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Preseason vs. pre-trial

By: Douglas H. Wilkins and Daniel I. Small January 3, 2019

In almost every endeavor that leads to a significant event, we are familiar with the warmup. Symphony conductors and theater directors lead rehearsals, professional sports teams do preseason games. These lead-ins provide key time to assess resources, obstacles and opportunities.

For the most part, the results do not matter as much as the process. A team can "lose" a preseason game but still show good progress and promise.

"Pre-trial" proceedings play a similar role in evaluating and developing your case, but there is a huge difference: In most cases, the event that you are preparing for never happens. The overwhelming majority of cases never go to trial and are, in fact, won or lost in the preseason. In litigation, lawyers generally do not have that luxury of ignoring the bottom line.

Yet, too many lawyers still treat "pre-trial" as preseason, not giving it the focus, preparation and commitment that it deserves. The result can be unnecessarily losing credibility, losing key issues and advantages, and even losing the case.

In this series of columns, we will look at various aspects of that litigation preseason, from the professional development of junior counsel right up to and beyond jury voir dire, and will suggest how lawyers may be able to improve their results, while still evaluating and developing the team.

No magic wands here, just an experienced Superior Court judge and a litigation partner at Holland & Knight, hoping to offer some commonsense approaches to common state substantive and procedural issues. We welcome your insights, comments and other input along the way.

In the preseason of any game, some basic principles are important to keep in mind. These basics will crop up as we discuss different parts of the process, but they are a key foundation here. They are an important reason why junior counsel need the experience upon which they will rely when they become lead counsel.

No matter what the case, it is essential for trial counsel to know six basic things:

1) Know your case. First and foremost, you have to know the facts. Your credibility with the court, with opposing counsel, and even with your clients depends on them being able to rely on your knowledge of the facts. If that trust is lost, it can be very hard to regain. "Winging it" may be tempting given all the competing pressures on your time, but it is an invitation to disaster.

2) Know the law. There is a difference between having a general familiarity with an area of law, and having read and understood the specific statutes and rules that your case involves. Too many mistakes happen because trial counsel is not sufficiently familiar with the law of the case, not just the law in general. Know it, be prepared to argue and defend it, have briefs or memos ready to go on the key issues.

3) Know your core themes. OK, so you know your case and the law, but what is your case about? Why are we here? Why does this matter? No matter how simple or complex, you need to answer these questions with a set of core themes: three or four short, simple, powerful statements that answer those questions. Do not expect to get this done sitting in your office, alone or with other lawyers. Get out. Tell the story of the case to non-lawyers: family, friends, strangers, people at the gym or bar or wherever. Listen to what moves or troubles or confuses them, and answer their questions. Develop your pre-trial process, and ultimately your trial, from those answers, those themes. A good core theme — developed after considering as many angles as you can — can help you

anticipate your opponent's moves, the range of possible judicial rulings, and even adjust to unanticipated events, which will inevitably occur during trial or pre-trial.

4) Know your judge. Knowing who your judge will be — whether only for a motion hearing or for the whole case — is important and useful knowledge. Do not let it go to waste. Different jurisdictions and courts vary widely on how far individual judges can go in setting their own procedural rules. Massachusetts Superior Court, for example, limits how individual judges can set local rules or procedure. But whether written or not, every judge is different. Every judge has his or her own way of doing things. Your life, and your case, will be much easier if you take the time to find out and adapt. Ask other lawyers, courtroom personnel, anyone who might be able to give you insights.

5) Know your procedural strategy. Put it all together. Not every case should follow the same path. Those strategic decisions are based on a careful consideration of a combination of the first four basic principles. Develop a case plan and follow it, adjusting as things change.

6) Prepare to adapt. The ability to adapt in-trial (and the confidence to do so) comes in large part from trial experience (exactly what our next articles address). The best trial preparation accounts for the unpredictable nature of any trial. Don't become so wedded to your Plan A that you miss important differences between what you thought would happen at trial and what actually does. Learn to listen to what the witnesses actually say. You may not need to dwell on a point that you expected would be hotly contested. You may need to address something that seemed without substantial dispute. Points 1-5 above are essential to trial preparation, but they also are the key to timely adaptation to the case that actually ends up being tried. We all know what happens to species that fail to adapt.

This is not a drill, this is not preseason; what happens in pre-trial can determine the future, and the outcome, of your case. Pay attention.

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