

STORMING THE FRONT LINE

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STORMING THE FRONT LINE: WHAT IN-HOUSE COUNSEL MUST CONSIDER WHEN YOU ACTUALLY END UP AT TRIAL

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Sure most cases get settled. But what about those cases where a jury is picked and a trial starts? Will in-house counsel managing litigation be second-guessed or ill-prepared when a case actually goes to trial? What in-house counsel should be prepared to deal with so that no case goes awry.

Introduction -

We all know that it is the surprises - drastic reevaluation of settlement value, adverse rulings, or even worse, a bad verdict, which often subject you to criticism from management. Predictability is sacrosanct. Pre-trial preparation and communication are the keys to avoiding those disfavored surprises. Achieving predictability requires careful scrutiny at all stages of litigation but this paper focuses only on the latter stages. (1) What information must be known before trial begins? (2) How can in-house counsel assist during at trial? (3) During trial, what things are most important for your continuing case evaluation? (4) When reporting from trial, what details need to be included?

The answers to these four questions will obviously depend upon the nature of the case, the particular dynamics at individual companies, and numerous other factors that go beyond this presentation. It is not my intent to alter any established guidelines and/or reporting requirements individual companies may have. This text offers only general suggestions and highlights certain critical areas of concern in effort to assist those who must monitor trial. It also hopes to promote a team concept between in-house and outside counsel, and ensure that pertinent information is effectively conveyed to management.

Nothing suggested in this paper is revolutionary. Rather, this common sense summary of ideas is more akin to a practical "are we ready for trial?" guide for the busy in-house lawyer.

Be Prepared Before Trial -

"*Knowing* is half the battle." - G.I. Joe. The saying holds true for the in-house counsel who finds him or herself heading to trial. The following is a list of questions you need to address before trial begins:

- Do you have the right lawyer to try your case?
- What is the reputation of your judge, opposing counsel and venue?
- Have you put the necessary insurers on notice?
- Do you need separate local counsel and, if so, who?

- Do you need appellate counsel?
- Should you conduct a mock trial and/or hire a shadow jury?
- Are there any disputes between your company and the insurance carrier(s) which need to be addressed before trial begins?
- What are the key issues to be resolved at trial and the pieces of evidence (or lack thereof) in support of the critical elements?
- Who are the key witnesses for each side and what is their expected testimony?
- What are the opinions/theories espoused by the competing experts?
- What are the alleged damages and expected proof of same?
- Are there any critical issues yet to be resolved by the Court and, if so, what are they? When are they expected to be addressed?
- Has your case been impacted by adverse discovery rulings?
- What is the status of settlement negotiations?
- How much will it cost to defend the case through trial and possible appeal?
- What is the likely jury verdict?
- Is there a chance for an excess verdict or a punitive damages award?
- Is there a business relationship which will be potentially jeopardized by trying the case?
- Does your judge expect or require a client representative to be present who has settlement authority?
- What are the rules concerning prejudgment and post-judgment interest in the applicable jurisdiction?
- Are there any existing appellate issues and are there any future appellate issues that you reasonably anticipate?
- If an adverse verdict were to occur, what are the chances of and procedures for posting a bond?

Have you assembled the right team for trial?

Trying a case in Hampton County, South Carolina is quite dissimilar from trying a case in San Francisco, California. While you might have retained one of the brightest attorneys on the planet, you must evaluate whether you've got the right lawyer for the particular venue, against a specific opposing counsel, and to try a case before a certain judge? Did you pick your lawyer or was he/she selected by your insurer? Does your trial counsel have a proven track record? Has he/she tried cases before this judge? In this venue? Of similar type? What cases has he/she tried lately? These are all basic questions you will want to have answered before you find yourself having to explain a bad verdict to your Board. On the positive side, one of the biggest protections you can provide to yourself and your company is having the right trial counsel with a demonstrated history of trying similar cases.

To the extent you have national coordinating counsel, would this lawyer be best served by hiring a local attorney who has good standing in the community and with the judge? The importance of having an influence in any particular venue cannot be overstated. To the extent you have a situation where you might be bringing in someone new to takeover the case, you will want to ask whether there are political reasons vis-à-vis your judge to keep the existing lawyer on board to still participate in some manner at trial. The search for the right lawyer can take considerable time so this should not be a last minute exercise.

You need to decide whether you need appellate counsel for the case? If so, why? You need to be able to justify why you are expending the funds to hire a new lawyer or team of lawyers versus having trial counsel handle appellate issues as well. If you do decide that your case justifies hiring appellate counsel, you'll want to ensure that you're getting the attorney you intended versus later learning that you had a second-year associate taking notes for \$350/hr.

Should you mock try the case? This topic could be a presentation all by itself but for our purposes I merely point out that this is a consideration. Same goes for the shadow jury option. When the exposure justifies the substantial costs involved, these options often provide valuable insight.

Judge, Opposing Counsel and Venue

There is no excuse in not knowing the reputation of the judge, opposing counsel and venue *before* you get to trial. This can be obtained quite easily by defense counsel. If for some reason defense counsel cannot provide this fundamental information with minimal effort, that's a good sign you don't have the right lawyer to take your case to trial. Basic internet research can usually provide an overview. Other databases such as Westlaw offer jury verdict databases for every state, information regarding amounts of settlements and verdicts, the attorneys involved, the facts involved, and the venue where the case was filed.

For a more in-depth analysis, The Network of Trial Law Firms is a fantastic resource, particularly since it is comprised of firms and lawyers who actually try cases.

Are there any critical issues yet to be resolved by the Court?

Sometimes you are forced to enter trial lacking essential knowledge which could drastically effect your evaluation, chances of success, etc. Perhaps the judge hasn't ruled on a Daubert motion which seeks to eliminate a critical expert. A surprise witness who was never deposed and who refuses to speak with your side might be allowed to testify. The judge could have reserved ruling on a significant motion. The numerous possible contingencies could go on and on but the point I want to make is a simple one – let the decision makers know about such contingencies and the potential impact they could have on the case. It's not sufficient to use these factors to *explain a verdict after the fact.* To the extent any important contingencies are known by you or trial counsel, they need to likewise be made known to your management and any applicable insurance carriers. An analogy that immediately comes to mind is an in-house lawyer receiving unanticipated legal bills which greatly exceed the initial budget outside counsel submitted and where the outside lawyer then attempts to explain why the bills were so high. It's obviously much easier for in-house counsel to accept such billings when the outside counsel first sent a revised budget or otherwise explained and received approval for the anticipated fees.

How Can In-House Counsel Assist At Trial?

In-house counsel are uniquely situated to address numerous crucial strategic matters from the selecting a corporate representative to negotiating with opposing counsel. The level of responsibility you assume at trial depends on a variety of factors and differs amongst companies but one key for any trial is that you discuss your preferred role with outside counsel before trial begins. The team needs to be on the same page. You may prefer to stay in the office, or may have to stay there in order to conduct other vital work. In such circumstances, the last section of this paper regarding "reporting from trial" is all the more important. More often, at least for high-exposure cases, in-house counsel attends at least the more significant portions of trial. In those circumstances, how can you help achieve optimal results?

Knowledge of the corporate culture and the company's history with litigation is important information for any trial. You usually know these facts better than outside counsel and you should make them known to the entire team.

In-house lawyers often know critical company witnesses on a personal level. You may understand not only these witnesses' substantive knowledge about a specific relevant issue but also whether such witnesses are well-liked in the community, participate in civic activities, received honors or, more generally, who

would be best liked by a jury. If there are multiple corporate witnesses who are technically able to testify about a given subject, you are probably best suited to select the person who will bring the extra things to the table. The corollary is that you might know which company witnesses have less personality, become easily agitated, or have a personal history which doesn't make him or her the best witness for a jury trial. To the extent you possess this knowledge you should definitely share it with trial counsel.

Witness preparation is a vital part of any trial and this is yet another area in which in-house counsel can add significant value. There might be company witnesses who are going to be called as experts or otherwise provide critical testimony. You should consider sitting in on the prep sessions, both as a showing of company support to the witness and to add input about the witness's testimony. In cases where an in-house lawyer is actually handling witnesses at trial, the team may want to consider having in-house attorney conduct the direct examinations of certain company witnesses. You often have relationships with them, easy access, and the best background knowledge for a thorough examination. Witnesses are sometimes more at ease when examined by someone they know well.

If you are not taking witnesses at trial there's a variety of other ways you might provide support such as:

- Coordinating with company witnesses so their trial attendance provides the least time away from other vital business
- Preparing corporate witnesses through mock examinations and making sure they understand the trial themes
- Assisting with the theories and opinions of defense experts
- Helping prepare for cross-examination of the opposition's experts
- Analyzing pertinent financial data, communicating with the company accountants or other financial persons, and explaining such data to trial counsel so that he or she can in turn communicate it effectively to the jury
- Communicating with management and thereby lessening trial counsel's diversion from other trial matters

Know What To Look For At Trial –

Hopefully you will have followed the suggested course of limiting surprises at trial by acquiring as much information as possible pre-trial but there is no way to

completely eliminate all variables. You will want to enter trial attuned to the critical issues. Through the pre-trial information you have received and communications with trial counsel, you should identify those issues ahead of time so that you monitor trial with focus. Determining which issues are truly "critical" is often specific to individual cases. Nonetheless, the following list provides some general topics that you should pay attention to as part of your continuing case evaluation:

- The composition of your actual jury
- The performance of your counsel and opposing counsel thus far
- The judge's attitude toward your counsel and opposing counsel
- Rulings on any significant motions
- Rulings on important evidentiary issues
- Performance and credibility of lay witnesses and experts
- Whether any significant issues for appeal have arisen and ensuring that they have been properly preserved
- The jury's attention and reaction to the evidence
- Any settlement negotiations or overtures by opposing counsel
- Your trial counsel's opinion about how the case is going

While you and your trial team have prepared to the hilt, trials are inevitably unpredictable and you cannot litigate your case with a chiseled-in-stone plan. There's a reason for the phrase, "the *practice* of law." Witnesses may testify differently than anticipated. The judge may rule on an evidentiary issue in a way you were not anticipating. You may decide that a certain witness' testimony would be more effective if presented at a different point in trial than you previously expected. You must always be prepared to alter your plan and react to what is actually happening at trial.

Reporting From Trial -

Settlement evaluations continue behind the scenes even as you are in the thick of the battle. During the course of trial, you should probably communicate with the decision makers in the case at least once after each trial day to provide a recap of the events of that day. You may also need to keep your insurers in the loop should they not be monitoring trial on their own. Typical matters that will be important to include in the report are:

- A summary of the witnesses of that day and their testimony, including how these witnesses appeared, any jury reaction to such witnesses, and the substance of their testimony
- An evaluation of the impact of the evidence on the issues in the case
- An evaluation of opposing counsel's effectiveness and how he or she is being received by the jury
- Any notable jury behavior, such as disinterest, sleeping, perking up during certain testimony, etc.
- An evaluation of the judge's behavior and treatment of the parties
- Any significant evidentiary rulings made by the court
- Any rulings on motions, as well as whether the court has deferred ruling on any motions
- Any publicity surrounding the trial
- A forecast of the next day's expected agenda
- Any updated settlement demands from opposing counsel

These daily reports not only keep your superiors informed, but also serve to keep you focused. They help to pinpoint the key issues from that day's trial activity and can be used to refine your strategy for the following day.

Conclusion

Trials are stressful enough when you arrive prepared and have kept the decision makers well informed. The more information you can obtain and provide your superiors before trial the better protection you have against being second-guessed or criticized should a bad outcome occur. Notify your insurers at your earliest opportunity, find the right lawyer for each individual case, and work as a team with trial counsel to determine how you can best help once you arrive in trial. At trial, keep the decision makers advised of all significant developments. If you follow this approach you will have done everything possible to achieve an optimal result. Best of luck in all your future trials!



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Civil trial practice focuses on professional negligence, medical device liability, product liability and premises liability. Has been counsel of record in 39 appellate decisions and has conducted over 100 jury trials as first chair in Georgia, North Carolina, Florida, Missouri, Kansas, Massachusetts, New Jersey and Washington. Admitted pro hac vice in 24 additional states.

Practice Areas

Alternative Dispute Resolution

Catastrophic Injury

Healthcare Litigation

Premises Liability

Product Liability Litigation

Professional Liability Litigation

Education

B.A., with honors,
University of Georgia, 1972

J.D., University of Virginia, 1975

Representative Cases/Experience

- Two week trial to verdict defending hospital in Fulton County, Georgia, following alleged wrongful death of patient in emergency room.
- Tried to verdict product liability case in Massachusetts, resulting in significant discovery opinion by the trial judge.
- Obtained defense verdict in case against DeKalb County, Georgia hospital amid allegations that nurses could have prevented infant's brain damage while obstetrician was en route to delivery.
- Obtained defense verdict for emergency room doctor after alleged inattention to patient in emergency waiting room resulted in coma.
- Represented international medical device manufacturer after brain catheter designed to help eradicate tumor allegedly malfunctioned, resulting in traumatic brain injury and death.
- Obtained defense verdict in 2006 in premises liability negligence claim against shopping center security company in Kansas City, Missouri, following shooting; appeared in case three weeks before trial with plaintiffs' demand at \$40 million.
- Obtained defense verdict in wrongful death product liability action in Jackson County, Missouri, in 2007; brought into case less than three months before trial after an unsuccessful mediation, with plaintiffs' initial demand at \$9.5 million. Plaintiffs asked for \$18 million at trial.

Professional Activities and Honors

Named Georgia "Super Lawyer" by Atlanta magazine for 2004, 2005, 2006, 2007, 2008, 2009 and 2010 in the category of Medical Malpractice Defense

Named to "The Best Lawyers in America" in personal injury litigation for 2007, 2008, 2009 and 2010

Two defense verdicts named among "Defense Verdicts of 2006 and 2007" by Missouri Lawyers Weekly

Professional Memberships and Affiliations

Vice-chair, American College of Trial Lawyers (Georgia Chapter)