

MID-CASE FILE REVIEW IN PREPARATION FOR TRIAL

The following is list of questions designed to trigger discussion and the creation of a master to-do list for the trial team as it wraps up discovery and prepares for trial. When this review should be undertaken is dependent on the nature and complexity of the case, the scheduling order in place, deadlines imposed by local rules, the status of settlement negotiations, the likelihood of settlement, and other relevant factors. In any event, however, the review needs to be conducted at such a time so that whatever additional work that needs to be done, it can be accomplished within the scheduling order, the requirements of the local rules, and other limitations and deadlines.

The goal of this review is to get a firm grasp on the case before any deadlines lapse that will limit available options or result in a continuance of the trial date. The only reason to open a file is to close a file, and the best way to close a file that must be litigated is to set and keep a trial date. Doing so requires planning and organization, and this document will help guide you through the process of preparing your case for trial.

1. What are the deadlines in this case? What deadlines remain to be established? This task involves reviewing the scheduling order and applicable statutes of limitation and repose, plus, in cases involving comparative fault, TENN. CODE ANN. § 20-1-119.

2. What are the real issues in the case? The effort here should be directed at classifying the issues: (1) what will definitely be in dispute at trial; (2) what will definitely not be in dispute; and (3) what may be in dispute. This can be achieved by identifying the elements of each claim and affirmative defense, or in any other manner which may work for you. The idea is to simply flush out the real issues in the case.

3. Is there a need to add or drop any cause of action or affirmative defense?

4. Are all parties who should be in the case in the case? Note: not all parties that can be sued must necessarily be sued. Not all allegations of fault against co-parties or nonparties that can be made must be made. The question here is an assessment of possibilities, and then making appropriate judgments about the subject. Depending on the scheduling order, and statutes of limitation and repose, this question must often be asked early in the litigation.

5. Are there issues that can be narrowed or eliminated by dispositive motion? What are they? Should such a motion be filed, or is the issue best left for resolution at trial?

6. Have we outlined what we must prove and determined how we plan to prove it?

7. Have we examined what our opponent must / will attempt to prove and how we anticipate those efforts will be made?

8. Have we examined how we intend to counter our opponent's arguments and asserted facts?

9. Have our experts been identified and complete Rule 26 responses served on opposing counsel?

10. Have our opponent's experts been identified and complete Rule 26 responses received? Is it necessary to depose the opponent's experts?

11. Is there anything in our opponent's expert disclosure that makes it advisable for us to seek and establish additional facts or additional expert opinions?

12. Are we aware of any need to supplement our discovery responses at this time? If not, when will we conduct our final review of our discovery responses to determine whether supplementation is necessary?

13. Have we reviewed our opponent's discovery responses and determined whether a good faith conference should be conducted? Should a request for supplementation be made, or a motion to compel filed?

14. In a case involving medical expenses, have all medical expenses been either proven, stipulated to, or the subject of admitted requests to admit?

15. In a case involving future medical expenses, have the need for and cost of the future medicals been established?

16. Have all witnesses and the subject matter of their testimony been identified internally and disclosed in response to a discovery request on the subject?

17. Have all witnesses been advised of the trial date and their availability confirmed?

18. Have all potential exhibits been identified, and the means of admitting those exhibits into evidence been determined?

19. Some exhibits or demonstrative aids can be expensive or take a longer time to prepare, especially if they need to be sent out to a service. Are there any such exhibits or demonstrative aids in this case? If so, when must they be prepared?

20. If applicable, have affidavits been obtained to meet requirements of business records exception, or will it be necessary to subpoena records and/or custodian? What are the applicable deadlines?

21. Which witnesses that we need are likely to be unavailable (by statute or rule) for trial? Discuss scheduling and deadlines. Is the video deposition of these witnesses desirable or undesirable?

22. What issues exist in this case for which additional legal research is necessary?

23. What potential motions *in limine* can we identify (both from us and against us)?

24. Are there any objectionable portions of evidentiary depositions that we took? Can those objections be cured or other proof obtained?

25. What stipulations do we need or would save time and money? What stipulations are we willing give / trade?

26. Is a focus group appropriate at this stage of the proceeding? If so, which issues should be addressed?

27. Discuss case theme, fine-tuning as necessary.

28. Who will begin assembling the trial notebook(s) and how will they be organized for this case? For example, are individual witness and/or issue notebooks necessary?

The amount of time it takes to do this review is dependent on the nature and complexity of the case, the organization of the file, and the extent to which a similar analysis was undertaken earlier in the case. That is, many of these same questions are often asked early in a case, and if that occurred, this process should be shortened considerably.

The work does not stop here. As mentioned above, this effort will result in a to-do list that will be supplemented as additional deadlines approach and additional trial preparation efforts are undertaken. For example, let's assume that this review causes the trial team to conclude that it will need to file four motions *in limine*. Assuming that there is a court-imposed deadline for filing motions *in limine*, a deadline should be established for the completion of those motions so that they can be filed at the appropriate time.

However, it is highly likely that as active trial preparation work begins, more subjects that give rise to motions *in limine* will be established. When those subjects are identified you need some way to capture those thoughts and add the work to the to-do list to meet the deadline.

Thus, this review is neither the first nor last such effort in the case. It is designed solely to direct you toward concluding what needs to be done to keep your case on track for trial before the deadlines for amending pleadings, serving discovery, taking depositions, or disclosing experts have expired. Your file reviews will be shortened if you set up and organize your file and document your actions with later file reviews in mind.