



Sixty Days to Trial

Steve Fogg

Corr Cronin Michelson Baumgardner & Preece (Seattle, WA)

sfogg@corrchronin.com | 206.274.8669

<http://corrchronin.com/our-team/steven-fogg/>

Sixty Days to Trial

Steven W. Fogg

Corr Cronin Michelson Baumgardner & Preece LLP

Seattle, WA

Introduction

Two months from trial. The to-do list is endless, filled with tasks large and small, and deadlines litter your calendar:

- Select and submit documents as trial exhibits
- Prepare motions in limine
- Prepare trial brief
- Prepare jury instructions
- Arrange for war room and trial accommodations
- Draft opening statement
- One last jury exercise?

- One final mediation?
- Work on voir dire
- Prepare juror questionnaire
- Meet with juror consultant
- Subpoena witnesses
- Deposition designations
- Meet with and prepare key witnesses
- Last minute depositions
- Late summary judgment motions
- Prepare cross and direct outlines

Trial Preparation: Maintaining Sanity is a Question of Balance

- For each task, ask:
 - Is the time and expense worth the value created?
 - Is the time spent on the task worth the time taken away from other tasks?
 - Am I the best/most economical performer of this task?
 - Will this task help me get a win, i.e., obtain the most economical outcome at trial or at settlement?

What is a Win for the Defendant?

- A win is NOT winning the mock jury exercise.
- A win is NOT preparing 200 slides for a 40-minute opening.
- A win is NOT “preparing” your company witness by frightening him or her into submission.
- A win for a defendant IS (generally) paying the least amount of money possible in total to the plaintiff AND THE DEFENDANT’S LAWYERS.

Six Tips To Maintain Your Sanity In The Sixty Days Before Trial

1. There should be one (but only one) weekly all hands conference call.
2. You should have frequent live communication with your opponent.
3. Extensive, expensive and elaborate pretrial witness preparation is rarely worth the time and money.

Six Tips To Maintain Your Sanity In The Sixty Days Before Trial *(continued)*

4. Mock jury exercises should be avoided in the sixty days before trial.
5. Do not over-prepare for opening and under-prepare for first witness.
6. The trial brief (not your motions in limine) is the most important pretrial brief the judge will receive from you.

Sanity Tip #1

- THERE SHOULD BE ONE (BUT ONLY ONE) WEEKLY ALL HANDS CONFERENCE CALL
 - Time limited! One hour is sufficient.
 - Agenda with task list circulated in advance.
 - Appoint a leader.
 - Call day and time should be the same every week and must take precedence over all other tasks.
 - All stakeholders (i.e., client, trial team, insurers) should be on line.
 - Delegate tasks with abandon.

Sanity Tip #2

- YOU SHOULD HAVE FREQUENT LIVE COMMUNICATION WITH YOUR OPPONENT
 - Two months from trial usually means you are at war with your opposing counsel. This can lead to a “cone of silence” effect, i.e., “you were a jerk during the deposition/motion hearing/meet and confer so I’m not talking to you.” Huge mistake.
 - Not talking to your opponent in the run-up to trial robs you of crucial information about your opponent’s trial plan and strategy.
 - Not talking to your opponent can delay a settlement during the most expensive phase of the litigation.
 - Settling a case at the courthouse that could have been settled with a phone call thirty days ago is not a win.

Sanity Tip #3

- EXTENSIVE, EXPENSIVE AND ELABORATE PRETRIAL WITNESS PREPARATION IS RARELY WORTH THE TIME AND MONEY
 - Woodshedding key witnesses in the weeks leading up to trial sounds like a good idea, but it frequently backfires.
 - Long pretrial mock crosses and prep sessions with witness coaches can leave the witness with more stress than he or she began with.
 - Goal should be to have short pretrial meeting (live or by phone) with witnesses to go over themes and put witness at ease.

Sanity Tip #4

- MOCK JURY EXERCISES SHOULD BE AVOIDED IN THE SIXTY DAYS BEFORE TRIAL
 - Trial lawyers are sometimes tempted (or required) to test themes with a “quick” one day mock.
 - The problem: preparing for the mock replaces preparing for trial.
 - No such thing as a “quick” mock.
 - The audition effect.
 - Test themes with jury exercises BEFORE the sixty day countdown begins.

Sanity Tip #5

- DO NOT OVER-PREPARE FOR OPENING AND UNDER-PREPARE FOR FIRST WITNESS
 - Yes, opening statement is crucial and must be prepared and tested with great rigor. But the testimony of the very first witness AFTER opening is when battle is actually joined before the jury.
 - What you say in opening must be supported by first witness. First impression of your credibility is on the line.
 - If representing defendant, do your best to ferret out first witness identity (see tip #2, i.e., talk regularly to your opponent) and prepare for that cross as you would for opening.

Sanity Tip #6

- THE TRIAL BRIEF (NOT YOUR MOTIONS IN LIMINE) IS THE MOST IMPORTANT PRETRIAL BRIEF THE JUDGE WILL RECEIVE FROM YOU
 - Preparing motions in limine is a time-consuming and expensive task.
 - Trial brief can be overlooked in the process. The belief that “the judge is familiar with our case” sometimes used as a rationale to mail it in.
 - Yet most judges say the parties trial briefs are the very first papers they read when preparing for trial. Motion in limine briefing receives less attention, and can be raised orally during pretrial hearings.
 - Lesson: if resources are limited, focus on the trial brief first and the motions in limine second.

About Steve Fogg

Partner | Corr Cronin Michelson Baumgardner & Preece | Seattle, WA

206.274.8669 | sfogg@corrchronin.com
<http://corrchronin.com/our-team/steven-fogg/>

Mr. Fogg is a partner in the firm. An experienced and successful jury trial lawyer who has tried more than eighty cases to verdict, Mr. Fogg's high-stakes trial practice runs the gamut from complex commercial lawsuits with nine figure exposure to personal injury lawsuits with catastrophic injuries. Mr. Fogg also uses his experience as a former SEC attorney and criminal prosecutor to help individuals and companies respond to civil and criminal investigations.

Mr. Fogg has received recognition for his trial skills from a variety of sources. This year, U.S. News and World Report and Best Lawyers named Mr. Fogg its "Lawyer of the Year for Products Litigation" in Seattle. In addition to being named "Lawyer of the Year for Products Litigation" in 2014, Mr. Fogg's peers have repeatedly recognized him in years past as a "Best Lawyer in America" in the fields of Commercial Litigation and Personal Injury Litigation. In addition, for the past several years, Seattle Metropolitan magazine's "Top Lawyers" annual issue has recognized Steve as one of the top litigators in the city. Finally, Steve has achieved an AV Peer Review Rating by Martindale-Hubbell, which is the highest rating an attorney can obtain.

Prior to joining the firm, Mr. Fogg was a senior homicide prosecutor in Seattle, where for several years he exclusively tried murder cases, including a number that received front-page media attention. Before moving to Seattle to become a prosecutor, Mr. Fogg practiced in Washington, D.C., where he worked for a securities litigation boutique and began his career as a staff attorney for the Securities and Exchange Commission Division of Enforcement.

Publications & Presentations

- Both Sides Now: Prosecuting and Defending Employee Mobility Cases, Network of Trial Law Firms, Scottsdale, Arizona, April 2012
- How To Try Lawsuits in King County Superior Court, Pincus Legal Education, Seattle, Washington, March 2012
- Trying The Admitted Liability Lawsuit, Network of Trial Law Firms, New York City, New York, August 2011
- How To Try Lawsuits in King County Superior Court, Pincus Legal Education, Seattle, Washington, March 2011
- Expert Witness: Procedures, Discovery and Trial Issues in Washington, Lorman Education Services, Washington State Convention & Trade Center, March 2005
- Apex Depositions: Using the Apex Doctrine to Protect High Level Corporate Executives from Deposition, Network of Trial Law Firms, New York City, New York, August 2006
- The CEO as a Witness, Network of Trial Law Firms, Naples, Florida, May 2008
- Failure to Warn Claims, Washington Defense Trial Lawyers, Seattle, Washington, December 2008
- Protecting the Senior Executive, Network of Trial Law Firms, Laguna Beach, California, November 2009

Education

- University of Virginia School of Law (J.D., 1989)
- College of William and Mary (B.A., English, 1986; Honors all eligible years)