

EFFICIENTLY PREPARING A CASE FOR TRIAL
ABA Distance CLE Teleconference
January 12, 2010

I. Scope of this presentation

A. I have previously presented a teleconference on Woodshedding Witnesses and 60 Days Out From Trial. Those presentations are available from the ABA and I recommend you read them along with this one

B. This session deals with how to prepare and try a case efficiently

II. You need to seek advice of someone who has tried a lot of cases in order to determine how to efficiently prepare one.

Lessons I've learned include:

A. Making agreements with the other side as to everything reduces stress, expense and the likelihood

that your client will be hurt by something that doesn't matter

- B. 95% of what happens before trial is not outcome determinative
- C. What is good for the other side, is not necessarily bad for you
- D. Talking to opposing counsel is more productive than writing her
- E. Get the lead lawyers on both sides to talk to each other
- F. 98% of what is said in a deposition never sees the light of day in a courtroom
- G. You will probably end up showing less than 100 exhibits to the jury and what you dump into evidence without publishing to the jury, will not change the result

- H. You are probably going to be limited to less than 20 hours to put on your evidence
- I. You can handle a considerable amount of surprise: indeed, surprise is the friend of good trial lawyers
- J. The first deposition you take will be the most important—do not waste it on some underling. It should be taken by the lead lawyer working on the case
- K. You should accommodate every request of opposing counsel that does not seriously prejudice your client (and very few do), and you should never file or threaten motion for sanctions
- L. You should discuss the above with your client before you start, because many clients intuitively believe that when it comes to discovery, more is better. You need to disabuse them of that notion.

- M. You also need to persuade them that their case will be lost if they fail to produce relevant documents or bring to trial key executives

III. Pretrial Agreements

- A. As soon as you know the identity of counsel, send them Exhibit A (Pretrial Agreements) and ask them what they are willing to agree to.
- B. As trial approaches, try to reach agreement on the subjects listed in Exhibit B (Trial Agreements)

IV. Case Management in General

- A. Control client expectations by preparing a document that you post on your website and that explains your philosophy of handling cases
- B. Try to negotiate a fee agreement that rewards you for efficiency, not wasted effort: both contingent and fixed fees will do the trick.

- C. Follow this simple rule: one lawyer per task; observers are unnecessary
 - D. Manage day-to-day preparation with Task Assignment Sheets updated and discussed at weekly trial team conference calls, with clients in attendance and limited to 30 minutes
- V. Before you file your first pleading, you should prepare the following pretrial aids, based solely upon you discussions with your client, a review of his documents, interviews of anyone who will talk to you without a subpoena and thorough internet research:
- A. Chronology of Events
 - B. Cast of Characters (noting any that are no longer employed by the opposing party and that might be interviewed before filing)
 - C. Hardest Questions and Best Answers

1. Every case boils down to no more than 10 tough questions
2. Preparing to take or defend depositions requires that you devote the time in advance to determining what these questions are and to getting your client's best answers
3. The resulting document will be reviewed and updated until the trial begins

VI. Preparing to take depositions (the most expensive form of discovery)

- A. Put all the hot documents (yours and theirs) in chronological order and update the written chronology
 1. follow up by email requests for additional, illegible or missing documents
 2. study the other side's privilege log—that's where most of the best documents are hid

- B. Put the initials of the best deponent to ask about each document that needs explanation—do not waste time proving up documents or asking about a document that speaks for itself
- C. Only take the depositions you really need and make the proponent for taking a deposition (be it a team member or client) justify spending the time and money by setting out in writing what is expected to be accomplished
- D. Write your questions in advance, share them you're your client and co-counsel in time for input, and plan to limit your questioning to 3 hours
- E. Depositions of witnesses who the other side controls (and therefore can be expected at trial) should be for discovery, not impeachment: do not ask too many leading questions; you want the witness to talk, not

you. It is extremely difficult at trial to impeach by a deposition.

- F. If the witness cannot be compelled to come to trial, conduct a real-life cross: make the questions short, don't shuffle papers or pause. Think always: will the video be interesting to the jury.
- G. Never depose an expert if you have his report and can understand what he has done: it only gives the expert a chance to correct his mistakes prior to trial

VII. Expert Retention and Preparation

- A. Invest in the best expert and be sure he understands your legal theories and any operative documents—forensic experience is more important than technical expertise. Get references from counsel who have cross-examined him at trial.

- B. You need to understand everything you expert does and says. You should be able to write his report yourself. If the other side can find errors in what the expert has done, you should be able to do so yourself.
- C. Make sure your expert express his opinions in ways that acknowledge how or why his opinions could change if he gets new info in the future
- D. Be sure each expert understands what other experts are saying.

VIII. Mock Trials

- A. Conduct one as early as possible and again shortly before the trial. The goal is to find out
 - 1. what you need to discover to win
 - 2. what your case is worth for settlement purposes
 - 3. how to improve your arguments and chances of winning if the case doesn't settle

- B. Make the lawyers do the arguing—forget focus groups or neutral presentations

IX. Outline of Proof and Trial Plan

- A. Well before discovery closes, prepare an outline of the proof you will present at trial to establish each of your claims or defenses: include key documents and the names of witnesses
- B. Before the trial starts, prepare a Trial Plan showing the order of your live witnesses, how much time you will spend on direct with each, the name of the lawyer preparing the witness' Q&A and presenting the witness, the dates for preparation and the projected day and time of testifying. If you are time-limited, this Plan will have to be updated at the end of each day

