Every Minute Counts

USING STRATEGIC PRE-TRIAL BRIEFING TO EFFECTIVELY ALLOCATE TIME IN COURT.

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With increasingly short time allocations at trial, each minute during trial is a precious commodity and needs to be used strategically. Pre-trial briefing can often help you get messages to the court more efficiently and clearly than oral argument during trial. However, merely filing documents is not always enough. Attachments to pleadings are not evidence, and the court cannot take judicial notice of the facts contained within a pleading. But, if the court has already seen your legal briefing and the evidence you intend to present at trial, it will take much less time to get your judge on the same page with you.

Filing written documents is an excellent way to give the court a primer on the legal issues that are particularly relevant to your case. Explain the nuances of characterization or best-interest considerations that are relevant to your client's fact pattern. If your judge reviews the briefing before trial, you can skip to the juicy bits without having to spend precious moments on exposition. If your judge has those briefs on file after the case but before rendition, those briefs can highlight your arguments and help clarify what precisely you are asking the court to do.

Additionally, if you have the arguments or objections clearly presented in a written document, you lessen the likelihood that the court of appeals may find you've waived any arguments for appellate review.

Motions for Summary Judgment

Motions for summary judgment are the big guns, the purpose of which is to allow courts to summarily end a case—or a portion of a case—when only a question of law is involved and there is no genuine issue of fact. If you succeed on a motion for summary judgment, you can reduce the number of issues to be presented at trial, allowing you to focus more clearly on the remaining disputed issues. In family law, this often means determining whether a marriage exists before going through the whole ordeal of a divorce proceeding, characterization of a material asset before dividing the community estate, or addressing whether a material and substantial change in circumstances warrants modification of prior orders affecting the parent-child relationship. Motions for summary judgment are, by definition, useful for the issues about which facts are undisputed. They are almost never helpful in a he-said-she-said argument or in the nebulous best-interest-of-the-child determination.

Traditional motions should be filed when you have all your evidence ready to prove your case or an element of your case. Even if your motion is denied, the other side will be forced to provide you with their best arguments to counter your evidence, which will assist you in trial preparation.

No-evidence motions must be filed after an adequate time for discovery has passed. While it may be tempting to file a no-evidence motion immediately, you must allow time for discovery exchange. But, once you have requested all evidence to support the other side's claims and nothing has been produced, a no-evidence motion can help remove those claims from the dispute at trial.

Bench Briefs

Bench briefs are another useful tool to clearly and concisely convey complex legal concepts to help your judge before trial. Bench briefs may also be helpful when the judgment is taken under advisement at the end of the hearing because the brief can help refresh the court's memory about legal arguments. Additionally, bench briefs can quickly make points about issues that are indisputable (or that you think are indisputable). For example, if you know a particular evidentiary issue such as the admission of an expert report is going to arise, you should get the research and argument on paper ahead of time. Not only will this give you a document to aid the court but drafting it (or at least reading it if drafted by co-counsel or an associate attorney) will better prepare you for trial.

Additionally, bench briefs can prevent you from forgetting to cover all your arguments on the day of the hearing or trial. If you have a handful of important legal briefs for the case accompanied by an index, you can skim the index shortly before closing your case to double check that all the issues and arguments were addressed and avoid waiver issues on appeal.

Caution should be taken with including factual assertions in a bench brief. A court can take judicial notice that a particular pleading was filed on a particular date, but it cannot take judicial notice of the facts contained within the pleading. So, if your brief says, "on [date], Petitioner filed her Original Petition for Divorce," the court can take judicial notice of that fact, and you do not need to worry about offering evidence to support that claim at trial. Additionally, if your brief only includes legal concepts supported by statutes and caselaw, the court could have done its own research, and there are no evidentiary issues to be concerned about. You are simply saving the court time by consolidating the relevant law. However, disputed factual allegations in a filed pleading, including bench briefs, are not evidence. You will need to support any factual allegations through testimony or documentary evidence offered during trial. But, if you filed a bench brief, instead of needing to explain the law to the court in your opening or closing, you can simply jump to the conclusion of the legal arguments in your bench brief and reiterate the inference you wish the court to reach after applying the law to the evidence presented during trial.

While you likely may not want to "show your hand" ahead of a hearing, dropping a bench brief on the court on the day of a hearing can often lead to the judge deciding that the other side should be given the opportunity to respond, delaying resolution for your client. Unless there is a very good reason for not filing early, simple professionalism should encourage you to attempt to get briefs timely filed before hearings, following the same deadline rules as for other pleadings and motions.

You may also consider drafting a short brief for why certain evidence should be admitted, particularly if you foresee a strong objection from opposing counsel. If you have the evidence attached to this brief (whether a document or affidavit of a potential witness's testimony), you have both your argument and offer of proof ready to go to preserve the issue for appeal. Additionally, by having something like this prepared, if the opposing counsel's objection to your witness or other evidence is sustained, you can get your case back on track more quickly without allowing the objection to completely derail your train of thought.

Finally, if there is an appeal, your bench brief can help point the client's appellate counsel in the right direction to avoid the client having to incur more fees based on the appellate attorney doing research for the "first time."

Drafting Tips

When preparing these briefs, remember your audience. While a jury may be swayed by hyperbole, many judges are not as impressed. Your case facts—as egregious as they may seem to you and your client—are probably not the most exciting thing the judge has heard that week. This fact is a reason why an appellate attorney could be an aid to your case before appeal. Appellate lawyers are more practiced in focusing on concise legal arguments without getting wrapped up in ethos. Emotional arguments are better presented through witness testimony, not through dry documents. Contrarily, legal arguments are particularly well-suited for written briefing.

When drafting a bench brief, first present the elements of the applicable law. Use headings to clearly establish where you stop talking about one element and begin talking about the next. If appropriate, explain why the facts of your case establish the required element. Make the brief clear and concise. You are being given limited time in the courtroom because the judges are busy. The judges do not want to read a novel. Give them bite-size chunks of your case so that the simple decisions can get made ahead of time or are at least clearer when it comes time to make the ultimate decisions.

If your information is better presented via a chart or diagram, use one. Use bullet points and white space when it makes sense. Step outside the idea that you need a form for everything. Writing is simply another form of communication. When your time for speaking is limited, writing can provide a useful tool to communicate all you need to convey to the court to zealously advocate for your client's case. **TBJ**

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is a family law appellate attorney practicing throughout Texas since 2012. She handles appeals and assists family law attorneys with research, drafting, and strategizing. Johnson also serves as one of the two co-editors in chief of the State Bar of Texas Family Law Section quarterly Section Report. She can be reached at beth@bethmjohnson.com.