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Trial Prep Tips – Ask, Listen and Learn

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There is no substitute for preparation. Although certain factors may influence the degree to which you prepare (the amount of damages in a dispute is small, but the case is precedent-setting for how the client operates as a business) or how you prepare (some of a client's witnesses are located overseas, and video-conferencing is available), preparing smartly will consistently give you an advantage. Preparing well also is not just what you do before oral argument on the motion for summary judgment. You begin preparing the moment a new matter comes in the door, and you are not finished until it is resolved.

This article will outline some suggestions regarding how to prepare, but there is no one-size-fits-all way to get ready. Each case is different. Each matter requires different kinds of preparation. Ultimately, a great way to prepare for any case is to ask good questions and keep asking good questions throughout the life of the matter because many of the tasks we perform in litigation have long lead times. A deadline for dispositive motions is an example. There are multiple preliminary objectives that must be met before the day of the deadline arrives.

The inception of litigation starts the ball rolling. There are some immediate things to learn. For example, some early factors to consider include:

1. Who is the judge? What do you know about his or her demeanor, preferences, and "local rules"?
2. What facts does the complaint allege, and what are the legal claims?
3. Who is the opposing counsel? Does he or she focus on these types of matters, or is the attorney a general litigator?
4. What does the client say this is all about? Is there a "back story"?

Once you have a general, preliminary understanding of what the case is about, begin to map how you are going to learn the facts and understand the nuances of the legal issues.

5. Are the client's key employees still employed? If not, where are they now, and did they leave on good terms?
6. Where are the documents and other information? Are there ESI concerns? Has the client sent a preservation notice to its employees?
7. Prepare an outline of the elements of each claim. What must the plaintiff prove for each claim?
8. Has the judge made decisions in similar cases?
9. Is there anyone in the Firm with substantial experience in this type of case who could offer helpful guidance?

Once you have identified your client's employees with knowledge about the facts, you need to plan for interviewing them and getting the documents. To ask better questions during your interviews, you need to understand your client's business. Are there unique processes and practices that apply to what it does? What are the employees' job duties and responsibilities? Who reports to whom? Additionally, identify key terms used in the client's industry.

Having a good appreciation of the legal issues will help you focus on the types of questions you should ask the client's employees, but remember that you are there to learn. Prepare well so you understand what you are hearing, but the key is to listen. Mix the questions you need to ask with open-ended questions to get the employees talking. You will learn a lot of information and that will prompt other, more pointed questions that will help you develop the facts and learn even more.

Once you have gathered the documents and information from the client's relevant employees, you can begin to frame your client's defenses. This is when you should refine your earlier legal research and understanding of the legal issues, which facilitates your focus on the discovery you need from the adversary party. Is this a case in which requests for admission could be an efficient way to get information? Whose depositions do you need? Are there third parties from whom you need information? And when you decide whose depositions you need to take, review and understand all documents that relate to those witnesses. That will enable you to decide what questions to ask or whether to even ask a question at all. Sometimes, it may be best not to ask a witness a question during a deposition.

It is often said that preparing for trial is like working with a funnel: we gather a lot of information in the beginning but limit or control the flow of it at the end. As you move through discovery, you will see issues begin to crystalize. Figure out who best can help tell the story and identify what documents you will need to do it. Having a good proof outline is important as it allows you to know what witnesses and what documents you will need to use to introduce evidence during trial. Are there evidentiary issues you need to plan for, such as anticipating arguments your opponent may make that may be addressed by a motion in limine? Do you need to move to exclude your opponent's expert?

There are myriad questions you will need to ask for each case. Start early. Importantly, you need to make sure the team working on the case is communicating frequently and well. You need to create a running checklist of key topics and tasks, so everyone knows the progression and changing objectives as the case moves forward.

Ask questions, learn, use your judgment, and put in the time to get ready. It is the best path to success.