



---

**SUPREME COURT OF TEXAS PERMANENT JUDICIAL  
COMMISSION FOR CHILDREN, YOUTH AND FAMILIES**

---

**TRIAL SKILLS  
TRAINING  
Building Blocks**

---

OCTOBER 2013

---

*Author: Peter T. Hoffman*

# Table of Contents

Direct Examination .....	BB-2
Cross Examination.....	BB-4
Foundations .....	BB-6
Objections .....	BB-8
Impeachment .....	BB-10
Experts .....	BB-12
Case Planning and Strategy .....	BB-15
Jury Selection .....	BB-18
Opening Statements .....	BB-20
Closing Arguments .....	BB-22
Pretrial and Trial Procedures .....	BB-25

# **BUILDING BLOCK #1**

## **DIRECT EXAMINATION**

**At the end of the course you should be able to perform the following with regards to the direct examination of witnesses:**

**1. ORGANIZE the direct examination in a persuasive and logical way, usually by:**

- Accrediting the witness
- Setting the Scene
- Describing the Action
- Filling in Detail

**2. Present the fact-finder with an UNDERSTANDABLE STORY by:**

- Sometimes using a teaser question
- Usually telling a chronological story, but sometimes using a topical approach
- Utilizing the doctrines of primacy and recency by starting and ending big
- Using head notes

**3. Keep the fact-finder involved by using an INTERESTING PACE by:**

- Not letting the story lag or become tedious
- Not leaving long pauses between answers and the next question except for dramatic effect
- Varying the pace depending on the information being asked about and the mood being created

**4. Make the examination PERSUASIVE by:**

- Tying the story into your case theory and theme
- Letting the witness tell the story, not the attorney, by putting the spotlight on the witness

- Using primarily nonleading, open-ended questions (Who, What, Where, When, Why, How, Describe, Explain)
- Keeping questions simple
- Using simple, non-legal, conversational language
- Using active language
- “Torturing” key points
- Using connectors and “looping back”
- Anticipating cross examination
- Using detail for credibility, not tedium

**5. Use an interesting and dynamic STYLE by:**

- Using your voice for interest and emphasis
- Maintaining eye contact
- Displaying energy and interest
- Not reading your questions, but operating from an outline
- Avoiding distracting mannerisms

## **BUILDING BLOCK #2**

### **CROSS EXAMINATION**

**At the end of the course, you should be able to perform the following with regards to the cross examination of witnesses:**

**1. ORGANIZE the cross examination in a persuasive and logical way, usually by:**

- Arranging the cross examination around the points being made
- Gaining any admissions from the witness before attacking the witness's credibility
- Not repeating the direct examination

**2. Make the examination PERSUASIVE by:**

- Making points that support your theory and theme
- Asking only questions to which you know the answer and not fishing
- Planning questions so that if fishing and the wrong answer is received, the fact-finder will not notice
- Using leading questions and never asking an open-ended question
- Asking only factual questions and not asking for opinions and conclusions
- Asking for only one fact at a time
- Making only big points and avoiding trivial matters
- Using simple language and short questions
- Building bit-by-bit
- "Torturing" key facts
- Using headlines
- Keeping the cross examination brief

**3. Use an interesting and dynamic STYLE by:**

- Maintaining eye contact
- Using a dynamic voice and tone
- Using gestures as appropriate
- Not reading your questions, but working from an outline
- Remembering that cross examination does not mean being cross.

## **BUILDING BLOCK #3**

### **FOUNDATIONS**

**At the end of the course you should be able to perform the following with regards to offering and opposing the offering of evidence:**

- 1. Proceed through the steps for laying the FOUNDATION for an exhibit:**
  - A. Request permission to approach the witness
  - B. Have exhibit marked by court reporter if not already pre-marked
  - C. Show exhibit to opposing counsel
  - D. Show exhibit to the witness and ask “I show you what has been marked as ..... and ask do you recognize it?”
  - E. “What is it?”
  - F. “How do you know that it is .....”
  - G. Any magic questions, e.g., “Does this photograph fairly and accurately show the intersection of Kirby and Mattis as it appeared on the evening of November 30, 2004?”
  - H. “I offer into evidence .....”
  - I. Once admitted, publish to the jury.
  
- 2. Know how to lay the following foundations (see Mauet p. 176):**
  - A. REAL EVIDENCE
  - B. CHAIN OF CUSTODY
  - C. PHOTOGRAPHS
  - D. BUSINESS RECORDS
  - E. MAPS, CHARTS & DIAGRAMS
  
- 3. Be able to OPPOSE the offering of an exhibit by knowing the role of Voir Dire.**

**4. Be able to review an exhibit to see if it meets the requirements of HARPPPO:**

**H**–Hearsay FRE 801

**A**–Authenticity–FRE 901

**R**–Relevance FRE 401

**P**–Personal Knowledge FRE 602

**P**–Prejudice FRE 403

**O**–Original FRE 1001

## **BUILDING BLOCK #4**

### **OBJECTIONS**

**At the end of the course you should be able to perform the following with regards to the making and meeting of objections:**

- 1. Have a REASON for objecting**
- 2. Decide whether objecting will MAKE IT WORSE**
- 3. Determine whether the objection will be SUSTAINED**
- 4. Make a RECORD for appeal**
- 5. AVOID making the objection in front of the jury**
- 6. Know HOW to object:**
  - A. Stand
  - B. Be timely
  - C. State “Objection”
  - D. Brief statement of grounds
  - E. Address judge, not opposing counsel
  - F. Sound confident
  - G. Approach bench to argue
- 7. Know how to RESPOND to objections:**
  - A. Request permission to be heard
  - B. Approach bench to argue
  - C. Wait for ruling
  - D. Offer for a limited purpose where appropriate
  - E. Make a conditional offer where appropriate
  - F. Make an offer of proof when necessary
  - G. Rephrase if objection is to the form of the question
  - H. If objection is overruled, ask question again

**8. Know BASES for objections (see Mauet p. 471)**

## **BUILDING BLOCK #5**

### **IMPEACHMENT**

**At the end of the course you should be able to perform the following with regards to the impeachment of a witness:**

- 1. Recognize inconsistencies in the witness' testimony and decide whether to impeach.**
- 2. Know whether the inconsistency leads to impeachment by prior inconsistent statement or to impeachment by omission.**
- 3. Know whether you want the jury to adopt the prior inconsistent statement as true or whether you want it to believe that both the present testimony and the prior inconsistent statement are false.**
- 4. Know the steps for and be able to do an impeachment by prior inconsistent statement:**

**C = CONFIRM the inconsistency.**

With an incredulous voice, confirm the previous testimony, e.g., "Are you telling us that the light was red?"

"In fact, you have testified/said before that the light was green?" OR

Ask what is in the prior inconsistent statement, using the exact language of the statement, e.g., prior inconsistent statement says the light was red; ask "The light was red?"

**C = CONFRONT the witness with the prior inconsistent statement.**

Ask "That hasn't always been your testimony?" or "You have testified/said in the past the light was red?"

Hand the statement to the witness and lead witness to admitting it is her statement.

If deposition, give page and line.

Read the impeaching words to the witness and have witness admit you have read them correctly.

**C = CREDIT the prior inconsistent statement.**

Build up the accuracy of the statement—internally (under oath, close to time) and externally (other facts in statement are true)

**C = CONTRAST (with caution) the prior inconsistent statement with current testimony.**

“Your deposition does not say the light was red?”

“It says the light was green?”

**5. Know that impeachment by omission is the same except that the statement is credited by building up why the statement should have contained the facts being testified to today.**

**6. Know how to rehabilitate a witness who has been impeached.**

“Counsel a few moments ago asked you about the color of the light. Is your deposition accurate?”

“Why isn’t it accurate?”

“What was the color of the light?” OR

Suggest excuses to the witness, e.g., “How were you feeling on the day your deposition was taken?” OR

Ignore.

## BUILDING BLOCK #6

### EXPERTS

At the end of the course you should be able to perform the following with regards to the direct examination of expert witnesses:

**1. ORGANIZE the direct testimony of the expert:**

**A. INTRODUCE the expert.**

- 1) “Dr. Jones, would you introduce yourself to the ladies and gentlemen of the jury?”
- 2) If unusual field, need to explain. “Dr. Jones, you said you are a mass spectrometry chemist, what exactly is a mass spectrometry chemist?”  
  
“Is one of the things a mass spectrometry chemist does is to test metal to see if it has flaws?”

**B. Give a TEASER**

“Have you been asked to come here today and give your opinion on whether the rudder attachments in the plaintiff’s plane were defective? Before we get to your opinion, let’s find out what qualifies you to give this opinion.”

**C. QUALIFY the expert.**

- 1) Slant the credentials to the opinion the expert will be giving. Avoid the category approach.
- 2) Give as much human interest as possible.
- 3) Anticipate any cross examination on credentials.
- 4) Some courts allow resumes to be introduced.
- 5) May want to hold back some credentials until later in the examination when they become more relevant. Consider bringing in some of the credentials at that point of the examination when they become relevant to what the expert did.

**D. TENDER the expert with a flourish with those judges permitting or requiring tendering.**

**E. Ask for the expert's OPINION.**

- 1) May want to do basis first.
- 2) Use a visual if possible.
- 3) Opinions must be to a reasonable degree of certainty or probability (or both). Some courts require that this be done through a two-step magic question: "Dr. Jones, do you have an opinion to a reasonable degree of certainty/probability as to whether the metal in the rudder connection was defective? What is that opinion?"

**F. Elicit the BASIS FOR THE OPINION.**

- 1) Many different organizational schemes. One possible organization:
  - a. Usual procedure in arriving at opinion.
  - b. Why follow that procedure
  - c. Procedure in this case
  - d. What found.
  - e. Significance of findings
- 2) Use plain and understandable language. Translate any jargon.
- 3) Encourage powerful, persuasive language.
- 4) Use examples and analogies.
- 5) Use internal summaries where long.
- 6) Avoid narratives unless excellent teacher.
- 7) Tie into greater authority; point out consensus.
- 8) Use visuals.
- 9) Anticipate cross examination.
- 10) Don't try to turn jury into experts.

**G. Explain the DIFFERENCES between your expert and the opponent's expert's opinion.**

**H. Conclude with OPINION AGAIN--“Having reviewed Dr. Smith’s report, do you still have the opinion that the metal in the rudder attachment was defective?”**

**2 Be able to CROSS EXAMINE the expert.**

**A. All the RULES OF CROSS EXAMINATION apply to experts in spades.**

**B. Consider whether to VOIR DIRE on qualifications and basis for opinion.**

**C. Areas of cross examination:**

1. FAVORABLE ADMISSIONS.
2. QUALIFICATIONS and/or LIMITING EXPERTISE.
3. Correctness of ASSUMPTIONS.
4. Varying ASSUMPTIONS.
5. BIASES.
6. Lack of PERSONAL KNOWLEDGE.
7. QUALITY of information relied on.
8. What expert HAS NOT DONE.
9. Selection of data or procedures by OTHERS.
10. ERRORS in calculations.
11. OMISSION of significant facts.
12. LEARNED TREATISES.

**D. Avoid cross examination challenging:**

1. ANALYSIS or LOGIC.
2. INFERENCES  
Adequacy of BASIS FOR OPINION.

## **BUILDING BLOCK #7**

### **CASE PLANNING AND TRIAL NOTEBOOK**

**At the end of the course you should be able to perform the following with regards to developing a case theory and preparing a trial notebook by:**

**I. UNDERSTANDING that a case theory is composed of three interrelated parts:**

- the LEGAL theory, that is the law that entitles you to the relief you are seeking
- the FACTUAL theory, that is the story or facts that satisfy your legal theory
- the PERSUASIVE theory, that is why you should win as a matter of fairness and justice
- the case THEME is a one sentence distillation of your case theory that appeals to the jurors' moral values

**II. Developing a LEGAL theory by doing the necessary legal research to determine all possible law governing your case**

**III. Developing a FACTUAL theory by determining what happened and by using:**

- Chronologies
- Proof Charts
- Identifying facts as opposed to conclusions
- Thinking about what inferences can be drawn from those facts—both pro and con
- Identifying hard facts versus soft facts
- Identifying those factual questions that are in dispute and determining how to develop further information about the disputed facts
- Thinking about the facts as a story or movie script—what should/would happen in this situation

- Thinking about why a jury should believe your story and not the other side's story

**IV. Developing a PERSUASIVE theory by thinking about what spin can be put on the facts, within the context of the law, that will appeal to our sense of fairness and justice**

**V. Developing a CASE THEORY that is:**

- Short, best summarized in one paragraph
- Simple
- Satisfies the applicable legal theory
- Consistent with all undisputed facts, explains all disputed facts in our favor and refutes all negative facts that need to be refuted, i.e. the case theory must be plausible
- Supported by credible witnesses and evidence that is admissible
- Emotionally appealing by satisfying our common sense, our sense of logic, our sense of justice and our sense of right and wrong
- Explains motives
- Blames someone
- Supported by detail
- Tells a story
- Organized in such a way that each fact makes succeeding facts increasingly more believable
- Uses impact words and phrases
- By the time of trial is limited to one theory
- A case theory that YOU believe

**VI. Creating a TRIAL NOTEBOOK that contains:**

- Litigation Plan

- Proof Chart
- Key Pleadings
- Key Discovery/Deposition Outlines
- Trial Brief and Memoranda/Key Statutes
- Ideas
- To Do List
- Pretrial Order
- Juror Information and Questionnaires
- Voir Dire
- Opening Statement
- Stipulations
- List of Witnesses
- Exhibit Chart
- Direct Examinations
- Cross Examinations
- Key Exhibits
- Closing Argument
- Jury Instructions
- Trial Errors List
- Common Objections/Outline of Impeachment and Refreshing Memory

## **BUILDING BLOCKS #8 & 9**

### **JURY SELECTION**

**At the end of the course you should be able to perform the following with respect to the selection of a jury:**

**1. Identify the GOALS of jury selection:**

- Establishing the theme of your case
- Identifying those prospective jurors who do not satisfy the statutory requirements for serving or who cannot be fair in considering your case
- Identifying fundamental attitudes of prospective jurors
- Establishing your credibility
- Establishing your leadership role
- Educating prospective jurors about the facts of your case
- Identifying those prospective jurors with whom you have positive rapport and those with whom you have negative rapport

**2. PREPARE to conduct an effective voir dire by:**

- Determining the types of persons who are likely to be most receptive to your case theme and theory
- Developing a system to evaluate prospective jurors
- Developing a jury questionnaire in complex case and cases involving sensitive or privacy issues
- Studying procedural and statutory rules, local procedures for the particular jurisdiction and judge.
- Determining who conducts the voir dire, time permitted for jury selection, number of peremptory challenges, bases for challenges for cause and other governing rules

**3. EXAMINE prospective jurors by:**

- Asking open-ended questions beginning with who, how, why, explain, etc.
- Using understandable language
- Looking for non-verbal communication, body language, how prospective jurors interact with one another, the types of books and magazines they carry with them, etc.
- Listening to answers and following up when necessary
- Not embarrassing prospective jurors by asking prying or personal questions in front of panel or making fun of them
- Exposing weaknesses of your case
- Establishing credibility

## **BUILDING BLOCK # 10**

### **OPENING STATEMENTS**

At the end of the course you should be able to perform the following with regards to opening statements:

1. **Organize the opening statement around the principles of PRIMACY and RECENCY, i.e. starting with a concise statement of your theory of the case and ending on a high note.**
2. **Start the opening statement with a THEME, i.e. a bumper sticker that captures the essence of your case theory.**
3. **Tell a STORY of what happened in the case organized in such a way that it is:**
  - Short
  - Simple
  - Understandable
  - Uses head notes, rhetorical questions and conclusory sentences to signal changes in topics
  - Arranged around your theory of the case
  - Begins with a theme sentence—a bumper sticker—capturing the essence of your case theory
  - Puts the listener at the time and place
  - Explains motives, psychological states, beliefs and feelings
  - Avoids excessive use of “The evidence will show . . . .”
  - Anticipates the other side’s case
  - Paints with a broad brush avoiding detail except on those points in dispute where credibility is at issue
  - Avoids overstatement
  - Incorporates exhibits and demonstrative aids where appropriate

- Discuss injuries, but avoid dollar amounts
- Uses impact words and phrases; avoids legalese and tentative language

**4. Use an interesting and dynamic STYLE by:**

- Not reading your opening statement or relying excessively on notes
- Preparing and rehearsing
- Being in the moment, projecting belief
- Maintaining eye contact
- Moving for a purpose
- Using appropriate gestures
- Being dynamic by projecting energy, varying tone, pace and volume, using pauses
- Avoiding distracting mannerisms

**5. Avoid ARGUMENT**

# **BUILDING BLOCK # 11**

## **CLOSING ARGUMENTS**

At the end of the course you should be able to perform the following with regards to closing arguments:

### **1. ORGANIZE the closing argument to:**

- Tie into your theory and theme
- If a defendant, directly challenge the plaintiff's case
- Summarize your evidence in a forceful and persuasive manner
- Resolve the hard issues in the case by using the "block approach"
- Have an emotional appeal and/or an appeal to fairness and justice
- Request a verdict at end

### **2. Use the BLOCK APPROACH that:**

- Identifies the hard issues in the case, usually contained in the jury charge, with which the jury will have to grapple in arriving at a decision
- Sets off each issue with a conclusory statement or a rhetorical question
- Marshals all the evidence in your favor with regards to the issue
- Argues why your evidence is persuasive
- Identifies evidence in opposition
- Argues why opposing evidence is not persuasive
- Concludes with resolution of the issue

### **3. Make the closing argument PERSUASIVE by:**

- Utilizing the doctrines of primacy and recency
- Tying into the case theory and theme
  - Avoiding overstatement
  - Using powerful language
  - As plaintiff, discussing liability before damages; as a defendant, discussing damages before liability

- Using exhibits and demonstrative aids
- Appealing to both logic and emotion

**4. ARGUE in the closing argument, including:**

- Jurors knowledge, experience and common sense
- Who can be trusted and believed
  - 1) Witness's ability and opportunity to observe
  - 2) Witness's manner and conduct while testifying
  - 3) Witness's interest, bias and prejudice
  - 4) Relationship between a witness and a party
  - 5) Reasonableness of witness's testimony, particularly in light of other evidence in the case
- Conflicts in the evidence
- What could have happened
- Analogies, stories, quotations, parables, references to the Bible
- Inferences to be drawn from the evidence
- Logic
- What was proven and not proven
- Failure of a witness to testify
- Burden of proof and whether satisfied
- Jury instructions, applying the law to the facts
- Vivid word pictures
- Sarcasm
- Emotion, sympathy
- Damages

**5. Use an interesting and dynamic STYLE by following the style section of the Opening Statements Building Block.**

**6. AVOID prohibited conduct:**

- Stating personal belief in truthfulness/untruthfulness of evidence, witnesses or merits
- Allude to any matter for which there has been no evidence
- Misstating the law
- Addressing jurors by name
- Appealing to passion or prejudice, juror's personal or social interest, rich versus poor, local versus out of state
- Arguing improper inference from evidence admitted for a limited purpose
- Using the Golden Rule
- Personal attacks on opposing counsel unsupported by the record
- References to insurance

# **BUILDING BLOCK 12**

## **PRETRIAL AND TRIAL PROCEDURE**

**At the end of this course you should be able to perform the following with regards to preparing and trying a case:**

**1. PLAN for trial by:**

- Determining the ORDER OF WITNESSES based on:
  - The need for COVERAGE and ORIENTATION
  - CREDIBILITY
  - TONE/EMOTIONAL IMPACT
  - PRIMACY and RECENCY
  - Telling a STORY
- Preparing a proposed JURY CHARGE
- Preparing TRIAL MEMORANDA and BRIEFS
- Checking the COURT FILE for completeness
- Determining what EXHIBITS will be used and preparing necessary copies and foundations
- Deciding on how exhibits can be most effectively PRESENTED to the court or jury
- Preparing any DEMONSTRATIVE EXHIBITS and ILLUSTRATIVE AIDS
- Using REQUESTS FOR ADMISSIONS and STIPULATIONS to establish authenticity and admissibility of exhibits
- Checking out the courtroom for using TECHNOLOGY
- Notifying all WITNESSES of time and place for their testimony
- SUBPOENAING witnesses when necessary
- Scheduling WITNESS PREPARATION sessions
- Reviewing LOCAL COURT RULES and learning about the judge's COURTROOM RULES
- Preparing a TRIAL KIT containing: White Out, Paper Clips (all sizes), Pens (all colors), Magic Markers and Underliners (all colors), Rubber Bands, Eraser, Aspirin, Stapler & Staples, Staple Remover, Black Clips, Post Its (all size and colors), Scissors, Hole Punch,

Index Tabs, Tape, Round Reinforcements, Round Red Dots, Tape Measure, Tissue, Calculator, Extra Tie (if male), Imwinklereid, *Evidentiary Foundations*, Tackle Box (to hold all)

- Bringing any MOTIONS IN LIMINE and challenges to EXPERT TESTIMONY
- Requesting JUDICIAL NOTICE when appropriate

**2. Prepare for the PRETRIAL CONFERENCE by:**

- Creating a WITNESS LIST, EXHIBIT LIST and a PROPOSED PRETRIAL ORDER, proposed DEPOSITION TESTIMONY, all consistent with the judge's requirements and the local court rules
- PREMARK exhibits
- MEET with opposing counsel to discuss any stipulations, exchange exhibits and creating a proposed pretrial order
- IDENTIFY any concerns or issues about:
  - Courtroom procedures
  - Conduct of jury selection, making challenges, etc.
  - Stating objections
  - Handling exhibits
  - Using technology, displaying exhibits, etc.
  - Demonstrative exhibits and illustrative aids
  - Calling witnesses out of order
  - Alternate jurors
  - Witness sequestration
  - Trial schedule
  - Jury charge
  - Using exhibits in opening
- Obtaining settlement AUTHORITY

**3. Prepare a TRIAL CHECKLIST that may include:**

- MOTIONS TO SEQUESTER
- Offering STIPULATIONS and agreed upon EXHIBITS
- MOTION FOR DIRECTED VERDICT
- RESTING
- ORDER of charging jury