Countdown to Trial

by James W. Quinn and David J. Lender

From the moment a complaint is filed, a good trial lawyer thinks about trial and how every step taken in the pre-trial period could affect the trial. But no time is more critical for preparation of a successful jury trial in a complex case than the 30 days before trial commences—the countdown to trial. Trial lawyers have many things to do in that month. First and foremost, a massive litigation that may have millions of pages of documents and thousands of pages of deposition testimony must be distilled to a simple but thematic story for the jury. Paring down the case and focusing on only those facts and legal issues that really matter are crucial to a winning presentation.

Among the host of topics a trial team must consider in the countdown to trial, three critical points should always be at the forefront: (1) simplicity, (2) consistency, and (3) credibility. Whether the issue is how many trial exhibits to have, which video deposition clips to use, or which witnesses to present and in what order, an effective trial team will present it all in a simple, consistent, and credible manner.

Regardless of the complexity of the facts, an effective trial team must simplify the story so it centers around a few common themes that can be returned to throughout the trial—from the opening statement, throughout the examinations, to the closing argument. While a complaint or a motion for summary judgment may be venues to argue in the alternative, a trial is not the place to be inconsistent. The story presented must flow and comport with the key themes of your case. Presenting multiple or alternative theories will confuse the jury and will undercut the strength of each of your theories. The jury may conclude that you are presenting alternative (and inconsistent) theories because your main theory is not strong enough. A trial team must have the confidence to pick a horse and ride it all the way through trial. Finally, always maintain your credibility. Building credibility with the jury starts with voir dire and continues every day during the trial. If a trial lawyer's credibility is questioned, it will have disastrous effects on the entire trial.

In sum, the key to presenting a simple, consistent, and credible case is paring down all the disparate theories that were considered throughout the litigation into a small set of cohesive and persuasive themes that will win the trial. Then the trial team can focus on all the practical items that it must address in the final countdown.

Perhaps the most important part of presenting an effective trial is having the right team in place. This does not mean just the lawyers who will examine witnesses but every team member down to the most junior paralegal. While some lawyers believe that assembling a trial team is a time to add new people, as with everything else, the countdown to trial is a time to pare down. Regardless of the size of the trial team, its members must be fully dedicated to the trial and know their specific roles. While all trials are different, some basic elements are key to every trial team.

The Lead Trial Lawyer. There should be a single face that the jury sees and knows, the face of the lead trial lawyer, who presents the story in a cohesive fashion from the voir dire, to the opening statement, throughout the trial and summation. The lead trial lawyer also should do the most important cross-examinations and certain of the direct examinations, including, preferably, the first witness called by his or her side.

The Second Chair. There should be another trial lawyer that the jury comes to rely on as part of the presentation. The second chair should be someone the jury becomes very familiar with and, depending on the trial, may end up examining as many or even more witnesses than the lead trial lawyer. In most cases, the bulk of the witnesses should be examined by

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the lead trial lawyer or second chair. This provides consistency for the jury.

The Lead Associate. The lead associate should be responsible for overseeing the entire operation outside the courtroom and should be ready to argue motions and other legal matters before the judge, including deposition designation objections, just before and during the trial. The lead associate should be involved in preparing witnesses and may also examine a witness or two during trial.

The Law Associate. One associate should be tasked with preparing all legal submissions just before, during, and after the trial. This associate also should be responsible for protecting the record for appeal. These tasks include proposed jury instructions, motions in limine, and motions for judgment as a matter of law. By entrusting these tasks to one of a small number of team members, the team ensures expertise in the relevant legal areas and avoids overloading the other members of the team.

Supporting Associates. It is important to have enough team members available to do all the work that is required in the countdown to trial and during the trial. While it is best to do as much as possible ahead of time, particularly during the countdown to trial period, new factual and legal angles will develop that need to be explored. In addition, in a case involving numerous witnesses, it is important to have team members who can work with the witnesses before trial, including to prepare them to work with the examining attorney.

Paralegal Support. Good paralegals with trial experience are critical in the countdown to trial period. It is best to have paralegals who are familiar with creating trial exhibit lists and deposition designation binders. Also, one paralegal should be tasked to appear in court each day to keep track of the witnesses, exhibits presented, and exhibits entered into evidence.

IT Support. Most complex cases involve presentations that use technology, such as Trial Director or Summation. Although generally it is best to have an associate who has lived with the case be responsible for running this technology during trial, it is critical that whoever is responsible for this task be familiar with the facts and core themes of the case. Nothing can damage your credibility more before a jury than waiting for exhibits to be located, especially as unexpected changes occur "on the fly" during a cross-examination.

Trial Graphics Team. In today's visual world, a good trial graphics team has become a critical part of any major trial. Some firms have in-house capabilities, while others use or supplement their in-house capabilities with an outside vendor. This group should expect to be working around the clock during the countdown period, so it is important that they be on site and familiar with the case before the countdown to trial begins.

Final decisions on trial exhibits are made during the last 30 days. You should keep a running list of potential trial exhibits throughout the course of a litigation, but the countdown to trial period is when the team must decide which exhibits it will actually identify on the list that it will exchange with the other side and/or submit to the court. Then comes the more difficult decision of which ones to actually use. This exercise may include paring down literally millions of documents to the few hundred exhibits that may be pre-marked for trial and the few dozen that will actually be entered into evidence.

Selecting trial exhibits is generally a bottom-up process, beginning with the associates most familiar with the key documents supporting the various key elements of the case, but it must involve all the senior members of the trial team as well. After the list has been pared down, the order of presentation in the exhibit list is important. Put the most important exhibits in the first 25 slots of the trial exhibit list, assuming the court you are in will permit pre-marking of exhibits. Some counsel put their exhibits in some other order, such as chronological order, anticipated order of presentation, or alphabetical order. This is a mistake. A trial team will appear more organized if it is constantly referring back to exhibit 1 or 2, as opposed to exhibit 267 or 388.

Once a team prepares its own list, it generally will exchange it with the other side, and then each side will exchange objections to those exhibits. Seeing the other side's list helps to crystallize what the other side's presentation will focus on. Use that list to direct your own team on exhibits you may want to use but had not focused on previously. It is best to try to resolve objections before trial if possible.

Because depositions can be presented in whole or in part directly to the jury depending on the circumstances, you must closely examine the deposition transcripts in the countdown to trial period. This can be a daunting task. In many cases, there is a significant volume of deposition testimony taken throughout the course of a litigation that you must mine for the nuggets to be presented to the jury. In making the choices, remember the rules of simplicity, consistency, and credibility.

For live witnesses, it is important to the witness's credibility that he or she testify consistently with the deposition, including any Rule 30(b)(6) (or equivalent) depositions. Your witnesses must know their own deposition testimony, and that is part of the trial team's job during the countdown. If there is a difference between what was in the deposition transcript and what the witness expects to testify to at trial, it is important to have a credible explanation for any such difference. There is nothing more damaging to a witness's credibility than when he or she says one thing on the stand, and then a second later, the jury is shown a video of that witness saying exactly the opposite. On the flip side, for purposes of cross-examination, it is critical to have a complete understanding of the deposition for the witnesses you are examining. Use of favorable deposition testimony during cross-examination is powerful.

For witnesses who do not appear live, one of the most important tasks in the countdown to trial is preparing both affirmative deposition designations and cross-designations. There are different philosophies on playing video depositions for juries. The most powerful depositions played to the jury are single admission clips, where you identify who the witness is, why the witness is important, and then play the admission for the jury. Try to limit the video to 5 minutes if possible, and it should almost never be more than 15 minutes. Some counsel play hours and hours of videotaped deposition during trial. This tack is not persuasive, and such videos are largely ignored. It can also undermine your credibility before the jury.

In most jurisdictions, a party must identify the video clips it intends to play. Then the other side has an opportunity to interpose both objections and cross-designations. It is important to object where necessary and to propose cross-designations where appropriate because there will be no other opportunity in the courtroom to limit the testimony or to counter it with more balanced testimony from that witness. While many objections will be resolved at pre-trial meet and confer sessions, certain objections will require a ruling from the court,

oftentimes the day before the video will be played. Thus, it is best to have the video segments prepared ahead of trial so that only the portions subject to a sustained objection will need to be eliminated mid-trial. Again, the more preparation during the countdown, the better the team can focus on winning and addressing new substance during the trial.

Before the countdown to trial, an experienced trial team may have already done one or more jury research exercises and should in any event have a good understanding of what themes resonate with potential jurors and what themes do not. The team also should have a general understanding of the types of jurors it would prefer. However, right before the countdown period, it may be useful to conduct a final jury research exercise. This provides the lead trial lawyer an opportunity to do a test-run of the opening statement and to hone the final trial themes before trial. It also may allow the trial team to test juror reactions to certain witnesses who are on the "may call" list.

Seeing the other side's list of exhibits helps to crystallize what the other side's presentation will focus on.

In many courts, jury consultants can be helpful in assisting the trial team during actual jury selection. In several courts, laptop computers are now permitted, including ones with Internet access. Thus, to the extent the list of potential jurors is not provided to the trial team in advance of jury selection, jury consultants can do real-time research on possible jurors, which can help in the selection process. The trial team should pay close attention during voir dire because you can learn seemingly unimportant things about the jury that can be exploited during trial. In one trial, we learned that a juror was a high school coach and a big college basketball fan. When examining a key witness who attended Texas Tech, we elicited testimony about the fact that he was a booster for the Red Raiders. It was the only time that the juror paid attention to any of the testimony.

The countdown to trial is dominated to a large degree by factual presentation, but the law plays a critical role as well. First, motions in limine can be critically important and can limit the issues that are to be tried, sometimes to such a degree that a party is forced to settle. File short, focused, single-issue motions in limine, not to exceed a few pages each if at all possible. Equally important is getting the court to rule on any objections to exhibits the trial team intends to use during the opening statement. No one wants an opposing lawyer objecting during the opening statement, much less having such an objection sustained by the court.

The second legal submission is the proposed jury instructions. While the trial team should have distilled the relevant legal issues in the case long before the countdown to trial, the proposed jury instructions represent the final refinement of applicable legal theories.

The third legal submission is the motion for a directed verdict, or judgment as a matter of law, on one or more issues. To the extent you can anticipate what an adversary is likely to do during the trial, you should start preparing this motion ahead of trial, focusing the in-trial work on editing the motion and fitting the testimony to the arguments.

The legal submissions are important not only because they could affect the trial but also because they are critical to preserving arguments for appeal. Again, it is best to assign primary responsibility for all of these legal submissions to one team member. While it is oftentimes a knee-jerk reaction of trial counsel to move for a directed verdict, especially because it can have an impact on a party's ability to file motions after the jury returns its verdict and on appeal, if you represent the plaintiff, tread carefully before making such a motion because you may end up taking the case away from the jury. In one trial, this exact circumstance transpired. After the plaintiffs' lawyer said that he was making a motion for a directed verdict "for the record," the court stated, "You are not really going to make that motion because if the defendant makes a similar motion you are both asking me to decide the case and not the jury, and I suspect you don't want me to do that." Plaintiffs' counsel humbly replied, "No, Your Honor."

The opening statement is one of the most important projects during the countdown to trial. The statement should lay out the entire case for the jury in a clear narrative. It is critical to have everything needed for the opening prepared well in advance of "opening day." A party must use only exhibits to which the other side has not filed an objection. If possible, seek to negotiate any objections with your adversary, and, as noted above, if an agreement is not possible, seek a court ruling on such exhibits before using them. Another issue that often comes up is whether to exchange opening demonstratives in advance of the opening. We generally do not do so because we do not want to give our adversary a road map of our opening that they then can defuse during their opening. This means that the opening demonstratives cannot be too argumentative or based on exhibits that are subject to an objection.

Any opening statement should focus on a handful of core themes that your side will prove to the jury and that, if proven, should result in a decision for your client. The lead trial lawyer should return to these same core themes during closing argument and show the jury how your side proved each of those core themes based on the evidence presented during the trial.

Much of the preparation for witness examinations occurs during the countdown period. The direct examinations are the evidentiary vehicle through which a trial lawyer tells the affirmative story of the client's case. In most cases, we believe that direct examinations should last no more than an hour (and preferably less) and focus on a handful of core issues. They need to have a beginning, which identifies who the witness is and why he or she is important to the story; a middle that lays out the core factual testimony; and an end that culminates in a key point.

We have been involved in many trials in which an adversary uses too much time with a witness and fails to make crisp points during the examination, leaving the entire courtroom to wonder what points the witness was trying to make. These types of rambling exams are easy to undermine with a pointed cross-examination because the jury will easily understand the purpose of the cross, unlike the direct.

The examining lawyer must meet with each witness during

the countdown to trial, preferably sometime during the weeks leading up to trial, as well as just before the testimony. In meeting with the witness well in advance of the trial, the trial lawyer often comes up with a new argument or angle to an argument. Outlines of direct examinations are not scripts and should not be treated as such by either the lawyer or the witness. Nonetheless, the outlines should be fully prepared and vetted, along with potential exhibits, as far in advance of trial as possible.

No matter the size of the case, a jury presentation is improved by demonstratives and graphics.

Cross-examination is perhaps the most important part of any trial. While effective crosses involve extensive preparation during the countdown to trial, it is critical to always remember to cross-examine the witness and the actual testimony presented during trial, even if it means moving away from what was prepared. Remember, if a witness made a significant admission during his or her deposition, ask exactly the same question during the trial examination; juries notice when they hear a witness say one thing on the stand and then see that witness give a different answer in response to exactly the same question during deposition.

Every possible video clip from a prior deposition that may be used during the cross-examination must be pre-cut and readily accessible. Every possible impeachment document has to be loaded onto the system and readily accessible. Cross-examinations are about momentum and undermining credibility. If you have a witness taking inconsistent positions with prior testimony or a document, you do not want to undermine the impact of the moment by fumbling to find the right clip or document.

No matter the size of the case, a jury presentation is improved by demonstratives and graphics. Remember that during the countdown to trial. Even in a small personal injury matter, simply blowing up a photograph of the injury enhances the presentation. Effective trial graphics are even more critical in a complex case. A trial team should be prepared to present documents with tools that emphasize certain portions of the documents, such as highlighting and red circles. Some demonstratives should be tested in mock jury exercises; these are often the last things to be finalized and refined in the last few weeks before the trial. In certain cases involving complex technology, computer models showing how a certain type of device or product works can be effective.

Many trial teams hire an outside consultant to be responsible for running the technology system in the courtroom. This is a huge mistake, unless the consultant becomes fully integrated into the trial team and learns the case as well as any other team member. As noted above, we often use an associate on the team to run the technology. Trials are unpredictable, and things change on a moment's notice. The person running the technology is a partner in the presentation and needs to understand the case so that he or she can anticipate changes as they occur in real time.

Although seemingly mundane, the courtroom setup is a critical part of the countdown to trial. Many courts now have built-in technology, including screens and speakers. However, these courts often have strict rules requiring pre-approval of equipment and try to limit the availability of such equipment. Make sure at the beginning of the countdown that all administrative prerequisites are satisfied. Also, because there is no need to have two sets of the same audio and visual equipment in the courtroom, it is generally advisable to confer with counsel for the other side and agree to share equipment, including the costs of such equipment.

Once the necessary approvals are obtained, it is important for the trial graphics team to do a dry run of the entire system before the trial begins. Nothing could be more embarrassing for a lead trial lawyer than getting warmed up in his opening statement and trying to use a document or video, only to have it not display on the screen. You do not get a second chance to make your opening statement come off right. As with everything else, preparation is key.

The last 30 days before a trial is a critical period in ensuring a successful trial. The challenge is to cull and pare down your evidence and theories to just what really matters. Viewing each of the numerous pre-trial action items through the lens of the three key themes—simplicity, consistency, and credibility—will help ensure that the trial team is prepared to present the best case it possibly can.

With all of this work packed into 30 days, how do you organize it and set deadlines on your countdown? Here is a hypothetical countdown, with the launch of trial to occur in 30 days:

- 30 days to go: Prepare and exchange exhibit lists; prepare and exchange deposition designations; ensure compliance with administrative prerequisites for courtroom technology.
- 23 days to go: Prepare and exchange objections to exhibits; prepare and exchange objections to deposition designations; prepare deposition cross-designations.
- 21 days to go: Prepare the first draft of the opening statement; prepare first drafts of the primary direct and cross-examination outlines.
- 16 days to go: File motions in limine; prepare and exchange witness lists; prepare and exchange objections to deposition cross-designations.
- 14 days to go: Meet and confer on objections to exhibits and deposition designations.
- 9 days to go: File proposed jury instructions; file objections to motions in limine.
- 7 days to go: Finalize the drafts of the opening statement and the primary direct and cross-examination outlines.
- 3 and 2 days to go: Hold the penultimate witness preparation meetings.
- 1 day before trial: Ensure that the courtroom setup is completed and make a dry run of the technology; participate in the final pre-trial conference with the court.

Then comes the end of the countdown, and you pick your jury.