

Standard 7.11-5 on Trial Practice

STANDARD 7.11-5 ON TRIAL PRACTICE

STANDARD

The practitioner should present a client's case at trial in a manner that is appropriate to the rules, procedures and practices of the court, exhibits full understanding of the facts and the law in the case and reflects thorough preparation.

COMMENTARY

This Standard applies to trials that take place in a court setting.¹ The rigor with which the practitioner will engage in trial is a function of the complexity of the matter. Some matters are routine and typically involve only a relatively brief trial. Others are complex and require considerable preparation and a thoughtful trial strategy. The practitioner should tailor the strategy and trial approach to what is necessary to represent the client's interests fully and effectively. Many of the suggestions in this commentary are appropriate in a complex trial, but might not be necessary in a brief, routine matter. Even in routine cases, however, the practitioner should prepare appropriately for trial and should be well versed in the facts and the law of the particular case.

There are also times when the practitioner has little time to prepare because of last minute notice of the trial. If the matter is factually or legally complex, the practitioner should seek to postpone the trial in order to prepare adequately, consistent with this Standard.

The keys to effective trial advocacy are trial preparation, anticipation of what to expect at trial and presentation of the facts and arguments to support the client's claims. In order to be an effective litigator, a practitioner should be fully grounded in the rules of evidence, procedure, and local practice. The practitioner should also be skilled in jury selection, examination of witnesses, introduction of evidence, oral argument to the judge, presentation of opening and closing statements to a jury, preparation of effective jury instructions and preservation of the record for appeal.

In addition, the practitioner should be thoroughly familiar with all available relevant facts and legal issues in the client's particular case. The practitioner should be fully prepared to present forcefully and cogently all legal arguments that support the client's position and should strive to be the most informed person in the courtroom. A fully prepared litigator should have a clear command of the facts and should be ready to present those that best support the client's position. The practitioner should determine in advance how those facts should be introduced and presented to the judge and to the jury, if applicable. The practitioner should plan the flow of the trial and should determine the timing and sequence for presentation of testimony and other evidence so that the fact finder will have a compelling and cogent picture of the client's case.

¹ Different considerations apply in adjudicative administrative hearings. See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.12 (on Administrative Hearings).

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The practitioner should fully prepare witnesses in advance to assure that when they testify they are able to recall important facts and to reduce any anxiety they may feel about the trial.

In addition, the practitioner should be familiar with the environment in which the trial will occur and should make affirmative efforts to establish good working relationships with clerks, stenographers, and other court personnel who can be useful resources in understanding local customs and practices and those specific events that may have an impact on the progress of the litigation. The practitioner should also be fully familiar with the technology available and used in the particular court in which the trial is being held.

The practitioner should be prepared to anticipate those factors that will affect the outcome of the trial. The practitioner should be able to present the facts and arguments that are likely to have the most impact on the judge or jury hearing the case and should present those arguments that will make the client's version of the facts more credible. The practitioner should anticipate the adversary's strategy and should be prepared to counter or rebut any damaging evidence or testimony that the adversary is likely to present. The practitioner should anticipate disputes regarding the admissibility of evidence and should be ready to present appropriate arguments for admission or exclusion.

In addition, the practitioner should be aware of possible factual and legal bases for appeal from an adverse judgment or ruling, and should preserve such issues for appeal in light of the overall litigation strategy.² The practitioner should create a record at the trial level that will sustain positions taken on appeal. The advocate should anticipate factual and legal issues that may be important upon review and should assure that they are raised properly and in a timely manner. New issues will arise during the trial as a result of rulings on motions and on the admissibility of evidence. Practitioners should make timely objections and offers of proof when necessary to assure the reviewability of issues that may affect the outcome of the appeal.

In more complex cases, and if the provider has adequate resources, effective trial practice can be enhanced if more than one of the provider's practitioners is involved in preparing the case and presenting it at trial. Alternatively, the provider may wish to associate outside attorneys who are experienced trial attorneys to serve as co-counsel.³ When more than one attorney serves as trial counsel, expanded opportunities exist for consultation as the case proceeds and the practitioners' capacity to respond to unexpected developments is greatly enhanced. Co-counseling also provides significant training opportunities for less experienced litigators who can benefit from working with practitioners with substantial trial practice.

² See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 7.11-7 (on Appeals).

³ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 2.7 (on Integrating the Resources of the Legal Profession and Involvement of Members of the Bar).