Session title: Planning to Win: Effective Trial Preparation Techniques for Proving your Case
Moderator/Panelists:
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Date and time: Wednesday, December 11, 9:15 am
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Session Summary

A good preparation for a case first requires continuing to prepare for the trial, even if an agreement is in sight, and even if this requires an additional lawyer.

The panelists also suggested keeping a case diary with all the relevant information right from the beginning of proceedings.

It is also important to know the facts and motivations behind the case to be able to make a simple presentation to the court.

Preparing witnesses is one of the points that was most emphasized for the success of a case. The panelists highlighted the importance of not taking their ability to testify for granted, even when the witnesses called upon are from the police, and not civilian witnesses. The importance of putting time aside to prepare witnesses was underlined, as this can take several meetings. Before a hearing, it is very useful to explain how events will play out and to go over their statements with them. The panelists agreed that witnesses should be made aware that the defense will ask them if they met the prosecutor in the course of their preparation so that they are comfortable confirming this in court.

As an introduction, it could be useful to start with general questions and to ask the witness if he or she is nervous and why, which will allow the witness to focus more specifically on the case afterward. This also has the advantage of showing the jury that the nervousness of the witness does not come from the fact that the person is trying to hide information, but rather from discomfort in regard to the people against whom he or she is testifying.

One should not hesitate to use preparatory meetings if they can help a case in regard to issues of privilege, admissibility of evidence, the possibility of agreement, or otherwise.

The opening and closing statements should primarily serve to explain what will be said and to repeat what has been said. This is the repetition rule to ensure that the message eventually gets across.

Panelists suggested trying to move from the general to the specific during examining. While leading questions are not allowed, it is possible to lead the witness in a certain direction. The witness should also be prepared in advance for the cross-examination. If the defense could potentially expose incriminating facts about the witness, it is preferable for the lawyer to address them during his or her examination-in-chief so as to keep control of the situation.

In the end, a perfect case does not exist. It is impossible to predict everything, but meticulous preparation is the key to a successful outcome.

Strategies for Prepping the Perfect Case: A Brief Outline

Prepared by Carolyn Farr, Brian Jacisin, and Mark Wasielewski

COGEL Conference, December 11, 2013

1. Change your mindset – you're going to hearing. Going to hearing is usually less desirable and less likely than settling your case. However, don't let your case preparation be derailed by settlement negotiations. Conduct depositions, gather documentary evidence, set hearing dates, prepare arguments and witnesses, keep on your timeline. Your case may settle (and doing the things below may increase your leverage), but you'll be prepared if it doesn't.

2. Keep a hearing preparation checklist. Hearing preparation is a process that tests an attorney's management skills. A hearing preparation checklist is instrumental in helping to ensure that statutory deadlines are met, motions get drafted, evidence is perfected, and in general you are ready, relaxed and confident when the hearing date arrives. Checklist templates can be found in open sources online—grab one and tweak it to suit your needs and the requirements of your jurisdiction.

3. Create a hearing notebook. The hearing notebook (AKA the trial notebook or the trial book) generally includes the opening and closing statements, legal research, motions *in limine*, evidentiary exhibits, questions for direct examination and cross-examination, and potential objections and responses to potential objections. Organize your notebook to suit your needs for the hearing.

4. Develop the theory of the case. Proving the statutory elements of a violation (or disproving the elements of a violation if you are defense counsel) may be borne out by the evidence. But developing a theory of the case delivers to the judge/hearing officer/jury a specific perspective from which the facts make sense. It doesn't have to be fancy to be effective.

5. Witness preparation. The preparation of witnesses includes several facets. The basics include reminding witnesses to answer questions honestly and to only answer the question that is being asked. Preparation of witnesses also includes introducing witnesses to direct examination questions, and potential cross-examination questions. A confident witness facilitates the credibility of that witness in the eyes of the trier of fact.

6. Consider and draft pre-trial motions/motions *in limine*. Motions excluding certain evidence and witnesses can be an important tool in keeping out irrelevant material and making a hearing more efficient. Even if motions are lost in the pre-trial period, you may still benefit by getting a sneak preview on how the opposing party intends to use evidence.

7. Opening Statement. Tell a story using your case theory and the facts that prove the elements of the case. This is your opportunity to speak directly to the judge/hearing officer/jury. Lawyers employ various tools during opening statements, such as repetition, exhibits, and foreshadowing. One rule of thumb that, in the least, organizes your statement for the trier of fact— "tell them what you are going to say, say it, then tell them what you just told them."

8. Direct Examination. Direct examination is your opportunity to elicit the facts that prove your case. The general tenets of direct examination include laying the proper foundation to what your witness is testifying for, getting into evidence your exhibits that support the testimony, and eliciting testimony that helps the story of your case. Some lawyers find direct examination more difficult than cross-examination because most jurisdictions do not allow leading questions on direct, though there are exceptions.

9. Cross Examination. If you choose to cross-examine a witness (if your case has <u>not</u> taken a hit during the witness' direct-examination, will you cross-examine?), it is important to establish goals for doing so. Goals include challenging the witness' credibility, refuting the witness' testimony, and eliciting favorable testimony based on the topics that the witness has already testified to. On this last point, cross-examination is limited to the topics covered on direct, so avenues are limited. Steer clear of actually damaging your case. A common rule of restraint that lawyers practice is, do not ask questions to which you don't know the answer.

10. Closing Argument. Don't let the fact that the hearing hasn't taken place yet stop you from preparing a closing argument. Outline your closing by using your evidence and case theory, and by addressing the weaknesses in your opponent's case. As the hearing comes to a close, you can fill in the outline with details from the hearing.

For an electronic copy of this outline, please send your request to Mark Wasielewski via e-mail: *Mark.Wasielewski@ct.gov.* Brian Jacisin also makes available his power point document, "Strategies for Prepping the Perfect Case." Please e-mail Mark for a copy as well.