



PROGRAM MATERIALS

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Avoiding Trial Prep Pitfalls: From Substantive to Logistical, What You Should Be Thinking About and When

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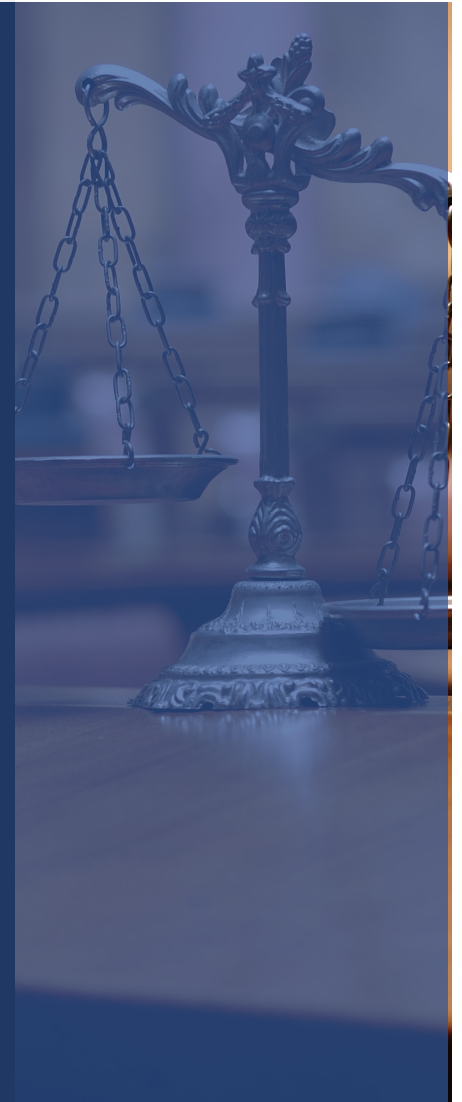
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Avoiding Trial Prep Pitfalls

From Substantive to Logistical
What You Should Be Thinking About and When

WEST LEGALEDCENTER
MARCH 7, 2023





What We Will Cover Today

- Introductions and Overview
- Preparing Your Case
- Home Base at Trial
- War Room & Trial Site
- Wrap Up and Questions

PRESENTERS

This group of presenters collectively brings decades of expertise as litigators, technologists and logistics professionals. You will leave today knowing exactly what to tackle (as early as possible) as you prepare for trial to avoid common pitfalls and maintain your edge through to closing arguments.



Jen Freeman



Ryan Spear



Bob Rivas



Peter Moore



Preparing Your Case





Get the Lay of the Land

Counsel should review:

1. The Federal Rules of Civil Procedure
2. The scheduling order and all applicable deadlines
3. The district court's local rules
4. The judge's individual rules

1. REVIEW RULES OF CIVIL PROCEDURE

- As we are presenting across all jurisdictions today we will use the Federal Rules of Civil Procedure
- The applicable rules are cited within the presentation where appropriate

2 – CHECK SCHEDULING ORDER AND KEY DATES

- The Judge must issue a scheduling order under Federal Rule of Civil Procedure FRCP 16(b)
- The scheduling order typically sets forth the dates for the final pretrial conference and trial, and contains pretrial deadlines, such as for dispositive motions FRCP 16(b)(3)

FRCP 16



Scheduling Order

FRCP 16(b)(3)(B)

(B) *Permitted Contents.* The scheduling order may:

- (i) modify the timing of disclosures under [Rules 26\(a\)](#) and [26\(e\)\(1\)](#);
- (ii) modify the extent of discovery;
- (iii) provide for disclosure, discovery, or preservation of electronically stored information;
- (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under [Federal Rule of Evidence 502](#);
- (v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;
- (vi) set dates for pretrial conferences and for trial; and
- (vii) include other appropriate matters.

3 – REVIEW LOCAL COURT RULES

It's critical to review all rules as early as possible.

- Some jurisdictions require non-resident attorneys to designate local counsel
- Some jurisdictions require attorneys to be accompanied by a member of the trial bar
- Always check for Standing Orders

4 – CHECK THE JUDGE’S INDIVIDUAL RULES

The Judge’s administrative rules or preferences may cover:

- the number of copies of exhibits counsel must bring to trial and whether the court requires exhibit notebooks
- the placement and format of exhibit stickers
- the number of **courtesy** copies of briefs and other trial filings
- the timing for counsel to exchange the items that FRCP 26(a)(3) requires
- the required contents of the pretrial stipulation and whether each side may unilaterally file its own proposed document or must file a joint document
- the judge's procedure for jury selection, including whether counsel may prepare their own jury questionnaire and question potential jurors
- whether each side may unilaterally file proposed jury instructions



Prepare to Tell Your Client's Story

Counsel should:

1. Organize key case documents
2. Subpoena Witnesses
3. Prepare deposition designations
4. Consider exhibits and demonstratives

1 – ORGANIZE KEY CASE DOCS

- Secure collaborative repository for:
 - Document productions (all parties)
 - Pleadings
 - Aids and demonstratives
 - Video and synced deposition transcripts
- Technical ability to make deposition designations
- Functionality to make clips
- Trial presentation capabilities

2 – SUBPOENA WITNESSES

To secure each witness's attendance at trial, counsel should subpoena and tender any required advance witness fees to all witnesses within the district court's subpoena power.

Witnesses within the court's subpoena power include persons who live, work, or regularly transact business in person:

- Within 100 miles of the courthouse.
- In the same state as the courthouse, and for nonparty witnesses, only if the witness also would not incur substantial expense in traveling to the courthouse.

FRCP 45



Disclosures

FRCP 26(a)(3)

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

- (i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;
- (ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and
- (iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

3 – PREPARE DEPOSITION DESIGNATIONS

To use deposition testimony at trial (for any purpose other than solely for impeachment), counsel must designate or identify the party's or witness's deposition testimony that counsel intends to use, and provide opposing counsel with the opportunity to object to the use of that testimony at trial

Counsel must typically exchange deposition designations (along with trial witness and exhibit lists) with opposing counsel before trial to allow for objections

FRCP 32



Depositions

FRCP 32(a)(1-2)

(a) Using Depositions.

(1) *In General.* At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the FRE if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) *Impeachment and Other Uses.* Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the FRE.



Depositions

FRCP 32(a)(3-4)

(3) *Deposition of Party, Agent, or Designee.* An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under [Rule 30\(b\)\(6\)](#) or [31\(a\)\(4\)](#).

(4) *Unavailable Witness.* A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

- (A) that the witness is dead;
- (B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;
- (C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;
- (D) that the party offering the deposition could not procure the witness's attendance by subpoena; or
- (E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.

4 – CONSIDER EXHIBITS AND DEMONSTRATIVES

- Once counsel has organized and reviewed key case documents counsel should begin drafting the trial exhibit list and assembling an exhibit notebook for use during trial
- Counsel must typically exchange exhibit lists with opposing counsel before trial to allow for objections
- Many judges also require that parties submit a trial exhibit notebook to the court (either unilaterally or jointly) before trial

FRCP 26(a)(3)



Disclosures

FRCP 32(a)(3-4)

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- (iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.



Wrap Up: Best Practices

As early as possible, counsel must:

1. Review every court rule
2. Scheduling and deadlines
3. Organize your case information
4. Prepare to present it

Home Base



HOTELS
FOR TRIAL





Goals for Home Base

- It is imperative that you find the ideal partner to host your overnight hotel rooms and your working space as soon as you believe the matter is heading to trial.
- Best case scenario you are within walking distance to the court at a comfortable high service level hotel.
- Worst case, you could be struggling to find rooms within a 30-minute drive to the courthouse and a level of service that is suboptimal.
- The difference in those two scenarios can mean having an efficient, well rested, effective team or not.

WHO IS GOING AND FOR HOW LONG?

- Team Size
- Special Needs
- Client-Specific Requirements

CLIENT AND FIRM EXPECTATIONS: VENUE

- Who sets the budget?
- Who will sign the contract?
- Should you require a non-compete from the hotel?
- What is the cancellation policy
- What are the travel restrictions, requirements, limits and stipends?
- How will the team communicate?

Expectations: Budget

- **BALLPARK COST:** Do you have a real sense of how much going to trial will cost from an operational perspective? This is outside of the legal fees, but would include hotel cost, food and beverage, transportation, technology and other services and fees.
- **PROFORMA:** It is recommended to draft a pro-forma, so that there is a clear understanding of trial expenses. Once a budget is established that considers the needs and requirements for the team, you can move on to the next step.

Expectations: Contract Liability

UNDERSTAND THE RISK: Hotel contracts carry financial liability as well as insurance coverage requirements, deposits and ultimately the responsibility to fulfil the agreement.

COURTESY ARRANGEMENT: Some hotels offer “courtesy” arrangements which protect the firm and your client from early settlement or dismissal.

“EARLY DEPARTURE” CLAUSE: Will help mitigate the amount of fees the hotel will charge for the lost revenue of your early check out.

Expectations: Exclusivity and Non-Compete

- Do you require the hotel to honor an exclusivity clause or non-compete with your opposing counsel?
- This point should be made in the beginning of the process if it is non-negotiable.
- Some firms are fine with opposing counsel being in the same hotel as long they are on a different floor, but others want no access and that would be communicated to the hotel during the RFP process.

Expectations: Special Requirements

- Health Restrictions
- Brand Relationships and Perks
- Financial Limitations and Stipends
- Billing Restrictions
- Credit Card Rules and Limits
- Travel from Outside US

Expectations: Communication

- Overcommunicate With Your Team
- Update the Client Frequently



Location

- Proximity to Courthouse
- Transportation and Parking
- Feeding Your Team
- Tactical Advantage/Local Vendor Resources
- Timing and Pre-arrival Team

LOCATION: PROXIMITY TO COURTHOUSE

FIRST DIBS: Early planning gives you the tactical advantage to find the closest living and working spaces to the courthouse.

WALKING DISTANCE: Ideally you would be in walking distance, but that is not always possible. You can do a simple Google Maps search to find this out, speak to local counsel or use a third-party service to assist.

LOCATION: TRANSPORTATION, PARKING AND SECURITY

- During and After Business Hours
- Rental Cars and Parking
- Publicity
- Confidential Information
- Hotel Security Team

LOCATION: FEEDING YOUR TEAM

- Proximity to Food
- Room Service Hours
- Hotel Catering
- Variety
- Clean Up
- Daily Stipends

LOCATION: TACTICAL ADVANTAGE

- Right Space and Resources
- Local Vendors (Couriers, Dry Cleaners, Office Supply, Tech Support)
- Happy, Rested and Fed Team

LOCATION: TIMING AND PRE-ARRIVAL TEAM

- Identify Logistical Issues Early
- Send a Scout
- Tech Setup
- Hotel Liaison



Wrap Up

- Start planning early
- Know your team and their preferences including the client's
- Make certain your budget expectations are clear
- Protect your firm and your client's interests in any agreement

Trial Site & Courtroom



A man in a suit and glasses is working on a laptop. A woman is partially visible in the background. The image is overlaid with a red semi-transparent filter.

Trial Site

- Components
 - Sleeping Rooms
 - Work Rooms
 - War Room
 - Witness Prep
 - Document Prep
- Central Secure Workspace
- Most Likely Hotel
- Local Counsel War Rooms
- Tech Needs

ADVANCE SITE SURVEY

SLEEPING ROOMS AND WORK ROOMS

- Can they be both?
- Can furniture be moved and stored?
- Is there enough space generally?

POWER NEEDS

- Copiers and printers are the biggest power load devices, high-speed copiers require dedicated 20amp circuits.
- Hotel may have to make power upgrades
- Will need significant space for office and copy room supplies

ADVANCE SITE SURVEY

INTERNET CONNECTIVITY CAN MAKE YOU OR BREAK YOU

- More bandwidth is always worth the price for team performance and morale
- Most teams use secure VPN to access the firm network, document management and eDiscovery systems
- Dedicated or a private segmented wired connection (not shared) is preferred
- We recommend approx. 3mb/s of bandwidth per person

Physical Security

- What security policies does the hotel have that must be followed?
- Does the hotel require a certificate of insurance (COI) for vendor deliveries?
- Does the hotel provide secure access to the rooms and/or the entire floor?
- Who has the authority to approve access cards/keys?
- Are security cameras in place and working?
- Who can sign for war room deliveries (couriers, messengers, food)?
- Trial site working hours are not 9-5, what restrictions exist after hours?
- Does firm or client have restrictions on labeling of shipment/deliveries (e.g., explicitly not using firm or matter name)?

Data Privacy & Security

- Are the trial teams laptops encrypted? – This is a must in case a laptop is lost or stolen while being shipped to the trial site (or during the war room stay)
- Are shred containers needed for certified destruction or shipped back to the law firm?
- Do non-firm participants in the war room require segregated or limited network access?

A man in a suit and glasses is working on a laptop. A woman is partially visible in the background. The image is overlaid with a red semi-transparent filter.

Trial Site Technology

Technology installation and configuration is crucial for users to work as seamlessly as possible while following all security requirements of the firm.

- Setup and Configuration
- Staffing and Testing
- Teardown

SETUP AND CONFIGURATION

- Network and internet configuration
- Includes access to all network resources including printers, copiers and storage devices
- Network security device configuration, including any wireless access points

TESTING AND STAFFING

- Test all user devices for access to all local and remote devices, services and applications and verify internet performance
- A war room technician can be retained to remain on-site for user support at trial site and for courthouse technical needs throughout the trial

TEARDOWN

- Technicians will be needed for technology tear down, pack up and removal of the venue including coordinating shipping, shredding and copier removal services
- Careful attention to avoid damage to all rooms, hallways and elevators, clearing out all materials and trash, following rules for freight elevators and parking

Courthouse & Courtroom

Learn, in advance, the rules, procedures, and timing for courthouse and courtroom access for the trial team, trial materials and personal technology.

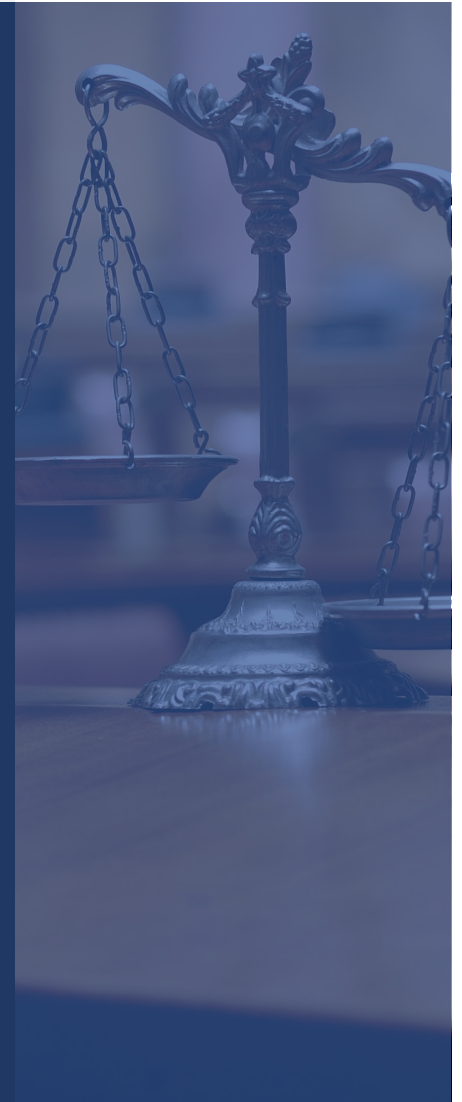
- What are the judge's preferences or limits on supplemental technology?
- If supplemental or complete technology is allowed, parties will agree ahead of time, be present for installation and testing and share costs
- Is there internet access in the courtroom? What speed? Passwords? Test in advance
- Are conference or break-out rooms available?
- How do we receive real-time court reporter feed in the courtroom? Outside the courtroom?

A man in a suit and glasses is standing and looking at a laptop. A woman is partially visible in the background, also working on a laptop. The image is overlaid with a red semi-transparent filter.

Wrap Up: Best Practices

- Preparation and planning is key.
- A trial deployment playbook can greatly help with answers to the firm's technology and security preferences
- Sooner is better, especially when dedicated internet circuits may need to be ordered
- Constant communication with technology provider as variables are many and changes are expected
- Leverage the experience of technology providers that focus on supporting litigation deployments as a core competency

Questions?



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