TRIAL PREPARATION

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The preparation of a trial is more complex and involved than any short paper can possibly cover. Entire seminars, in fact years of seminars combined, would be required to properly cover all of the aspects necessary to be properly prepared for trial. Trial preparation cannot be considered as something that begins on Friday afternoon and ends in the wee hours on Sunday night. Instead, proper trial preparation begins when the client hires counsel and is a continuous process until the case is tried or otherwise concluded. To have a case prepared for trial, the preparation will take many months and include everything from the decision to take the case to the preparation of voir dire examination of the prospective jury.

Given the breadth of work necessary for trial preparation, there is no way this presentation can do the subject the justice it demands. So, instead of trying to write the exhaustive textbook on trial preparation which would put Matthew Bender and Lawyer's Co-Op out of business, this paper will focus on some of the more commonly encountered problems which should be considered, and hurdles which must be overcome, to properly prepare any personal injury case for trial. Accordingly, there is no attempt to discuss depositions, for example, in detail but there is, instead, a brief discussion of some of the aspects of taking depositions relevant to the broader topic of trial preparation. It might be important for the reader to know that these materials are prepared from the perspective of a trial lawyer who tries between five and fifteen civil jury trials a year and gets an additional ten to twenty cases completely prepared but which, because they are prepared, settle on the eve or morning of trial

after all trial preparation is completed. Accordingly, efficiency has become an important aspect in the writer's concept of trial preparation.

The most important part of trial preparation is hard work. There is no substitute for hard work. A famous lawyer once said that being a great trial lawyer is ten percent skill in the courtroom and ninety percent drudgery in the office preparing the case. Nothing could be truer. Drudge work out of the courtroom, in the form of diligent and careful trial preparation, can more than make up for a lack of trial experience and a lack of natural trial charisma. Preparation not only provides the knowledge necessary to deal with witnesses and the court; but, just as importantly, it allows the prepared lawyer the supreme confidence which almost always foreshadows success. A case which is genuinely prepared is often one that can be settled. On the other hand, where there has been a lack of preparation, settlement is rarely possible on anything close to fair terms. In short, if counsel wants to insure that a case will have to be tried to obtain a fair resolution, he or she can do so by failing to prepare for the trial which he or she will be forced to participate in!

I. Pre-Suit Trial Preparation

Trial preparation begins before accepting the client. No matter how much trial preparation is accomplished in the weeks immediately before trial, if the proper ground work was not laid at the beginning, there will not be a good result for either the client or his or her lawyer. This is why the first step in trial preparation is to make sure that the case is one in which the lawyer has the interest, skills, time, and finances to handle.

A. A Lawyer Must be Skilled in the Area

The disciplinary rules and ethical considerations governing the practice of law require lawyers to be careful about accepting work in areas in which they are not, or will not, become competent. In fact, DR6-101 provides that a lawyer shall not handle a matter which he knows or

should know he is not competent to handle.[1] This sometimes requires additional study before deciding whether the case presented is one which can ethically be handled.

These rules do not mean that it is unethical to take a case of a kind which a lawyer has not handled before. Instead, we are ethically bound to put forth an effort to acquire the skills necessary to handle the case. Additionally, there must be candor with the client as to the skills that the lawyer brings to the particular case. It is absolutely improper for a lawyer to tell a client he has certain skills, or can achieve a certain result, when he does not have the experience necessary to do so.[2]

B. Associate Counsel or Refer the Case

As noted above, lawyers must be confident that each case accepted can be handled professionally and skillfully. If a case cannot be handled professionally and competently, thought should be given to either associating more experienced counsel or to referring the case to another attorney altogether. The rules of ethics come into play in both cases.

A lack of skill or competence is not the only reason counsel should consider referring the case or associating additional counsel. Sometimes the realities of money must be considered. Big cases cost big money! Even the simplest medical malpractice case will cost close to ten thousand dollars. And the costs in a complex products liability case can exceed one hundred thousand dollars almost overnight. With these realities in mind, counsel must ask herself whether she can really afford to prosecute the case from an advanced costs point of view and from a time point of view. Each of us must ask ourselves whether this kind of investment in a case, in the way of advanced case expenses and time, will create a conflict of interest where we will become so risk adverse in our desire to get the expense money back that we will make decisions based on recouping the expenses instead of what is best for the client. This kind of

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[1] DR 6-101, EC 6-1, 6-2.; Legal Ethics, Second Edition, Matthew Bender, Raymond L. Wise, p.84.

[2] DR 2-101(A).

conflict of interest must be consciously avoided.[3] If it arises it should be discussed with the client.

i. Retain Co-Counsel or Refer the Case

As noted above, sometimes it is necessary to ask for help in order to best serve the needs of the client. There are ethical considerations involved in associating counsel and in referring the case out altogether. These mainly involve fee division issues. The most important point to remember is the necessity of keeping the client informed.

> "The Code . . . provides that any fee-sharing arrangement other than among the lawyers in the same firm, must be fully disclosed to the client, the client's consent to it must be obtained, and the total fee must not clearly exceed reasonable compensation for all the legal services rendered by all the lawyers to the client. Disciplinary Rule 2-107."[4]

Typically, if the work is shared, a proper fee division can be worked out. This division must take into consideration the experience level, financial contribution and risk, and client origination. Normally, there is not a problem if the referring attorney stays abreast of the case and provides some level of input. Every fee division should be clearly indicated on the settlement statement.

The more complicated problem arises where the attorney who originates the file does not do any work, and does not provide any services to the client, but instead merely gets the case and immediately refers it out and wants a referral fee for doing so. This practice can cross the line if it constitutes a major portion of the referring attorney's practice.

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[3] DR 5-102 comes into play in peripheral way in these circumstances in that it prohibits a lawyer from having an interest in the case. If the lawyer feels the pressure caused by a tremendous expense outlay, he has an ethical obligation to discuss that with the client. EC 5-21.

[4] Aronson & Weckstein, Professional Responsibility, Second Edition, West Publishing Company (1991).

> "The evil of the referral fee occurs when an attorney becomes a broker of legal services, one who solicits business which is then referred to another attorney for a percentage of the fee earned by the latter. The forwarding attorney thus does not engage in the practice of law but earns a livelihood by feeding business to other practitioners."[5]

This would be improper. However, where the referral of clients is only an occasional thing, it is acceptable to get a fee for doing so. As noted below:

> "A different ethical response may be justified, however, where a lawyer normally engages in a law practice but refers an occasional client to an attorney in another state or to one who practices another field of law to better serve that client's needs. Permitting the referring lawyer to share in the ultimate legal fee may not be undesirable, particularly where he has performed some legal services or assumes continuing responsibility, the client is not required to pay a higher or unreasonable fee because of the sharing arrangement."[6]

In fact, there is a good argument that referring cases to more experienced counsel should be encouraged. One way to insure that referrals are made is to allow some fee to the referring counsel. This is not to be confused with paying a referral fee to a non-lawyer or dividing fees with a non-lawyer - both are unethical.[7]

ii. Hire Local Counsel

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[5] Id. at 279.

[6] Id. at 279-280.

[7] Formal Advisory Opinion 91-3 of the State Bar of Georgia provides that a lawyer may not pay a non-lawyer employee a monthly bonus that is a percentage of the law office's gross receipts because such compensation constitutes a division of legal fees with non-lawyers in violation of the rules. Standard 26; Disciplinary Rule 3-102; ABA Disciplinary Rule 3-102(a); ABA Rule 5.4; ABA Opinions 303, I792, I1440.

Another point, not totally unrelated to the referring of cases, is the retention of local counsel. If a case is to be filed and tried in a community in which the retained lawyer does not practice, local counsel should often be retained. This is less important in large cities than it is in small towns. In smaller towns, the local counsel is far more likely to know the eccentricities of the judge and the members of the venire. Additionally, there is the practical advantage of having someone available to attend calendar calls and other court business.

The considerations for fee sharing discussed above must be considered in this arrangement as well. There are two basic ways of retaining local counsel. One is to retain the local lawyer on a percentage basis keeping in mind that the percentage must somehow reflect or relate to the responsibility given. The other is to pay the local lawyer by the hour regardless of the outcome. When local counsel is paid by the hour, that should be considered part of the overhead of the originally hired counsel, and not charged to the client - regardless of the outcome of the case. In other words, the hourly fee of the local counsel is not a case expense.

C. Avoid Conflicts of Interest

Some conflicts of interest are obvious. For example, it would not be appropriate to represent both sides of the same lawsuit. And it would not be appropriate to represent a client who is suing another client. The more subtle conflicts of interest also demand careful consideration and clients should be informed of them. In particular, a lawyer who has a large personal injury defense practice, as a result of being retained by various insurance companies, should carefully consider advising any plaintiff who approaches him about the potential for a conflict. The potential conflict involves what is known as "issue conflicts." For example, if a defense lawyer is doing his job, at every opportunity he will be arguing to limit the concept of proximate cause and to limit the damages to which plaintiffs are entitled. This contrasts sharply with the interests of plaintiffs who want greater damages and a lower proximate cause burden.

Perhaps because of the obvious effect this would have on the incomes of defense lawyers, there is very little written on this subject. Commentators who spend their careers thinking about ethics have written the following:

"A lawyer may not represent one client whose interests are adverse to those of another current client of the lawyer's, even if the two representations are unrelated, unless the clients consent and the lawyer believes he or she is able to represent each client without adversely affecting the other."[8]

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"All that need be present is that one lawyer or firm is representing two clients, even on unrelated matters, with potentially conflicting interests."[9]

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"An emerging concern, often referred to as 'issue conflicts,' involves a lawyer's advocacy of one side of a legal issue in one case and the other side for a different client in another and entirely unrelated case. Courts and ethics' panels are still struggling with this problem."[10]

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"A variation on the conflicts explored in this chapter involves what has become known as 'issue conflicts.' The problem arises when a lawyer's advocacy of a legal position in one case could have negative consequences for a second client in another matter. In essence, the question is: [I]f a lawyer urges a court to issue a ruling that would require the law to be interpreted in one way, does that preclude representation of another, otherwise unrelated client whose interests are best served by contrary legal ruling?

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8 Lawyers' Manual on Professional Conduct, American Bar Association, Bureau of National Affairs, Inc., 51:101.

9 Id.

10 Id.

> There is little authority on the issue, despite the frequency with which the question crops up in the practice of law."[11]
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> "The comment to Model Rule 1.7 states: 'A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the time in an appellate court.'"[12]
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> "The tentative draft of the restatement of the law governing lawyers, Section 209, Comment F (April 10, 1990) states that 'Merely indirect precedential affect on another client's legal position does not constitute a conflict. However, if a lawyer were to contemporaneously assert both sides of an unsettled point of law before the same tribunal on behalf of different clients, the argument in each case would inevitably affect the other. Absent informed consent . . . that a lawyer would be required to withdraw from one of the matters because of a conflict of interest.'"[13]

The bottom line is that lawyers will continue to represent both plaintiffs and defendants. It is apparently ethical for them to do so. However, the line is crossed where a lawyer fails to inform the client of the conflict which exists, or which might exist, by virtue of the lawyer's advocacy of legal rulings which will harm his clients on the other side of the bar.

D. Do Pre-Suit Investigation

Before filing any suit, counsel should, if at all possible, investigate the case to determine that it is meritorious. This pre-suit investigation has both practical and ethical ramifications.

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11 Id. at 51:107.

12 Id. at 51:108.

13 Id.

The practical advantage of pre-suit discovery is that witnesses can often be contacted and interviewed, before a suit is filed, who can only be deposed after suit is filed. The rules relating to contacting adverse parties change when suit is filed as this generally means that they will have counsel to represent them. When suit is filed it is assumed that counsel is retained and that contact with opposing parties can only be made through counsel - this usually involves depositions. However, before suit is filed it is usually open season, in the absence of notice to the contrary, on getting statements and making direct contact with the defendants and agents and employees of a corporate defendant.

> When a client's adversary is not represented by counsel, it usually will be necessary for the lawyer to communicate directly with the adverse party. In this situation, the lawyer should not offer any advice, other than the advisability of securing legal representation, and the lawyer should not state or imply that he/she is disinterested. If the unrepresented person appears to misunderstand the lawyer's role, he/she should make reasonable efforts to correct the misunderstanding.[14]

The bottom line is that it is acceptable to contact an adverse party so long as it is not represented by counsel and there is no misrepresentation as to the purpose of the contact. There are two purposes for this contact - to insure that the claim is valid before filing suit and to get a candid uncoached statement that simply cannot be duplicated in the setting of a formal deposition.

In addition to the advantages associated with being able to contact adverse witnesses and parties without the candor robbing defense counsel's preparations, pre-suit investigation also reduces the likelihood of bad faith suits. In the federal courts, a lawyer's signature on a pleading

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[14] Aronson & Weckstein, Professional Responsibility, 319-320, Second Edition, West Publishing Company (1991); Disciplinary Rule 7-104(a)(2).

indicates that there is a good faith basis for the position asserted - and this includes the filing of complaints.[15]

Note, however, that there are instances where it is acceptable to file suit without investigation if forced by circumstances to do so. A lawyer may file a suit before establishing a factual basis for the claim in order to meet the applicable statute of limitations, provided there is a reasonable possibility that the lawyer can later establish facts to support the cause of action and the court's procedural rules do not require the lawyer to attest to the adequacy of the facts in filing a claim. If the lawyer later finds that he is unable to support the claim, he must either dismiss the suit or withdraw from the representation.[16]

An obvious advantage to pre-suit investigation is that memories and scenes change over time, and, if the investigation is delayed, it may be too late to document the facts necessary to prove a case. Photographs must be taken, the vehicles involved should be inspected and stored if necessary, and experts retained.

E. Pre-Suit Demands

Eventually, a demand should be made in every case. The advantage of an early demand, when you know everything and the other side knows nothing, is that a liquidated damages letter sent at this stage will almost never be paid and interest can be started early on an amount which will not even be considered after the case is in motion. At the early stages, a genuine rock bottom demand can be made with very little fear of the other side paying it. A good pre-trial demand also can work wonders on preparing the opposite for exactly how serious you mean to be. Include language in the demand which will put the defendant on notice that the demand is made in an effort to compromise a disputed claim and cannot be used at trial. However, in big cases there is rarely any real benefit in waiting to file suit in response to a demand because the

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15 Fed. R. Civ. Pro. Rule 11.

16 Formal Advisory Opinion Board of the State Bar of Georgia, 87-1; DR 7-102(e)(c), DR 7-4, DR 7-5.

opposition is almost always going to get input from its lawyers anyway. Delay can rob the plaintiff of his unfettered right to dismiss the case if things are not going his way.

i. Liquidated Damages Letters

A liquidated damages letter should be sent in every tort case. (In FELA and other federal causes of action, the liquidated damages letter may not apply - but there is no real harm, when in doubt, in sending it anyway in case the law changes.) Make sure the letter is properly addressed and complies with the statute. Be especially careful where there are multiple defendants so that it is clear that payment by one will release all of them. After suit is filed, a liquidated damages letter can be addressed to the defendant in care of defense counsel. A liquidated damages letter which is sent to the insurance adjuster is not going to be in compliance with the statute. A copy of a standard liquidated damages letter is attached as Exhibit "A."

F. Choose Venue and Jurisdiction

The bittersweet reality of our world is that jurors, judges, procedures, and law vary depending on the venue and jurisdiction in which a case is pending. This issue is raised in this paper on trial preparation because the choice of venue and jurisdiction can make a world of difference in how trial preparation is carried out.

Issues including the number of jurors, six in federal court and twelve in state court, and the time to trial, are significant. There are studies which seem to correlate smaller jurors with larger verdicts. There must be some truth to this as defendants regularly insist on the largest jury allowed. Further, on a case which might be removed by the defendant, keep in mind when choosing a state court venue, where removal to federal court would take the case. Judges differ radically. The amount of work necessary in state courts does not approach the work necessary in federal court with respect to trial preparation such as reports to the court and mandatory settlement conferences. (Unless you are in Florida, in which case, the state court work load exceeds anything imagined.)

When choosing venue in a case with multiple choices, keep in mind that if the defendant on whom venue rests is exonerated, all of the trial preparation work will have been wasted

because the verdict will be moot.[17] Further, if there is no jurisdiction, the case is subject to being thrown out at any time - even without a motion by the defendant.[18]

II. Start the Suit Properly

A good beginning is a fine start. Do not start the case so haphazardly that it hampers the preparation for trial. Keep the potential for trial in mind at every stage of the action - including the drafting of the complaint.

A. Draft a Good Complaint

The complaint should be a short statement of the claim[19] but with enough information so that, if it goes out with the jury, it will illustrate the plaintiff's position. Keep in mind that certain kinds of cases have specific pleading rules. Malpractice[20] and fraud allegations[21] are the two most obvious. On the other hand, be mindful that the complaint may be read to the jury by the other side and, if it is outrageous, it can be more harmful than helpful. If an affidavit is needed, attach one and make sure it is in perfect form.[22]

i. Serve Discovery with the Complaint

You cannot prepare for trial unless discovery has been properly and timely completed. Have a set of basic interrogatories and requests for production served with the summons and

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17 *See e.g., Collip v. Newman,* 217 Ga. App. 674, 675, 458 S.E.2d 701 (1995) (citing *Southeastern Truck Lines v. Rann,* 214 Ga. 813 (1959)).

18 O.C.G.A. § 9-11-12.

19 O.C.G.A. §9-11-8(a)(1)(A).

20 O.C.G.A. §9-11-9.1.

21 O.C.G.A. §9-11-9(b).

22 *See e.g., Jordan, Jones & Goulding v. Wilson*, 197 Ga. App 354 (1990) (setting forth which professions requiring affidavit); *Redmond v. Shook,* 95 FCDR 2891 (Ga. App. 9/11/95) (holding affidavit submitted with complaint not valid where notary did not witness affiant signing the affidavit; case dismissed).

complaint.[23] This gets the case started early and insures that this vital step is not forgotten. Keep these requests short as you do not want to use all of your questions[24] before finding out more about the defenses. Use discovery that the other side will answer. This is insured by reading the discovery from the point of view of a total idiot. If a total idiot can understand the question, and will not believe it so broad as to be unintelligible, then the question has at least a chance of being answered by defense counsel. This is especially important in the beginning as this first exchange of discovery often sets the tone and will influence the success of your more particular requests which will be asked later.

The insurance industry has a file on every one of us. Ask for it. This cannot be duplicated by the plaintiff and contains information which may prove essential to the understanding of why the defendant will not settle.

B. Perfect Service of Process

No suit can be started without service of process being properly perfected. Know the rules and follow them. Do not hesitate to have a special agent appointed for service of process. A sample motion and order appointing a special process server is attached as Exhibit "B." If you have trouble finding the defendant, keep accurate notes which will support your argument that you diligently pursued him. This is especially important if you are close to the expiration of a statute of limitations.

C. Pay Attention to Affirmative Defenses

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[23] This rule of thumb does not apply in Federal Court where there is a 30 day waiting period before discovery can begin. *See* Local Rules of the Northern District of Georgia, 225-1(a).

[24] In Georgia State court practice interrogatories are limited to 50, including subparts. O.C.G.A. § 9-11-33(a)(2). In the United States District Court for the Northern District of Georgia the number is 40, also including subparts. Local Rule 225-2(a).

Read the answer and figure out which affirmative defenses will cause trouble down the road. Failure to state a claim is rarely a big deal and is mostly pled with no real intention to claim that an allegation that the defendant ran a ran light is not a claim cognizable under the law. However, if the defendant claims that venue, jurisdiction, or service is defective, these defenses should be followed up immediately. Often a phone call to defense counsel will result in an easy cure. Sometimes, discovery is necessary. A sample of discovery useful for determining the basis of affirmative defenses is attached as Exhibit "C." Regardless of whether the effort is formal or informal, correcting service defects must be done promptly as the serving party has an obligation to exercise due diligence to perfect service of process.

III. Manage the Case Properly

Trial preparation, as noted above, begins long before the weekend before trial. It is an ongoing process which involves careful management of the case to insure that it is moving forward properly. When a properly managed case comes to the weekend before trial, the final preparation will be just that - final preparation.

A. Make a Timetable

In federal court, in particular, there are numerous time deadlines which must be met. Make a time line and share it with opposing counsel so that every one will be dancing to the same tune. A sample timetable is attached as Exhibit "D." Pay attention to discovery deadlines. Serve discovery so that it can be answered within the discovery period as this allows you to make use of the Court's power to compel if the answers are not appropriate or complete.[25]

B. Avoid Sloppy Work, Look Professional

Use a quality typeface which gives a professional image. Avoid spelling and typographical errors. Use quality paper. Looks are certainly not everything, but trial lawyers deal in perceptions and, if a lawyer is perceived to be second rate, he will be treated as such. Look and act like a big time lawyer and people will expect you to get results like one.

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[25] Uniform Superior Court Rule 5; Federal local rule 225-4.

C. Know the Law

No trial can be prepared unless it is prepared in the context of the law applicable to the case. It may be obvious, but it cannot be overemphasized. Read entire cases, not just headnotes and the sections which relate to the headnotes. A loss of credibility caused by an erroneous or opposite citation is hard to regain.

Part of knowing the law is sharing that knowledge with the court. This is both a practical and an ethical obligation. "[T]he rules require a lawyer to disclose legal authority 'in the controlling jurisdiction' known to be 'directly adverse' to the position of the client which is not disclosed by opposing counsel."[26] It is many times better to lose a point at trial than on appeal. Further, candidly identifying controlling authority on one point often establishes sufficient credibility on the next point to carry the day in a gray area or on a judgment call.

"The ABA Model Rules of Professional Conduct state a lawyer is competent if he has the 'legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.'"[27] "A lawyer must undertake such research as lawyers engaged in similar matters would employ in acceptable practice to reach an informed and intelligent judgment."[28]

D. Have a Litigation Plan

It is important to be in control of the case. You need to know what you need and how you are gong to get it. Sit down with your assistants several times during the course of a case and make sure that the case is moving in the direction necessary to obtain a verdict. This can only be accomplished if it is thought of as part of the trial preparation. It is imperative to think about the trial during the discovery phase. Decide what kinds of experts are needed, what

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[26] Aronson & Weckstein, Professional Responsibility, Second Edition, West Publishing Company, p. 347 (1991); Disciplinary Rule 7-106(b)(1).

[27] Lawyers' Manual on Professional Conduct, American Bar Association, Bureau of National Affairs, Inc., 31:201.

[28] *Hughes v. Malone,* 146 Ga. App. 341, 247 S.E.2d 107 (1978).

exhibits will be needed, which witnesses should be deposed, and which witnesses should be interviewed.

E. Keep the File Organized

Use a good system to keep the paperwork organized. Divide the file into manageable parts. Consider using fancy notebooks. Attached as Exhibit "E" is a copy of a typical table of contents in a personal injury file. One of the best products for keeping a file organized is made by Bindertek. It is amazing how much easier it is to work with a file when it is easily assembled and disassembled.

F. Read Discovery Responses

No one answers discovery with quite the specificity that the other side wants. Rarely are these answers challenged. This is because the sending party does not take the time to really read the responses. This is an essential part of trial preparation. Discovery responses should be reviewed in the week they are received, and follow up letters sent.

G. Be Careful About Trade Secrets

Defendants in products cases often want the entire file sealed as being some sort of trade secret. This is rarely actually necessary as there is not that much secret material involved in most cases. Instead, the defendant's real goal is to isolate the plaintiff from other plaintiffs and prevent cooperation. Hopefully plaintiffs' counsel will want to share information and obtain assistance from others with similar cases. This creates competing interests which can usually be compromised to the satisfaction of both parties. Most of the time the defendant will agree to a limited vow of secrecy which will allow limited sharing. The advantage of this arrangement is that both sides avoid an unnecessary hearing at which either could lose. Further, from the plaintiff's point of view, there is no delay in getting the information to the plaintiff. This is particularly important when the information sought is needed by the plaintiff's expert. A sample limited confidentiality order is attached as Exhibit "F."

H. Establish a Tickler System

Every letter or discovery request that goes out should come back to the sender from a tickler file within a certain time. It is amazing how often discovery is sent, and not answered, without any complaints by the sender until the week before trial. At that point, it is too late! Similarly, discovery is often answered in the most ridiculous fashion and the letter asking for a proper answer is sent out right away but never followed up on. The simple cure is a good tickler system that returns a "reading" copy of every letter to the writer in a pre-set number of days such as fifteen or twenty. The use of a numbered sorter into which every letter is placed is imperative. The tabs from a typical numeric sorter are attached hereto as Exhibit "G."

I. Depose Carefully

Do not take depositions willy nilly. Depositions are expensive, and much of the information which is obtainable in depositions can be obtained in statements which are cheaper and have the added advantage of keeping your opponent in the dark. (However, be careful about contacting adverse witnesses who are represented by counsel.) Remember that much of discovery serves the purpose of making the other side prepare when it otherwise would not. Be prepared for depositions by reading the materials and making copies of exhibits which will be used. Do not ask questions which have already been answered just to make money. (Unfortunately, some unethical defense counsel extend the time of depositions for the obvious purpose of increasing their billings.)

i. Use 30(b)(6) Depositions

When suing a corporation the best way to pin it down is with corporate depositions.[29] Start all such depositions by establishing that the deponent is the person authorized to testify about the identified subjects. Make sure there is no doubt about the qualification of the witness. In fact, it is good practice to end the deposition by again asking the witness to state or admit that as to the matters discussed in the deposition that he is the best person in the company to have spoken about them. A sample 30(b)(6) notice is attached as Exhibit "H."

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[29] Fed. R. Civ. P. Rule 30(b)(6); O.C.G.A. §9-11-30(b)(6).

ii. Use Video Depositions

Videography should often be considered when taking a deposition for use at trial. If counsel has met with the witness before the deposition, he can determine whether video is appropriate. If video is used, an order is often necessary. A sample video order is attached as Exhibit "I."

iii. Interview When Possible

It is amazing how lawyers believe that the only way to talk to a witness after a case starts is by deposition. This is ridiculous! The use of a deposition to interview a witness guarantees that the other side will be there and learn what the noticing party learns. Instead, consider having the witness come to your office and take a detailed statement, before a court reporter, without even inviting the other side. Additionally, while you must be concerned about contacting a witness represented by counsel, you should also know that just because a witness used to work for the defendant does not mean the defendant has the only access to the witness. In fact, a lawyer may interview former employees of a represented corporate opponent so long as the former employee consents after the lawyer fully explains the lawyer's purpose.[30]

> DR 7-104(A)(1) and Proposed Rule 4.2 are not intended to protect a corporate party from the revelation of prejudicial facts but rather to preclude interviewing those corporate employees who have the authority to bind the corporation. [Instead, the] clear purpose is to foster and protect the attorney-client relationship and not to provide protection to a party in civil litigation nor to place a limit on discoverable material. The comment language[31] . . . allows for communications

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[30] Formal Advisory Opinion Board of the State Bar of Georgia, 94-3; Opinion 87-6; Standard 47; Rule 4-102; ABA Rule 4.2 (9/9/94).

[31] The comment language referred to is the official comment to Proposed Rule 4.2. That language is as follows: "If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for

> with an agent or employee who has his/her own attorney without notice to the organization, corporate entity, or its attorney. This language defeats the purpose advanced by defendant . . . .[32]

This interpretation is consistent with State Bar of Georgia Formal Advisory Opinion No. 87-6 (87-R2) which interprets Georgia's rules of conduct. "The Code of Professional Responsibility, like a statute, should be construed so as to carry into effect the intent of the governing body which enacted it. The construction given should be in harmony with the policy of the law and must square with common sense and sound reasoning."[33]

State Bar of Georgia Formal Advisory Opinion No. 87-6 (87-R2) cites with approval ABA Informal Opinion 1410 (1978). That opinion answers the question of whether a plaintiff can interview employees of a corporate defendant to see what facts they know which would shed light on the plaintiff's claims. The opinion provides that:

> ***[g]enerally*** *a lawyer may properly interview witnesses or prospective witnesses for opposing sides in any civil . . . action* ***without the prior consent of opposing counsel*** *- unless such person is a party . . .* [and] no communication with an officer or employee of a corporation with the power to commit the corporation in the particular situation may be made by opposing counsel unless he has prior consent . . . .

(emphasis added). Thus, the general rule is one allowing communications with the employees of a corporate defendant. It is acceptable to interview the ex-employees of a corporate defendant.[34]

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purposes of this Rule." This comment was quoted in the State Bar of Georgia Formal Advisory Opinion No. 87-6 (870R2).

[32] *DiOssi v. Edison*, 583 A2d 1343, 1345, 1346 (Del. 1990) (footnote added).

[33] *In the Matter of Dowdy*, 247 Ga. 487, 492 (1981) (citations omitted).

[34] The Formal Advisory Opinion Board of the State Bar of Georgia has opined at 94-3 9/9/94 that a lawyer may interview former employees of a represented corporate opponent so

This general rule of allowing communications makes a great deal of sense from a number of prospectives. In *Vega v. Bloomsburgh*, 427 F. Supp. 593 (D. Mass. 1977), the court, in reaching the conclusion that the plaintiff could interview state employees who were responsible for implementing a program which was the subject of the action being litigated, recognized that a defendant who seeks to limit access should show that the employees are represented by counsel, or that their interests are adverse to the plaintiff's or defendant's. The court recognized these practical requirements because of the advantages and importance of the informal discovery process as something which must be considered when limiting a party's right to interview a corporate defendant's employees. Other courts have also recognized the value of informal investigation as an essential method of promoting the expeditious resolution of disputes in an inexpensive manner.[35]

Thus, when deciding whether an *ex parte* communication should be restricted, the court should look at all of the circumstances on a case by case basis while keeping in mind the purpose of the rules, which is to protect attorney client relationships of *parties* to a lawsuit.[36] The court must do this while remembering that while a corporate employee may be a client for purposes of the attorney client privilege,[37] that same corporate employee is not necessarily a *party* for purpose of the rules.[38] That is especially true where the employee did not cause the injury at issue.

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long as the former employee consents after the lawyer fully explains the lawyer's purpose. Opinion 87-6; Standard 47; Rule 4-102; ABA Rule 4.2.

35 *E.g., Niesig v. Team 1*, 559 N.Y.2d 639 modifying NYS 2d 153 (1989).

36 *E.g., State (N.J.) v. CIBA-GEIGY Corp.*, NJ Super Ct. App. Div., No. A2289-90TIF (4/10/91 released 4/23/91).

37 See *Upjohn v. U.S.*, 449 U.S. 883 (1981).

38 *Niesig v. Team 1*, 559 N.Y.S.2d 639 modifying 545 NYS 2d 153 (1989).

Further discussion of the differences between the rule prohibiting efforts to discover privileged information and efforts to discover facts is found in a most liberal view of the rule as discussed by the Supreme Court of Washington State in *Wright v. Group Health Hospital*.[39] *Wright* was a medical malpractice action in which the plaintiff sought to interview nurses who had treated and cared for him while at the defendant hospital. The defendant hospital objected, claiming that the rules prohibited any such *ex parte* communications. In rejecting defendant's narrow interpretation of the rules, an unanimous court held that the rules only restrict informal access to those who are managers/speakers for the corporation. The court indicated that even those employees who caused the incident at issue could be interviewed so long as they were not managers or speakers for the corporation. The court further distinguished *Upjohn v. U.S., supra*., and similar cases relating to attorney client privilege, reasoning that only the communication between the attorney and the client are privileged - not the facts known by the witness.[40]

The interpretation of the rules discussed above, which distinguish fact witnesses from witnesses who committed the wrong at issue, or who can bind the corporation, is one that should be followed in Georgia. It is consistent with State Bar of Georgia Formal Advisory Opinion No. 87-6 (87-R2) and the vast majority of interpretations by other courts and ethics panels.[41]

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[39] 103 Wash. 2d 192, 691 P2d 564, 569 (1984).

[40] *See, e.g., Fair Automotive Repair, Inc. v. Car-X Service Systems, Inc*., 128 Ill. App. 3d 763, 471 NE2d 554, 569 (1984).

[41] LA Cy. Bar Ass'n Op. 369 (1977) digested at O. Maru, *1980 Suppl. to the Digest of Bar Assoc. Ethics Opinions* 75-76 (1982); Ariz. St. Bar Ass'n. Op 203 (1966) digested at (Maru, *1970 Suppl. to the Digest of Bar Assoc. Ethics Opinions* 127 (1972); Idaho State Bar Ass'n Op. 21 (1960) digested at O. Maru, *Digest of Bar Assoc. Ethics Opinions* 105 (1970); Texas State Bar Ass'n Op. 342 (1968) digested at O. Maru, *1970 Suppl. to the Digest of Bar Assoc. Ethics Opinions* 297 (1972); La. State Bar Op. 326 (1968) digested at O. Maru, *1970 Suppl. to the*

DR 7-104(A)(1) and Proposed Rule 4.2 only prohibit an attorney from interviewing employees of a corporate opponent, when the corporate opponent is represented by counsel, *if* the persons sought to be contacted are members of one of the following two groups:

(1) an officer, director, or other employee with authority to bind the corporation; or

(2) an employee whose acts or omissions may be imputed to the corporation in relation to the subject matter of the case.

For a person to be bound by the tortious conduct of his agents and servants, there must be tortious conduct by them.[42] If the servant or employee is not responsible for any tortious conduct, neither will be the principal unless it has independent tortious acts.[43]

iv. Depositions are not Trial Testimony

On too many occasions, during a deposition noticed by the deposer for use at trial, it will be discovered that the deponent is going to be hostile or adverse. Often this is not realized until well into the deposition when it is too late to simply cancel the deposition and go home. When this occurs, stop using direct questions which allow the hostile witness to harm your client and start leading! Of course the other side will begin objecting, but ignore him and just keep leading. You are not going to use the deposition in your case in chief and thus are not required to use direct questions and are, instead, allowed to cross examine. Just because a deposition is noticed for preservation of evidence and use at trial, particularly a doctor's deposition, this does not mean that the party noticing the deposition is stuck with the witness. Until called at trial, a witness belongs to no one.[44] When the other side starts his examination, he will naturally begin using leading questions - object to all of them. Then, during the trial when you have not read the

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Digest of Bar Assoc. Ethics Opinions 225 (1972); LA Cy. Bar Op. 234 (1956) digested at O. Maru, *Digest of Bar Assoc. Ethics Opinions* 66 (1970).

42 *See*, O.C.G.A. §51-2-2.

43 *E.g., Townsend v. Brantley*, 163 Ga. App. 899 (1982).

44 O.C.G.A. §9-11-32(c).

hostile witness's testimony in your case in chief, the opposition will attempt to do so in its case in chief. Unfortunately for him, you had been preparing for trial when you took the deposition and in anticipation of his reading the transcript in his case in chief had made the appropriate objections. If you objected properly, he will have only a few direct questions and you will have a blistering cross examination. All this is true because:

> A deponent's testimony obtained through discovery, does not belong to or bind either party until such testimony is introduced in evidence at the trial of the case, whereupon the party introducing it adopts the testimony and is bound by it.[45]
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> - - -
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> What constituted the direct examination of a witness whose testimony was initially taken for discovery, could not be determined until the trial, when one of the parties elected to use the testimony on his behalf. At that time, the rules governing direct and cross examination would apply.[46]

v. Prepare the Deponent

In almost every instance, it is important to meet with the witness before the deposition. It is really an obligation to do so if the witness is available. Deposition testimony can be used at trial and thus is unquestionably part of trial preparation - do not prepare for it any differently than in preparing for trial. This is especially true where the witness is a treating medical doctor - this saves the embarrassment of asking questions which lead to bad answers.

There are ethical boundaries on how far one can go in preparing a witness for deposition and for trial testimony.

> As a general rule of good trial practice, a witness should not be put on the stand unless the attorney has first had an opportunity to interview the individual. Knowledge, memory, sincerity, demeanor, and skills of expression should all be

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45 *Travis Meat Seafood Co., Inv. v. Ashworth*, 127 Ga. App. 284, 286 (1972).

46 Id. at 287.

> probed and observed beforehand to avoid unpleasant surprises at trial, to minimize testimony or weaknesses, and, if there is a realistic choice, to determine whether or not to use a particular witness. These are legitimate tactics and essential to adequate trial preparation. But it is not proper to prepare a witness by putting words in his mouth or by inducing him to commit perjury.[47]
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> - - -
>
> The line between unethical coaching and proper preparation is not a bright one.[48]

With respect to telling witnesses or clients the law before they tell you the facts, one must consider the limits provided by the rules of ethics. In short, it is not allowable to tell a witness or client the law so that they will tailor their recollection to match the law, but it is ethical to advise them of the applicable law so that they will understand the importance of the facts as the facts relate to the case.

> [T]he lawyer's conduct is improper only if the advice or information on the applicable law is given under circumstances that show the lawyer intended or anticipated that the client would create a story or situation which the client knew was contrary to the facts. In other words, it is permissible, and strongly advisable, for the lawyer, in light of the applicable law, to methodically probe the client's memory, to make sure important points are not overlooked, have the client to organize, effectively verbalize, and tailor his anticipated testimony to relevant facts helpful to his cause, and to even rehearse the testimony and probable cause examination. The ethical line is crossed, however, if the lawyer counsels or

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47 Aronson & Weckstein, Professional Responsibility 315, Second Edition, West Publishing (2nd ed. 1991).

48 Id.

assists a witness to testify falsely, or participates in the creation of evidence which the lawyer knows is false.[49]

vi. Fix Bad Questions

The number one rule in objecting at a deposition is that if the problem could be cured at the deposition, it is the objector's responsibility to object in order to allow the other side to do so. This is why the standard stipulations used almost universally provide that "all objections except as to the form of the question and responsiveness thereto shall be reserved until such time as the transcript is used." Despite this almost universal admonition at the beginning of depositions, it is simply amazing how often an objection as to form, i.e. "leading," is made without the questioning attorney taking any effort to fix the bad question. Fix bad questions at the deposition. This is essential in trial preparation as it is too late to fix the question on the Sunday before trial.

vii. Take Notes

When defending depositions, do not just sit there and read the paper or work a crossword puzzle. Take notes about the questions and answers, what needs to be fixed, and what should be the subject of a motion in limine. Make sure the witness and the attorney are on the same subject. Lawyers who are not paying attention allow inquiry into illegal areas and are not earning their keep.

More important than taking notes when asking questions is listening to the questions and the answers. Too often lawyers take copious notes and really do not listen to the answers. They are wedded to a check list and are too interested in completing the checklist which was prepared by some senior partner at their firm. This blind allegiance to a check list causes the questioner to fail to ask questions in follow up and to fail to really understand the witness. Be curious without being nosy.

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[49] Id. at 317, RPC 3.4(b), Code of Professional Responsibility, Disciplinary Rule 7-102(a)(6).

Do not allow counsel to use a deposition to abuse a witness. Impose objections and direct the witness not to answer when the purpose of the deposition appears to be to cause the witness unnecessary trouble and expense and harassment.[50] Read the discovery and medical records before the deposition and do not waste a bunch of time on facts which are already known. Lawyers who waste time at depositions with stupid questions are either stupid, or they are milking the file for additional fees and are thus unethical as fees must be reasonable.[51]

J. Make Medical and Trial Exhibits

Trial exhibits take a long lead time to prepare. There is no way that these essential aspects of trial preparation can first be considered on the night before the trial starts. Models, which can cost thousands of dollars, can take weeks to build and get just right. Medical illustrations can be obtained more quickly; however, by the time the doctor approves the drawing and it is printed, an eight week lead time is not unusual for surgical illustration.

Models must be made with the input of the expert and other witnesses as they will be called upon to use the model to illustrate their testimony.

Medical illustrations can be made, at minimal cost, for every case. Use both outside artists and various in-house materials such as Benders and A.D.A.M. Large boards should be used for video depositions and trial testimony. Small fold-ins should be used for regular depositions as there is some drama in pulling them out of the sealed original transcript and letting

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[50] A witness is entitled to be protected against harsh and insulting questioning. O.C.G.A. § 24-9-62. Discovery should not be used oppressively. *See, e.g., American Oil Co. v. Manpower, Inc.*, 124 Ga. App. 79 (1971).

[51] No matter what type of fee is selected or billing method is employed, one standard always applies: "[A]n attorney's fee must be reasonable." "Lawyers are subject to professional discipline if they charge or collect a fee that is 'illegal or clearly excessive' (under the model code) or is not 'reasonable' (under the model rules)." Lawyers' Manual on Professional Conduct, American Bar Association, Bureau of National Affairs, Inc., 41:301.

them go back into the jury room. Make sure the doctor has actually marked on the exhibit for it to have maximum impact.

Familiarize yourself with the plaintiff's medical history. Read and understand the medical records and illustrations.

K. Answer Discovery in a Timely Fashion

Discovery must be answered fully and timely. This establishes credibility and moves the case along. Additionally, it prevents an unnecessary trip to the courthouse to answer why discovery was not answered. Make sure that the client understands the interrogatory answers. Keep in mind that all answers can be read at trial by the other side, not as impeachment necessarily, but as materials in the reader's case in chief.

L. Prepare a Trial Notebook

A trial notebook should be part of case management; not just something which is created the night before trial. Keep a list of motion in limine topics, witnesses, and trial themes. A copy of the tabs from a preprinted set of dividers used by the author is attached as Exhibit "J."

M. Choose a Trial Theme

A trial theme is the single phrase which lends credibility, through human experience, to your version of the facts. An effective trial theme will leave a jury with no choice but to apply the facts, presented within the framework of the legal theory of recovery, and award you a verdict.

The trial theme is *not* the legal theory of recovery. The legal theory of recovery is the *why* of your case and the theme is the *how* of your case. For example, in a typical intersection case, the legal theory, that is the reason *why* you are entitled to recover, is almost always that the defendant failed to yield the right of way. The themes which are applicable to such a case are as broad as the imagination of the trial lawyer, who will tell the story of the crash through the voices of his or her witnesses illustrated by exhibits. *Negligence* is not a theme - it is a legal theory. *Careless failure to prevent injury* is a theme. Note the emotional difference. Talking about negligence does not establish emotional or psychological responses in the jurors. Talking

about a defendant's careless failure to prevent injury evokes a variety of emotions and images which are likely to aid the plaintiff in obtaining a fair recovery.[52]

N. Retain Good Experts

Experts can be used for testimony and consultation. Only disclose experts who will testify. The use of expert witnesses is unquestionably an essential and ever increasing practice in modern tort litigation. Certainly, in every case involving a bodily injury, expert testimony comes in through medical care providers. Additionally, attorneys in Georgia regularly use economists, accident reconstructionists, engineers, and other more specialized experts in state and federal court trials.

> The appearance of an expert witness in a trial should be the signal for a time of clarity and reason, when the expert, who in legal theory has been called to help the jurors understand complex evidence, will explain the significance of what they have already heard. Every now and then, one would expect an expert to provide a moment of sparkling interest and, not too rarely, even a bit of high drama.[53]

Too many great cases are weakened because the use of experts is an afterthought. Because the use of experts is often the only way certain aspects of the burden of proof can be met, experts should be selected as early as possible in the case preparation. Often, if not in most cases, an expert should be retained before the suit is filed. Certainly, this is true in professional negligence cases in which O.C.G.A. §9-11-9.1 requires that an affidavit identifying at least one negligent act be attached to the complaint.[54]

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[52] Michael J. Warshauer, Automobile Crashes, Trial Themes (Georgia Trial Lawyers Association, October, 1994).

[53] James W. McElhaney, *Trial Notebook,* Chapter 21, p. 161 (1981).

[54] Case law provides that in suits against several types of professions an affidavit is required. When in doubt, the careful advocate will always attach an affidavit. For example, in suits against pharmacists the Georgia Court of Appeals initially took the position that O.C.G.A.

At a minimum, experts should be immediately consulted and retained in all product liability suits, all malpractice suits, and all toxic injury suits. Even car wrecks can benefit from expert testimony if there is serious doubt about the cause of the crash. (In car wrecks involving serious injury and death, regardless of how clear cut liability appears to be, it is essential to get expert involvement as early as possible while the evidence is still available. The bigger the case, the more vigorous the defense.) Of course, if the matter is one in which expert testimony is not needed because the question is one of common knowledge, it will be impossible to have an expert testify.[55]

O. Use Summary Judgment Motions

Most plaintiffs' lawyers look at motions for summary judgment as something to be responded to instead of as an affirmative tool to narrow issues and establish liability. Use motions for summary judgment aggressively to get the defendant on the run and to flesh out the best defense that the defendant has to offer. Summary judgment motions cause defense experts to narrow the issues and lock them into an opinion. Some trial courts are very reluctant to grant a plaintiff a partial motion for summary judgment as such orders do not prevent the trial. Do not let this intimidate you, as even if the motion is not granted, at the least the trial court is educated that the issue will go in your favor and this will help at the directed verdict stage. Also, an order determining liability is a lot better than allowing the defendant to come forward, admit liability, and obtain some degree of capital because it has done the right thing by admitting liability.

P. Keep the Client Informed

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§9-11-9.1 did not apply. *Harrell v. Lusk*, 208 Ga. App. 358, 430 S.E.2d 653 (1993). The Supreme Court then took the opposite position and held that an affidavit is required when suing pharmacists. 263 Ga. 895 (1994). If the appellate courts cannot be sure, the advocate who wants to avoid malpractice will attach an affidavit whenever the defendant is involved in almost every kind of licensed field of endeavor.

[55] *Garner v. Salter*, 168 Ga. App. 520, 521 (1983).

Clients must know what is going on. This relates not only to the day-to-day events but also to problems with liability and damages. A client who first hears that his case is falling apart on the eve of trial is a tough sell on settlement which at that point may not only be in his best interests, but his only real option. Clients need to know the law and practicalities of the jury system. This is part of trial preparation because sometimes the best trial preparation must be abandoned in order to settle, and sometimes an uneducated client will force a settlement at the first big offer because he has no idea how strong his case really is.

Q. Know the Value of the Case

Keep the case in perspective and make sure that you are representing the client and not yourself. One of the most dangerous aspects of preparing a case for trial is the sudden rise in testosterone and confidence which prevents a rational evaluation of the case. Know the value of the case so that settlement offers that arrive on the morning of the trial can be legitimately considered in light of the case instead of your over-confidence that may be associated with being totally prepared and cocky.

R. Be Professional

Our profession is governed by rules which are, in many ways, more important than the Disciplinary Rules, Standards, and Ethical Considerations. These are the traditions of the bar which make it possible to be a zealous advocate and yet maintain a friendship of sorts with opposing counsel. Unfortunately, in the last year or two, this professional courtesy has seemed to disappear. We must fight to keep it. In our legal community, we go to opposing counsel's office to take his client's deposition, we try to agree on the dates for medical depositions before noticing them, we regularly grant extensions for answers and discovery responses, and we give releases instead of insisting that the other side obtain subpoenas for the same information. We do not attack each other personally. When we stop acting civilly, the practice of law will not be fun and that will be a real loss. All of us must strive to apply the Golden Rule to our law practices.

S. Know How to Get the Case on the Trial Calendar

All the trial preparation in the world is worthless if the case cannot get set on a trial calendar. Many cases will never be reached for trial without a conscious effort to get them on a trial calendar. Find out how, and do it. Despite the Uniform Rules, which were implemented years ago, every county is different. This step is too often overlooked. Educate your client about dockets and calendars and how they work. Clients are very often frustrated by the system we are governed by. Do your best to explain it to them and your witnesses.

IV. Be Ready for Trial

If the case has been managed with trial as a goal, the last few days before the trial should be a cakewalk. However, there are a few things which need to be done.

A. Be Physically and Emotionally Ready for Trial

A trial is a physically demanding exercise. Keep yourself in good physical condition and ready for the stress. Exercise regularly and get plenty of rest. Do not come into a week long trial already exhausted. During the final preparation and during the trial itself, do not handle other matters. Focus on the trial.

B. Prepare a Trial Brief

One of the best ways of establishing control in a case is to have a good trial brief. Parts of it should have been prepared during the months preceding the trial. Put it in a notebook and have it tabbed and indexed. Attach the important cases. Discuss the important issues, such as the fact that you will likely be entitled to a directed verdict. Anticipate tough evidentiary issues and explain why your side should prevail. A sample from the table of contents of a trial brief is attached as Exhibit "K."

C. Obtain and Serve Subpoenas

Witnesses must be served with subpoenas and appearance checks. Do not wait until the night before trial to do this. Serve your subpoenas when your case first appears on a calendar. Keep the witnesses informed - the key witness is almost always on vacation during the first day of trial unless you have kept him informed. File the subpoenas in court as required.

A subpoena may be served by any sheriff, by his deputy, or by any other person not less than 18 years of age. Subpoenas may also be served by registered or certified mail.[56] When service is made by a person, proof of service is made either by filing a return of service to the court or by completing a certificate actually endorsed on a copy of the subpoena.[57] When service is made by registered or certified mail the return receipt constitutes prima facie proof of service.[58] Subpoenas served at least ten days before trial is the best practice.[59] A sample of a letter used as the cover letter on a subpoena served by certified mail is attached as Exhibit "L."

A subpoena which is not served until the last twenty-four (24) hours before trial is not likely to be sufficient to support a motion for continuance if the witness does not show up for the trial.[60] After a subpoena is properly served, it is not necessary to reserve the witness just because the trial is continued to another date; the party who has served the subpoena can advise of the new date by less formal means.[61]

Of course, a party can be compelled to trial by service of the subpoena on his attorney of record.[62]

D. Keep the Court Informed

Make sure conflict letters are timely and complete and suggest to the court the course of action you intend to take and where you intend to be when surprise is what courts hate the most. A sample of a conflict letter which complies with the rules of both state and federal courts in Georgia is attached as Exhibit "M."

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56 O.C.G.A. § 24-10-23.

57 Id.

58 Id.

59 *Frost v. Pennington*, 6 Ga. App. 298, 65 S.E. 41 (1909).

60 O.C.G.A. § 24-10-25(a); *Eubanks v. Brooks*, 139 Ga. App. 166, 227 S.E.2d 923 (1976).

61 *Mijajlovic v. Stat*e, 179 Ga. App. 506, 347 S.E.2d 325 (1986).

62 O.C.G.A. §24-10-23.

E. Be Familiar with the Court

Go and watch the court try a case or at least part of case. Know how voir dire is conducted. Introduce yourself to the judge and ask him if there is anything you can do to assist him in getting ready. Offer to tender your charges on a computer disc. Know the bailiff and the court reporter. Make the courtroom yours and fill it with your friends. Find out if the courtroom has plaintiff and defendant tables. If not, be prepared to get to the courtroom early in order to get the table you want.

F. Make sure your Discovery Responses are Supplemented

When doing the final preparation, do not forget to supplement the discovery responses and make sure the other side does the same thing. Discovery responses can be read at trial, and, if the parties have not supplemented, half-answered requests can be a powerful impeachment tool at trial.

G. Be Careful With the Pre-Trial Order

Make sure your pre-trial order is timely and complete. Be in control of the pre-trial pleadings. Read everything in the file before, not after, the pre-trial order is submitted. Use the preparation time as the time to complete the trial notebook. Make sure the pre-trial order has also been properly supplemented with witnesses and exhibits, if necessary, in accordance with your supplemental discovery responses.

H. Have a Trial Kit

Make sure you have all the toys necessary for a trial - easels, overhead projectors, markers, tape, staples, and paper. Make yourself a good trial kit. Keep in mind the size of your car trunk.

I. Go to Calendar Calls

As your case moves to the top of the trial calendar, it is essential to go to the calendar calls. This is particularly true if you are from out of town, as you want the judge to know who you are and that you care about his or her court. This is also the only chance you have to see how the cases ahead of you are lining up. After the calendar call, follow the cases ahead of you

on the calendar - call the attorneys and stay abreast of the likelihood of being reached. Keep your client and witnesses informed.

J. Polish the Opening Statement

If the trial notebook was properly prepared, it will have a sketch of an opening. In the days preceding the trial, the opening should be polished to the point where you know it cold.

K. Prepare for Voir Dire

Picking a jury, at least in Georgia State Courts, is really the initial part of the opening. Incorporate your trial theme and opening into your voir dire questions. Know what kinds of jurors to avoid. If the court publishes the jury list in advance, get it and research each juror. This is especially important in small communities and is another reason to have a local lawyer on your team.

L. Complete the Jury Charges

Jury charges are an essential aspect of trial preparation.[63] They serve as the outline for case preparation. The facts must be relevant in light of the instructions the court will give to the jury. Write good charges. Make them simple and short. When turning in requests, ask for both pattern charges and charges uniquely relevant to the case. In order to save trees and keep your stack of paper to a minimum, use a cover sheet in which the pattern charges are requested and then ask for additional charges in addition to those. A sample of a jury charge cover sheet is attached as Exhibit "N."

M. Prepare the Witnesses

By the time the case is on a trial calendar, all of the witnesses should have been interviewed and told their roles in the case. However, this is not the same as preparing them for trial. To prepare witnesses for trial, they should be brought together as a group and told what the

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[63] Michael J. Warshauer, *Jury Charges - Writing, Using and Preserving, Plaintiff's Personal Injury Practice*, ICLE, (October 15, 1993).

trial is about and the procedures which will be followed. Tell them that you have to ask direct questions and the other side can lead. Asking questions, go through the basics of what you want them to testify to. But never over prepare a witness, especially the plaintiff! An over prepared witness looks like he is reading from a script; if there is any interruption, he loses his place on the script and can't figure out what he is supposed to say. Instead, emphasize to him that his role is to tell the truth and follow your lead. Direct examination is like a dance - it works well if one person leads and both partners are dancing to the same music.

N. Write a Motion in Limine

Motions in limine are not always necessary, but it is usually good practice to raise a few points, such as collateral sources and that unrelated DUI your client got in college. Some courts want to have these kinds of matters handled weeks ahead of the trial and others want to wait until the morning of trial. Find out the court's preference and follow it. Remember that motions in limine are treated differently in federal court and state court. In federal court, if the motion is denied, the objection must still be made at the time the evidence complained of is offered. In state court, the motion in limine obviates the need to make a contemporaneous objection. Make sure that the court does indeed rule. A sample motion in limine is attached as Exhibit "O."

O. Prepare for the Appeal - Have Questionable Evidence Ready for Proffering

Be ready to proffer evidence the court has already ruled out. Do not simply ride on a prior ruling. Protect the record and have the excluded witness ready to testify even though the trial court has excluded him before the trial started.

P. Protect the Jury System

In conclusion, it is our job as lawyers to protect the civil jury system. Otherwise there will be no trials to prepare for. Join and give funds to the Georgia and American Trial lawyers Association. Contribute to Law Pac. Be involved and support the Civil Justice Foundation.