EFFICIENTLY PREPARING A CASE FOR TRIAL
New York City Bar CLE
April 5, 2010

I. Scope of this presentation

A. This talk deals with how to prepare and try a case both efficiently and cost effectively

B. Litigating with costs in mind will improve your case, get you to trial quickly, and please the court

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. Cooperation is required by some courts. For example, in the E.D.N.Y, Local Rule 26.5 states that "Counsel

are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous in their dealings with each other, including in matters relating to scheduling and timing of various discovery procedures."

C. 95% of what happens before trial is not outcome determinative

D. What is good for the other side, is not necessarily bad for you

E. Talking to opposing counsel is more productive than writing her

F. Get the lead lawyers on both sides to talk to each other

G. 98% of what is said in a deposition never sees the light of day in a courtroom

H. 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

I. You are probably going to be limited to less than 20 hours to put on your evidence

J. You can handle a considerable amount of surprise: indeed, surprise is the friend of good trial lawyers

K. 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

L. 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

M. 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

N. You also need to persuade them that their case will be lost if they fail to produce relevant documents or properly preserve documents. *See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs, LLC,* No. 05-9016, 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan. 15, 2010) (explaining how "a failure to preserve records -- paper or electronic -- and to search in the right places for those records, will inevitably result in the spoliation of evidence.")

O. You also need to explain to the client their case will be lost if they fail to bring key executives to trial

III. Pretrial Agreements

A. As soon as you know the identity of counsel, send them Exh. A (Pretrial Agreements) and ask them what they are willing to agree to

B. As trial approaches, try to reach agreements 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 your 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 with 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. Cost Agreements

A. Negotiate with all vendors to decrease costs.

1. Court reporting services will give you a better deal if you agree to use them for the entire case

2. E-discovery vendors will negotiate their fee and agree to caps

B. Agree to split some costs with the other side

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

EXHIBIT A

SUSMAN GODFREY L.L.P

Interoffice Memorandum

TO: Attys, LAs

FROM: Stephen D. Susman

DATE: February 11, 2009

RE: Checklist of Pretrial Agreements

Here is a list of pretrial agreements to try to reach with the other side before discovery begins. These agreements will make life easier for both sides and do not advantage one side over the other. Waiting until you are in the heat of battle to try to reach these agreements, one side or the other will feel disadvantaged. Place a check mark in the "Agreed" column for all the agreements that are reached. Any modifications or additions should be noted.

1. As to any discovery dispute, the lead lawyers will try to resolve by phone and no one will write letters to the other, including letters attached as pdf's to emails: just e-mails and phone calls.

2. Depositions will be taken by agreement, with both sides alternating and trying in advance to agree upon the dates for depositions, even before the deponents are identified. In jurisdictions where there is no limit to the length or number of depositions, each side gets 10 lasting for 6 hours each.

3. The parties will use the same court reporter/videographer, who agrees to provide specified services at discounted prices for the right to transcribe all depositions.

4. All papers will be served on the opposing party by e-mail.

5. Documents will be produced on a rolling basis as soon as they have been located and numbered; if copies are produced, the originals will be made available for inspection upon request.

6. Each side must initially produce electronically stored information from the files of 5 custodians selected by the other side during an agreed period of time. Only documents which have a lawyer's name on them can be withheld from production and only if they are in fact privileged. Production does not waive any privilege and documents can be snapped back whenever the producing party recognizes they are privileged. After analyzing the initial production, each side can request electronic files from 5 other custodians. Beyond that, good cause must be demonstrated.

We will produce ESI in the native format kept by the producing party, or in a common interchange format, such as Outlook/PST, Concordance or Summation, so it can be searched by the other side. If any special software is required to conduct a search in native format and is regularly used by the producing party, it must be made available to the other side. We will produce a Bates numbered file listing of the file names and directory structure of what is on any CDs or DVDs exchanged. Either side may use an e-mail or an attachment to an e-mail that came from one of these previously produced disks by printing out the entire e-mail (and the attachment if they are using a file that came with an e-mail) and marking it at the deposition or trial, and either side may use application data (which was not an attachment to e-mail–so it's stand-alone on a CD or DVD) as long as the footer on the pages or a cover sheet indicates (1) the CD or DVD from whence it came, (2) the directory or subdirectory where the file was located on the CD or DVD, and (3) the name of the file itself including the file extension.

7. If agreement cannot be reached on the form of a protective order within 48 hours of the time they are exchanged, both sides will write a letter to the Court including each other's preferred version and, without argument, ask Court to select one or the other ASAP.

8. All deposition exhibits will be numbered sequentially X-1, X-2, etc., regardless of the identity of the deponent or the side introducing the exhibit and the same numbers will be used in pretrial motions and at trial.

9. The parties will share the expense of imaging all deposition exhibits..

10. Neither side will be entitled to discovery of communications between counsel and expert witnesses or to drafts of experts' reports.

11. The production of a privileged document does not waive the privilege as to other privileged documents. Documents that the other side claims are privileged can be snapped back as soon as it is discovered they were produced without any need to show the production was inadvertent.

12. Each side has the right to select 20 documents off the other's privilege list for submission to the court for in camera inspection.

13. Demonstrative exhibits need only be shown to the other side before shown to the jury and need not be listed in any pretrial order.

14. We will agree upon jury questionnaire.

15. We will ask the Court to allow the jurors to take notes and ask questions (by delivering the same to the Court anonymously)

16. We will agree upon a juror notebook possibly containing a cast of characters, list of witnesses (and their photos), time-line, glossary, dispositive documents, etc.

EXHIBIT B

TRIAL AGREEMENTS

1. Agreed briefing schedules on all pretrial motions
2. Date for exchanging real live witness list. Any witness who appears on a party's live witness list whom the other side has not deposed, can be deposed before the final pretrial
3. Agreement on the length of the trial
4. An agreed Motion in Limine plus a briefing schedule for opposed motion
5. All trial exhibits listed on the exhibit lists the parties exchanged before trial are deemed admitted when the trial starts if no party has objected to their admission by that time
6. All exhibits produced by a party are deemed authentic. All exhibits produced by certain third-parties are authentic
7. Deadlines for exchanging exhibit objections and a time to meet and confer on them
8. Deposition counter-designations will be counted against the designator's time. Counter-designations for optional completeness will be played during the "direct examination" portion of the video playback. All counter-designations will be played in full after the "direct examination" portion of the video playback is completed

9. The parties will exchange proposed jury questionnaires on _____ and try to reach agreement before the pretrial conference

10. An agreed juror notebook containing glossary, cast of characters, chronology, any key documents

11. The jurors can take notes, can use their own notes during deliberations and can direct, through the judge, witness questions to each witness before he leaves the stand

12. Distributing sheet for jurors to take notes on before each witness testifies, that contains his photo and title

13. The parties shall notify opposing parties of the order in which they plan to call live witnesses each Friday by 5pm for the following week. The parties shall further notify opposing parties 36 hours before any particular witness is called live

14. Demonstrative exhibits (i.e., those that do not go back into the jury room) need not be listed on the parties Trial Exhibit lists. Those to be used on direct examination, opening or closing will be provided to opposing counsel before the session (morning or afternoon) in which they will be used.

15. The parties will exchange proposed jury instructions on _____ and try to reach

agreement before the trial court sets a charge conference

16. The parties will ask the court to instruct the jury before final arguments

17. The parties will jointly request real-time reporting

18. The parties will share any courtroom audio-visual equipment and will provide each other electronic versions of whatever they display immediately after the display