

**TRIAL PREPARATION: MORE THAN A GOOD IDEA, AN
ETHICAL RESPONSIBILITY**

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Kan. R. Prof Con. 1.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, **thoroughness and preparation** reasonably necessary for the representation.

Legal Knowledge & Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, **the preparation and study the lawyer is able to give the matter** and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

...

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and **use of methods and procedures** meeting the standards of competent practitioners. It also includes **adequate preparation**. The required attention and preparation are determined in part by what is at stake; **major litigation** and complex transactions ordinarily **require more elaborate treatment** than matters of lesser consequence.

...

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

No excuse for failing to thoroughly prepare for trial.

Just Reviewing the File Isn't Enough

A decision to rely on a defense formulated simply by reviewing the file and general discussing the case with the client, as opposed to actual trial preparation, is unethical. *In re Samad*, 51 A.3d 486, 495-96, 501 (D.C. 2012).

You Must Have A Good Reason for Not Doing Something

“An attorney’s decisions regarding the scope of pretrial investigation and preparation must be informed.” *In re Hawver*, 300 Kan. 1023, 1050 (Kan. 2014).

In re Hawver, 300 Kan. 1023 (Kan. 2014)

Although he had never defended a capital case, Hawver agreed to represent a defendant charged in one. He did not investigate potential alibi witnesses or reduce his caseload to prepare for trial. So, he only spent about ____ hours preparing for the trial.

At trial, Hawver told the jury that the defendant was a “professional drug dealer” and “a shooter of people.” He later explained this decision was based on his (incorrect) belief that the prosecution would be able to get the defendant’s prior involuntary manslaughter conviction into evidence, so he was merely trying to preempt it.

Hawver violated Rule 1.1 (competent representation) because he had not tried a murder case in 20 years, failed to reduce his caseload to prepare for trial, failed to familiarize himself with applicable law governing the trial, had no representation plan, and spent only ____ hours preparing for trial.

Hawver violated Rule 8.4(d) (prejudice to the administration of justice) by incompetently representing the defendant.

Result?

DISBARRED!

“But in this court's view the essentially uncontroverted findings and conclusions regarding Hawver's previous disciplinary history, his **refusal to accept publicly financed resources to aid in his client's defense**, and his **inexplicable incompetence** in handling Cheatham's case in the guilt and penalty phases of the trial are more than sufficient to require disbarment.” *Hawver* at 1056.

PROCESS & METHODS FOR TRIAL PREPARATION

Step 1 — Statements and Exhibits

A **statement** is most often a narrative report containing the statement of one or more other witnesses.

An **exhibit** is something that has independent evidentiary value, such as a lab report.

Create a folder titled “Trial.”

Within the “Trial” folder, create folders titled “Statements” and “Exhibits.”

From your Discovery folder, use “Save As” to create copies of **statements** in your “Statements” folder. Rename the file using (1) the initials of the author of the statement; (2) the number for the statement created by that author; (3) a dash; (4) the initials of the persons whose statements are contained in the report; (5) a dash; and (6) the date of the report’s creation.

Ex: A report authored by John Smith on May 16, 2016 containing Jose Bautista’s statement would be titled: JS01-JB-05162016

From your Discovery folder, use “Save As” to create copies of **exhibits** in your “Exhibits” folder. Rename the file using the same system you used for a **statement**, but by adding an “Ex – “ in front and deleting the portion containing the initials of the person whose statement is contained in the report.

Ex: A lab report created by John Smith on May 17, 2016 would be titled: EX-JS01-05172016.

Tip: It helps to create an index for **statements** and **exhibits** as you go through this process. It should just contain the new title you have given the file and a brief description of it.

Step 2 – Timelines

- Put information in context
- Link causes and effects otherwise hard to detect
- Spot inconsistencies

Fig. 1: Example Timeline

United States v. Jose Bautista
Case No. 17-10001

Date	Description	Source	Cite
5/15/16 Top 8	Matt Bush hits Bautista with a pitch	EX-JS01	EX-JS01@ 2:30
5/15/16 Top 8	Bautista illegally slides into Rougned Odor at second base	EX-JS01	EX-JS01 @ 7:30
5/16/16	Bautista tells MLB investigator that he wanted to break Odor's leg	JB -> JS	JS01-3T

Date: Should contain date and time (if relevant) of act

Description: No more than one sentence

Source: Where fact came from (witness, exhibit, etc.)

Cite: Precise citation within **statement** or **exhibit** to prove that act occurred

Tip: Leave a blank space between lines to make it easier to go back and add new events later.

Step 3 – Witness-Evidence-Topic Sheet

Topics: Elements of crime charged, impeachment topics (i.e. bias, truthfulness, etc).

Evidence: Statements and exhibits

Witnesses: Persons needed to testify in order to get needed statement or exhibit into evidence

Fig. 2: Example Witness-Evidence-Topic Sheet

<i>United States v. Jose Bautista</i>			
	Forcibly assault	Intentionally	Inflict Bodily Injury
John Smith (MLB Investigator)		Bautista tells MLB investigator that he wanted to break Odor's leg (JS01-3T)	
		Matt Bush hits Bautista with a pitch (EX-JS01@ 2:30)	
Rougned Odor	Bautista illegally slides into Rougned Odor at second base (EX-JS01 @ 7:30)	Matt Bush hits Bautista with a pitch (EX-JS01@ 2:30)	Odor suffered heavy bruising as a result of the slide (EX-JB01)

Step 4 – Evidence Presentation

You need to present evidence in a visual format because:

- People quickly forget about two-thirds of what they hear¹
- Those exposed to graphics are more persuaded to act²
- Visual aids in courtroom presentations enhance juror attention and memory³
- Immersive use of graphics during trial yield best results⁴

“[U]nless our words, concepts, [and] ideas are hooked onto an image, they will go in one ear, sail through the brain, and go out the other ear. Words are processed by our short-term memory where we can only retain about seven bits of information (plus or minus 2) [...]. Images, on the other hand, go directly into long-term memory where they are indelibly etched.” - Dr. Lynell Burmark

¹ Mitrushina, M. Handbook of Normative Data for Neuropsychological Assessment, Chap. 13 (discussing history of Weschler Memory Scale).

² King Jr., Wesley. The persuasive effect of graphics in computer-mediated communication. 7 Comp. in Hum. Behav. 4, 269 (1991).

³ Feigeson, Neal. Visual Evidence. 17 Psychonomic Bull. & Rev. 2, 149-154 (2010).

⁴ Broda-Brahm, Ken. Show, Don't Just Tell: Part 1, Continuity (Persuasion Strategies Visual Persuasion Study), July 14, 2011 (available at: <http://www.persuasivelitigator.com/2011/07/show-dont-just-tell-continuity.html>).

Necessary Components of Your Evidence-Presentation Platform

- It must be able to perform call-outs on documents.
- It must be able to put documents or images side-by-side.
- It must be able to play audio and video.
- You must be able to run it during trial (either by yourself or have someone assisting you.)
- It must not be the ELMO.

Callouts

Side-by-side

Audio & Video

- For audio recordings, have someone type up a transcript of the recording, and then convert the audio and the transcript into a video to play for the jury.
- In other words, do not play anything as audio-only if you can avoid it.

Make Sure It Will Work During Trial

Set up a time with the courtroom deputy (preferably a week or more before trial) to test out your platform. Try every possible type of presentation (document, picture, audio, video) to make sure they all work, things are visible and audible in the courtroom.

This will also be a good time to walk through the mechanics of using the platform during trial. How long will it take you to put the document up for the jury to see? How long will it take to load the video? Figure out ways to cut the “dead time” — time the judge and jury are waiting for you to get something on the screen.

The ELMO is a disaster

- Avoid it at all costs.
- Its focus is counter-intuitive.
- You cannot callout a specific part of a document.
- You cannot compare documents side-by-side.
- You cannot get a document to line up perfectly with the display, which makes it look crooked, which makes you (though no fault of your own expect for relying on the stupid, ancient, dumpster-fire of a technological antique) look sloppy.
- It cannot play audio or video.