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Advocate's VIEW

Advice to attorneys in preparation for a civil trial

Benjamin Franklin once said that “[b]y failing to prepare, you are preparing to fail.” While the saying is drastic, it is well recognized that in the context of preparing for a civil jury trial preparation is crucial to presenting a client’s best case. With reference to my own experience, as well as formal and informal sources, this article will address tasks to consider and complete as a civil trial date approaches.

As soon as a trial date is received, immediately notify your client and all potential witnesses, including your expert witness. If you find that a professional witness is unavailable and the trial date cannot be moved, you may need to videotape the testimony of the witness and then have the videotape edited to deal with any objections that may have been raised during the course of the testimony.

This testimony will likely take place before the trial begins and will be outside the presence of the judge. Additionally, be sure to review the Uniform Trial Court Rules for the very specific requirements for therecording and use of videotape testimony. If you are in State Court and the witness is unavailable, you may have to prove the statutory requirements for unavailability in order to use that witness’s prior testimony.

As early as possible, establish a schedule for interviewing and preparing witnesses for their anticipated testimony at trial. This should include a practice cross-examination of your client and any of its representatives or employees. You should also create a trial box to take to court that includes a folder for every witness. The witness folders should include any documents that may be used with the witness, copies of exhibits to be entered, as well as copies of any prior testimony and affidavits.

The trial box should also include an up-to-



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date information sheet with contact information for every person that you may need to contact during the course of the trial – including court and insurance company personnel. Additionally, add to the information sheet a summary of settlement negotiations for easy access to the information when the court asks what has taken place.

Further, the trial box should include a pleadings folder and relevant discovery. Check discovery demands to ensure that all information and documents have been received from the opposing side and determine if anything is owed from your client. If so, produce it. Just as importantly, the trial box should be stocked with non-perishable food to get you or a witness through the long days of trial, as well as post-it notes, highlighters, colored pens and other supplies that should be readily available to avoid delay in front of the judge and jury.

Additionally, given my insurance coverage background, I urge sensitivity to what insurance coverage potentially exists for a claim and recommend determining if a reservation of rights letter or letters have been issued by any insurance carriers. If coverage for certain claims have been disclaimed or a reservations of rights letter has been issued based upon certain conclusions of fact, you should identify those sensitive areas, advise the client and make any necessary adjustments to proof at trial.

Further, such reservations or disclaimers may ethically prevent your ability to disclose certain information to an insurance carrier as the case is prepared and

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goes to trial.

At least 20 days before trial, consider serving Notices to Admit upon opposing counsel. Such notices are an effective tool for establishing basic facts and foundation for introduction of evidence at trial. Likewise, stipulations can be sought from opposing counsel to avoid moving against unnecessary claims or on any other issue that is uncontested.

Additionally, you should look for the assigned judge’s rules and case-specific court order. Locally, many State Court judges issue orders providing dates for motions, dates to stipulate to the exhibits to be used at trial, as well as time restrictions on such things as jury selection, openings and closing statements. Two recent Monroe County Supreme Court trial orders that I have received limit opening and closing statements to 15 minutes each. In addition, one of the orders limits jury panel questioning to thirty minutes. If these

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limitations present a particular hardship in a case, the issues should be discussed with the judge as soon as possible. If an order has not been issued by the presiding judge, contact the judge's clerk or assistant for any guidance he or she may provide, including the times the judge runs his or her courtroom as well as any down days that may take place during the course of the trial. In addition, judges often require trial memoranda from each party describing the case and expected issues to be tried.

Further, determine the method that the assigned justice uses for jury selection prior to the beginning of trial. Preparation should include reading the rules, which can be found at the Office of Court Administration's website at: <https://www.nycourts.gov/publications/pdfs/ImplementingVoiDir2009.pdf>. If your trial is a bench trial, adjust your strategy to make it as easy as possible for the court to follow your evidence. For example, consider having a trial notebook for the court as well as counsel. It should include pleadings, discovery responses, deposition transcripts or excerpts of depositions transcripts, as well as important exhibits and other documents you determine necessary, such as prior orders.

You will also want complete familiarity with the anticipated jury instruction or instructions that the court will follow in deciding the case. Often an assigned justice will provide its standard instructions for the attorneys to review and to propose additional pattern jury instructions or instructions tailored to the case, with supporting case law. If proposals will be made to the court, always inquire if the jury instructions requested can be provided in a word processing format that is compatible with the judge's software. For yourself, write out the elements of each claim and how you will prove it or defend against it.

To the extent possible, always subpoena witnesses and documents as early as possible. Disclosure of trial subpoenas to opposing counsel is not technically required, but upon service it is good practice to pro-

vide copies to counsel in order to discuss any issues with the subpoenas before the trial actually begins. This will prevent unnecessary delays during the course of the trial. Further, make trial subpoenas for documents returnable prior to the commencement date of the trial so the records can be processed by the Clerk of the Court and sent to the judge's courtroom. The arrival of the documents at the Clerk's office should be monitored by the attorney requesting the documents. Additionally, it is advisable to check on what documents the opposing side has subpoenaed for its possible use during the trial.

Preparation for the trial should also include listing exhibits that may - or need - to come into evidence at trial. Identify which witness will be used to enter the evidence and the bases for its acceptance into evidence. If possible, have backup witnesses for introduction of evidence. If you will be introducing the exhibit, write out all of the questions necessary to lay the proper foundation for admitting each piece of evidence at trial. Likewise, one should anticipate objections to evidence that may be presented at trial, including objections that you may make to opposing counsel's introduction of proof during the course of the trial.

If possible, have brief trial memoranda ready to submit to the court on any evidentiary issues that you anticipate. In cases with significant evidentiary issues, move *in limine* (before trial) to preclude the evidence or mention of an issue during the course of the trial. Once a bell has been rung, it cannot be undone. Motions *in limine* are an excellent way to prevent mention of issues that could create unfair prejudice to a party.

Likewise, do not underestimate the importance of demonstrative evidence at trial. This can include pictures, diagrams, summaries or even simply projecting a larger image onto a screen for everyone to see and to easily follow-along as the testimony is presented. Remember that people learn and remember differently – some jurors may be auditory learners while others may be visual learners. Cater to both and if something can be held or passed to the jurors for handling,

plan on doing so if the court permits.

As the trial date approaches, prepare an Order of Proof document for you to use which lists the order of witnesses and evidence to be introduced at trial. In addition, create an exhibit list for yourself with columns to indicate when an exhibit has been marked for identification and when it has been entered into evidence. Further, check in with the court clerk at the conclusion of each day of trial to make sure that all of the exhibits in evidence are present and review his or her list of what has been received into evidence. You cannot walk away with an exhibit that has been received into evidence. It must remain with the court.

Of course, as you prepare, you will be consistently thinking about the theme for jury selection and the trial. If you have particular questions for the jury on a global basis and you do not want to ask them – possibly because of the sensitivity of an issue – ask the court to consider asking the question or questions to avoid bias against your client.

As a practical matter, as you prepare for trial you should try and give your client or the insurer a sense of costs that may be incurred during the course of the trial, including attorney's fees. One can never anticipate the actual cost, but an estimate is usually sufficient. An additional practical note for those with supporting staff and attorneys: communicate the trial requirements and seek support during the course of the trial for other cases as well as the one actually proceeding to trial.

In conclusion, with sufficient preparation, the trial itself should run smoothly and permit you to focus on the unexpected twists and turns that happen with every case. Enjoy the ride.

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