Litigation Rules, Please Complete This List

1. Don't underestimate opposing counsel.

2. Don't overestimate opposing counsel.

3. Ask "what could go wrong" in preparing to follow a course of action.

4. Ask "what will be opposing counsel argue in response" in preparing an argument or course of action.

Please complete.

Roger M. Rosen, California

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5. Who is the judge, and what do I know about him/her?

Ryan Phillips, South Carolina

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6. Assume your witnesses will change their version of what happened. Be ready to either rehab or impeach

Randy Birch, Utah

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7. See number 5. Although I don't do it in every case, I tend to work backwards. I think about the result I want from that particular judge or jury. What evidence I need and how should I present it to get that result.

Then I frame what discovery I will need to gather the evidence I need. Then I will draft the complaint that clearly states the issues I am capable of proving. If I am defending a suit, I do the same thing except the last step is drafting my answer to the complaint. This helps me keep focus on only the relevant issues I will present to the fact finder in a clear, simple manner. Too often I see litigators who are so self-absorbed with their issue spotting ability, that they allege 10 or more grievances in their complaints or cross-claims. Most fact finders have trouble keeping focused on more than 3 issues. Confusing or boring the fact finder will rarely get you a good result. This is a very long way of saying keep it simple and direct.

Duke Drouillard, Nebraska

Usually, the litigation will consume more time than estimated.

Have a draft order, including some blank lines, for the court to sign at the end of the hearing.

Have a list a Proposed Disposition of Issues list, including attorney fees and other loose ends such as effect of hearing on prior orders, injunctions, review hearing dates, if any.

Related to proposed disposition of issues, it can be in table form customized for the hearing with columns for each party (i.e. who prevails on that issue), a column for dollar figures, and a comments column. Some judges like these as they have to write less. You will have to decide whether to include issues you would rather not face, i.e., points which may go the way of the other party or parties.

Give court reporter your card and get the court reporter's card and on her/his card note the date and case name.

Have copies of cases and statutes with highlighting.

Make use of colored paper, whether to be offered into evidence or not. The witnesses, the court reporter and the judge can more quickly jump to whatever you are addressing when you refer to the color of the paper.

Label exhibits and other documents to be used at hearing in advance, leaving space of adding the item's number.

See if counsel and the court will allow calling witnesses out of order, assuming it does not prejudice your presentation, which practice makes for happier witnesses, communicates to the judge that you are sensitive to the needs of witnesses, and shows the court you are organized.

Be prepared to prove-up your attorney fees. Including this issue on the Proposed Disposition of Issues helps to remember this important point. I always tell clients not to get hopes up about favorable ruling on attorney fees.

Rob V. Robertson, Texas

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8. For every piece of evidence you intend to introduce, have a cheat sheet ready with the most likely objections and your response, citing relevant evidentiary rules and/or case law. It's great when opposing counsel objects, the judge looks at you and says, "Your response?" and you have your answer ready, rather than being caught off guard or hemming and hawing trying to come up with the reason it's admissible.

Ryan Phillips

I think there are several rules that come before rule 1 on your list:

1. Before you do ANYTHING, decide what ultimate result you can reasonably expect to achieve, and figure out the most efficient way to get there.

2. Continually see the forest. Fight the fights that are necessary to achieve your goal; don't fight the fights that are distractions.

3. Recognize when litigation is an education process. Sometimes what you need to do is make the other side understand how weak their case is (sometimes it's the lawyer, sometimes it's the client). In that situation, your priority is to teach the other side most effectively.

4. Play YOUR game; don't let OC dictate.

5. Have a reason for everything you do or say (or don't do or say). You should be able to explain cogently why you are making a motion, or an argument, or serving a subpoena, or asserting a claim. That explanation should include how it gets you closer to your ultimate goal.

Patrick W. Begos, Connecticut

Most important, what are the deadlines?

John Davidson, Pennsylvania

I agree with all the other responses.

This goes hand in hand with what others have said about knowing your objectives and how to arrive at the result you want -- draft your jury charge early. If the facts discovered during the litigation change the causes of action or elements, you can revise the jury charge accordingly.

Do not wait until the day or two before trial to draft your jury charge. I often get requests to draft jury charges the few days before trial, when the attorney is already in a frenzy and trying to prep witnesses, get exhibits ready, prepare motions in limine, plus do a million other things, so don't get caught in that situation.

Tracia Y. Lee, Texas

Don't be caught in the assumption that because someone says no you can't do that, means you can NEVER do that

Yeah sure the mention of insurance is prejudicial in things like PI trials, but that doesn't mean you can never reference insurance. Facts really really matter.. check them against what the law is

Erin M. Schmidt, Ohio

I know it seems obvious, but I have been surprised that many trial attorneys don't follow the first rule of success at trial: INVESTIGATE YOUR CASE! Know EVERYTHING about the case and everything that can be known about the opposing case. Don't cut corners, don't assume, follow every piece of evidence to its end…you'd be surprised what comes up at trial. A fully investigated case tends to make presentation easier and more robust, makes you more confident in front of the jury and scares the shit out of opposing counsel.

Debb Reece

I think this rule has to bend to the economics of the case, what the client can afford to pay, and what the client's goals are.

For example, I am handling a construction contract dispute right now. Though it involves an amount in the mid-six-figures, legal fees easily could eat up a significant portion of the amount in dispute if we were to investigate everything. For example, if one party raises an issue that might have a

$10,000 affect on a case where there is $500,000 in dispute, you wouldn't want to spent $20,000 investigating the $10,000 issue.

Another more concrete, but somewhat unusual, example where the client's goals take precedence. I defend a lot of ERISA claim litigation. It is extremely important to clients to maintain the courts' understanding and enforcement of streamlined procedures that apply to this case. That includes limited

or no discovery. There are cases where it would be wonderful to depose the plaintiff, or her doctor, or take some other discovery. But we almost never do that, because it would likely lead to an escalation of discovery that would make future cases more expensive. Unusual situation, to be sure, but it reflects the fact that there could well be valid reasons for NOT learning everything you can about a case.

Having said that, I agree that (assuming client is willing to pay for it) you absolutely know everything you can realistically know about the case.

And certainly you should know the evidence you do have forwards, backwards, inside and out. Maybe some people can successfully try a case without immersing themselves in the minutiae of the evidence, but I've never been able to do it that way

Patrick W. Begos

Thank you to everyone who has responded so far. I may try to collect all of this and put it in one place sometime.

Roger M. Rosen

I'm a little late to this discussion, but here are a few other "rules" to consider (sorry if they've already been covered):

1. Always, always calculate your own due dates. Even though you may have applied the statute or rule establishing the deadline a hundred times, read the statute or rule carefully each time you have to calculate a deadline. Then do the calculation your self - don't rely on a paralegal, assistant or automatic program. After 31 years of practicing law, I still do the calculations the old-fashioned way, by hand using a calendar. Then, once the deadline has been calculated, enter it on your calendar a few days early to provide a little flexibility.

2. Unless you have a practice where it is the norm (like personal injury) or re working for blue chip clients, never advance costs for a client. The clients are more responsible with their litigation (in many ways) if they have some financial skin in the game.

3. Always get a retainer in some amount before taking a case (again unless you have a practice like a personal injury practice) and never take a case where the client cannot or will not pay the retainer at the commencement of the engagement.

4. Not really a litigation rule, but if you can avoid it never schedule meetings or court hearings for Monday mornings or Friday afternoons, especially during the summer!

Greg Goonan

Remember that client management problems will only get worse as trial gets closer.

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Geoff Wiggs

The Friday afternoon remark brings to mind this point.

Seems like the most likely time period for cases to settle, typically on the phone, is between 3 and 5 PM on Fridays, particularly if trial docket call is first thing the following Monday.

What do you say the most likely days/times are for cases to settle?

Rob V. Robertson

I remember hearing (many years ago) that most cases settle “at the last minute.”

The difference is in the definition of what constitutes the last minute.

For a relatively straight-forward case, the last minute could be in the hallway outside the courtroom, 5 minutes before the closing arguments are set to start.

For a very complex case (for instance, a large antitrust case), the last minute may be six months or more before jury selection is set to begin—because the level of preparation needed to try that sort of case is so massive.

Brian H. Cole, California

Once, I settled a case at about 2am with jury selection set to begin at 9am. Wouldn't recommend it, but the defendants were getting increasingly desperate, and were fighting among themselves more and more, so I ended up settling for about twice my settlement demand.

James S. Tyre, California