Cowman	Cowman			
S6	Prefiled Testimony and Exhibits of Jenna Carlson Dietmeier, PhD	Dietmeier			
S7	Prefiled Testimony and Exhibit of Herbert Pirela	Sterner			
S8	Prefiled Testimony and Exhibit of Adam DiAntonio	Frazell			
S9	Prefiled Testimony and Exhibits of Amy Cottrell	Sterner			
S10	Prefiled Testimony and Exhibit of Brian Sterner	Sterner			
S11	Prefiled Testimony and Exhibit of Sara Thronson	Sterner			
S12	Prefiled Testimony and Exhibit of Alissa Ingham	Ingham			
S13	Prefiled Testimony and Exhibit of Matthew Frazell	Frazell			
S14	Additional Staff Data Requests to Applicant	Thurber			

Motions

- Print off and keep the motions as they are filed.
- This will help you keep track of what is pending and make sure nothing gets missed.
 - If your job is to rule on motions, you'll want to make sure that at the end of the proceeding your "Pending Motions" tab is empty.

List of your desired Findings of Fact

- Print out a list of findings you hope to have included in the final order.
- This will help you focus on information you need to get from witnesses.
- Jot down a note next to the FOF when you get supporting testimony to make it easier to find later.
 - This will be a lifesaver when you go to draft your proposed FOF for the final order!

List of Common Objections

- Include a list of “frequent flyer” objections, along with a brief note on how to make them and how to respond to them.

Lack of Foundation

The questioning attorney fails to establish the competency of the witness to provide the information sought to be elicited, e.g., lack of personal knowledge or expertise.

32(d)(3)(A)

Examining Attorney: *“What did Ms. Smith do after you left her office?”*

Defending Attorney: *“Objection, form. Lack of foundation.”*

Examining Attorney: Can have the witness answer, or begin anew by asking, *“Mr. Jones, do you know what Ms. Smith did after you left her office?”*

Witness: *“Yes, she stormed out right behind me and cursed at me.”*

Lay Opinion

The question calls for an opinion based on the perception of a lay witness that would be helpful to clearly understand the witness’s testimony or fact in issue. Fed. R. Evid. 701. The witness has no firsthand knowledge on which to base his or her perception, and/or the opinion would not be helpful in terms of understanding the testimony or aiding the jury.

32(d)(3)(A)

Examining Attorney: *“From what you know of her condition, were you able to form an opinion as to whether Ms. Smith was under the influence of alcohol when you saw her on January 10 of last year?”*

Defending Attorney: *“Objection, lack of foundation.”*

Examining Attorney: Can have the witness answer, or can start anew by asking, *“From what you saw of Ms. Smith on January 10 of last year are you able to form an opinion as to whether she was under the influence of alcohol at that time?”*

Witness: *“Yes.”*

Examining Attorney: *“What is your opinion?”*

Witness: *“Based upon what I saw and . . . Ms. Smith was under the influence of alcohol at that time.”*

Cheat Sheet for laying foundation

- Example:
 - I have handed you what has been marked for identification purposes as _____. Do you recognize this document?
 - What is it?
 - Did you create this document?
 - At the time you created _____, was it true and correct to the best of your knowledge?
 - I move for admission of Exhibit _____.

Outline your direct examination questions

- Sample starter questions:

- Please introduce yourself for the record.
- By whom are you employed?
- What is your job title?
- What are your job duties?
- Do you hold any professional certifications?
 - Flesh that out as needed.
- Did you file prefiled written testimony in this matter?
- Was it true and correct to the best of your knowledge at the time it was filed?
- Do you have any additions, corrections, or deletions to make?
- If I asked you the same questions as in your prefiled testimony today, would your answers be the same?

Legal Theories

- If you have a technical theory that supports your case, write it out in a presentable format.
- Include relevant statutes and case citations.
- Example (note this is merely illustrative and not necessarily my opinion): If my legal theory is that economic harm due to use of eminent domain cannot result from the permitting and construction of a pipeline, because attorney's fees, diminution in property value, and crop loss are all accounted for by the court in a condemnation proceeding, I will include:
 - Cases showing what a court takes into account in valuing property in an eminent domain suit,
 - Statutes on eminent domain
 - Language for potential motions to strike

Suggestions?!

Questions?

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Feel free to reach out anytime.