

# Professionalism in Preparing for Trial

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## ***Rule 4.11, Rules Regulating the Florida Bar.***

***Competence A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.***

- I. Preparation, Preparation, Preparation
  - A. Develop the trial plan
    1. Begin with an order of proof
      - a) Analyze the cause of action
        - (1) Elements of proof
      - b) Evidence necessary to prove each element
        - (1) Determine admissibility
        - (2) Evidence code citation
        - (3) Case law support
      - c) Sources of evidence for every essential fact
        - (1) Documents
        - (2) Demonstrative evidence
        - (3) Admissions
        - (4) Depositions and interrogatories
        - (5) Live testimony
    2. Analyze your case
      - a) Strengths and weaknesses

- b) Patterns and exceptions
  - c) Aberrations and inconsistencies
  - d) Critical self analysis
    - (1) What really happened?
    - (2) Why?
    - (3) What will people believe?
    - (4) What will they not believe?
  - e) Consider adversary's case
    - (1) Avoid taking extreme position
    - (2) Avoid getting carried away
    - (3) Be reasonable
3. Must tell a story
- a) Start with a crisis
  - b) Develop facts around real people
  - c) Describe what happened and what will happen
4. Now you are ready to begin planning and preparing for trial
- a) Learn backwards
  - b) Be on the lookout
  - c) Write it down
  - d) Throw it in a folder
- B. Develop the framework for trial
1. Persuasive and pertinent pleadings
- a) Remember – only notice pleading required generally
  - b) Particularity may lock you in
  - c) What does this court require
  - d) Every motion, pleading, brief and memorandum ought to tell a trial – winning story
- C. Develop facts through informal investigation first
1. Techniques
- a) Do it yourself – meet the people
  - b) Begin as soon as possible
  - c) Go to the scene
  - d) Get it recorded

2. Sources

- a) Internet
- b) Medical, emergency room, ambulance records
- c) Criminal and court records
- d) Public morgues
- e) Public libraries
- f) Legal research data bases – Westlaw and Lexis

D. Develop facts through formal discovery

- 1. Interrogatories – to obtain data and leads
- 2. Requests for admissions – to eliminate issues
- 3. Requests to produce – to obtain basic written information
- 4. Depositions
  - a) Only if no other way to obtain and need to preserve testimony
  - b) Must prepare
    - (1) Review pleadings and documents
    - (2) Have a purpose
    - (3) Make an outline – but not detailed questions
  - c) Know the ground rules – "usual stipulations"
    - (1) Waiving reading and signing
    - (2) Objections, except as to form – but be careful
  - d) Get the story
    - (1) Who, what, where, when, how and why
    - (2) Ask for help in understanding
    - (3) Ask for explanations, reactions, feelings
  - e) Follow-up questions
    - (1) Pay attention to answer
    - (2) Always follow-up for proof of motive, means, opportunity
    - (3) Be persistent – get an answer to your question
    - (4) Box the witness to avoid surprise at trial

**E. Develop your case for the courtroom**

**1. Preparation of witnesses**

- a) What to wear
- b) How to act
- c) Voice
- d) Verbal habits
- e) Physical habits
- f) Impartiality
- g) Direct vs cross examination
  - (1) Rehearse and deal with problems and conflicts in testimony
  - (2) Answer the questions that are asked
  - (3) Do not argue – but do not please
  - (4) Admit no knowledge
- h) Keep in touch with witnesses

**2. Preparation of "Trial Notebook"**

- a) Analysis of your and your adversary's case
  - (1) Ideas
  - (2) Notes – including contact information for witnesses
  - (3) Checklists
- b) Order of proof
  - (1) Formal facts the law requires you to prove – the elements of your cause of action or defense
  - (2) The evidence that supports each element
  - (3) The source of the evidence
    - (a) Witnesses
    - (b) Documenting evidence
    - (c) Interrogatories, depositions, and admissions
  - (4) Jury selection, if applicable
  - (5) Opening statement
  - (6) Pertinent pleadings, stipulations, and pre-trial orders
  - (7) Examination outlines for witnesses
  - (8) Applicable law

- (a) Evidence and procedure rule citations
- (b) Case law
- (c) Hip pocket memos
- (9) Final argument
- (10) Motions and other requests
- 3. Final preparation
  - a) Brainstorm – but follow your gut
  - b) Demonstrative evidence
    - (1) Photographs
    - (2) Sketches
    - (3) Graphs
  - c) Final contact with witnesses

## II. The Trial – It is still about preparation

### A. The credibility of the lawyer

1. Know your judge
2. Always be professional
3. Exhibit your preparation
  - a) Be crisp
  - b) Be concise
  - c) Be competent
4. Keep your eye on the ball
5. Try your own case

### B. Humanize your client

1. Introduce your client to the court and court personnel
2. Call him/her by name
3. Be sensitive to your representing a real person who has
  - a) Senses and emotions
  - b) Memories and anticipations
  - c) Rights and obligations

### C. Presenting the evidence

1. If the judge wants to hear it, it is admissible
2. Make objections sparingly but protect the record
3. Argue to the judge – not with the judge

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4. Agree with the judge when you can
  5. Do it the judge's way – ask for direction
  6. Make your record
  7. Get it admitted another way
- D. Use of expert witnesses
1. Does the case need an expert
  2. Retain a respected expert
  3. Start with the conclusion
  4. Allow the expert to educate
- E. Final argument
1. Presumably it was prepared prior to trial
  2. Continue and recount the story
    - a) Emphasize key testimony
    - b) Illustrate through flip chart, power point or other medium
    - c) Provide authority
  3. Losing arguments
    - a) Dishonest arguments
    - b) Pushing a point too far
    - c) The wrong message
    - d) Risky arguments
- F. Achieve a sense of satisfaction
1. I did the best I could
  2. I would not do anything differently
  3. I furthered the ends of justice
  4. I served my client well

Acknowledgement is given to the American Bar Association Section of Litigation, to the writings of Professor Jim McEllaney, and to my many mentors for the ideas, information and insight in this presentation.