

TRIAL TECHNIQUES AND TACTICS

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Jury trials, no matter how large or small, require a tremendous amount of time, effort, and focus. Considering the numerous tasks trial lawyers must perform while dealing with the pressures of trial, presenting legal arguments to the court can become relegated to on-the-fly statements rather than calculated, focused attacks. One of the best tools that a trial lawyer can use to assist with arguments are trial briefs. This article discusses the role of trial briefs and how to use them effectively.

Don't Forget the Trial Briefs

ABOUT THE AUTHORS



Zandra E. Foley is a trial attorney who represents clients in complex litigation matters related to products liability, mass torts, malpractice, and errors and omissions. She also defends clients who have been sued for various intentional torts including assault, battery, libel, slander and defamation. Zandra has served as national and regional trial counsel on medical device, product liability, and mass tort related matters and has extensive experience advising clients on a variety of complex disputes with an eye toward early and efficient resolution. She can be reached at zfoley@thompsoncoe.com.



Andrew L. Johnson is a partner in Thompson Coe's Houston office and vice-chair of the firm's appellate section. Andrew is Board Certified in Civil Appellate Litigation by the Texas Board of Legal Specialization. His specialties include drafting appellate briefs, complex motions, jury charges, and expert challenges. He can be reached at AJohnson@thompsoncoe.com.

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The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Zandra E. Foley
Vice Chair of Newsletter
Thompson, Coe, Cousins & Iron, LLP
zfoley@thompsoncoe.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

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For purposes of this article, a trial brief is a legal writing that is filed with the court shortly before or during trial that addresses relevant evidentiary and legal issues for the court to consider. They are used to educate the court on a specific issue and can range from presenting a chronology of facts to providing legal authority on obscure or complex legal matters. Danner and Toothman, *Trial Practice Checklists* § 8:22 (2d ed.).

A. When to Use Trial Briefs

When considering how trial briefs can be used during trial, I conferred with Andrew L. Johnson, a Board-Certified Appellate attorney and partner with Thompson Coe in Houston, Texas. "Trial briefs can be used to streamline the issues and educate the Court regarding legal arguments and evidentiary objections," says Mr. Johnson. "They can be much more persuasive than oral argument alone, providing the judge with a tangible document outlining and summarizing relevant authorities." The following are some of the ways in which trial briefs can be used effectively.

1. Reurging Summary-Judgment Arguments during the Pretrial Phase

Before trial begins, the court will consider motions in limine and other issues which help streamline things. This is the perfect time to present the court with legal arguments supporting your position and to reurge issues you may have lost during motions for summary judgment. While you certainly can make a motion for directed verdict or judgment as a matter of law later when the evidence closes, using a trial brief during the pretrial stage is an opportunity to present dispositive arguments before any evidence is even presented.

For example, if your opponent has multiple causes of actions or damages theories, presenting during the pretrial phase a strong trial brief explaining why one of the causes of action or damage theories fails as a matter of law may gain the court's attention because it is aimed at preventing the presentation of superfluous evidence, reducing the length of trial. The strongest way to present these legal arguments is in the form of a trial brief so that the court is relying on more than your oral statement of the law. Directing the court to a well-reasoned trial brief at this initial stage shows that you are prepared, creating a confidence between you and the court which can last for the duration of trial. Coming to the courthouse with a series of trial benches on the various relevant issues

is like having a quiver full of sharp arrows.

2. Evidentiary Issues

The admission and exclusion of evidence happens quickly during trial. The admission of a single piece of evidence may be the difference in a judgment for or against your client. An objection to evidence must be sufficiently specific (unless the basis of the objection is apparent from the context in which it is made—but any competent attorney would not risk waiver of error by relying solely on context). Because it is important to specify the legal bases for your objections, a trial brief ensures you do not forget important grounds for the objections. In the battle of trial, it is far better to rely on a trial brief than to try to recall from memory evidentiary objections learned in law school. And on the converse side, if opposing counsel will be objecting to a crucial piece of evidence, having a trial brief ready that explains why the law requires admission of the evidence means you will not be caught flat-footed attempting to explain why the jury should hear the evidence.

3. Jury-Charge Phase

Trial briefs are also useful in aiding argument and preserving error during the important jury-charge phase of trial. Charge conferences can be disorganized times when the court is interested in getting the case to the jury and the lawyers are thinking about their closing

arguments. But perhaps nothing is more important to your case than the charge, which provides the law for the jury to consider. Thus, outlining your arguments and objections in a brief for the court to review ensures you do not forget specific objections and shows the court the authorities upon which you rely. Furthermore, some charge issues *must* be preserved by a written submission, depending on the jurisdiction, so presenting the judge with a properly worded question, instruction, or definition, and a briefed explanation for why the request should be submitted, is the best way to ensure the court considers your arguments and error is preserved.

B. Tips for Preparing a Trial Brief

What's the most effective way to draft a persuasive trial brief? "Short and simple is best," says Mr. Johnson. Trial briefs should not be so long that they lose sight of the issue being briefed. Mr. Johnson recommends that instead of filing lengthy briefs that a court may not have time to read, the better practice is to file succinct briefs that isolate the legal points at issue. It makes for easier reading and a quicker way for the court to digest the information quickly during a fast-paced trial. He recommends a length of approximately four-to-five pages or less if possible. The brief should contain direct points of law and attach the specific cases cited in the brief with relevant portions highlighted. Few things are more persuasive to a court than physically seeing the actual law upon which counsel is relying.

Additionally, trial briefing should be done pursuant to the court's requirements and expectations. Many courts will have local rules that will govern the form and procedure for filing trial briefs. Shumate, 5 Am. Jur. Trials § 89 (2015). The Honorable Chief Judge Morey L. Sear of the United States District Court for the Eastern District of Louisiana provided what he believes are the top ten suggestions for good trial briefing, all of which he believes are "equally important":

- Know the rules, especially the local rules and the requirements.
- File timely by meeting all deadlines.
- Prepare before you write by honing and focusing your legal and factual arguments.
- Be brief.
- Be accurate in your presentation of the law and evidence.
- Write clearly.
- Cite binding precedent.
- Direct the judge to specific parts of documents, depositions, and other evidence.
- Exercise good faith.
- Be civil.

Sear, Briefing in the United States District Court for the Eastern District of Louisiana, 70 Tul L. Rev. 207, 208–24 (1995). Filing trial briefs late or contrary to the court's requirements may result in your brief being struck—and could subject a lawyer to sanctions. See *Roberts v. McCrory*, 693 F. Supp. 998, 1010 (W.D. Okla. 1987) (imposing monetary sanction for filing a frivolous trial brief).

Lastly, while specific, succinct trial briefs are powerful tools, keep in mind that courts frown upon briefing that is not case specific or that does no more than recite general rules of evidence or law. For example, judges are familiar with the general concepts of hearsay and relevancy, so do not insult their intelligence by briefing such concepts.

In sum, lawyers should not overlook the persuasive force a trial brief can provide but should brief important arguments so that the court does not have to take counsel's word for a proposition but can see the law for itself.

TRIAL TIP:

MOVING SLOW WHEN YOU WERE BORN TO RUN

BY BERNADETTE CATALANA

Let's face it—as a trial lawyer, you're a rare breed. You love to move fast. And a slowdown, whatever the cause, can break your momentum and throw you off your feet. So what do you do when you have the one thing you're always short on?

Start by taking a look back at your last trial. If you had a do-over, what would you have spent more time on? Put those items first on your to-do list for any trial that is adjourned but likely to be rescheduled later this year.

For the rest of your trial docket, consider the following:

- Are there experts you routinely encounter? Research and review any deposition or trial transcript you can get your hands on and prepare a general outline for your next round. Resolve to become the expert on an expert or two.
- If your client has unfortunate documents—or those that can be misconstrued—drill down, learn each weakness, and work to overcome it. When an opponent offers one into evidence on your watch, you will be ready.
- Are you resting on the same themes in every single trial? Use *The Pause* to pause and rethink. Use Zoom technology to talk out some different angles with your team.
- You may not be getting older, but juries are getting younger. Can tweaking your *voir dire* presentation help improve your connection and your next jury selection?
- Review your last open and your last close. If it was videotaped, watch it like a football coach analyzing last week's game. Even if your client was victorious, did *you* deliver? Do an honest forensic analysis of your speech (what you said), your speech (how you said it), and your body language. What can you do better?

Finally, get inspired. Try to recapture the excitement and enthusiasm you had when you began the race. And remember, the pace will be picking up soon....

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