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## Trial Prep 101: Tips on What to Think About, What to Focus on, How to Behave, and What to Wear

Joseph S. Simms – May 24, 2017

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In this day and age, the vast majority of cases never see a courtroom. Statistics show that more than 90 percent of cases filed are resolved in some fashion short of trial. But if you're a litigator, odds are good that at some point in your career, you'll have at least a case or two go to trial. And there's no way around it. Trial work is hard. It's time-consuming. And stressful. But if you prepare properly, it can be the most fulfilling aspect of practicing law. If you go into each case with the expectation of long, hard hours, pay attention to details, and expect the unexpected, you will increase your chance of succeeding. You almost certainly won't win every

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case. But if you work hard and prepare properly, you'll do the best possible job for your client every time. This article discusses how to do that in the context of trial preparation. What to think about and when to think about it. What to focus on and what to delegate. Even what to wear and how to behave. Because everything you do in the courtroom counts. And preparation is the key to making sure the courtroom experience is smooth and successful.

### **The Devil Is in the Details**

What do you have to do before arriving on the courthouse steps? How do you maximize the chances of success? How do you minimize risk? You guessed it. Preparation. That's how surprises are avoided. That's how you gain the advantage over your adversary. By being more prepared than they are. And by paying attention to details. Details are how cases are won and lost. You might not need to use every detail. You won't present every shred of evidence. But if you know the details of your case—the facts and the law—you can be flexible and adapt immediately to whatever pops up at trial.

So how do you make sure you are fully prepared and pay attention to details? Standardize the work. Develop a process that you use repeatedly. Every case is different, but litigation has certain key aspects that you always have to hit. So develop a plan. Develop a process. Find what works for you. And do it in every case. For example, every case needs a timeline, a to-do list, a trial notebook. Include certain standard tabs in that notebook and develop them over the life of the case.

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Also, focus on the theme. Everything you do should further the theme. Write it down and keep it in the front of your notebook. Review it frequently and tweak it repeatedly. Always consider what you have to prove and disprove. Track key pleadings and motions and important witnesses and documents. Always be thinking about how your evidence and witnesses play into the case. Guide your actions by what you want in the jury instructions. Guide your actions by what you want to be able to say in opening and closing. Make sure you have evidence to prove everything you need to. And make sure you have a surefire way to get that evidence into the record.

Start preparing for trial the day you are retained. Although the vast majority of cases will never go to trial, prepare as if your case will so you're ahead of the curve. Always be thinking about your themes, evidence, and witnesses. Make sure you have the witnesses and exhibits to prove what you need to prove—and disprove what you need to disprove. Always keep the applicable law in mind. Always know your strengths. And always know your weaknesses.

### **Know the Judge**

Make sure you “know the judge.” Does the court have standing orders? What are the local rules? Does your judge stick with form jury instructions or accept customized versions? If the latter, take the time to customize them. Take the time to make them persuasive and bulletproof. If they're dead-on accurate and the court accepts them, they are hugely influential. Use that opportunity to advocate.

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Have your depositions been filed with the court? Do you know the court's procedure for handling deposition objections? Find out whether the judge handles voir dire exclusively or allows counsel to question the jury pool. Again, that's a huge opportunity for advocacy. Don't squander it.

Does the court want materials submitted electronically? Hard copy? Both? Find out if your case is likely to get spun to a visiting judge in the event of a conflict or continued. If the former, can you glean any information about where you might land so you can prepare accordingly?

And, of course, know the deadlines. When are your witness lists and exhibits due? When must you submit jury instructions, interrogatories, and questionnaires? Make sure all dates and deadlines for pretrial submissions are calendared. Make sure all motion deadlines are honored.

Know all of this early so you can prepare accordingly without having to scramble. The eve of trial is not when you want to be backfilling or dealing with distractions.

### **Know the Courtroom**

Equally important is knowing the courtroom. You may have been there for pretrials, case-management conferences, and settlement conferences. But it's time to look at the courtroom with an eye toward trial. Think about basic things. Where will you sit? Where will you stand during argument and questioning? Where is the blackboard? The whiteboard? The easel? Where is the screen and projector? Even minor things are important—like how big is counsel table? Will it accommodate you, your notebooks, and

exhibits, as well as your trial team and their materials? Make sure you're thinking about technology needs. Find out what is available. Will you be able to plug in, or do you need portable chargers? Will you have Wi-Fi access, or will you need a hotspot?

If you're in a foreign jurisdiction, think about parking. Make sure you know what traffic will be like. Is there construction that will affect parking or traffic? Is it cash parking or credit card? Metered, hourly, or full day? Any detours or special events? What about media, crowds, or spectators? Scope out restaurants for breakfast, lunch, and dinner meetings as needed. Make sure you and your clients and witnesses know where the restrooms are. And make sure you know these details ahead of time.

### **Organize Your Pretrial Preparations**

So you've developed the evidence. You've identified the witnesses and documents. You know the applicable law, and how you intend to try to have that law applied to the facts of your case. You're now through discovery and dispositive motion practice. Absent a settlement, your case is going to trial. You've learned about the judge's proclivities and the courtroom set-up. What now? Again, standardization. Always have a punch list of what needs to be done and when.

Make sure you've identified your trial team—partner/associate/paralegal/clerk, whatever the case may be. At this point, tasks and responsibilities have to be allocated so each team member knows what he or she has to do and when. Or, if you're on your own, what you need to do and when.

## Plan Your Pretrial Motions

A key component of trial prep is motion practice. And not just your pretrial motions. Everything you file—even procedural filings—should emphasize and reinforce your theme. Think strategically. Does your motion to dismiss (or for judgment on the pleadings or for more definite statement) comport with your theme of the case? How about your motion to compel discovery?

Think critically at this point. If you succeed, can you damage your opponent's case before even walking into the courtroom? If you don't succeed, will it hurt your case? Do you want early rulings to position yourself better for settlement? Or should you hold back for strategic reasons until the trial? Remember, this is a good opportunity to educate the judge about what the evidence and evidentiary issues are going to be. It's also a good opportunity to preoccupy your opponent with responding to motions when your opponent should be otherwise preparing for trial—although be prepared for similar strategic gamesmanship from your opponent. Anticipate dealing with those eleventh-hour filings, or make sure you have someone on your trial team doing so.

Pretrial rulings on motions in limine likely will not be made until the eve or morning of trial. They are preliminary in nature and may be revisited during trial. This works both ways. Be prepared for the court to allow evidence you wanted excluded. And to exclude evidence you wanted to get in. But also be prepared to reargue your position at trial. Make the appropriate arguments and proffers to preserve issues for appeal and to convince the court to reconsider an adverse ruling. Trials are fluid. Things can change

quickly. Have bench briefs ready to go on points of law you want to address with the court.

### **Prepare Your Exhibits**

Identify your exhibits and think about how to get them into evidence. Consider any strategic ordering of the exhibits you may want in your binders. Consider whether you want to keep anything separate to hand to the witness for dramatic effect—and make sure that doing so is permissible in your courtroom. Mark, exchange, and submit the exhibits per order or local rule. Mark up your copy to make sure you highlight what needs to be addressed when you start preparing witness outlines.

As you prepare exhibits, discuss stipulations of authenticity and admissibility with opposing counsel. And consider motions in limine to address the exclusion (or admission) of certain evidence. Start preparing your demonstratives and summaries, and make sure you understand what the court permits. Again, this should be somewhat repetitive if you've stayed on top of trial preparation throughout the life of the case.

And don't forget to prepare trial logs. In the heat of trial, the admission and exclusion of exhibits can get lost in the fray. Keep track of what exhibits have been introduced on your side and by your opponent. Identify those to which you will maintain objections, and be prepared to argue for their exclusion. And do not forget to move your exhibits into evidence before resting if they haven't already been admitted.

### **Prepare Your Witnesses**

As you prepare your exhibits, you should also be preparing your

witnesses. In fact, well before, you should be attending to your witnesses. Identify whom you need to testify, when, and why. Where are they? How can you get them to trial? Do you need subpoenas?

Of course, prepare outlines. Not just your questions. Prepare your witnesses for what they may anticipate on cross-examination as well. Meet with your witnesses—and meet with them repeatedly. Prepare them ad nauseam. What can they expect on direct and on cross? Review their prior deposition testimony yourself. And review it with them. Make sure they're familiar and comfortable with their prior testimony and with the exhibits they will see on direct and cross.

Review and update their background information. See if there are any developments that are in the public domain—arrests, lawsuits, divorces, bankruptcies, news articles. Anything that opposing counsel could try to use to impeach, trick, embarrass, or upset the witness.

Take them to the courthouse before trial and cover the logistics. When should they be there? And where should they go? Make sure you talk to them about their clothing, appearance, and demeanor. Make sure they know what to say and how to say it; how to dress; how to sit; where to look; and what to do with their hands so they don't fidget. Make sure you're on top of travel arrangements, flight reservations, hotels. Issue subpoenas if necessary. And practice, practice, practice. You want your witnesses to tell your story credibly, accurately, and flawlessly. And your cross-examinations should be airtight.



Know the exhibits and deposition testimony cold. Have impeachment material at your fingertips. And refresh your background investigations of the other side's witnesses. You never know what new information might be available that could be helpful to your case. And be prepared to deal with rulings on objections that don't go your way, including making a record for appeal by way of proffer. Have your authority at the ready for any sidebar arguments about admissibility.

### **Finalize Your Trial Preparation**

As you head into the last few weeks before trial, revisit everything you've done. Finalize jury instructions, interrogatories, and questionnaires. Attend to stipulations. Make sure your subpoenas are served. And work on your opening statement.

If you've been keeping tabs of evidence that will prove your case, now is the time to put it together. Think again about your theme. And the elements of every cause of action you're either trying to prove or disprove. And once you prepare your opening statement, go through it and identify exactly what is needed to support everything you say. What witnesses will provide the testimony? What exhibits will prove what you say in opening? And what witnesses are needed to get those exhibits into evidence? If you can't identify evidentiary support for something, it shouldn't be in the opening. Jurors notice and remember everything. If you say the other side cannot prove something, be certain that's the case. If you say you are going to prove something, be sure you can. And think about your closing argument as well. What do you want to be able to say? What do you have to prove or disprove in order to be

able to say it? And protect the record for appeal and think about post-trial motion practice.

Make sure you know the details. Are you allowed to approach witnesses? Does the court expect you to stand for objections? Are you allowed to have water at counsel table? Where does the court expect you to keep your briefcases, boxes, and files? Don't let the jurors see you get reprimanded for trivial matters. Don't let them see you scrambling. Know the answers ahead of time. Ask the bailiff, the scheduler, the clerk, or the judge at the final pretrial conference if you have to. Just make sure you know the answers ahead of time.

Have backups to use in the event of tech failures. And have plans and coverage for distractions. Needs of other clients will pop up before and during trial. Developments in other cases will happen. Personal matters will arise. Make sure you provide for coverage so you are not distracted while you're knee-deep in preparing for trial.

**Closing Thoughts** Remember, the more you prepare, the more flexible you'll be with changing circumstances and surprises. The more you prepare, the smoother the process. The more you prepare, the better able you'll be to discuss settlement if—or when—the court urges you to do so at the eleventh hour. Remember, well over 90 percent of cases go away before trial. If you're in court and about to go to trial, bet on the judge pushing settlement. Simply put, the more you prepare, the more likely you are to succeed.

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