Trial Preparation: The Grind is Worth It

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The hardest part of trial is trial preparation. Trial itself is exciting—nothing quickens a lawyer's heart like an adverse witness eviscerated or a juror nodding along in closing argument. Although we lawyers love to talk about trials themselves, sudden inspiration and spontaneous wit at trial are almost never the keys to victory. It is in the weeks and months of *plodding, grinding trial preparation* that trials are won or lost. That is what this article is about.

Preparing a case for trial requires a lawyer to consider everything from big-picture strategy to mundane details. The lawyer must be able to mentally 'zoom out' and 'zoom in' on any issue—that is, to 'zoom out' and see where any given piece of evidence fits into the overall theory of the case, and 'zoom in' and know exactly how each piece of evidence will be introduced and presented. Because I handle wrongful death and personal injury cases, most of the lawyers I prepare cases with are plaintiffs' lawyers, and I have learned that most plaintiffs' lawyers *love* to 'zoom out'—they are forever talking about overall strategy or trial themes. They want to give big-picture opinions then leave the details to someone else. That is not enough. To win consistently, a lawyer must also master the details.

Trial preparation checklists help, and many are available. Many writers and speakers before me have offered them, and if you want a checklist and don't have one, Google will be happy to help. The best course is to develop a trial prep checklist that is tied to your practice area and the types of the trials that you anticipate, probably by combining lots of preexisting checklists. But a trial prep checklist is not what this article offers.

This article offers specific points that I have found helpful. If you imagine that building a case is like building a house, of course you need a 'zoomed-out' blueprint of how the case is supposed to look when you are finished. Such big-picture architecture is important. But you also need nails and cement mix. This article is about the nails and cement mix.

Courtroom Technology

There is *no* excuse for 'technical difficulties.' Plan, practice, and have a backup.

Many courtrooms have their own audiovisual equipment, and for prosecutors or public defenders who are in the same courtroom often enough to become familiar with the equipment,

that is great. But I am reluctant to trust it. If the Court's audiovisual equipment is gone on the day of trial, or out of batteries, or the system has gone down, or the county forgot to pay the WiFi bill, or the IT person is out sick, then the judge is going to shrug and I am going to be out of luck. I prefer to have my own gear.

Our firm has our own mobile setup. We have a 55-inch television that mounts on a rolling cart and that syncs with any of our firm's laptops over a wireless HDMI connection. We can practice with the setup in our office, then bring the same equipment to trial. We arrive at trial with the TV, rolling cart, an extension cord, the remote control, extra batteries, our wireless HDMI transmitter, a backup HDMI cable, our trial laptop, a backup laptop, a mobile printer, extra ink cartridges, and a host of other equipment that never leaves our trial bag. That way we are self-sufficient, and the chances of technical difficulties are minimized.

The author in trial with a mobile TV monitor.

There are many ways to effectively present electronic images with this setup. Many lawyers love AppleTV, an iPad, and a program called TrialPad. I think that is a great setup, but my office does not use it because we are Windows-based and I worry that the system becomes too dependent upon a single iPad, which could be dropped, get lost, or crash. For Windows tablets, there is a similar program called Limine that I have tinkered with. I found it promising but have not used it at trial because when I tested the program, it crashed occasionally. My office uses something simpler—we use a mirror display with a wireless HDMI transmitter called Nyrius Aries, and we bring an additional laptop and an HDMI cable for backup. When we pull something up on the laptop, the same thing appears on the TV—nothing fancier than that.

Flip Chart

My favorite presentational tool is an old one—the flip chart. In a day of flitting electronic images, its tangibility gives it power.

There are basically three ways to use it. The first is to prepare a page ahead of time, tab the page, then turn to it when you need it. This works well when you want to provide a preplanned, simplified framework for the jury to consider when assimilating evidence. For instance, in a recent automobile collision case against a company that operated commercial motor vehicles, we pre-wrote a page for opening statement that put our three basic theories of liability in one place—the defendant-company (1) hired an unqualified driver, (2) failed to train him, then (3) failed to pull him off the road.

The second way to use a flip chart is to enumerate points that a witness makes. This can work particularly well to describe a multistep process. Here, I like to write in front of the jury on a blank page to emphasize that the evidence is coming from the witness, not from me. For instance, in one case in which my client's injury required him to go through a six-step process every time he had a bowel movement, I wrote the six steps on the flip chart as my client testified. Again, the mundane preparation is key—before asking the questions, I knew the answers and had made tiny tick marks on the page where I planned to write each numeral, one through six, so that the six of them would fill the page but not go over.

The third way is to pre-write some of the page, but fill the rest in later while the jury is watching. I like to do this when asking the jury for money in closing argument. When I turn to the page, the categories of damages are already written—for instance, the page might say "medical bills," "pain and suffering," and "changes to life"—then when I propose numbers, I can write the number beside the corresponding category.

The author using a flip chart in closing argument.

As with the rest of trial, details are key. Writing letters of the right size on a vertical surface while simultaneously questioning a witness is not easy—so practice your penmanship ahead of time. Make sure your easel is sturdy. Buy a flip chart that fits your easel and that has a firm back so that it will not wobble when you're writing. Avoid the Post-It brand flip charts with adhesive on the pages because the stickiness makes it difficult to flip pages during trial.

Voir Dire

Because voir dire practices vary significantly from court to court, my firm makes it a practice to observe the judge's voir dire in a different case a month or two before trial. For instance, in the State Court of Fulton County, the venire often sits out in the gallery so that general questions are asked of thirty- or forty-something potential jurors at one time. In the State Court of Clayton County, however, courts often move jurors from the gallery to the jury box in groups of twelve at a time, such that the lawyer is only asking general questions of twelve jurors at any given moment. Federal judges seem to have their own unique preferences. These differences matter because they change the way I approach my general comments before questioning and the way we draw the seating chart that my office will prepare before the first day of trial.

There are other particularities between courts. Some judges want challenges for cause to be made immediately, some want to hear about challenges for cause only after everything else is completed, and some judges inquire into challenges for cause during breaks. Some judges refer to jurors by placard numbers and others use jurors' names. Some judges expect the lawyers to call out the name or number of each juror who raises his hand or placard in response to a general question, and some prefer to call the names themselves. Some allow questions that align closely with the facts of the case, and some do not. Some are reluctant to excuse jurors for cause, and some will excuse any juror who appears partial even if the juror does not expressly admit to being biased. I want to know as much of this as possible beforehand.

Law to Have on Hand

Every trial brings with it certain undecided legal issues. Be prepared for them. For instance, where it appears even remotely possible that a defendant may try to 'steal' concluding argument, my firm brings printed copies of the cases that outline the rules in that area. We will usually bring four copies of every case—one for the judge, one for the clerk, one for the defense lawyer, and one for me. We prepare the cases for distribution in two ways. First, using Adobe Acrobat, we normally make electronic highlights in the cases and then color-print them so that each copy of the case has highlighted sections that I want to emphasize. Second, if there are multiple cases or authorities on an issue, we will organize them into 'packets' such that in a moment's notice, we can distribute four identical packets, each of which contains the same highlighted authorities paperclipped together in the same order.

It also helps to have legal citations in your notes. For instance, if I plan to ask a controversial question in direct examination, my notes will contain a footnote citing the case that

allows me to ask the question. A common example is a medical bills chart—if I plan to introduce voluminous medical bills through my client, my firm usually prepares a chart summarizing those bills and I will have a footnote in my notes indicating that such summaries are permissible pursuant to O.C.G.A. § 24-10-1006.

Conclusion

Lawyers love to dream big. As architects dream of gorgeous mansions, trial lawyers dream of smashing victories. That's well and good. But you can't build the mansion unless you start with nails and cement.