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TOP PLAINTIFF LAWYERS

It's never too soon to prepare for trial: The seeds of good trial preparation begin early in litigation.

By Jason E. Fellner

Whether representing a plaintiff or defendant, it is never too soon to prepare your case for trial. Be the captain of your ship and direct the case to where it needs to go as you prepare for trial. Preparing for trial begins with knowing the substantive claims and defenses in your case, understanding the evidence, and crafting your client's story in a timeline.

By organizing the development of your case early with these three central pillars, you can be the best advocate for your client in directing the litigation to fit the needs of your client's case and avoid falling victim to reacting to the activity of opposing counsel. Showcasing your unbridled assurance in the substantive law of the case, the evidence at issue, and chronology leading to the dispute early in a case will not only better prepare you for trial in an efficient and proactive way, but it will also shield you from litigation attacks by adverse counsel and will surely win you the confidence of your client and credibility in court.

Substantive Claims in the Case

All too often a complaint is filed with too many causes of action seeking the same overlapping remedies and relief from the court. Likewise, answers filed in court contain far too many affirmative defenses. All participants in litigation are better served if complaints and answers are more focused and narrow, which more closely resemble the claims at issue for trial rather than a wish list of exaggerated claims or defenses. Not only are those types of overbroad complaints and answers easily subject to pre-trial demurrers and/or motions to strike, they unnecessarily expand the universe of claims and defenses at issue for discovery and trial. Because of the expanded pleadings that are routinely filed, discovery and motion practice is unnecessarily enhanced leading to motions that seek to pare down the real claims in dispute for trial. It is not uncommon for a case that was first filed with eight causes of action to be reduced by the time of trial to two causes of action. The only true consequence of unnecessarily pleading multiple claims in a case is to increase the cost (and time) of litigation.

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Instead of throwing in the kitchen sink on both sides of a lawsuit in initial pleadings, lawyers are better served to go directly to the CACI jury instructions and evaluate whether the facts supporting the claim and/or defense exist. By narrowing the claims and defenses at issue, reducing them to the core elements of proof, a lawyer's job in gathering the evidence to prove or disprove those elements at trial becomes targeted, manageable, and efficient. Reviewing the jury instructions for each claim or defense at the outset of a case will position you well for paving the way for an efficient path to trial. The sooner you settle what substantive law is applicable to the case, the easier it will be to gather evidence to prove up your claim or defense.

Evidence Is Key

Most cases at trial will turn on the evidence supporting the claim or defense. By the time of trial, the law is most always not in dispute. The earlier an attorney begins to collect both documentary and testimonial evidence in a case, the better prepared the case will be for trial. Gathering evidence in a case does not need to begin with serving and responding to written discovery. Indeed, waiting until then, especially for plaintiffs, is ill-advised. In order to direct the litigation, an attorney can gather evidence him or herself by hiring a private investigator, reviewing documents available to them from their client or willing third parties, interviewing witnesses, and doing internet research. Of course, any investigation taken by the attorney should keep in mind the rules of attorney work product and attorney-client privilege. Not only is evidence material to each element of a claim or defense worth uncovering, but also evidence that calls into question credibility of parties is equally important.

Once a case is filed, all too often attorneys sit on their hands and wait to initiate discovery and depositions until a trial date is set. After the short mandatory waiting period on discovery is over, discovery should begin in earnest. Obtaining verified responses that can be used at trial is critical to preparing a case for trial. Most cases now involve electronically stored information so discovery requests should be tailored to reach information contained on electronic devices like cellphones and computers. Limiting discovery to documents is insufficient in the world in which we live where witnesses will archive all kinds of useful information in a case on social media, but all the while have zero documents in a hard copy file. Gathering evidence for trial should start immediately. As evidence is collected, it should be organized and tagged as having relevance to each material element at issue in the case. Diligence in the collecting and organizing of evidence will prove essential in making a clear presentation at trial. After all, it is at trial where the lawyers are tasked with simplifying and organizing all the law and evidence into something coherent and digestible for the jury to understand.

Crafting Your Client's Story in a Timeline

Every good story has a beginning and an end. The same is true for the narrative that is told at trial. An easy and important way to develop rapport and credibility with a judge and jury is to showcase the events at issue in the form of a timeline in an opening statement. The preparation of this timeline does not need to wait until weeks before trial, but instead should be prepared as evidence is collected during litigation. Each event on the timeline should line up with a piece of documentary or testimonial evidence. Nothing is more powerful than a story and an easy way to organize evidence revealed during the course of a lawsuit is to fit it into either an element of the claim or defense at issue or the timeline of key events that explain the arc of the story involved in the case.

Ultimately, prompt action in organizing the substantive law and evidence in a case for trial will yield positive results and will allow you to direct the litigation to your client's advantage and position you for victory. ■

Jason E. Fellner *is a shareholder at Murphy Pearson Bradley & Feeney PC.*