



Trial documents you can write in advance

Some documents can be prepared ahead of the trial giving you time to deal with last-minute issues.



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BY WILLIAM VEEN AND OLIVER VALLEJO

It's Friday and trial starts Monday. You plan to spend the weekend developing your themes for trial and preparing for voir dire and opening statement. But as you exchange trial documents, the defense unexpectedly hands you two boxes of briefs. If this has ever happened to you, you understand the importance of preparing trial documents well in advance.

There are at least four types of trial documents you can prepare well before trial: motions in limine; trial briefs; legal memoranda; and special jury instructions. All these documents can be written ahead of time, thereby saving you time to deal with the last minute issues that typically arise before trial.

Motions in limine

A motion in limine is a request to the court for an evidentiary ruling, usually before the start of a trial, "to avoid the obviously futile attempt to 'unring the bell'..." in the event a jury hears evidence it shouldn't. (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 337.) Depending on the venue, in limine motions may be exchanged as late as the day before trial. (See, e.g., Super. Ct., Santa Clara County, Local Rules, rule 8(D).) When this occurs, any oppositions must be prepared in a day. The short turnaround time benefits the attorney who briefs the issues ahead of time.

Identifying and briefing evidentiary issues early requires a methodical approach. Periodically read the Evidence Code and CACI instructions with your case in mind. You will no doubt spot issues not previously considered. As you receive written discovery – such as an interrogatory which asks about your client's immigration status – highlight the discovery and immediately draft a motion to preclude any evidence on the subject.

During deposition, write "MIL" in red pen in your notes as you recognize issues so that you won't forget them later. When you return to the office, immediately review your notes for red ink and draft the motions. If you don't have time to draft a full motion, create a document with an appropriate title (e.g. "MIL exclude drug use"). Just naming the document may be enough to jog your memory later. When you have more time, search your database for documents entitled "MIL" and complete any unfinished motions. This way, you can avoid spending the weekends before trial, reviewing vast deposition notes for potential evidentiary issues.

Trial briefs

Another trial document that you can prepare well in advance of trial is the trial brief. A trial brief is sometimes optional, but you should always file one. A trial brief is designed to educate a trial judge about your case – to present the key facts, issues and arguments. It is a "roadmap" for the case, and as with any roadmap, the judge will likely rely on the clearest, most reliable one.

Some courts allow the parties to exchange trial briefs at the last minute. (See, e.g., Super. Ct., Santa Cruz County, Local Rules, rule 2.2.06 [exchange day before trial].) So it is important to know early on how you will present your story to a judge, as well as anticipate how the defense will present its case.

A good time to prepare a trial brief is immediately after finishing a demand letter or mediation brief. Turn the demand into a trial brief, but eliminate any questionable facts or hyperbolic argument so you don't lose credibility with the judge. Attach motions in limine to the brief for easy reference.

Legal memoranda

A legal memorandum is a persuasive brief de-



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signed to educate a trial judge on a discrete legal issue. If your trial judge lacks civil experience, be ready to brief the judge on any law that is crucial to your case, even if it appears pedestrian to you. When the judge asks, “Do you have a brief on that issue?” have a brief at the ready. If you don’t, you will spend the night brief-writing instead of preparing for the next day’s witnesses.

Special jury instructions

Jury instructions are the set of legal rules a jury should follow in deciding a case. The Judicial Council of California publishes approved jury instructions. Specially prepared jury instructions or “special jury instructions” are “instructions from other sources, those specially prepared by the party, or approved in-

structions that have been substantially modified by the party.” (2009 Cal. Rules of Court, rule 2.1055(1)(B).) A party can propose a special jury instruction on an issue not covered by the approved jury instructions. (*Ibid.*)

Special jury instructions and corresponding legal memoranda can be prepared well before trial. For example, a demurrer or summary judgment motion may challenge a unique duty theory. When you write your opposition, copy and paste your brief into a separate document and draft the jury instruction you want read to a jury.

Conclusion

Most courts allow parties to exchange trial documents shortly before trial. But you don’t need to wait until

then to prepare them. Being “trial ready” means anticipating trial issues early in the case, so that you can focus on trial later.

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William Veen founded The Veen Firm as a sole practitioner in 1975, gradually developing it into a firm of more than 40 attorneys and staff who represent severely injured workers and consumers. He is a member of the American Board of Trial Advocates and he was honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003.

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