

TRIAL PREPARATION

Importance of Trial Preparation:

“Preparation is the foundation of success in advocacy. Neither genius nor talent, neither tact nor cunning, can equip an advocate to try a cause as it is the duty of advocates to try causes, without a foundation well laid by thorough and complete preparation. The first step is to acquire a knowledge of the facts. It is not enough to obtain a knowledge of them in outline; they must be known in their breadth and depth and in their relation to each other and to the ruling principles of law. Knowledge less thorough will not enable an advocate to acquit himself with credit nor will it enable him to do his duty to his client. Cicero says: “What Socrates used to say, that all men are sufficiently eloquent in that which they understand, is very plausible but not true. It would have been nearer the truth to say that no man can be eloquent on a subject that he does not understand.” No man can be strong where his knowledge of his subject is feeble. Preparation alone supplies the knowledge which makes trial lawyers strong. Biographers of advocates, like biographers of military heroes, sometimes take up the pen of the romancer, and, to magnify the man of whom they write, invent pleasant fictions. It is to this class of biographers that legal literature owes many stories of verdicts won, as they say, “by a flash of wit or a torrent of eloquence.” There is more of rhetorical flourish than of sober truth in these stories. For the most part, legal controversies are not fields for display, but fields for hard work. The advocate cannot too strongly lay it to heart that preparation is absolutely essential to success. Speeches that are lauded as remarkable examples of extemporaneous speaking are almost always found, when the truth is known, to be the result of careful and laborious preparation.”

BYRON & WILLIAM ELLIOTT, THE WORK OF THE ADVOCATE 3–4
(1888)

Duty To Prepare

Preparation is not only a good idea tactically, it is legally and ethically required.

Alabama Rule of Professional Conduct 1.1 provides: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The Commentary goes on to say: Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standard of competent practitioners. It also includes adequate preparation. Competent representation includes both investigation and preparation.

I. Gathering The Facts:

A. Discovery

- * Explore both formal and informal discovery
- * Rule 16 of Alabama Rules of Criminal Procedure
- * More specific discovery
- * Use subpoenas to obtain documents from various agencies or businesses

B. Open and Collaborative Communication With Client

- * Earn the trust of your client
- * Take the time to listen to the excruciating detail of the criminal charge from your Client
- * Obtain a list of potential witnesses from the Client
- * Include your client in the process
- * The “non-participating” client

C. Facts vs. Conclusions (“I’m not guilty, that’s all I know.”)

- * When interviewing the Client or witnesses, seek out the facts that support each conclusion.
- * Find a starting point
- * Develop a detailed chronology

Independent Investigation

The A.B.A. Standard Relating to the Administration of Criminal Justice 4– 4.1(a) provides: Defense counsel should conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused’s admissions or statements to defense counsel of facts constituting guilt or the accused’s stated desire to plead guilty.

In the official commentary, the following steps are mentioned as ethically required in criminal cases:

- * Search for and locate potential witnesses and try to secure their cooperation

- * Obtain independent laboratory analysis of fingerprints, handwriting, clothing, hair, blood, and weapons
- * Request formal and informal discovery from the prosecutor
- * Talk to the police who investigated the case and arrested your client
- * Investigate your client's background, education, employment record, mental and emotional stability, family relationships, and the like
- * Investigate the backgrounds and character of opposing witnesses to prepare for impeachment
- * Find out the conditions at the scene, especially those that may have affected eyewitnesses' opportunities for observation

II. Developing A Theory Of Defense

- * Informs all aspects of the case, to include, specific discovery issues, *voir dire* and jury selection, opening and closing statements
- * A theory is the simplest model that explains what happened and why you are entitled to a favorable verdict.
- * What to do with false or unreliable evidence?
- * Your theory should include facts, weaknesses and the law that is applicable to the case.

III. Pre-Trial Motion Practice

- * Motions For Specific Discovery
- * Audio or Video Evidence
- * Motions to Suppress
- * Motions *In Limine*
- * Motions specifically tailored to specific witnesses
- * Rule 403 and Rule 404
- * *Ex Parte* Motions For Extraordinary Expenses
- * Expert Witnesses

- * Requested Jury Instructions
- * Pre-Trial Motion Practice is as much about preserving the record as it is about controlling the admission of evidence at trial.

IV. Witnesses

- * Identify witnesses as soon as possible
- * Take the time to interview witnesses
- * Make an effort to reach out to Prosecution witnesses
- * Ask witnesses for supporting documents/social media
- * Research social media and criminal background of witnesses
- * Expert Witnesses
- * Issue subpoenas at least 4 weeks prior to trial setting
- * Do you have to call every witness that is identified?
- * Plan for the anticipated order of Defense witnesses
- * Should the accused testify?
- * Prepare a one page summary of each witness for the trial notebook
- * Witnesses in the age of COVID-19

V. Anticipating Objections and Supporting Caselaw

- * Identify each “piece” of evidence that you anticipate will be offered in the case
- * Good preparation means that there should not be “surprises”
- * Take the time to determine the evidentiary foundation for the admissibility of each piece of evidence.
- * Plan your objections
- * Be prepared with the specific objection to the admissibility of the evidence
- * Be prepared with the specific argument for the admissibility of the evidence
- * On the more “complex” legal arguments, have caselaw to support your position

VI. Trial Notebook

- * A trial notebook is an organized and convenient resource for all of the information gathered prior to trial. The goal is to provide a central, easily transportable storage place for everything you may need at trial, and to organize it so that you immediately can locate any part of that material.
- * The most common “trial notebook” is a 3 ring binder with tabulated sections identifying pertinent information that can be quickly accessed.
- * Other methods include the use of expandable folders with individual folders for each topic.
- * Organization is usually based on the chronological progression of the trial.
- * Keep quick checklists at the beginning of each section (Witnesses; Evidence; Objections; Elements; Relevant evidentiary points.)