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PERSPECTIVE

Trial prep in 16 “easy” steps

By Dan L. Stanford

Preparing for any jury trial can be a daunting task, especially for younger lawyers new to the arena. After more than a year of written discovery, depositions, motions and the creation of thousands of pages of documents, it is time to think about putting it all together to make an engaging and compelling live theatre play for twelve strangers.

After dozens of jury trials and too many seminars to count, I have developed a list I call “trial prep in 16 easy steps”, some of which I have created and some I have willfully stolen from others. This list stands as a “minimum,” and should be used at least 90-120 days prior to trial.

1. Make a big “to do” list

Jury trials are all about credibility, and the key to establishing credibility is to be organized (and confident). So, as old fashioned as it may sound, at about 120 days before trial make a comprehensive list of everything you’ll need to accomplish, and perhaps even a timeline of “due dates.” Obviously, the items below should be on any list.

2. Read the applicable jury instructions

Although I highly recommend this also be done in the beginning of your case as you start to prepare your discovery, also well in advance of the trial, you should go over the CACI instructions applicable to the causes of action in your particular case. These provide you with the legal roadmap for the proof you’ll need to win, so only a novice would think about jury instructions late into the trial. And, you’ll only do that once.

3. Read and summarize (if not already done) all deposition transcripts, getting excerpts for witness examinations

Each deposition you have taken becomes a gold mine of possible testimony for trial, so they all have to be read and summarized weeks prior to trial for trial testimony and potential impeachment. In many cases, including the legal mal-

practice cases I prosecute, it can make both the party and their lawyers look bad.

6. Organize and tab a trial binder

Don’t go into war without a plan. Don’t put on a play without a script. And, don’t go to trial without trial binders. They are used to organize your entire trial. At a minimum, your trial binder should include the following tabs:

The title ‘16 Easy Steps’ is obviously tongue in cheek.

practice cases I prosecute, it can be very effective to call the defendants, under 776, by playing directly to the jury selected portions of their videotaped depositions. It can prove embarrassing to them, having to sit still and watch themselves talking nonsense. And, defense counsel has little or no counter designations.

4. Review every piece of paper in the file

Not only should you go through every exhibit used in depositions and motions, but you should take the time to re-review the entire file, cover to cover. The one or two items you’ve missed or forgotten just might save the day.

5. Select written discovery to be used at trial

To the extent you can find inconsistencies in the written discovery, or answers contradicted by deposition testimony, written discovery can provide good impeachment and should be reviewed for such. In addition, reading stupid, blanket objections to the jury can

- a) List of trial objections (bone up on hearsay and objections).
- b) Motions in limine
- c) Voir Dire (Jury Selection)
- d) Opening Statement
- e) Direct Examinations for Each Witness
- f) Cross-Examinations for Each Witness
- g) Closing Argument
- h) Verdict Form

You may also want a tab for “pocket briefs” (see below). By the way, most lawyers use plain black binders, which is why, as a plaintiffs’ lawyer, I use nothing but white binders. White – as in “good guy”.

7. Consider, outline, research and write any motions in limine

Defense lawyers love motions in limine, and most plaintiffs’ lawyers hate them. However, virtually every trial, from both sides, involves at least a few motions to keep evidence or argument out of the case. Consider what evidence really harms your case and research to see if there is

viable precedent to keep it out. If you win on the motion, great, but if you lose, it’s not the end of the world. I have yet to see a case won or lost on the motions in limine.

8. Consider the need for any “pocket briefs”

If you anticipate a major issue may come up during trial, like a motion for nonsuit or directed verdict, consider outlining and drafting succinct legal briefs you can have in your “pocket” for presentation to the Judge if the issues arise. Keep your ears open for pretrial arguments made by opposing counsel, because they will often tip you off to the need for such motions.

9. Draft a trial brief for the court

Some lawyers make the mistake of focusing their entire trial preparation on the jury, and make the mistake of forgetting the judge. Those lawyers quickly learn the hard way that the trial judge can

Dan L. Stanford is a Senior Trial Attorney and CalBar Certified Legal Malpractice Specialist who has prosecuted hundreds of such cases throughout California.



either be friendly, or your worst enemy. Lay your case out, both the facts and law, in a well-written trial brief for the judge. And, don't forget if you're the plaintiffs' lawyers, to address the major defenses you know will be raised.

10. Come up with the "theme" of your case

This item should perhaps be listed first, since not only is it conceivably the most important, but it is an item you should develop from the day the clients walk into your office. Have a theme of your case, remember the theme as you go through discovery, and focus your entire trial prep around your theme. You'll never win a jury trial without a compelling theme and evidence organized around that theme designed to repeatedly reinforce it.

11. Write out jury selection

Remember, you don't pick the jury, you unpick the jury. So, figure out which topics you need to touch on to allow you to intelligently exercise your preemptory challenges. Mix up your questions, get the jury to talk, and if you can, plan on memorizing the jurors' names.

12. Write out or outline your opening statement

Many studies have shown the importance of a powerful opening statement. So, don't ever try to wing it. In fact, I write my opening statement at the beginning of the case and then continually modify it as the case progresses through discovery. Make it interesting and compelling, and avoid saying "the evidence will show." That convinces no one. Start strong, finish strong, and drive home your theme.

13. Write out or outline direct examination for each witness

List the witnesses you intend to call to tell your clients' story and come up with a direct examination for each. Remember not to be redundant or "cumulative," and also remember no leading questions. Who? What? Where? When? How? Here the witness is the star.

14. Write out or outline cross-examinations for each witness

Take the list of opposing witnesses and work to outline your

cross-examination for each. Figure out the vulnerable areas for each and what can effectively impeach them. In my opinion, this is the most fun you can have as a trial lawyer, so enjoy! And remember, all leading questions are the best approach. Here you have the chance to be the star!

15. Outline or write out your closing argument

Don't wait to outline or write your closing argument until the night before you give it. This is a bad mistake. In fact, like your opening, you can begin your closing argument at the start of the case and then refine it throughout. You will, of course, want to tie it to the evidence presented, but again, like opening statements, make it a compelling story that proves the theme of your case. And, by all means prepare your verdict form and in closing, go over every question in the verdict form and tell the jury how the evidence compels them to vote.

16. Consider technology for trial presentation, including blow-ups, timelines, power-point presentation, etc.

Try not to laugh when I say blow-ups and timelines, just because I've been trying cases before the invention of the internet. Visuals, including videos, are important and blow-ups and timelines can be incorporated into your technology. And, in this area I strongly recommend that you hire and rely on a professional. I do.

In conclusion, the title "16 Easy Steps" is obviously tongue in cheek. However, if you work hard on these items well in advance of your jury trial, your chances of success will go way up.

This column is the first in a series of articles that will appear over the next 5 months. Upcoming topics include:

Sept. – **Taking Expert Depositions in Preparation for Trial**

Oct. – **Tips for Successful Jury Selection**

Nov. – **Effective Opening Statements**

Dec. – **Keys to Effective Direct and Cross Examination**

Jan. – **Tips For A Winning Closing Argument**