Document Library

All content authored by John D. Hadden

Contact: 404-939-4525 | john@hadden.law | www.haddenfirm.com

NOTICE AND DISCLAIMER

The materials that follow were prepared for use by licensed attorneys and are provided for informational use only. The information contained herein was accurate at the time of publication, but, because laws frequently change, may no longer represent the state of the law. Nothing in these materials should be considered legal advice or relied upon as such, and neither John Hadden nor the Hadden Law Firm intend to create an attorney-client relationship by voluntarily providing these materials. If you have a legal claim or issue, you should consider obtaining a consultation with an attorney licensed in your state. John Hadden is licensed only in the State of Georgia and does not intend to hold himself out as offering legal services in any other state or country. No express or implied warranty of any kind is made as to these materials, and any damages resulting from use of these materials are expressly disclaimed. This material may not be published or distributed without the express written permission of John D. Hadden.

NOTE: Attachments and Exhibits, if referenced in the article, may have been omitted in this document.

COUNTDOWN TO TRIAL – FINAL PREPARATION

John D. Hadden
Atlanta, Georgia

Discovery is over, dispositive and expert motions have been decided, and the case is set for trial. While most cases resolve prior to trial, there is a reasonable chance that if your case has made it to this point it may indeed reach the jury. Moreover, obtaining the maximum value in a case, whether it is ultimately settled or decided by a jury, requires being ready, willing, and able to prove your case in court. This paper will cover a number of the critical issues, large and small, involved in final planning and preparation of a lawsuit for trial. While every lawsuit is different, and pretrial preparation must be tailored to the facts of the case you intend to present at trial, the following items are some of the essential pieces of final trial preparation in most cases.

1. Prepare outlines for voir dire, opening/closing, and witness testimony

It goes without saying that a litigant should be well prepared for these critical parts of trial well in advance. A review of the relevant rules governing voir dire and the scope of individual questioning is also helpful in order to be prepared for possible attempts by the court to limit questioning into specific areas of bias.[1] In some cases, a short supplemental questionnaire may make the process more efficient.[2] An understanding of the judge's particular preferences and procedures for jury selection can also assist counsel in tailoring an efficient voir dire outline.

---

[1] See O.C.G.A. §§ 15-12-120 through 142 (covering the jury selection process generally). O.C.G.A. § 15-12-133 discusses the specific right to individual questioning of jurors.

[2] See, e.g., Blue & Hirshhorn, *Blue's Guide to Jury Selection* (2004).

One benefit of representing a plaintiff is that the opening statement can be prepared and practiced well in advance. Of course, opening statement and closing arguments are perhaps the parts of trial most subject to personal style and discretion, but it is helpful to have a general framework in mind for both opening and closing so as to minimize reliance on notes. Although the closing argument cannot be entirely prepared in advance, it is very often possible to have a rough outline in place before trial, emphasizing the themes of the trial and tying in the points introduced in opening and emphasized in the testimony and evidence. It pays to be flexible as well: although the plaintiff usually has the right to open and close the argument, there may be a strategic advantage in waiving the opening portion if the defense appears particularly unprepared and, perhaps, not ready to present its final argument.

Direct examination witness testimony should be prepared in conjunction with the witness to the extent possible. Trying a case without a witness having reviewed his or her deposition transcript (if there is one) is dangerous, and so those transcripts should be obtained once the trial is imminent if they are not already in the file. Counsel may wish to prepare an outline covering the subjects likely to be relevant at trial (taking care to deal with any harmful facts that came out in the deposition, or that are otherwise expected to appear, rather than letting the opponent do so) and then asking the witness to review the outline for familiarity and to discuss any other issues that counsel may not have mentioned in the outline. Ideally, the witness should be advised of matters likely to be raised on cross-examination, and should definitely be advised to carefully review

the deposition since it may be a source of intense questioning by opposing counsel.

Cross-examination outlines should be indexed to deposition testimony as well as written discovery responses and evidence for possible impeachment purposes. As discussed below, it is critically important to ensure that the original transcripts and discovery are in the court's record for use during the cross examination, but marked-up copies should accompany the outline in the trial notebook (also discussed below).

If testimony is to be produced through a deposition transcript, the person acting as the witness should practice reading it out loud in order to hold the jury's attention as much as possible and, importantly, to make sure that no words are mispronounced. If it is possible to present deposition testimony by video, counsel should keep in mind that objections must be dealt with, and the video edited or otherwise prepared for trial, well before the witness is to be called. Designations of portions of depositions to be presented to the jury should be filed in the record, and a record should also be made of any deposition objections in accordance with the Civil Practice Act.

2. Prepare and file jury charges

Uniform State/Superior Court Rule 10.3 provides that

> All requests to charge shall be numbered consecutively on separate sheets of paper and submitted to the court in duplicate by counsel for all parties at the commencement of trial, unless otherwise provided by pre trial order; provided, however, that additional requests may be submitted to cover unanticipated points which arise thereafter.

Thus, it is appropriate for a court to require written requests, although courts may also,

in their discretion, waive the uniform rule requirement as necessary.[3] Many attorneys make it a practice to begin preparing jury charges early in the case, as part of a "Rules of the Road" approach to the lawsuit.[4] Regardless, care should be taken in tailoring the requested charges to the evidence and the relief sought. Although the court is obligated to charge the jury on certain matters, these are far less extensive than in criminal cases and a civil litigant should not rely on the court to give the most appropriate or relevant charges. Should facts, evidence, or arguments arise during trial that were not contemplated in the submitted jury charges, counsel should file supplemental written jury charges in order to ensure that the issue is presented properly to the trial court and preserved for possible appellate review.

3. Prepare and file motions in limine

Motions in limine are a critical part of pretrial preparation and can substantially affect the outcome of a case. They are used to obtain, prior to the start of trial, rulings as to the admissibility of evidence, and are also used to prevent opposing counsel from bringing up certain prejudicial matters that would be subject to exclusion at trial. While in the former situation these motions serve as a convenient method to simplify evidentiary issues at trial, in the latter they provide the parties with a remedy to the fact that it is impossible to "unring the bell" after an opponent brings up an inappropriate matter at trial.[5]

---

[3] See *Kelley v. State*, 301 Ga. App. 43, 686 S.E.2d 810 (2009).

[4] See Rick Friedman and Patrick Malone, *Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability* (Trial Guides 2d. Ed., 2010).

[5] *Harley-Davidson Motor Co. v. Daniel*, 244 Ga. 284, 285 260 S.E.2d 20 (1979).

Although motions in limine may be oral or in writing, the most prudent practice is to submit written motions in order to ensure that the arguments are well-conceived as well as documented in the record for possible appellate review.[6] The general rule is that a party alleging error as to the granting or denial of a motion in limine need not raise a further objection at trial when the evidence either comes in or the party believes it should be admitted. This principle has been recently reaffirmed by the Supreme Court,[7] and section 24-1-103 of the 2013 Evidence Code codifies the rule and simplifies preservation of error in general for litigants, stating, in pertinent part, that "[o]nce the court makes a definitive ruling on the record admitting or excluding any evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve such claim of error for appeal." But counsel should be careful to recognize that the protection provided by a motion in limine can be waived or lost based on conduct at trial, and a motion in limine may not save for review a very similar but not identical issues not raised at trial.[8]

The subject matter of motions in limine will differ substantially from case to case, but certain issues tend to arise repeatedly and may be relevant to motions in many cases. These issues include:

- Limitation of impeachment by criminal convictions to those allowable under O.C.G.A. 24-6-609
- Financial impact of judgment against defendant (particularly where insurance is involved)

---

6 *Reno v. Reno*, 249 Ga. 855, 295 S.E.2d 94 (1982).
7 *CSX Transp., Inc., v. Smith*, 289 Ga. 903, 717 S.E.2d 209 (2011).
8 See generally Hadden, *Ga. Law of Evidence* (2015-2016 ed.) § 1:9.

- Questioning and impeachment of plaintiff through statements contained in medical records[9]
- Plaintiff's use of drugs or alcohol
- Collateral source benefits and presence/absence of insurance
- Questions, evidence, and suggestions as to when and how plaintiff's counsel was retained, and fact that plaintiff's counsel is compensated through a contingency fee
- Lottery analogies, references to "jackpot justice," etc.
- Evidence or questioning regarding the plaintiff's past bankruptcies or failure to file tax returns.

4. Prepare and file (as appropriate) a trial brief

Many attorneys find it helpful to prepare and file trial briefs both to provide the judge with additional background regarding the facts and law applicable to the case as well as to focus counsel's attention on the critical issues involved in the case. While some of the information contained in a trial brief is also likely to be contained in the pretrial order, a trial brief is an opportunity to provide a succinct outline of the issues you believe to be important and to educate the judge (and opposing counsel) on any critical issues that counsel believes may arise. A trial brief may provide, among other things, (1) a more thorough outline of the facts of the case than in the pretrial order, particularly including relevant background information; (2) a summary of the

[9] Under prior evidence law, the controlling authority on this issue was *Barone v. Law*, 242 Ga. App. 102, 527 S.E.2d 898 (2000), which contains strict requirements for questioning and impeachment based on medical records and required that any statements used to impeach a witness come from a statement of the witness, and not from hearsay of others. While *Barone* remains good law, O.C.G.A. § 24-8-803(6) significantly eases the requirements for admission of records, opening up other avenues of potential impeachment beyond that allowed under this case.

procedural history of the case, including any issues already decided on motions in order to prevent an attempt at re-litigation of those issues at trial; (3) the law governing any unusual or particularly contested matters (perhaps also covered in motions in limine) that are expected to arise at trial; and (4) a witness list with a synopsis of expected testimony. This list is not exhaustive. To the extent that there are disputes as to the law, the author generally attaches copies of the pertinent authorities to the brief.

As an alternative, or possibly in addition, to a trial brief, counsel may wish to draft single-issue memoranda on key issues that are expected to arise at trial. This requires substantial pre-planning and may not be appropriate for some, perhaps even most, cases, but it can send a powerful message as to a party's preparedness if such memoranda with well-supported legal arguments are produced in response to an oral motion or objection from an opponent.

5. Identify and prepare documentary and other evidence

Once the case is set for trial, the attorney should carefully review all evidence that might be necessary for trial and ensure that it is in a form that can be admitted. This includes identifying which witness will identify, authenticate, and provide the proper foundation for admission of the evidence. Although pretrial orders require identification of documentary and other physical evidence that the parties may tender at trial, it is helpful, before trial, and critical, during trial, to have an exhibit index (ideally two – one for the plaintiff's exhibits and one for the defendant's) stating the exhibit number, identification of the exhibit, the witness through whom it is to be

admitted, and whether it actually has been admitted. Although a list for the opponent's exhibits will be blank and filled in as trial progresses, the plaintiff's list can be largely filled in and completed before stepping foot into the courtroom through pre-marking of exhibits (subject to court instructions requiring, for example, a master list of exhibits). Following is a sample exhibit list. The known exhibits and any known information are filled in pre-trial, although it is a good practice to leave some blank fields in order to accommodate exhibit changes or new exhibits that may arise through the course of trial.

Plaintiff Exhibits

Exhibit Number	Description	Admitted? (By whom?)
1	Medical bill package	Plaintiff
2	Overhead photo of intersection	Plaintiff
3	Photo of defendant's car (side view)	Witness 1

If photographs are to be used, 8x10 enlargements are recommended, and it may be desirable to enlarge some photographs or other exhibits to poster size (2x3 feet or larger) to display to the jury during testimony and arguments.

Note that the 2013 Georgia Evidence Code is significantly more lenient when it comes to authentication and admission of business records into evidence, substantially adopting Federal Rule of Evidence 803, which allows such records to be admitted via a records certification.[10] Under the prior rules, the foundation for such records generally

[10] O.C.G.A. §§ 24-8-803(6) and 24-9-902(11) and (12) contain explicit requirements for a valid

require the testimony of a records custodian, unless the parties stipulated to the admission of such evidence. The new rule also allows into evidence, as does the federal rule, diagnoses and opinions contained in business records, representing a major change to evidence law.

6. Ensure that necessary original discovery is filed

Under the Civil Practice Act and Uniform Rules, original discovery documents are retained by the parties until those documents are needed in court. Although the documents are often filed in connection with motions long before trial, counsel should carefully review the file as trial approaches to ensure that originals of all necessary written discovery are in the record for use at trial. Similarly, parties should request that opposing counsel file originals of any necessary transcripts and written discovery that might possibly be used at trial. An opponent's responses to interrogatories, document requests, and requests for admissions can be critical at trial, so it is especially important to confirm that these documents and any original transcripts actually make it into the official record.

It is also prudent to request that the opposing party supplement discovery shortly before trial. Although O.C.G.A. § 9-11-26(e) places upon litigants a duty to supplement their responses in a number of circumstances, much disagreement exists over the scope of that duty, and as a practical matter it is often the case that no supplementation actually takes place. Therefore, subsection (e)(3) allows a party to

---

certification. Certifications under provisions of the prior Georgia Evidence Code may not be in compliance and may result in the exclusion of records if not revised. A sample certification is located in the appendix to this paper.

make a formal request for supplementation of prior responses, which places an affirmative duty on the other party to update its responses. In order to ensure that the supplement is a part of the record for a case where trial is imminent, it is advisable to file, along with the request for supplementation, a request that the original response to the supplement be filed with the court rather than retained by the party.[11] Similarly, counsel should review their own discovery to ensure that everything that might be relevant at trial has been properly disclosed. If it has not, it should be immediately supplemented or amended.

7. Obtain and serve subpoenas, and file affidavits of service

In order to obtain the full protection of having a witness under subpoena (including seeking a continuance should the witness not appear), witnesses must be served with a subpoena at least 24 hours prior to the time they are requested to testify, and counsel must file with the clerk a list of the names and addresses of those witnesses at least six hours before the time testimony is sought.[12] An affidavit of service, with a copy of the subpoena attached and a precise description of the time and method of service, including whether a witness fee was tendered upon service, should be filed in order to ensure that there is no question as to appropriate service.[13] Under the 2013 Evidence Code, attorneys may unilaterally issue subpoenas as officers of the court both for trial and discovery, as is the case in federal courts.[14]

---

[11] A sample request for supplementation is located in the appendix to this paper.
[12] See generally O.C.G.A. §§ 24-13-20 through 29 for rules governing trial subpoenas.
[13] A sample affidavit of service is located in the appendix to this paper.
[14] O.C.G.A. § 24-13-21. See also Federal Rule of Civil Procedure 45.

8. Complete the trial notebook

Although some lawyers still try cases using little more than a banker's box full of folders, Redwelds, and legal pads, there is much to be said for a well-organized, indexed, and tabbed trial notebook allowing for quick access to all trial documents as well as key pleadings and discovery. Many trial lawyers now begin preparation of their trial notebook early in the litigation process, to be filled in progressively as the case moves forward. In some smaller cases, a trial notebook may include all pleadings and discovery, as well as the trial documents, in a single binder. In most cases however, the pleadings binder or folder will be separate so as to simplify the trial notebook. A table of contents at the front of the notebook helps keep everything organized and accessible. Following is an abbreviated example of the table of contents from a short trial the author tried earlier this year. Note that some, but not all, pleadings and discovery are included; a full set would be kept separately but accessible if needed. Exhibits to be introduced are also kept separately, though copies may be included in the notebook as appropriate.

Table of Contents

Document	**Tab**
Pretrial order	1
Trial brief	2
Defense trial brief (if submitted)	3
Voir dire outline	4
Jury instructions	5
Defense jury instructions	6
Motions in limine	7
Defense motions in limine	8

Opening statement	9
Witness direct exam outline	10
Witness deposition transcript	11
Plaintiff direct exam outline	12
Plaintiff deposition transcript	13
Plaintiff interrogatory responses	14
Defendant cross-exam outline	15
Defendant deposition transcript	16
Defense interrogatory responses (with plaintiff's requests)	17
Defense response to request for admissions (with plaintiff's requests)	18
Closing argument	19
Proposed verdict form	20
SELECT PLEADINGS	
Complaint	21
Answer	22
Amended complaint	23

9. Ensure that the pretrial order is complete

The pretrial order, once entered, generally supersedes the pleadings and controls the remainder of the case through final judgment. Although doing so is not uncommon, preparing a pretrial order in a perfunctory manner can be hugely detrimental to a case. In particular, parties and their attorneys must be careful to properly identify any witnesses that might be called to testify as well as all evidence to be presented.[15] For example, the pretrial order should include both medical records AND bills in the documentary evidence section. Any and all witnesses who might possibly be introduced through deposition testimony should be identified as such. In some cases, courts may attempt to disallow jury charges based on certain statutes if those statutes are not identified in the pretrial order. Any objection to submissions or arguments raised by the other party should be carefully noted to avoid a later waiver argument.

[15] The law is more lenient with respect to failure to list all documentary evidence, however, than it is with respect to failure to list witnesses. See, e.g., *Ballard v. Meyers*, 275 Ga. 819, 572 S.E.2d 572 (2002).

APPENDIX

IN THE SUPERIOR COURT OF _____ COUNTY
STATE OF GEORGIA

JOHN DOE,	)	
	)	
Plaintiff,	)	Civil Action File No.
	)	
v.	)	
	)	
ABC CORPORATION,	)	
	)	
Defendant.	)	

CERTIFICATION OF BUSINESS RECORDS

I, the undersigned, hereby certify that I am the duly authorized custodian of records for [**NON-PARTY**], and I have authority to certify said records and copies thereof. I further certify that the copies of records attached hereto are true and accurate copies of the records of [**NON-PARTY**] regarding [**IDENTIFY RECORDS REQUESTED**]. These records, including any opinions and diagnoses contained therein, were prepared and maintained at or near the time of the described acts, events, conditions, opinions, or diagnoses; prepared by, or from information transmitted by, a person with personal knowledge and a business duty to report; kept in the course of a regularly conducted business activity; and it was the regular practice of that business activity to make the memorandum, report, record, or data compilation.

This _____ day of _____, 20___.

_____

_____(name)
Custodian of records for [**NON-PARTY**]

Sworn to and subscribed before me
this _____ day of _____, 20___.

_____
Notary Public
My Commission expires:

IN THE SUPERIOR COURT OF _____ COUNTY

STATE OF GEORGIA

JOHN DOE,	)	
	)	
Plaintiff,	)	Civil Action File No.
	)	
v.	)	
	)	
ABC CORPORATION,	)	
	)	
Defendant.	)	

AFFIDAVIT OF SERVICE OF SUBPOENA

This is to certify that I have this day served a *Witness Subpoena* in the above-captioned civil action upon the following person:

The method of service was: Personal/Service Upon Attorney/Certified Mail/ Other:_____.

Witness fees, if necessary, were delivered in the amount of $_____.

I certify that I am over the age of 18 and am authorized to serve this subpoena as provided by O.C.G.A. § 24-13-24. A copy of the subpoena as served and witness fee, if necessary, is attached.

This _____ day of _____, 20___.

_____

Name:_____

Sworn to and subscribed before me
this _____ day of _____, 20___.

_____
Notary Public
My Commission expires:

IN THE SUPERIOR COURT OF _____ COUNTY

STATE OF GEORGIA

JOHN DOE,	)	
	)	
Plaintiff,	)	Civil Action File No.
	)	
v.	)	
	)	
ABC CORPORATION,	)	
	)	
Defendant.	)	

REQUEST FOR SUPPLEMENTATION AND FILING OF DISCOVERY

Plaintiff John Doe hereby requests, under O.C.G.A. § 9-11-26(e)(3), that defendant ABC Corporation update and supplement, under oath to the extent required by the Civil Practice Act, all prior responses to written discovery propounded by Doe in this lawsuit. Doe further requests that the original supplemented discovery be filed with the Court as provided by O.C.G.A. § 9-11-29.1 and Uniform Superior Court Rule 5.2.

Respectfully submitted this _____ day of _____, 20___.

_____
Plaintiff's counsel
Georgia Bar No. _____

[Attorney firm, address, and phone number]