

TRIAL READINESS/SKILLS CHECKLIST

Note: This document was adopted and approved by the Defender Services Performance Measurement Working Group in March 2019, and by the Defender Services Advisory Group in April 2019. It is intended to serve as a checklist to be consulted by the attorney as his or her client's case approaches trial. It may also be advantageous to consult this checklist at the beginning of a representation to aid with developing a theory of the case with a trial strategy in mind.

This checklist supplements the *Federal Adaptation of NLADA's Performance Guidelines for Criminal Defense Representations*, Guideline 7.1 et seq., which should be consulted for additional guidance relating to trial preparation; the *Performance Guidelines* also contain guidance on pre-trial investigation and advocacy, sentencing, and other duties of defense counsel.

Guideline 7.1 General Trial Preparation

1. Review and re-review discovery and investigative plan for continue to prepare case;
2. Review and re-review standard jury instructions to develop and hone legal theory that is consistent with the elements of the offense and affirmative defenses;
3. Begin to choose and develop theme;
4. Pretrial motions and notices;
 - a. Suppression motions;
 - b. Comply with notice requirements of Rule 12 of the Federal Rules of Criminal Procedure and the Federal Rules of Evidence;
 - c. Motions in limine (Continue to review need for as preparations go forward);
 - d. Consider evidentiary stipulations with the government;

5. Review Judge's individual trial order/standing order/pretrial conference order to make sure that you know all of requirements of that Court;
6. Make sure that you have subpoenaed all witnesses, including impeachment witnesses that you might need;
7. Identify any sticky evidentiary issues and work through how to get the information into evidence. Consider which issues to brief in writing ahead of time;
8. Consider filing an in camera trial brief to flag issues and explain the theory of the defense;
9. Prepare trial notebook and witness files;
10. Prepare working draft of Rule 29 motion;
11. Make sure your client will be appropriately dressed for trial.

Guideline 7.2 Voir Dire and Jury Selection

1. Propose voir dire questions for the Court or prepare to conduct voir dire according to the practice of the Court;
2. Consider requesting permission to conduct voir dire if court does not generally allow questioning by attorneys;
3. Consider requesting that the Court play an implicit bias video (See the video created by the Western District of Washington);
4. Make sure you understand how the Court conducts challenges and selects alternate jurors;
5. Make sure to preserve issues at sidebar, if appropriate;
6. Prepare for Batson challenges.

Guideline 7.3 Opening Statement

1. Elements of a strong opening
 - a. Introduces a memorable theme and tells a story, a story that you have a good faith belief that you will be able to present in court;
 - i. Don't over promise in opening;
 - b. Organized;
 - c. Covers the elements of the case;
 - d. Uses clear, simple language;
 - e. Uses impact words and word images;
 - f. Personifies the client;
 - g. Avoid too much argument;
 - h. Ends strongly.

Guideline 7.4 Confronting the Prosecution's Case

1. Cross examination fundamentals
 - a. Use leading questions that have only one fact per question;
 - b. Control the witness;
 - c. Listen to the response of the witness;
 - d. Tie questions to your theme and theory;
 - e. Start and end strongly;
 - f. Organize in chapters;
 - g. Consider whether you need to cross;

- h. Utilize treatises (such as Pozner and Dodd's publications);
- i. Impeachment
 - i. Review mechanics of impeachment by prior inconsistent statements;
 - ii. Review mechanics of impeachment by omission;
 - iii. Review mechanics of impeachment based on bias and interest in outcome;
 - iv. Be familiar with how to rehabilitate your own witnesses. See FRE 801(d)(1)(B) and 608(a);
 - v. Remember Rule 806, which allows you to impeach a hearsay declarant as if they are the declarant;
- j. Adjust Approach to examination based on particular challenges
 - i. Witness may be sympathetic, such as severely injured or scarred or elderly or a child or disabled;
 - ii. There may be a language problem (FRE 604);
 - iii. Witness may be evasive, hostile or forgetful;
 - iv. Witness may need to be approached with candor, fairness, respect/comfort or control;
 - v. It is necessary to be familiar with FRE 611, 612, and 613 in crossing the challenging witness;
- k. Recognize that the preparation and approach of examination of experts is different. Work with treatises and/or work with consulting expert to prepare an approach;

2. Objections
 - a. In order to be ready to object, review FREs prior to trial to refamiliarize yourself with foundational requirements, etc.;
3. Remember to ask the government to bring the physical evidence to court if you would like to utilize it during your examination;
4. Bring Little Red Book to court;
5. Remember to make Rule 29 motion at the close of the government's case-in-chief;
 - a. If the physical evidence will be handled, remember to have gloves with you.

Guideline 7.5 Presenting the Defense Case

1. Preparation
 - a. Meet with witnesses prior to trial;
 - b. Conduct mock examinations;
 - c. Prepare client for testimony through mock directs and crosses;
 - i. Consider having another lawyer conduct the mock cross in order to preserve the attorney-client relationship;
2. Direct examination
 - a. Foundational principles to a good direct
 - i. Open, non-leading questions;
 - ii. Re-living the story and making it memorable and believable
 - iii. Make the story understandable. It should be simple, direct and organized;

- iv. The story should be convincing. Humanize the participants, make it close, and expose the weakness of your story;
 - v. Use short questions and transitions;
 - vi. Start strongly and end strongly;
- b. Refreshing recollection: Any things that refresh the witness's recollection may be used, such as documents, objects, and photographs. Be familiar with the steps for refreshing: establish that the witness does not remember, determine that the witness's memory would be refreshed with a thing such as a document or a photograph, show the thing to the witness and allow them time to examine it, ask of witness's memory has been refreshed, and if the answer is yes, remove the thing and ask the witness to continue the testimony;
- c. Consider using lay opinion and expert witnesses
- d. Character witnesses
 - i. Consider risks and benefits; consider whether you will be opening the door to other unwanted evidence;
- e. Exhibits
 - i. Determine if you want to premark and know what the Court requires. If exhibits are premarked, have binders ready for the witness, the Court, the court reporter, and opposing counsel;
 - ii. If you don't want to premark, make sure that you have enough copies in order to easily mark and distribute during examination;

- iii. Make sure that you actually enter the exhibits into evidence that you want in evidence;
3. Renew Rule 29 motion.

Guideline 7.6 Closing Argument

1. Elements of a good closing
 - a. Continues the memorable theme that was introduced in the opening;
 - b. Is organized and incorporates the jury instructions into the argument;
 - i. really explains and argues the presumption of innocence and the burden of proof;
 - c. Uses clear, simple language and impact words and word images;
 - d. Covers the elements of the offense;
 - e. Addresses the most challenging evidence and makes sure that it folds it into the theory of the defense;
 - f. Must be practiced, practiced and practiced;
 - g. Ends strongly;
 - h. Consider using visual aids and use of technology;
 - i. Watch for improper rebuttal arguments;
 - i. Understand that rebuttal arguments are supposed to be responsive;
 - ii. Make objections;
2. Consider motions for mistrial;
3. Review the exhibits to make sure that the correct ones are going back to the jury. And watch for objectionable labeling of disks, notebooks, exhibits.