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THE TRIAL PREPARATION PROCEDURES—CIVIL

Will Rhee[*] *& L. Richard Walker*[**]

"[U]nder conditions of complexity, not only are checklists a help, they are required for success. There must always be room for judgment, but judgment aided—and even enhanced—by procedure."

—Dr. Atul Gawande[1]

"There is a step-by-step procedure that our Army learned. . . . It works. It wins."[2]

—Colonel Dandridge M. Malone,
U.S. Army Leadership Expert[3]

"We are really not well informed about how lawyers prepare their cases . . . ." Preparing for trial is "a state of complete and total misery."[4]

—Robert F. Hanley, Founder and Chair of the American Bar Association Section of Litigation and Famed Trial Lawyer[5]

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* Professor of Law, West Virginia University College of Law. Will learned the military decision-making process as a U.S. Army infantry platoon leader and company commander. He litigated federal civil cases as both a private lawyer and a U.S. Department of Justice civil rights trial attorney before he became a law professor teaching civil procedure and dispute resolution. He can be reached at william.rhee@mail.wvu.edu. Will thanks the Hodges Summer Research Grant for funding and West Virginia University Continuing Legal Education ("WVCLE") for hosting the article website.

** First Assistant Federal Public Defender, Federal Public Defender, U.S. District Court for the Northern District of West Virginia, Clarksburg, West Virginia Office; former Lecturer in Law, West Virginia University College of Law. Richard can be reached at richard_walker@fd.org. This Article incorporates his personal opinion and does not reflect any official policy of the Federal Public Defender's Office.

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1. ATUL GAWANDE, THE CHECKLIST MANIFESTO 79 (2009).
2. DANDRIDGE M. MALONE, SMALL UNIT LEADERSHIP 43 (1983).
3. *Id.* at 171–72 (calling Malone "the Army's leading expert on leadership").
4. Robert F. Hanley, *The Last Thirty Days, in* LITIGATION MANUAL: TRIAL 66, 66 (John G. Koeltl & John Kiernan eds., 1999).
5. For example, Hanley won a $1.8 billion antitrust jury award against AT&T. Bruce Lambert, *Robert Hanley, 67, Trial Lawyer Who Won Suit Against A.T.& T.*, N.Y. TIMES

ABSTRACT

In an effort to provide scholarship immediately useful to the litigator, this Article proposes a detailed systems workflow to plan and coordinate preparing for federal civil trials called the Trial Preparation Procedures—Civil or "TrialPrepPro—Civil" for short. Although there is an abundance of anecdotal "learning from doing" trial preparation guidance, empirically testable "learning about doing" trial preparation guidance is rare. We present our TrialPrepPro to learn more about doing.

The TrialPrepPro is modeled after the battle-proven U.S. Army Troop Leading Procedures used, with modifications, by all U.S. military services, our NATO allies, and many other foreign militaries. Although there is ample anecdotal or episodic published trial preparation guidance, to the best of our knowledge, the TrialPrepPro is the first attempt to provide a comprehensive, ready-out-of-the-box trial preparation framework.

In light of the U.S. legal profession's established lack of management training, the TrialPrepPro helps a busy practitioner, law firm, or legal services organization to coordinate the arduous and increasingly rare trial preparation process among team members. Moreover, the TrialPrepPro establishes a thoughtful minimum shared professional standard for any law office and any trial team. The TrialPrepPro is meant to be shared, customized, and, above all, used in actual practice. Accordingly, we encourage practitioners to download a free editable copy of the TrialPrepPro from our website (http://www.wvcle.wvu.edu/TrialPrepPro). We only ask that downloaders complete a short survey and share any modifications. We plan to provide a criminal version, the TrialPrepPro—Criminal, in a follow-up article.

(Sept. 16, 1991), http://www.nytimes.com/1991/09/16/nyregion/robert-hanley-67-trial-lawyer-who-won-suit-against-at-t.html.

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INTRODUCTION

Many critics, including U.S. Supreme Court Chief Justice John Roberts, have decried a paucity of legal scholarship useful to the practicing attorney.[6] This Article attempts to answer that plea by providing litigators with a simple, ready-out-of-the-box systems framework for preparing for trial—the Trial Preparation Procedures (***"TrialPrepPro"*** for short[7])—that law offices can tailor to their own practice needs. To the best of our knowledge, the TrialPrepPro is the first standardized, systematic trial preparation process of its kind.[8] It is modeled after a decision-making process long used by all U.S. military services and most allied foreign militaries.[9]

Instead of a traditional thesis, we offer a practice-ready product. In this first Article, we offer a civil litigation version of the TrialPrepPro. In

6. Chief Justice John Roberts has criticized "a great disconnect" between legal academics who "deal with the legal issues at a particularly abstract and philosophical level" and legal practitioners. *A Conversation with Chief Justice Roberts, Fourth Circuit Court of Appeals: 77th Annual Conference*, C-SPAN (June 25, 2011), https://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts; *see also* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2191 (1993); Harry T. Edwards, *Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession,"* 69 WASH. L. REV. 561, 561–63 (1994); William R. Trail et al., *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 211 (1996); Richard A. Wise et al., *Do Law Reviews Need Reform? A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 6 (2013).

7. While this Article has tried to minimize jargon, new terms—often taken from the military decision-making process—are unavoidable. The first time new key terms are mentioned we put them in ***boldface italics*** for emphasis.

8. The only systematic approaches to preparing for trial we found in our research were the Practicing Law Institute's *Trial Handbook*, the American Law Institute-American Bar Association's ("ALI-ABA's") *Achieving Excellence in the Practice of Law*, the U.S. Army Judge Advocate General ("JAG") School's *The Advocacy Trainer*; *Handling Federal Discovery*, *Preparing for Trial in Federal Court, The Trialbook,* and *Strategy, Planning, and Litigating to Win*. None adopted a system similar to the TrialPrepPro. *See* ALI-ABA COMM. ON CONTINUING PRO. EDUC., ACHIEVING EXCELLENCE IN THE PRACTICE OF LAW: THE LAWYER'S GUIDE (2d ed. 2000); WILLIAM M. AUDET & KIMBERLY A. FANADY, HANDLING FEDERAL DISCOVERY (2018); U.S. ARMY JAG SCHOOL, CRIM. L. DEP'T, THE ADVOCACY TRAINER (1999); A.S. DREIER, STRATEGY, PLANNING & LITIGATING TO WIN (2012); NANCY B. PRIDGEN, PREPARING FOR TRIAL IN FEDERAL COURT (2015); KENT SINCLAIR, TRIAL HANDBOOK (Fall 2020 ed. 2020); JOHN O. SONSTENG ET AL., THE TRIALBOOK: A TOTAL SYSTEM FOR THE PREPARATION AND PRESENTATION OF A CASE (1984).

9. For further discussion, *see infra* Section II.A.

a follow-up article, we shall offer a criminal litigation version of the TrialPrepPro.

The TrialPrepPro is summarized in the diagram—Figure 1a—and the outline—Figure 1b—below. A busy trial practitioner can quickly scan these two Figures to obtain the essence of the system. Practitioners are welcome to download editable copies of these two Figures for free from our Article website (http://www.wvcle.wvu.edu/trialpreppro). In exchange, we ask that you provide us feedback on the TrialPrepPro by answering some questions on the website and share any edited versions with us.

Figure 1a: Trial Preparation Procedures—Civil Diagram

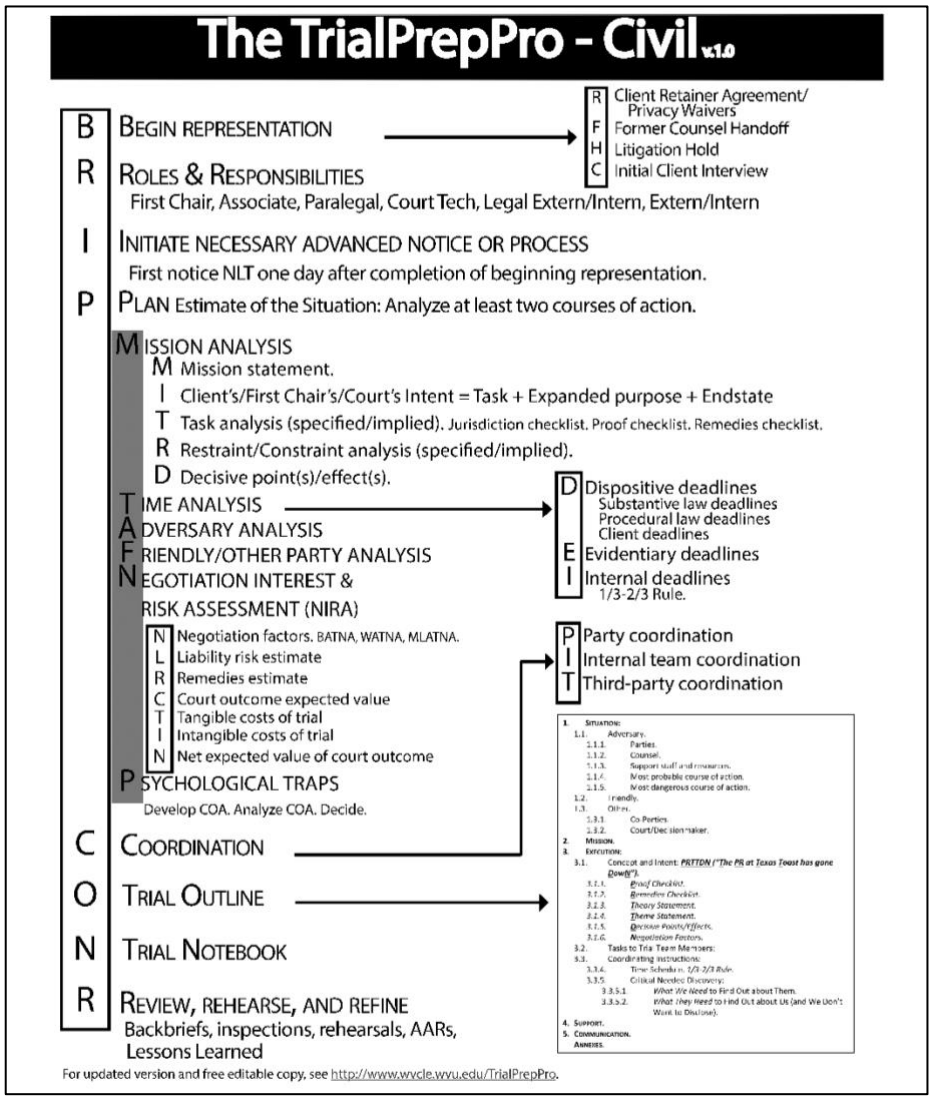

Figure 1b: Trial Preparation Procedures—Civil Outline

The TrialPrepPro—Civil (version 1.0)

"Bye! Rest In Peace, CONnoR!"

For updated version and free editable copy, see http://www.wvcle.wvu.edu/TrialPrepPro.

1. **B**-BEGIN REPRESENTATION: ***("Raising Fairness to Help the Client"):***
   - 1.1. **R-Client Retainer/Privacy Waivers**: Complete conflicts check, execute client retainer agreement and necessary privacy waivers.
   - 1.2. **F-Former Counsel Handoff**: If your client was represented by former counsel, coordinate handoff and check their past work.
   - 1.3. **H-Litigation Hold**: Initiate litigation hold if not already done so.
   - 1.4. **C-Initial Client Interview.**

2. **R**-ROLES AND RESPONSIBILITIES: *Always counsel in writing.*
   - 2.1. First-Chair Attorney.
   - 2.2. Associate Attorney.
   - 2.3. Paralegal.
   - 2.4. Courtroom Technology Technician.
   - 2.5. Legal Extern/Intern.
   - 2.6. Extern/Intern.

3. **I**-INITIATE NECESSARY ADVANCED NOTICE OR PROCESS. *Avoid information silo or waiting too late to start third-party process. First notice NLT* ***one day*** *after completion of beginning representation. Constantly ask,* ***to whom do I need to give a heads-up? What do I need to do now to make the team's life easier later?*** *What process do I need to initiate now?* ***You can never give too much notice.***

4. **P**-PLAN: *Make a tentative plan (****the Estimate****). At a minimum, analyze* ***MTA-FNP*** *(****"My Toys Always Find New Players"****) for each COA. Develop at least two COA for each claim or defense. Analyze them and decide which to use.*
   - 4.1. M-Mission Analysis ***("My Iguana Tried to Run Down"):***
     - 4.1.1. **Mission statement**: 5Ws—*who, what (task or task(s)), when, where, and why (purpose).*
     - 4.1.2. **Client's/First Chair's/Court's Intent: Task(s) + expanded purpose + desired endstate**.
     - 4.1.3. **Task Analysis**: *Identify* ***specified*** *and* ***implied*** *tasks. Comprehensive task dump is key.* ***All critical tasks must be assigned*** to a trial team member.
       - 4.1.3.1. **Jurisdiction checklist**.
       - 4.1.3.2. **Proof checklist**. *Need at least two sources for every key fact. Can incorporate Bayesian/Wigmore evidence chart or decision tree.*
       - 4.1.3.3. **Remedies checklist**. ***("That CD is RAD.")***
         - 4.1.3.3.1. Coercive remedy (preliminary injunction/temporary restraining order, specific performance).
         - 4.1.3.3.2. Damages (compensatory, punitive/exemplary);
         - 4.1.3.3.3. Restitution.
         - 4.1.3.3.4. Attorneys' fees.
         - 4.1.3.3.5. Declaratory relief.
     - 4.1.4. **Restraint/Constraint Analysis:** *Identify specified and implied* ***restraints*** *or* ***constraints****.*
     - 4.1.5. **Decisive point(s)/effect(s)**: *Identify the decisive point(s) or effect(s) of the dispute/stage/event.*
   - 4.2. T-Time Analysis ***("What time of DEI is it?"):***
     - 4.2.1. **Dispositive Deadlines:** ***("Dispositive deadlines are very SPeCial.")***
       - 4.2.1.1. **Substantive law deadlines**.
       - 4.2.1.2. **Procedural law deadlines**.
       - 4.2.1.3. **Client deadlines**.
     - 4.2.2. **Evidentiary Deadlines**.
     - 4.2.3. **Internal Deadlines**. *Remember the* ***1/3-2/3 rule****.* Schedule rehearsals and inspections first so team can backwards plan.
   - 4.3. A-Adversary Analysis:
     - 4.3.1. Parties.
     - 4.3.2. Counsel.
     - 4.3.3. Support Staff.
     - 4.3.4. Resources.
     - 4.3.5. **Most Probable Course of Action**.
     - 4.3.6. **Most Dangerous Course of Action**.
   - 4.4. F-Friendly/Other Party Analysis:
     - 4.4.1. **Theory statement.**
     - 4.4.2. **Theme statement.**
   - 4.5. N-Negotiation Interest and Risk Assessment (NIRA): *Litigation can be as risky as eating food from a* ***"Nasty Lead Rust-Coated TIN."***
     - 4.5.1. **Negotiation Factors:** ***("RIC COLA")*** ♠
       - 4.5.1.1. **Relationships.**
       - 4.5.1.2. **Interests.**
       - 4.5.1.3. **Communication.**
       - 4.5.1.4. **Commitment.**
       - 4.5.1.5. **Options.**
       - 4.5.1.6. **Legitimacy.**
       - 4.5.1.7. **Alternatives** (BATNA, WATNA, MLATNA).
     - 4.5.2. **Liability risk estimate.**
     - 4.5.3. **Remedies estimate.**
     - 4.5.4. **Court outcome expected value.**
     - 4.5.5. **Tangible costs-of-proceeding-to-trial estimate.**
     - 4.5.6. **Intangible costs-of-proceeding-to-trial estimate.**
     - 4.5.7. **Net expected value of court outcome.**
   - 4.6. P-Psychological Traps ***("Little Fella CAN CROSS"):*** *Top 10. Can substitute specific psychological traps from Friendly/Adversary Analysis.*
     - 4.6.1. **Loss aversion** (Status quo) **bias.**
     - 4.6.2. **Framing.**
     - 4.6.3. **Confirmation bias.**
     - 4.6.4. **Anchoring.**
     - 4.6.5. **Naïve realism.**
     - 4.6.6. **Consensus error** (Projection).
     - 4.6.7. **Reactive devaluation.**
     - 4.6.8. **Overconfidence** (Egocentric bias).
     - 4.6.9. **Selective perception.**
     - 4.6.10. **Self-serving bias** (Attribution error).

5. **C**-COORDINATION: *Constantly repeat Steps 3 and 5.* ***You can never coordinate too much.*** *Coordinate well to avoid falling into a* ***PIT****.*
   - 5.1. **P-Party** Coordination.
   - 5.2. **I-Internal Team** Coordination.
   - 5.3. **T-Third-Party** Coordination.

6. **O**-TRIAL OUTLINE: *Issue* ***orally*** *to trial team and client.*

   1. SITUATION:
   - 1.1. Adversary.
     - 1.1.1. Parties.
     - 1.1.2. Counsel.
     - 1.1.3. Support staff and resources.
     - 1.1.4. Most probable course of action.
     - 1.1.5. Most dangerous course of action.
   - 1.2. Friendly.
   - 1.3. Other.
     - 1.3.1. Co-Parties.
     - 1.3.2. Court/Decisionmaker.

   2. MISSION.

   3. EXECUTION:
   - 3.1. Concept and Intent: ***PRTTDN*** *(****"The PR at Texas Toast has gone DowN"****).*
     - *3.1.1. Proof Checklist.*
     - *3.1.2. Remedies Checklist.*
     - *3.1.3. Theory Statement.*
     - *3.1.4. Theme Statement.*
     - *3.1.5. Decisive Points/Effects.*
     - *3.1.6. Negotiation Factors.*
   - 3.2. Tasks to Trial Team Members:
   - 3.3. Coordinating Instructions:
     - 3.3.4. Time Schedule. *1/3-2/3 Rule.*
     - 3.3.5. Critical Needed Discovery:
       - 3.3.5.1. *What We Need* to Find Out about Them.
       - 3.3.5.2. *What They Need* to Find Out about Us (and We Don't Want to Disclose).

   4. SUPPORT.

   5. COMMUNICATION.

   ANNEXES.

7. **N**-TRIAL NOTEBOOK.

8. **R**-REVIEW, REHEARSE, AND REFINE: *Backbriefs, inspections, and rehearsals are essential. Constantly conduct After-Action Reviews ("AARs") and institutionalize key insights in law office Lessons Learned database.*

♠ If cross-cultural negotiation, consider using ***GREAT FISH CAR, CAP!*** elements: (1) **G**oal; (2) **R**egards to time; (3) **E**motion; (4) **A**ttitude; (5) **T**eam; (6) **F**ace and honor; (7) **I**dentity; (8) **S**uccess means; (9) **H**orizon; (10) **C**ontrol; (11) **A**greement form; (12) **R**isk taking; (13) **C**ommunications style; (14) **A**greement building and processes; and (15) **P**ersonal styles.

The rest of this Article explains the need for a standardized trial preparation framework and how to use the TrialPrepPro. Section I examines the U.S. legal profession's lack of formal management training

and need for systematic trial preparation guidance. Section II highlights the primary benefits of the standardized military decision-making process. Section III summarizes the TrialPrepPro's eight steps. Section IV illustrates the TrialPrepPro's application through a negligence lawsuit hypothetical. The Article concludes with the hope that qualitative research on how practitioners actually use the TrialPrepPro may help create more learning *from* doing practical scholarship[10] that moves beyond the current "learning by doing" approach.[11]

I. THE NEED FOR A TRIAL PREPARATION SYSTEM

Between April 1 and April 10, 2003, U.S. Army Rangers and Delta Force commandos seized and defended the Haditha Dam Complex in Al Anbar, Iraq, as Section of Operation Iraqi Freedom.[12] It was the longest sustained ground combat action by a single U.S. military unit since the Vietnam War.[13] Severely outnumbered, the Ranger-Delta assault force killed at least 230 Iraqi soldiers; destroyed 29 tanks, 28 artillery pieces, 28 mortars, 23 anti-aircraft pieces, three cargo trucks, two motorcycles, and one kayak; and captured and held 18 enemy buildings and eight ammunition caches—all while protecting the Dam itself.[14] Four U.S.

10. *See* Will Rhee, *Law and Practice*, 9 LEGAL COMMC'N & RHETORIC: JALWD 273, 311 (2012).

11. "Learning by doing" is the motto of the National Institute for Trial Advocacy ("NITA"), the U.S. preeminent trial advocacy training organization. *See In-House Training Solutions for Law Firms and Organizations,* NITA, https://www.nita.org/program-course-type/in-house-training (last visited Mar. 5, 2021) (mentioning the "NITA learning-by-doing methodology"). NITA was created in response to a 1969 U.S. Task Force on Trial Advocacy sponsored by the American Bar Association, American College of Trial Lawyers, and the American Trial Lawyers Association. *See About NITA, History,* NITA, https://www.nita.org/about-us (last visited Mar. 5, 2021); *see also* Warren E. Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 FORDHAM L. REV. 1, 5–6 (1980).

12. Tactical-Life, *Spec Ops History: The Seizure of Haditha Dam*, TACTICAL LIFE: SPECIAL OPERATIONS MAG. (Oct. 30, 2015), https://www.tactical-life.com/lifestyle/military-and-police/seizure-haditha-high-dam/.

13. COMM. ON THE INITIAL ASSESSMENT OF READJUSTMENT NEEDS OF MILITARY PERSONNEL, VETERANS, & THEIR FAMILIES, INSTITUTE OF MED., RETURNING HOME FROM IRAQ AND AFGHANISTAN 17 (2010), https://www.ncbi.nlm.nih.gov/books/NBK220072/pdf/Bookshelf_NBK220072.pdf; *see also* MARTY SKOVLUND, JR., VIOLENCE OF ACTION: THE UNTOLD STORIES OF THE 75TH RANGER REGIMENT IN THE WAR ON TERROR 49–50 (2014).

14. One of the largest hydroelectric dams in the world the Haditha Dam Complex in 2003 provided one-third of the electricity for all of Iraq. John D. Gresham, *The Haditha Dam Seizure: The Target, Section 1*, DEF. MEDIA NETWORK (May 1, 2010), https://www.defensemedianetwork.com/stories/hold-until-relieved-the-haditha-dam-seizure/. The Dam also controlled the flow of the Euphrates River into the lower Euphrates/Tigris River Valley. *See id.* If the Dam was destroyed, not only would much of Iraq lose electricity, but

soldiers were killed.[15] The 154 surviving U.S. soldiers were awarded the Valorous Unit Award, five Purple Hearts, four Silver Stars, 26 Bronze Stars, and 71 Army Commendation Medals.[16] The History Channel even broadcast a 42-minute documentary reenactment of the battle.[17]

Then-Captain—and current Brigadier General—[18] David Doyle, Commander of Company B, 3d Battalion, 75th Ranger Regiment (Airborne), had "less than 12 hours to plan and get moving" on the Haditha Dam seizure and defense.[19] So how did Doyle do it? He pulled his worn *Ranger Handbook*[20] out of his rucksack and completed steps 1–7 of the standardized military Troop Leading Procedures ("TLP").[21]

Renowned trial lawyer Joe Jamail once said that "preparing for trial is like preparing for war."[22] Like Captain Doyle, litigators can also benefit from a standardized decision-making process that helps them make and communicate timely, complex decisions.

What is the current prevailing approach to trial preparation in the United States? A survey of the trial preparation literature[23] and the authors' experience suggest that the default approach is largely ad hoc.[24] Although experienced trial attorneys may have developed a trial

also much of the entire central Section of the Valley, including Baghdad, Karbala, and other populated areas, would be flooded. *See id.* Consequently, the Dam had to be secured to prevent Iraqi President Saddam Hussein from employing the same "scorched earth" tactics he had used during Operation Desert Storm in 1991 when after the Coalition Forces' initial military success he flooded the Persian Gulf with crude oil to kill fish and contaminate desalination plants. *See id.*

15. *See* Tactical-Life, *supra* note 12 (stating four U.S. soldiers were killed in action).

16. John D. Gresham, *The Haditha Dam Seizure: The Taking of Objective Cobalt, Section 3*, DEF. MEDIA NETWORK (May 12, 2010), https://www.defensemedianetwork.com/stories/hold-until-relieved-the-haditha-dam-seizure-3/.

17. *The Warfighters: A Battle for Haditha Dam*, HIST. CHANNEL (Jan. 24, 2016), https://www.history.com/shows/the-warfighters/season-1/episode-3.

18. *See* Kyle Rempfer, *New Commanders Announced for Three Army Divisions and JRTC*, ARMY TIMES (May 1, 2020), https://www.armytimes.com/news/your-army/2020/05/01/new-commanders-announced-for-three-army-divisions-and-jrtc/.

19. John D. Gresham, *The Haditha Dam Seizure: Getting Ready—Move to Contact*, *Section 2*, DEF. MEDIA NETWORK (May 5, 2010), https://www.defensemedianetwork.com/stories/hold-until-relieved-the-haditha-dam-seizure-2/ [hereinafter *The Haditha Dam Seizure: Getting Ready*].

20. *See* U.S. DEP'T OF ARMY, TRAINING CIRCULAR ("TC") 3–21.76, RANGER HANDBOOK 2-1–2-41 (Apr. 2017), https://fas.org/irp/doddir/army/tc3-21-76.pdf [hereinafter "*Ranger Handbook*"].

21. *The Haditha Dam Seizure: Getting Ready*, *supra* note 19.

22. DONALD E. VINSON, AMERICA'S TOP TRIAL LAWYERS: WHO THEY ARE & WHY THEY WIN 201 (1994).

23. For further discussion, see *supra* note 8. *See also infra* Section I.D. notes 66–70 and accompanying text.

24. For further discussion, see *infra* notes 53–59 and accompanying text.

preparation routine over time,[25] the authors have yet to find a comprehensive, standardized trial preparation *system* like the TrialPrepPro.

A standardized trial preparation system could remedy at least four problems with the default, ad hoc approach: (A) as fewer cases go to trial, practitioners—particularly supervisors and mentors—are less familiar with the trial process; (B) the best trial advocate can still be a terrible manager; (C) there is a lack of minimum professional trial preparation standards, particularly when supervising nonlawyers; and (D) most existing preparing-for-trial guidance relies upon circumstantial personal anecdotal experience.

A. Lawyers and Support Staff with Little-to-No Trial Experience Can Obtain Comprehensive, Systematic Guidance

It is well-established that trial—once the focus of the U.S. litigation system—has become scarce.[26] According to recent studies, less than 1 percent of federal civil cases[27] and 4 percent of state civil cases went to trial.[28] Concomitant with such low trial probability is the loss of civil jury trials,[29] a right enshrined in the Seventh Amendment to the U.S.

25. A "routine" is an organizational habit. *See* FED. R. EVID. 406. The mere fact that something is the way it has always been done of course does not guarantee comprehensiveness or effectiveness. In contrast, we submit that an established system can guarantee comprehensiveness and effectiveness.

26. *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L. J. 522 (2012).

27. From March 31, 2018 to March 31, 2019, only 0.8 percent of federal district court civil cases went to trial. *Table C-4—U.S. District Courts–Civil Federal Judicial Caseload Statistics*, U.S. CTS. (Mar. 31, 2019) https://www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2019/03/31 ("U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending March 31, 2019.").

28. The National Center for State Courts concluded that based on the reporting data of 50 state court systems only four percent of state court civil cases in 2015 had an "adjudicated disposition." Paula Hannaford-Agor et al., NCSC, CIV. JUST. INITIATIVE, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 19–21 fig. 9 (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf. The NCSC noted that differences in the way states described dispositions in their reported data may have skewed this result. *Id.* at 19–20.

29. One 2005 study of selected civil trials in state courts concluded that 68.3 percent of trials were "disposed through jury trial." Lynn Langton & Thomas H. Cohen, U.S. DEP'T JUST., BUREAU OF JUST. STAT., CIVIL JUSTICE SURVEY OF STATE COURTS: CIVIL BENCH AND JURY TRIAL IN STATE COURTS, 2005 2 (2009), https://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf. In the federal court, civil jury trials declined from 11.5 percent of all case dispositions in 1962 to 1.8 percent of all case dispositions in 2002. *See* Galanter, *supra* note

Constitution.[30] Blackstone called the jury trial "the glory of the English Law."[31] James Madison, the drafter of the Seventh Amendment, called it "as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[32] The Federal Rules of Civil Procedure state that the "right of jury trial . . . is preserved to the parties *inviolate*."[33]

Despite the rarity of actual civil trials, trial nevertheless remains the essential reference point for the entire civil litigation system. At least procedurally, preparing for trial remains the pretrial focus. In federal civil litigation, the focus of the two pretrial procedural motions to end the litigation—the motion to dismiss for failure to state a claim[34] and the motion for summary judgment[35]—remains whether a plaintiff's claim or a defendant's defense are factually or legally sufficient to justify discovery for trial or trial.[36] If they are not, then an order of dismissal or summary judgment is warranted.[37] If they are, then absent voluntary settlement or voluntary dismissal,[38] the litigation must proceed to discovery or trial.[39] In addition to "discourag[e] wasteful pretrial activities" and "facilitat[e] settlement," a purpose of the federal pretrial conference is to "improv[e] the quality of the trial through more thorough preparation."[40]

Even discovery—arguably the modern litigator's most time-consuming task[41]—must be focused on trial to be truly effective. Without a trial preparation focus, discovery can become excessively expensive

26, at 462–63 tbl.1 (2002) (citing ANN. REPS. ADMIN. OFF. U.S. CTS., tbl.C-4.). In the federal courts, only the judge, not the jury, decides pre-trial motions like a motion to dismiss for failure to state a claim, a motion for judgment on the pleadings, and a motion for summary judgment. *See* FED. R. CIV. P. 12(b)(6), 12(c), 12(d), 56.

30. *See* U.S. CONST. amend. VII.

31. SAMUEL WARREN, BLACKSTONE'S COMMENTARIES SYSTEMATICALLY ABRIDGED AND ADAPTED TO THE EXISTING STATE OF THE LAW AND CONSTITUTION WITH GREAT ADDITIONS 566 (1855).

32. Mark W. Bennett, *Judges' Views on Vanishing Civil Trials*, 88 J. AM. JUDICATURE SOC'Y 306, 307 (2005) (citing 1 ANNALS OF CONG. 454 (Joseph Gales ed. 1789)).

33. FED. R. CIV. P. 38(a) (emphasis added).

34. *See* FED. R. CIV. P. 12(b)(6).

35. *See* FED. R. CIV. P. 56.

36. *See generally* DAVID F. HERR ET AL., FUNDAMENTALS OF LITIGATION PRACTICE § 25 (2020) ("Dispositive Motions"); Wendy Gerwick Couture, Conley v. Gibson*'s "No Set of Facts" Test: Neither Cancer Nor Cure*, 114 PENN STATE. L. REV., PENN STATIM 19, 20–22 (2010) (defining legal and factual sufficiency).

37. *See generally* HERR ET AL., *supra* note 36, at 3, 7, § 25.

38. *See* FED. R. CIV. P. 41(a).

39. *See id.*; FED. R. CIV. P. 16.

40. *See* FED. R. CIV. P. 16(a)(3–5).

41. *See* Rebecca Love Kourlis et al., *Managing Toward the Goals of Rule 1*, 4 FED. CTS. L. REV. 1, 11 (2010).

with either too much or not enough detail for trial.[42] While discovery often facilitates settlement,[43] settlement's converse—the worst alternative to negotiated agreement ("WATNA") is usually trial.[44] Having such a trial focus presupposes familiarity and comfort with preparing for trial.

Most importantly, a trial practitioner must be fully prepared for trial to provide truly competent representation.[45] Although rare, trials, especially jury trials, sometimes are the best option for dispute resolution, particularly if there are fundamental rights at issue or if a change in the law is sought.[46] Not surprisingly, trial scarcity has resulted in fewer attorneys, supervisors, and law offices having actual trial experience.[47] Less overall trial experience also means less available trial mentoring or institutional guidance for lawyers unfamiliar with trials.[48] This empirical reality is in marked contrast to the popular public perception of so-called trial lawyers possessing significant trial experience.[49]

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42. *See* Tracy Walters McCormack et al., *Honesty Is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 GEO. J. LEGAL ETHICS 155, 169–70 (2010).

43. *See, e.g.*, Pruett v. Erickson Air-Crane Co., 183 F.R.D. 248, 251 (D. Or. 1998) ("[O]ne of the purposes of broad discovery is to encourage settlement.").

44. *See* Ayelet Sela et al., *Judges as Gatekeepers and the Dismaying Shadow of the Law: Courtroom Observations of Judicial Settlement Practices*, 24 HARV. NEGOT. L. REV. 83, 112–13 (2018).

45. As the report in support of the resolution adopted by the ABA Section of Litigation observed in 2017:

> With respect to newer lawyers, these newly minted members of the bar also have a responsibility to the rest of the legal profession to improve their own [trial] skills. Newer attorneys must demonstrate the dedication necessary to learn the craft of the legal profession. . . . In satisfying these expectations, newer lawyers accept serving as officers of the courts and advocates critical to our system of justice.

LAURENCE F. PULGRAM, REPORT, AM. BAR ASS'N. 3 (Aug. 2017), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2017/2017-am-116.pdf.

46. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1085–87 (1984).

47. *See* MARC GALANTER & ANGELA FROZENA, POUND CIVIL JUSTICE INST., THE CONTINUING DECLINE OF CIVIL TRIALS IN AMERICAN COURTS 23 (2011), http://www.poundinstitute.org/wp-content/uploads/2019/04/2011-Forum-Galanter-Frozena-Paper-1.pdf.

48. *See, e.g.*, Janine Robben, *Oregon's Vanishing Civil Jury Trial: A Treasured Right, or a Relic?*, 70 OR. STATE BAR BULL. 19, 22–24 (identifying the concern that declining trial rates lead to "fewer lawyers and judges who know how to try and judge cases.") (emphasis omitted).

49. *See id. See also* Grant Reese, *Should I Settle or Should I Go (to Trial)?: An Analysis of the Dearth of Trials in the Modern Era and the Resulting Effects on Settlements*, 44 L. & PSYCH. REV. 297, 310–11 (2019–2020).

Although obtaining actual trial experience might be beyond a lawyer or law office's control,[50] standardized systematic frameworks like the TrialPrepPro can ensure that even inexperienced trial lawyers and their support staff are prepared for trial. By so doing, the TrialPrepPro can minimize the fear of going to trial which, when excessive, can impair a litigator's professional judgment by making settlement effectively the only option.[51]

B. Lawyers Lacking Management Training or Experience Can Use a Simple, Comprehensive System to Ensure Everything Gets Done

American lawyers are not required to complete any management training.[52] Yet practicing lawyers are required to work with other people who usually are not lawyers.[53] Although a law student can graduate law school learning only individual legal skills and focused only on self-management, a practicing lawyer of course represents a client who may not be legally trained.[54] Moreover, lawyers often are required to lead a team of nonlawyer support staff or expert witnesses.[55] Leading a legal

50. Recognizing the need for young lawyers to obtain trial experience, the American Bar Association House of Delegates in 2017 approved Resolution 116, which "urg[ed] courts to implement plans that welcome opportunities for new lawyers to gain meaningful courtroom experience." PULGRAM, *supra* note 45. While no substitute for trying actual cases, an inexperienced lawyer can learn how to try cases appropriately through dedicated self-study. ALI-ABA, SKILLS AND ETHICS IN THE PRACTICE OF LAW 121 (2d ed. 2000). "The lawyer should develop and improve trial skills by undertaking a course of study that includes participating in experiential trial practice, continuing legal education programs, observing experienced litigators, and studying trial practice video[s] and texts." *Id.*

51. *See* Reese, *supra* note 49, at 313–16 (collecting authorities).

52. *See* DEBORAH L. RHODE, LEADERSHIP FOR LAWYERS 3–4 (2020). Although more law schools offer leadership and law practice management courses, they remain electives. *See* Meredith R. Miller, *Designing a Solo and Small Practice Curriculum*, 83 UMKC L. REV. 949, 954 (2015) (stating that out of the one-third of law schools that offered a law practice management course, none required it). *See How to Become a Lawyer*, U.S. BUREAU LAB. STAT.: OCCUPATIONAL OUTLOOK HANDBOOK, https://www.bls.gov/ooh/legal/lawyers.htm#tab-4 (last updated Sept. 1, 2020).

53. As law practice management consultant Wendy Werner observed:

> Lawyers manage people. . . . Lawyers will be more productive and profitable if they are well-trained and supervised, and if they get sufficient feedback as they develop their craft to learn how to improve their skills. But where in their careers or through their education would lawyers learn the skills necessary to manage people?

Wendy L. Werner, *Management Skills for Lawyers*, 39 L. PRAC. 62, 62 (2013).

54. *See* MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2009) ("Scope of Representation and Allocation of Authority Between Client and Lawyer").

55. *See* MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 2009) ("Responsibilities Regarding Nonlawyer Assistance"). *See also Ethical Landmines on Using Nonlawyer Staff*,

team by definition requires collective skills (i.e., involving more than one person) interrelated with yet above and beyond the individual skills of each team member.[56] Because effective trial advocacy remains predominantly an individual skill,[57] a capable trial advocate is not necessarily a capable manager or supervisor.

At least five recent U.S. lawyering studies have identified collective supervisory skills as essential to practice.[58] By providing a shared system

AM. BAR. ASS'N (Nov. 2017), https://www.americanbar.org/news/abanews/publications/youraba/2017/november-2017/ensure-your-paralegals-ethics-align-with-yours-/. *See generally* AM. BAR. ASS'N, ABA MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVICES (2018), https://www.americanbar.org/content/dam/aba/administrative/paralegals/ls_prlgs_modelguidelines.pdf; NAT'L ASS'N LEGAL ASSISTANTS, INC., MODEL STANDARDS AND GUIDELINES FOR UTILIZATION OF PARALEGALS, (Dec. 2018), https://www.nala.org/sites/default/files/files/banner/Model%20Standards.pdf; NAT'L FED'N PARALEGAL ASS'NS, INC, MODEL CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY AND GUIDELINES FOR ENFORCEMENT (2006), https://www.paralegals.org/files/Model_Code_of_Ethics_09_06.pdf.

56. The U.S. military distinguishes between individual skills, "clearly defined, observable, and measurable activities accomplished by an individual," and collective skills, "clearly defined, observable, and measurable activities or actions" that "require organized team . . . performance, leading to the accomplishment of a mission or function." U.S. DEP'T OF ARMY, ARMY DOCTRINE PUB. ("ADP") 7-0, TRAINING 1-1–1-2 (July 31, 2019). Individual and collective skills are clearly interrelated. To succeed, a team must excel at both individual and collective skills. *See id.* at 1-2.

57. After all, witness examinations are customarily assigned to only one lawyer. *See* Finjan, Inc. v. Cisco Sys. Inc., No. 17-cv-00072-BLF, 2019 U.S. Dist. WL 7753437, at *2 (N.D. Cal. Sep. 9, 2019) (Order on Joint Discovery Letter Brief Re Expert Depositions of Drs. Mitzenmacher, Jaeger, and Orso) (commenting that it is "typical practice . . . for only one attorney to question a witness at a deposition.").

58. Those five reports were the 2014 Foundations for Practice Project, the 2007 Best Practices Report, the 2007 Carnegie Report, the 1999 Association of Legal Administrators ("ALA") lawyer business and management skills curriculum study, and the 1992 MacCrate Report. *See* Alli Gerkman & Zachariah DeMeola, *Foundations for Practice: The "Whole Lawyer" and the Path to Competency for New Lawyers*, 87 BAR EXAM'R 17 (2018), https://thebarexaminer.org/article/legal-profession/foundations-for-practice/ (survey of over 24,000 U.S. lawyers in all 50 states to identify what new lawyers need to be, know, and do to be successful); *see* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 142 (2007) (ebook), https://www.cleaweb.org/Resources/Documents/best_practices-full.pdf [hereinafter *Practices Report*] (recommending that in-house law school clinical courses "provide a model of law office management in which appropriate case and office management *systems* are utilized" (emphasis added)); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 28 (Carnegie Foundation for the Advancement of Teaching ed., 2007) [hereinafter *Carnegie Report*] (managerial and decision-making skills implicate two of the three legal education apprenticeships); Stephen R. Chitwood et al., *Teach Your Associates Well: Developing a Business and Management Skills Curriculum for Law Firm Associates*, 19 LEGAL MGMT. 25, 28 (2000) ("Category 2: Management and Supervisory Skills"); ROBERT MACCRATE ET AL., A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 135–41 (1992) [hereinafter *MacCrate Report*]).

for an entire trial team, the TrialPrepPro can assist even an inexperienced lawyer-manager with supervising their team's trial preparation.

C. A Trial Preparation System Can Set Minimum Professional Standards for Lawyers and Non-Lawyers

All lawyers with managerial authority in a law office are required "to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm" will conform with applicable professional conduct rules.[59] In particular, managing attorneys must "ensure that inexperienced lawyers are properly supervised."[60] This supervisory duty also extends to non-lawyers.[61]

Internal systematic processes like the TrialPrepPro provide clear organizational professional standards for lawyers and non-lawyers.[62] As

59. MODEL RULES OF PRO. CONDUCT r. 5.3 cmt. 2 (AM. BAR ASS'N (2019). *Accord* RESTATEMENT (THIRD) OF L. GOVERNING LAWS. § 11 (AM. L. INST. 2000) (concerning law firm civil liability). *See generally* Dresser Indus., Inc. v. Digges, No. JH-89-485, 1989 WL 139234 (D. Md. Aug. 30, 1989) (fraudulent billing monitoring system); Davis v. Ala. State Bar, 676 So. 2d 306 (Ala. 1996) (case volume and budget policies); *In re* Lenaburg, 864 P.2d 1052, 1055 (Ariz. 1993) (supervision of nonlawyer employees); *In re* Dahowski, 479 N.Y.S.2d 755 (N.Y. App. Div. 1984) (record keeping review). *See* Lane v. Williams, 521 A.2d 706 (Me. 1987) (lawyer has duty to establish office procedures to ensure that notice of appeal was timely filed, but failure to do so not "excusable neglect" permitting late filing); Implementation of Standards of Professional Conduct for Attorneys, Release No. 8185, 17 C.F.R. pt. 205 (2003) (Securities and Exchange Commission ("SEC") standards of professional conduct for attorneys who appear and practice before the SEC).

60. MODEL RULES OF PRO. CONDUCT r. 5.1 cmt. 2 (AM. BAR ASS'N 2019).

61. *See* MODEL RULES OF PRO. CONDUCT r. 5.3 (AM BAR ASS'N 2019); RESTATEMENT (THIRD) OF L. GOVERNING LAWS. § 11 (AM. L. INST. 2000).

62. Legal malpractice expert Ronald Mallen observed that "law firms adopt requirements and guidelines to improve the quality of representation and to minimize the risk of error." RONALD E. MALLEN, *The Standard of Care Defined*, *in* 2 LEGAL MALPRACTICE § 20.2 (2020).

Although it is far from well-established, standardized internal processes like the TrialPrepPro could conceivably be used as evidence in a malpractice lawsuit that a legal organization exceeded the standard of care. In *Wiley v. County of San Diego*, the California Court of Appeal held that an advocacy organization's "internal performance guidelines are properly admissible as evidence of the standard of care." Wiley v. County of San Diego (*Wiley I*), 68 Cal. Rptr. 2d 193, 202 (Cal. Ct. App. 1997) (citations omitted), *review granted and superseded, by* 950 P.2d 57 (Cal. 1997), *and aff'd and remanded*, (*Wiley III*) 66 P.2d 983 (1998). Although the case lost its precedential value when the California Supreme Court granted review, CAL. R. CT. R. 8.1105(e)(1) (2020), the California Supreme Court never addressed the internal performance guidelines in its opinion. *See Wiley III,* 66 P.2d 983. *Wiley* concerned a criminal defendant (the "Plaintiff") who brought a legal malpractice action against his former public defender, the County of San Diego, and the San Diego

the Maryland Committee on Law Practice Quality recognized, "evaluation of quality makes no sense without the development of standards."[63] Every advocate and every "law practice 'implicitly and unavoidably adopts and enforces standards of performance.'"[64]

D. A Trial Preparation System Goes Beyond Anecdotal War Stories

Our initial research of the voluminous preparing-for-trial guidance available in the United States found the vast majority compromised of selected pointers written by practitioners based upon their own anecdotal experience.[65] While such anecdotal war stories are undoubtedly useful,[66] they are problematic as the primary source of trial guidance for three reasons. First, without some summarizing or systematic aggregation, the

County Public Defender's Office (collectively, the "County"). *See Wiley I*, 68 Cal. Rptr. 2d at 195. At the end of the trial, the trial court gave a special instruction, over the County's objection, that included the Office's "internal performance guidelines" as Section of the public defender's duties in representing the Plaintiff. *Id.* at 202 n.6. The County argued on appeal that because the internal performance standards were "above and beyond those required by the standard of care," the trial court's instruction was improper. *Id.* at 202. While the Court of Appeal agreed that "the instruction, as given, did not comport with the law," the Court of Appeal found the error harmless because the performance guidelines in the instruction were "broad in nature" and the County did not "point to any particular guidelines as misstating or overstating the general obligations of counsel in representing a client in a criminal case." *Id.*

63. Michael Kelly, *What Are the Appropriate Standards of Quality?: Maryland's Response*, *in* ABA SEC. LAW PRAC. MGMT., THE QUALITY PURSUIT 216 (Robert M. Greene, ed. 1989).

64. *Id.* at 217 (quoting MD. STATE BAR ASS'N, LAW PRAC. QUALITY GUIDELINES, A GUIDEBOOK FOR SELF-ASSESSMENT BY PRACTICING LAWS. (1985)).

65. The preparing-for-trial literature is too vast to summarize here. The U.S. Library of Congress has a useful research guide, *Trial Preparation: A Beginner's Guide*, LIBR. OF CONG., https://guides.loc.gov/trial-preparation/introduction (last visited Mar. 6, 2021). For recent examples, see generally Curtis Alva et al., *Pretrial Preparation and Trial Procedures; Direct Examination, Cross-Examination, Redirect, and Rebuttal, in* BUSINESS LITIG. IN FLA. 11-1 (10th ed. 2019); Neil J. Dilloff, *Trial Preparation, in* CIVIL PRE-TRIAL PRACTICE 159 (2019); Peter L. Ettenberg et al., *Early Trial Preparation: An Overview, in* MASS. SUPERIOR COURT CRIMINAL PRACTICE MANUAL 5-1 (2d ed. 2014 & Supp. 2019); John Kenneth Felter, *Preparing for Civil Trial in Massachusetts, in* MASS COURTROOM ADVOCACY 2-1 (3d ed. 2017 & Supp. 2019); KATHLEEN S. PHANG, FLORIDA CIVIL TRIAL PREPARATION (2020); PA. BAR INST., TRYING A PERSONAL INJURY CASE FROM START TO FINISH (2018); Eric N. Schloss, *Preparation and Trial of Tort Claims, in* PRACTICE MANUAL FOR THE MARYLAND LAWYER 11-1 (5th ed. 2019); David Chamberlain et al., *Preparing Witnesses for Trial*, 90 ADVOC. TEX. 33 (2020); G. Michael Gruber et al., *The Use of Trial Plans and Templates in Trial Preparation,* 82 ADVOC. TEX. 8 (2018); Tom Tinkham & Meghan DesLauriers, *So You Are Going to Trial: How to Prepare for the Case That Doesn't Settle*, 75 BENCH & BAR MINN. 22 (2018).

66. *See generally* Michael L. Seigel, *The Effective Use of War Stories in Teaching Evidence*, 50 ST. LOUIS U. L.J. 1191 (2006).

anecdotal trial literature ironically is simply too vast for a busy practicing attorney to read.[67] Second, to be worthy of emulation, the war story must "accurately recount what happened, even (especially) if it is not flattering to the reporter."[68] It can be difficult to verify the veracity of a trial war story independently. Third, although trials require authority and evidence, war stories rely on so-called "trial and error."[69]

There are at least four problems with such trial-and-error learning. The first problem is that trial and error is a wasteful and inefficient way to learn what works. As Chief Justice Warren Burger observed, trial lawyers who learn through trial and error on real cases do so "at the expense of their clients and as a burden on the courts."[70]

The second problem is that trial and error rewards survival and not necessarily best practice.[71] Survival does not ensure that an experienced lawyer is qualified to teach others.[72] As a result, "all manner of awkward, nonproductive, or sub-optimal practices are likely to remain in any lawyer's repertoire simply because they are not so counterproductive as to lead to catastrophe."[73]

The third problem concerns experience. War stories impart only what some lawyers have found to be effective, and still beg the question: how do they know? Just because someone has diligently done something for a long time does not mean that it is a best practice.[74]

Finally, because such hit-or-miss learning is unavoidably limited to the areas that happened to be at issue in a practitioner's cases and given the increasing scarcity of trials—and the accompanying narrowing of practitioner and mentor experience[75]—learning by doing alone cannot provide comprehensive guidance, especially for the novice lawyer, a team of lawyers, or their nonlegal support staff.[76]

67. *See* HENRY G. MILLER, ON TRIAL: LESSONS FROM A LIFETIME IN THE COURTROOM ix (2001). The New York State Bar Association ("NYSBA") called past NYSBA President Henry Miller a "'larger than life' trial lawyer." Christian Nolan, *Remembering Henry Miller, "Larger Than Life" Trial Lawyer & Past NYSBA President*, N.Y. STATE BAR ASS'N (Apr. 22, 2020), https://nysba.org/remembering-henry-miller-larger-than-life-trial-lawyer-past-nysba-president/.

68. Alvin I. Frederick, *Litigator or Trial Lawyer?*, 37 MD. BAR. J. 53, 56 (2004).

69. Michael J. Saks, *Turning Practice into Progress: Better Lawyering Through Experimentation*, 66 NOTRE DAME L. REV. 801, 803 (1991).

70. Burger, *supra* note 11, at 1, 6–7.

71. *See* Steven Lubet, *Lessons from Petticoat Lane*, 75 NEB. L. REV. 916, 917–18 (1996).

72. *See id.* at 919.

73. *Id.* at 918.

74. *See* Saks, *supra* note 69 at 802.

75. *See supra* Section I.A.

76. *See* JOINT COMM. ON CONTINUING LEGAL EDUC., ALI-ABA EDUCATION, CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCE AND RESPONSIBILITY 3–4 (1959).

The TrialPrepPro replaces ad hoc practices with a system. The Federal Rules of Civil Procedure are already by design systematic. They are transsubstantive—the same procedural rules apply to most federal civil lawsuits[77] regardless of "case-type" (i.e., the particular claims or defenses at issue) or "case-size" (i.e., the parties' size, savvy, sophistication, or resources).[78] They also create a generic, linear pretrial, trial, and post-trial sequence for every litigation.[79] A systematic approach therefore is particularly appropriate for preparing for trial. The TrialPrepPro thus relies on another battle-tested decision-making system for inspiration.

II. WHAT WORKS FOR PREPARING FOR COMBAT CAN WORK FOR PREPARING FOR TRIAL

The standardized Troop Leading Procedures ("TLP"), employed by Captain Doyle before the Battle for Haditha Dam,[80] were not only comprehensive but also shared by his subordinate platoon leaders, his superiors, and—because of allied forces standardization agreements—even coalition military leaders.[81] In short, the TLP ensured that everyone involved in the complex operation were on the same page.

When TrialPrepPro steps were inspired by the TLP or other military doctrine, this Article has relegated such background discussion to the footnotes.[82] There are however three overarching reasons why the TLP are an appropriate model for the TrialPrepPro: (A) the TLP are a general, problem-solving framework with a proven track record; (B) when used appropriately, the TLP can combine the benefits of both rational and intuitive planning processes; and (C) the TLP are best understood as a continuous, iterative process.

A. The TLP Are Common-Sense, Problem-Solving Steps with a Proven

77. *See* FED. R. CIV. P. 81.

78. Stephen N. Subrin, *Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 378 (2010).

79. *See*, *e.g.*, J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS, & ETHICS 9–15 §1.04 (3d ed. 2002).

80. *See supra* notes 1821 and accompanying text.

81. *See* Christopher R. Paparone, *U.S. Army Decisionmaking: Past, Present and Future*, MIL. REV., July-Aug. 2001, at 46–47 (describing the implementation of the first allied joint planning Standardization Agreement (STANAG) 2118 in 1968 and eight more North American Treaty Organization (NATO) planning STANAGs in 1984).

82. *See id.*; *See infra* notes 83–102.

Track Record

Today, because the same standardized military decision-making process is taught in all U.S. military leadership schools, from college Reserve Officer Training Corps ("ROTC") military science classes[83] to tactical officer,[84] non-commissioned officer,[85] and strategic officer training,[86] General Doyle undoubtedly remains intimately familiar with the TLP.[87] Moreover, the TLP are a proven model used by most foreign militaries.[88] Perhaps the reason why the TLP are so popular is because they ultimately are a generic problem-solving approach. In fact, when used at higher unit levels, the TLP are simply called the Military

83. *See*, *e.g.*, U.S. ARMY ROTC, TACTICAL LEADERSHIP: MILITARY SCIENCE & LEADERSHIP (MSL) 301, at 215–19 (2005) [hereinafter TACTICAL LEADERSHIP]. The Army ROTC college course is the main source for U.S. Army commissioned officers. U.S. Army Training & Doctrine Command (TRADOC), *Army Officer Commissioning*, STAND-TO! (May 10, 2019), https://www.army.mil/standto/archive_2019-05-10/#:~:text=United%20States%20Military%20Academy%20(USMA,on%20foreign%20engineers%20and%20artillerists.

84. *See* U.S. Army Fort Benning and The Maneuver Ctr. of Excellence, *The Infantry Officer Basic Leader Course*, https://www.benning.army.mil/Infantry/199th/IBOLC/content/pdf/IBOLC%20Course%20Curriculum.pdf?19NOV2019 (last visited Mar. 6, 2021) (listing "Basic Troop Leading Procedures" and "Advanced Troop Leading Procedures" training for U.S. Army infantry second lieutenants).

85. *See* NCO LEADERSHIP CTR. EXCELLENCE, BASIC LEADER COURSE (600-C44) COURSE MANAGEMENT PLAN (CMP) 37 (2019), https://home.army.mil/bragg/application/files/9315/5475/8191/BLC_CMP_March_2019.pd.pdf) (listing "Apply troop leading procedures (TLP)" under Course Learning Objectives).

86. *See* U.S. DEP'T OF ARMY, CONDUCT TROOP LEADING PROCEDURES 150-LDR-5012, at 2 (Apr. 2, 2020) https://rdl.train.army.mil/catalog-ws/view/100.ATSC/B2CD5B93-A4F0-40F3-82E3-AAA34EA2ECAD-1395943497063/report.pdf; KENNETH L. EVANS ET AL., U.S. ARMY RSCH. INSTITUTE FOR THE BEHAV. & SOC. SCIS., RES. REPORT 1852: IMPROVING TROOP LEADING PROCEDURES AT THE JOINT READINESS TRAINING CENTER 1 (2006) (stating that "TLPs are taught in the Army's institutional leader development and training programs").

87. In the U.S. Army, while the TLP are intended for Army units company-sized or smaller, the Military Decision-Making Process ("MDMP") is intended for Army units battalion-size or larger that have a dedicated planning staff. *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL ("FM") 3-21.20, THE INFANTRY BATTALION para. 1–9 (Dec. 13, 2006) [hereinafter FM 3-21.20]. For simplicity, this Article shall use the term "TLP" to refer to both the Army's TLP and MDMP.

88. *See generally* Dudi (Yehuda) Alon, *Processes of Military Decision Making*, 5 MIL. & STRATEGIC AFFRS. 3, 3 (2013) ("This essay examines the prevalent theoretical approaches to decision making and surveys practical models appropriate to the military setting."). Given the joint and coalition nature of modern warfare, which necessitates the interoperability of military planning and operations across branch of service and national boundaries, it is unsurprising that U.S. and allied militaries utilize similar versions of the TLP. In a survey of contemporary military decision-making models, the former head of the joint doctrine branch in the Israeli Defense Force Doctrine and Training Division labeled the TLP as "the standard military model presented to all ranks in the familiar literature." *Id.* at 9, 19 n.11 (citing U.S. DEP'T OF ARMY, FM 101-5 Ch. V; JP 5.0 Ch. IV).

Decision-Making Process ("MDMP").[89] As Colonel Malone observed, the TLP are ultimately common-sense steps for good decision-making in any context:

> [The TLP] is a *basic* in the business of knowing what to do and getting it done. . . .
>
> This process will work *all* the time—on the battlefield taking an objective or down in the Motor Pool getting ready for a big inspection. In peacetime, you might have to change a few words here and there. But this is the basic process by which the leadership of the unit gets the *right* things done. Big things, and little things.[90]

89. *See* FM 3-21.20, *supra* note 87, at 2-11 to 2-12 (emphasis added).

90. MALONE, *supra* note 2, at 43–45. The U.S. Army Center for Army Lessons Learned ("CALL") and the U.S. Army Research Institute for the Behavioral and Social Sciences have long established that "[h]istorically, a unit's success is directly related to [its] ability . . . to execute the military decisionmaking process." CTR. FOR ARMY LESSONS LEARNED, HANDBOOK NO. 15-06, MILITARY DECISIONMAKING PROCESS (MDMP) iii (Mar. 2015); *see also* RICHARD L. WAMPLER, ET AL., ARMY RSCH. INST., THE MILITARY DECISION-MAKING PROCESS (MDMP): A PROTOTYPE TRAINING PRODUCT 1 (Jan. 1998).

The U.S. Army's Troop-Leading Procedures ("TLP") are: (1) receive the mission; (2) issue warning order; (3) make a tentative plan; (4) initiate movement; (5) conduct reconnaissance; (6) complete the plan; (7) issue the operations order; and (8) supervise and refine. *See Ranger Handbook*, *supra* note 20, at 2-1 tbl.2-1. Each major TLP step has associated subordinate steps. *See id.*

Colonel Malone plainly summarized the TLP as: (1) "Get the orders for what the unit is going to do;" (2) "Alert subordinates so they can start getting ready;" (3) "Figure out a general, 'ballpark' plan;" (4) "Start troops moving toward where the action will be;" (5) "Make an on-the-ground study of where the action will take place;" (6) "Adjust the 'ballpark' plan and fill in the details;" (7) "Communicate the plan to subordinates and check for understanding;" and (8) "Keep checking on how the action is going, and keep making adjustments." MALONE, *supra* note 2, at 44.

For example, TLP Step 3 is also known as the Estimate of the Situation. The Estimate basically covers the brainstorming process between the receipt of a mission from higher command and the formulation and issuance of a combat order implementing the perceived best course of action to accomplish the mission. *See* JOHN SUTHERLAND, THE BATTLE BOOK 53 (1998).

The U.S. military has employed the Estimate of the Situation since at least 1779. *See* JAMES D. HITTLE, THE MILITARY STAFF 178–79 (Stackpole Co. 3d. ed. 1961). The common-sense Estimate is composed of five steps: (1) detailed mission analysis; (2) estimate of the situation and develop courses of action; (3) analyze the courses of action; (4) compare courses of action; and (5) decide. SUTHERLAND, *supra* note 90, at 53–54. Malone recognized that the Estimate was another "basic" tool that "will work in war and peace." MALONE, *supra* note 2, at 45.

All U.S. and allied militaries tend to summarize the TLP's most important steps in a single reference flowchart diagram. *See* U.S DEP'T. OF ARMY, ARMY TACTICS, TECHNIQUES

B. When Used Appropriately, the TLP Can Combine the Benefits of "Slow" Analytical and "Fast" Intuitive Processes

Because of the TLP's formal, rational theoretical assumptions, it is often assumed that detailed systematic decision-making frameworks like the TLP overemphasize "slow-thinking" deliberation and neglect "fast-thinking" intuition.[91] With practice, however, leaders can internalize

& PROCEDURES ("ATTP") 3-21.8, INFANTRY PLATOON AND SQUAD, at A-4 fig. A-2 (Apr. 12, 2016) [hereinafter ATTP 3-21.8]; U.S. MARINE CORPS ("USMC"), LEADER'S TACTICAL HANDBOOK ("LTH"), V. 2.04 76 (2011) [hereinafter LTH]. *See generally* MARTIN L. BINK ET AL., TRAINING AIDS FOR BASIC COMBAT SKILLS: A PROCEDURE FOR TRAINING-AID DEVELOPMENT, ARI: RSCH. REP. 1939, at 5 (2011) (discussing the development of graphic training aids).

Although other U.S. services and allied militaries may give it a different name or state the steps differently, the essence of their respective military decision-making processes is identical to the TLP. *See*, *e.g.*, DAVID J. BRYANT, DEFENSE R&D CAN., CONCEPTS FOR INTUITIVE AND ABBREVIATED PLANNING PROCEDURES 1–3 (2005) (stating that the Canadian Operations Planning Process ("OPP") model is similar to the MDMP and calling the MDMP the "most prominent analytic planning model"); Derek Condon, *Learning from the Past and Preparing for the Future: How could the Military Improve Decision-Making?* 10–12 (Mar. 2, 2015) (summarizing U.K. model); Adel Guitouni, et al., *An Essay to Characterise the Models of the Military Decision-Making Process*, DE VERE U. ARMS 10–12, 16–17 (2008) (calling the MDMP the "Classic Military Decision-making Model"); Eri Radityawara Hidayat et al., *Military Decision-Making for Field Commanders: The Indonesian National Army's Experience*, *in* DECISION-MAKING: INTERNATIONAL PERSPECTIVES 45 (Peter Greener, ed., 2009) (stating that the Indonesian army and other foreign armies have adopted the MDMP); Ibanga B. Ikpe, *Reasoning and the Military Decision Making Process*, 2 J. COGNITION & NEUROETHICS 144, 149–50 (2014) (stating that many militaries around the world employ the MDMP); INT'L COMM. OF THE RED CROSS, DECISION-MAKING PROCESS IN MILITARY COMBAT OPERATIONS 7 (2013) (using a framework very similar to the TLP and calling them "the classical military estimate or appreciation process as taught, trained, and applied in the majority of armed forces around the world"); FRED W. NICKOLS, STRATEGIC DECISION MAKING: COMMITMENT TO ACTION 3 (2016) (calling the MDMP the "Classic Decision Making Process" and stating that it is "[w]idely known"). The USMC, for example, calls the TLP the Planning Process or the Troop Leading Steps. *See Applying the Troop Leading Steps, in* MARINE CORPS INSTITUTE, LEADING MARINES (MCI 0037), at 3-11 to 3-21 (2007).

91. *See*, *e.g.*, Dudi (Yeshida) Alon, *supra* note 88, at 3 (collecting criticism of rational-philosophical models like the TLP and summarizing cognitive-psychological models). *See also* Gary A. Klein, *Strategies of Decision Making*, MIL. REV. 56, 56 (1989); Neil Shortland et al., *Military (In)Decision-Making Process: A Psychological Framework to Examine Decision Inertia in Military Operations*, 19 THEORETICAL ISSUES IN ERGONOMICS SCI. 752 (2018) (advocating the more intuitive SAFE-T model over the TLP and other rationalist models). *See generally* NATURALISTIC DECISION MAKING (Caroline E. Zsambok & Gary Klein eds., 1997).

Cognitive science recognizes two types of human information processing systems, "slow-thinking" deliberative and more "fast-thinking" intuitive. *See* PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT 21 (2010). Whereas an intuitive system quickly chooses a response to a judgment problem,

systematic decision-making frameworks like the TLP to where they are instinctual.[92] In that instance, the TLP can be used with "fast" intuition.

Even when used more analytically, the TLP still employ intuition. With the TLP, "[t]he two approaches to decision making are rarely mutually exclusive."[93] For example, a leader can make a quick, intuitive decision during combat informed by a situational understanding they acquired earlier through deliberation.[94] If time permits, a deliberate war game can test an initial intuitive decision.[95] When time is short, a leader can intuitively choose to shortcut TLP steps, like analyzing only one course of action.[96] Likewise, because the TLP can never have perfect

a deliberative system takes the time to compare multiple possible responses and to select the perceived highest quality option. *Id.* In real life, humans engage in both deliberative and intuitive decision making. *Id.* at 23–24 (collecting authorities); JENNIFER K. ROBBENNOLT ET AL., PSYCHOLOGY FOR LAWYERS 87–88 (2012).

92. As Colonel Malone observed, "If you're among the *best* small-unit leaders, . . . [the TLP process] is more than something you have merely learned. It is . . . an instinct. Automatic." MALONE, *supra* note 2, at 44 (emphasis in original)*; see also* U.S. DEP'T OF ARMY, INFANTRY SCHOOL MANUAL, RANGER DEP'T, DISMOUNTED PATROLLING 2-1 (1981) (stating that the TLP "should be an instinctive and automatic way of thinking for combat leaders"). The TLP "walks you through the best possible planning process—the one which is most likely to lead to your choosing the *right* things to do. When [it] is an instinct, the whole thing and all the parts may take only a few seconds." MALONE, *supra* note 2, at 45.

When well-rehearsed and internalized, the TLP thus can be used quickly and intuitively. As Malone concluded:

> All this might appear to be a time-consuming process. First time out, it is. But when all the levels of the leadership in the unit use the same process, and when they have run a hundred missions together, the 'vertical teamwork' . . . begins to develop. Procedures that had to be thought through and worked out before now become SOP [standing operating procedure]. Automatic. And what is written down in the notebooks and on the wallet cards of the leadership begins to become instinct.

MALONE, *supra* note 2, at 46. Major John Sutherland concurred:

> Planning and preparation often win the day, or lose it. To do this right is a duty. To do it wrong is a crime. The leader must understand the estimate. . . . Once you have internalized the estimate, you can edit it and tailor it to meet your needs, the needs of your unit, and the overall situation. Understanding allows the leader to cut and refine to meet his needs. . . .
>
> [Although the estimate] is a drawn-out step[,] . . . the seasoned company commander does it intuitively through his internalization of the process. Once he masters the process and runs through it a few times, it becomes second nature. He might even cut a few steps under a time crunch, but, he'll know why he is doing what he is doing and he'll be able to compensate for the short cuts.

SUTHERLAND, *supra* note 90, at 2–3, 59.

93. ARMY ROTC, ADAPTIVE LEADERSHIP: MILITARY SCIENCE & LEADERSHIP (MSL) IV, at 345 (2008).

94. *See id.*

95. *See id.*

96. *See id.*

information, a leader can use intuition to recognize the limits of the analysis and to fill the remaining gaps.[97]

Whether to be more deliberative or intuitive depends primarily on the leader's experience and the availability of time and information.[98] A more deliberative approach is best when there is more time, more information, or a less experienced leader.[99] In contrast, a more intuitive approach is best when there is less time, less information, or a more experienced leader.[100]

C. The TLP Are Best Understood as a Continuous, Iterative Process

Perhaps the TLP's biggest benefit for trial preparation is that they ensure efficient coordination. Instead of focusing on the TLP's ends—their product, the plan or combat order—leaders should focus on the TLP's means, the efficient coordination that results from their rigorous, comprehensive analysis. As General George S. Patton said, "A good plan violently executed now is better than a perfect plan next week."[101] Lieutenant Colonel Raymond Millen elaborated, "an adequate, tentative plan . . . the 80 percent solution" timely disseminated and coordinated is superior to the so-called "perfect plan" issued too late and poorly disseminated and coordinated.[102]

Because combat leaders—and litigators—will always lack sufficient information and because the information they do have is constantly open to change,[103] the TLP's plans should be viewed iteratively and as less important than the underlying process to create them. While a rigorous TLP process should result in the best possible course of action at that particular time given the available information, the TLP should be an ongoing process, constantly updating the tentative plan in response to new changes.

An analogy to the writing and editing process may be instructive. Focusing upon the quality of the overall TLP process instead of its

97. *See id.*
98. *See id.*
99. *See id.*
100. *See id.*
101. Klein, *supra* note 91, at 61 (citation omitted in original) (quoting Patton).
102. *See* RAYMOND A. MILLEN, COMMAND LEGACY: A TACTICAL PRIMER FOR JUNIOR LEADERS 35 (2d ed. 2008). *Accord* SUTHERLAND, *supra* note 90, at 51 ("The 80% solution given in a timely manner is far superior to the 100% solution given an hour before the operation commences.").
103. *See* Mike Pietrucha, *Living with Fog and Friction: The Fallacy of Information Superiority*, WAR ON THE ROCKS (Jan. 7, 2016), https://warontherocks.com/2016/01/living-with-fog-and-friction-the-fallacy-of-information-superiority/.

individual tentative plans is akin to focusing on the quality of the overall writing and editing process instead of its individual drafts. The adage that there is no good writing, only good rewriting—popularly attributed to a number of authors[104]—applies equally to planning. There are no perfect plans, only imperfect tentative plans that are constantly being revised in response to the changing situation.

The ideal TLP constantly generate the best possible tentative plan at the time, understanding that by the time the plan is done it probably is outdated. The iterative TLP process of constantly making and revising tentative plans is what leads to successful mission accomplishment.

The TLP are akin to an airplane with a clear destination that takes off and lands at the planned destination on time while being off course 90 percent of the time.[105] An imperfect tentative plan still provides a team with a common shared reference point from which it is much easier and quicker to adapt or improvise than reinventing the plan from scratch. The eight-step TLP served as the inspiration for the eight-step TrialPrepPro.[106]

III. THE EIGHT-STEP TRIALPREPPRO

In this Section, we explain the TrialPrepPro's eight steps: (A) Begin the Representation; (B) Roles and Responsibilities; (C) Initiate Necessary Advanced Notice or Process; (D) Plan; (E) Coordination; (F) Trial Outline; (G) Trial Notebook; and (H) Review, Rehearse, and Refine.

104. This quote has been attributed, among others, to Justice Louis Brandeis and Robert Graves. *See* Douglas E. Abrams, *Judges and Their Editors*, 3 ALB. GOV. L. REV. 393, 396 n.12 (2010); Joe Fassler, *There's No Such Thing as Good Writing: Craig Nova's Radical Revising Process*, ATL. (June 11, 2013), https://www.theatlantic.com/entertainment/archive/2013/06/theres-no-such-thing-as-good-writing-craig-novas-radical-revising-process/276754/.

105. *See* STEPHEN R. COVEY, HOW TO DEVELOP YOUR PERSONAL MISSION STATEMENT 7 (2013) (ebook).

106. Given the ubiquity of the military decision-making process, any veteran lawyer, paralegal, or other litigation support staff previously trained in it probably would see the utility of having a similar process to prepare for trial. In fact, an experienced attorney who happens to be a veteran would be an ideal person to tailor the TrialPrepPro to a particular law office and to explain the TrialPrepPro to their fellow lawyers, paralegals, and support staff.

Based on 2017 and 2018 data, only 1.75 percent of lawyers represented in the National Association of Law Placement ("NALP") Directory of Legal Employers reported they were military veterans. Both Class of 2017 and Class of 2018 veteran law graduates were much more likely to be employed by government than the private sector. *See* NALP Bulletin, *Two Perspectives on Military Veterans*, NALP (Feb. 2020), https://www.nalp.org/0220research.

The U.S. military fastidiously employs acronym mnemonics to help recall almost anything, including the TLP.[107] Although litigators are undoubtedly familiar with acronym mnemonics,[108] such mnemonics work for some and not for others.[109]

To facilitate memory retention of these eight **"*BRIPCONR*"** steps, a law office can use the mnemonic **"*Bye! Rest In Peace, CONoR!*"**—patterned after the 1984 *Terminator* movie directed by James Cameron[110]—or create its own mnemonic. If you do not find this mnemonic particularly helpful, then you can simply use the eight numbered steps for reference.[111]

A. Step 1: Begin the Representation

Of the TrialPrepPro's eight steps, the first Step—beginning the representation—might be the most familiar to law offices.[112] The

107. *See* Mark Solseth et al., *A CRISIS Exists: An Easy Mnemonic to Remember the Sustainment Principles*, U.S. ARMY (Apr. 23, 2018), https://www.army.mil/article/200199/a_crisis_exists_an_easy_mnemonic_to_remember_the_sustainment_principles (listing examples of the "many useful mnemonics used by the Army"). For example, the USMC employs the rather cryptic acronym "BAMCIS" for the TLP's steps. *See* LTH, *supra* note 90, at 76.

108. To U.S. trial attorneys, one of the most familiar evidence law mnemonics may be the acronym "MIMIC" for the appropriate non-propensity reasons to introduce a defendant's prior crimes during direct examination under FED. R. EVID. 404(b), to show the defendant's M-Motive, I-Intent, M-lack of Mistake, I-Identity, and C-Common plan or scheme. *See*, *e.g.*, *MIMIC Rule*, CORNELL L. SCH: LEGAL INFO. INST., https://www.law.cornell.edu/wex/mimic_rule (last visited Mar. 6, 2021).

109. *See* Kamil Jurowski et al., *Comprehensive Review of Mnemonic Devices and Their Applications: State of the Art,* 9 INT'L E-J. SCI., MED., & EDUC. 4, 6, tbl.II (Nov. 2015) (listing the advantages and disadvantages of mnemonic strategies).

110. In the first *Terminator* movie, the Terminator, memorably played by Arnold Schwarzenegger, hunted Sarah Connor, played by Linda Hamilton. *See* TERMINATOR (Paramount Pictures 1984). In the sequel movie, *Terminator 2: Judgment Day*, the Terminator's memorable catch-phrase is "Hasta la vista, baby!" *See* TERMINATOR 2: JUDGMENT DAY (Paramount Pictures 1991). "Hasta la vista" is Spanish for "goodbye." *See Hasta la vista*, *DICTIONARY.CAMBRIDGE.ORG*, https://dictionary.cambridge.org/dictionary/spanish-english/hasta-la-vista (last visited Mar. 6, 2021). In 2008, the U.S. Library of Congress selected the *Terminator* for inclusion in its National Film Registry as being "[c]ulturally, historically, or aesthetically significant." *See Complete National Film Registry Listing*, LIBR. OF CONGRESS, https://www.loc.gov/programs/national-film-preservation-board/film-registry/complete-national-film-registry-listing/ (last visited Mar. 6, 2021).

111. If the entire USMC can find "BAMCIS" helpful, then at least some lawyers might find "BRIPCONR" or "Bye! Rest In Peace, CONoR!" helpful. *See supra* note 107 for the previous discussion of BAMCIS.

112. While this step is analogous to TLP Step 1, "Receive the Mission," there otherwise is little overlap between the TLP Step 1 and the TrialPrepPro Step 1. *See* SUTHERLAND, *supra* note 90, at 53–54.

TrialPrepPro merely highlights the four most essential first tasks like signing a client retainer agreement,[113] obtaining necessary client privacy waivers—to access discovery, getting a handoff from previous counsel,[114] initiating a litigation hold[115] if necessary, and completing the initial client interview.[116]

Once this Step is complete, the First Chair has no more than *one day* to complete Step 3—initiate necessary advanced notice or process.[117] The purpose of this deadline is to ensure that information is timely passed along to the rest of the trial team. No one should sit on information valuable to the rest of the team. Because all of the TrialPrepPro steps are iterative, if Step 1 is taking longer than expected, the First Chair can complete Step 3 with the information they have at present and supplement later.

113. Every law office is familiar with retainer agreements (or other client representation agreements) and there already exists ample published guidance about them. *See*, *e.g.*, ALAN S. GUTTERMAN, *Attorney/Client Fee Agreement with Retainer*, *in* BUS. TRANSACTIONS SOLS. § 3.82 (2020); Gerald Phillips, *How Clients Can Use ADR Practices to Reduce Litigation Costs and Prevent Billing Abuses*, 30 ALTS. TO HIGH COST LITIG. 193 (2012); 1 ROBERT L. ROSSI, *Types of Retainers*, *in* ATTORNEYS' FEES § 1.2 (3d ed. 2020); Lori A. Colbert, *Creating the (Almost) Perfect Retainer Agreement (with Form)*, 54 PRACT. LAW. 25 (2008); *see also* MODEL RULES OF PRO. CONDUCT r. 1.5(b) (AM. BAR ASS'N 2009).

114. Every law office is already familiar with handoff from former counsel and there is ample published guidance. *See* 20 G. RONALD DARLINGTON ET AL., *Entry of Appearance—By New Counsel*, *in* WEST'S PA. PRAC., APP. PRAC. § 120:2 (2019); Mark Bassingthwaighte, *Managing File Handoffs*, 45 WYO. L. 24 (2018).

115. A "litigation hold" is a written notice to a client to take reasonable steps to avoid spoliation of evidence (including electronic evidence) once litigation is reasonably anticipated. *See* JAY E. GRENIG ET AL., ELECTRONIC DISCOVERY AND RECORDS AND INFORMATION MANAGEMENT GUIDE § 10:1 (2019) (citing Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311 (Fed. Cir. 2011)); *see also* Zubulake v. UBS Warburg LLC, (*Zubulake I*), 217 F.R.D. 309 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC, (*Zubulake* IV), 220 F.R.D. 212, 218 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC, (*Zubulake* V), 229 F.R.D. 422, 432 (S.D.N.Y. 2004). Because there is ample published litigation hold guidance, we do not examine this task further. *See*, *e.g.*, Nathan M. Crystal, *Ethical Responsibility and Legal Liability of Lawyers for Failure to Institute or Monitor Litigation Holds*, 43 AKRON L. REV. 715 (2010); Jason A. Pill & Derek E. Larsen-Chaney, *Litigating Litigation Holds: A Survey of Common Law Preservation Duty Triggers*, 17 J. TECH. L. & POL'Y 193 (2012).

116. As there is ample published guidance on client interviewing, we do not discuss this task further. *See, e.g.*, DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS (4th ed. 2019); Nancy M. Furey, *Legal Interviewing and Counseling Bibliography*, 18 CREIGHTON L. REV. 1503 (1985); 1 LAWRENCE V. HASTINGS, *Interviewing the Client*, *in* AM. JURIS TRIALS 1 (2020); J.P. Ogilvy, *Section Three: Synopses of Articles, Essays, Books, and Book Chapters*, 12 CLINICAL L. REV. 101 (2005) (interviewing and counseling entries).

117. This requirement is analogous to the TLP requirement of issuing the first warning order within 30 minutes after receiving the mission. *See* MILLEN, *supra* note 102, at 35.

B. Step 2: Roles and Responsibilities[118]

The First Chair is ultimately responsible for everything the trial team does or fails to do. The buck stops there. The First Chair must ensure that everyone on the trial team is crystal clear *in writing* about their team duties and expectations to guarantee accountability for everything that needs to be done. Once the First Chair has finished the initial counseling of the trial team member on their roles and responsibilities, both the First Chair and the subordinate should *sign* the shared document. Lawyers already know that having a signed written document simplifies accountability later. The Appendix contains Model Trial Team Roles and Responsibilities.[119]

Ideally, this Step would already be Section of the law office's hiring or professional development. Because the best teams obviously have worked together before,[120] if everyone on the trial team has already acknowledged their roles and responsibilities in writing—and the particular representation does not require any changes—then the trial team can skip this Step. This Step, however, remains here in case someone on the trial team has never worked with the other team members before.

To ensure proper accountability, this Step must be taken seriously and should never become a paper drill. For that reason, no matter how busy they are, the First Chair must always prioritize counseling a new trial team member one-on-one and in writing as soon as possible. Furthermore, the First Chair must ensure two realities.

118. There is no equivalent TLP step because written counseling on roles and responsibilities is something the U.S. military already does routinely. *See, e.g.*, U.S. DEP'T OF ARMY, ARMY TRAINING PUBLICATION ("ATP") 6-22.1, THE COUNSELING PROCESS 2-4 to 2-10 (2014) [hereinafter THE COUNSELING PROCESS]. So, this is really an implied step that should already be complete *before* the TLP, before the receipt of any mission. The U.S. military mandates at least annual written performance counseling between superiors and subordinates. *See generally*, *Evaluation Systems Homepage*, U.S. ARMY HUM. RES. COMMAND, https://www.hrc.army.mil/content/Evaluation%20Systems%20Homepage (last visited Mar. 6, 2021). In addition, the U.S. military employs standardized written duty descriptions for jobs. *See generally* U.S. DEP'T OF ARMY, AR 611-1, MILITARY OCCUPATIONAL CLASSIFICATION STRUCTURE DEVELOPMENT AND IMPLEMENTATION (2019).

119. *See infra* Appendix. Although the Model Trial Team Roles and Responsibilities assume one person per role, one person can of course occupy multiple roles. Differentiating between the different roles and responsibilities is arguably even more important for someone with multiple roles. Solo or small firm practitioners thus can still benefit from written roles and responsibilities.

120. *See, e.g.*, Roberta Kwok, *For Teams, What Matters More: Raw Talent or a History of Success Together?*, KELLOGGINSIGHT (June 3, 2019), https://insight.kellogg.northwestern.edu/article/talent-versus-teamwork-for-successful-teams.

First, that the written roles and responsibilities accurately reflect ground reality. If either the First Chair or the subordinate believes that the subordinate's job or expectations are changing, then they should immediately revise the written roles and responsibilities to reflect the change accurately, quickly meet face-to-face about the change, and sign the updated writing. Although not ideal, in a pinch, an email and an acknowledged reply can suffice until the two have time later to meet.

Second, the First Chair must respond immediately and appropriately the first time any trial team member violates or ignores a written role or responsibility.[121] In that instance, the First Chair should take that person aside, respectfully point out the oversight, and make sure it does not happen again. If it does, the First Chair must repeat the same process. While situation dependent, having a paper trail here would be prudent. Much like the beginning of a hostile witness cross examination,[122] the way the First Chair handles a trial team member's initial insubordination, whether intentional or not, will set the tone for the rest of the litigation.

C. Step 3: Initiate Necessary Advanced Notice or Process

Avoid siloed information and start any necessary time-consuming process as soon as possible.[123] As Senior Paralegal Millie Dyson astutely observed, failure to give subordinates proper notice or sufficient time to

121. Senior Paralegal Millie Dyson also wisely recognized that too many lawyers have "no strategy for dealing with poorly performing staff." Jessika M. Ferm et al., *Common Complaints: A Paralegal's Perspective on Three Top Management Pains*, 36 L. PRAC. 39, 40 (2010). In the authors' experience, failure to address poor staff performance is:

> a prevalent pattern in many firms. Lawyers can be great at negotiating complex deals and destroying opponents in court but, ironically, they avoid conflict when it comes to dealing with underperforming or nonperforming staff persons within their own firms out of a fear of being perceived as mean . . . . When firms have, and use, effective performance management systems, taking tough measures with nonperformers, people with poor attitudes and toxic individuals is simply a matter of process.

Id.

122. For a discussion of how to handle the beginning of a hostile witness cross examination, see for example, U.S. DEP'T OF TRANSP., NAT. TRAFFIC L. CTR., CROSS-EXAMINATION FOR PROSECUTORS 18–19 (2012), https://ndaa.org/wp-content/uploads/Cross-Exam_for_Prosecutors_Mongraph.pdf.

123. This step takes the general motivation behind TLP Steps 2 (Issue a Warning Order), 4 (Initiate Movement), and 5 (Conduct Reconnaissance) and expands it to be a broader, continuous inquiry throughout trial preparation. *See Ranger Handbook*, *supra* note 20 at 2-1 tbl.2-1.

do their jobs is not only totally avoidable—and thereby inexcusable—but also perhaps the quickest way to demoralize and alienate your team.[124]

This continuous Step seeks to avoid missing deadlines and to provide all trial team members with the maximum time and opportunity to do their jobs. Throughout the entire litigation, the trial team must constantly ask, "To *whom* do I need to give a heads-up?" or "What do I need to do *now* to make the team's life easier later?"

This Step also should be dynamically synchronized with Step 5 (Coordination). A natural starting point for this continuous Step is your Time Analysis in Step 4 (Plan). Starting with the dispositive, evidentiary, and internal deadlines you identify in your Time Analysis,[125] constantly ask, given that particular deadline, *who* do I need to notify *now* or what *process* do I need to begin *now*?

In the authors' experience, this Step and Step 5 are the most commonly neglected. *You can never give too much prior notice and you can never coordinate enough.*

D. Step 4: Plan

More than any other TrialPrepPro Step, this Step reflects the TLP's analytical approach. It essentially adopts the time-honored ***Estimate of the Situation*** to trial preparation and negotiation.[126] To reiterate, the

124. As Ms. Dyson explained:

> I get that crises happen. I'm okay with going all out in an emergency. But when I lose a weekend because some attorney gave the client the "drop deadline" instead of adding a day or two for my work, it makes me want to quit. When it happens every single weekend, it makes me want to hurt somebody.

Ferm et al., *supra* note 121, at 39, 41.

125. *See infra* Section III.D.2.

126. For further discussion, *see supra* note 90. The U.S. military has employed some form of standard decision-making process since its inception. The first documented use of the U.S. Army process of "estimating the situation" was during the Revolutionary War, when Prussian Major General Friedrich Wilhelm von Steuben, the only trained staff officer working for General George Washington, produced an "estimation of the situation" concerning next steps after the American capture of Stony Point, New York, on July 16, 1779. HITTLE, *supra* note 90, at 177–79.

As a Prussian officer serving in the new American Army, von Steuben had been trained in the Estimate and other staff functions by Frederick the Great. *Id.* at 178. The Estimate process reflected the Prussian Army's belief in a documented, systematic, and logical approach to solving military problems. REX R. MICHEL, U.S. ARMY RSCH. INST., ARI RESEARCH REPORT 1577, HISTORICAL DEVELOPMENT OF THE ESTIMATE OF THE SITUATION 3 (1990) (citing U.S. NAVAL WAR COLLEGE, SERIAL NO. 7: SOUND MILITARY DECISION INCLUDING THE ESTIMATE OF THE SITUATION AND THE FORMULATION OF DIRECTIVES (1936)).

The Estimate has remained remarkably consistent from 1909 to the present day. *See id.* It is called the Estimate of the Situation because after studying the mission and situation,

point of planning is not to predict the future accurately—which would be a futile impossibility. The point of planning is to go through the rigorous, comprehensive *process* to ensure that the entire trial team has war-gamed every possible contingency and is on the same page.

Although you should always strive to output the best possible prediction given your current information into the TrialPrepPro, you also must accept that because your current information is probably no longer accurate, your good faith prediction is probably wrong as well.

Everything in the TrialPrepPro is simply a means to the end of obtaining the best possible client outcome. Nothing in the TrialPrepPro should be done for its own sake. If anything in the TrialPrepPro truly appears unnecessary for, or irrelevant to, obtaining the best possible client outcome, then ignore it. The TrialPrepPro should always save you time, not waste it.

While planning is situation-dependent, the First Chair at a minimum should conduct six analyses of ideally at least two different approaches to every claim or defense:[127] (1) ***Mission Analysis***; (2) ***Time Analysis;*** (3) ***Adversary Analysis;*** (4) ***Friendly/Other Party Analysis;*** (5) ***Negotiation Interest and Risk Assessment;*** and (6) ***Psychological Traps***. These six sub-steps form the acronym ***"MTA-FNP"*** (with the mnemonic "***My Toys Always Find New Players***"). The planning

staff officers working for the unit commander estimate the enemy and friendly pros and cons, develop courses of action, wargame each course of action, and assist the commander in choosing the best course of action. *Id.* at 3–4. Only after completing this Estimate process would the commander, with their staff assistance, formulate the actual combat order. *See* HITTLE*, supra* note 90, at 199.

To the present day, the Estimate remains a key component of military decision-making. *See*, *e.g.*, UNITED KINGDOM ARMY, ARMY DOCTRINE PUBLICATION: OPERATIONS ¶ 0633 at 6-15 to 6-16 (2010) (calling all standardized decision-making an "estimate"); *see also* Milan Vego, *The Bureaucratization of the U.S. Military Decisionmaking Process,* 88 JOINT FORCES Q. 34, 35 tbl.1, 36 tbl.2 (2018) (comparing the current Estimate of the Situation steps for the U.S. Army, USMC, U.S. Navy, U.S. Air Force, U.S. Joint Doctrine, and German Wehrmacht). Some foreign militaries like that of the United Kingdom call their version of the TLP the Combat Estimate. *See* UNITED KINGDOM ARMY, *supra*, ¶ 0635 at 6–16 (2010).

Today, the Estimate essentially codifies common-sense rational course of action development. *Accord* Alon, *supra* note 88, at 3, 5–6. As a 1914 book observed,

> The "estimate of the situation" is a logical process of thought, terminating in a tactical "decision." Such a process will be no innovation in the brain of any thinking man, since it is characteristic not only of tactics, but of all other serious affairs of life. It involves a careful consideration and analysis of all the evidence bearing upon the situation.

P.S. BOND ET AL., TECHNIQUE OF MODERN TACTICS 20 (1914).

127. *Accord* SUTHERLAND, *supra* note 90, at 47.

products of these analyses will later be plugged into the ***Trial Outline*** during Step 6.[128]

The First Chair can delegate portions of this planning process to other trial team members. Because the TrialPrepPro is intended to be used iteratively from the pre-filing investigation stage[129] through post-trial, it is a best practice to wargame at least two different courses of action to every claim and defense, especially at the beginning of the litigation when facts and evidence usually remain unknown. Although wargaming more than one course of action is very time consuming,[130] having more than one course of action, at least until the facts and evidence become clearer, avoids confirmation bias and anchoring.[131] The First Chair might want to be responsible for developing the most promising course of action and delegate brainstorming less likely courses of action to another trial team member such as the Second Chair.[132]

We examine each analysis in turn.

1. Mission Analysis

The Mission Analysis further breaks down into five minimum steps that form the acronym "***MITRD***" (with the mnemonic *"**My Iguana Tried to Run Down**"*): (a) Mission Statement; (b) Intent; (b) Task Analysis; (c) Restraint/Constraint Analysis; and (d) Decisive Point/Effect.

a. Mission Statement[133]

The Mission Statement (or simply "Mission") answers the 5Ws—who, what (task), where (location), when (time), and why (purpose).[134] For our occasion, the most important Ws are the what and the why, also known as ***task + purpose***.[135] The Mission tasks are usually proving or

128. For further discussion, *see infra* Figure 2.

129. For an example of the TrialPrepPro's usage during the pre-filing investigative stage, see *infra* Section IV.B.

130. *See* NEIL A. GARRA, WARGAMING: A SYSTEMATIC APPROACH 35 (2004).

131. For definitions of confirmation bias and anchoring, see *infra* Section III.D.6.

132. The Model Trial Team Roles and Responsibilities assigns brainstorming less promising courses of action to the Second Chair. *See infra* Appendix, Section B.3.

133. For a sample Mission Statement, see *infra* Section IV.B.4(a)i.

134. *See, e.g.*, TACTICAL LEADERSHIP, *supra* note 83, at 227. The mission contains the most important standardized collective task that the unit must accomplish. *See* U.S DEP'T OF ARMY, ADP 1-02, TERMS AND MILITARY SYMBOLS 9-1 (2019) (defining a *tactical mission task* as "a specific activity performed by a unit while executing a form of tactical operation or form of maneuver") (emphasis in original). The purpose simply explains why the unit must accomplish the mission task. TACTICAL LEADERSHIP, *supra* note 83, at 227.

135. TACTICAL LEADERSHIP, *supra* note 83, at 227.

disproving the key claims or defenses in the lawsuit.[136] If possible, the Mission would also employ standardized task terms and definitions.[137]

b. Intent

The ***Intent*** basically gives the why and big picture to enable the trial team to take the initiative to further the Intent without having to waste time to get permission or guidance. At a minimum, the Intent must contain (1) an expanded purpose; (2) key tasks; and (3) an end state.[138] The ***expanded purpose*** "does not restate the 'why' of the mission statement. Rather, it describes the broader purpose of the unit's operation in relationship to the higher commander's intent and concept of operations."[139] ***Key tasks*** are "those significant activities the force must perform as a whole to achieve the desired end state."[140] They are the essential subset of all the tasks you are expected to accomplish during the mission. "The ***end state*** is a set of desired future conditions" the decisionmaker "wants to exist when an operation ends" that describes "the desired conditions of the friendly force in relationship to the desired conditions of the enemy" and the surrounding circumstances.[141]

The three most typical Intents are: (i) the Client's Intent; (ii) the First Chair's Intent; and (iii) the Court's Intent.

i. The Client's Intent

First, every lawsuit or potential lawsuit should have a Client's Intent. Clearly protected by the attorney-client privilege,[142] the Client's

136. Such mission tasks are most likely contained in the pleadings. *See* FED. R. CIV. P. 8(a), (b).

137. Because causes of action and defenses are based upon published statutes and case law, see LINDA H. EDWARDS, LEGAL WRITING & ANALYSIS 3–4 (3d ed. 2011), standardized litigation task names and definitions (with associated conditions and standards) could be developed just like military collective tasks. Such a format would synthesize legal research—and past experience—in a more directly applicable, checklist format. *See* ATTP 3-21.8, *supra* note 90, at 2-31.

The U.S. military has published standardized lists of collective (unit) tasks and definitions. For example, the infantry collective task "Enter and Clear a Building" (of occupying enemy forces) is task number 07-3-9018. There are published task, conditions (prerequisites), and standards (a checklist of yes-or-no actions or results that the unit conducting the task must do or achieve to complete the task successfully). *Id.* at 2-31–2-38.

138. U.S. DEP'T OF ARMY, ADP 5-0, THE OPERATIONS PROCESS 3 (2012).

139. U.S. DEP'T OF ARMY, ADP 6-0, MISSION COMMAND: COMMAND AND CONTROL OF ARMY FORCES 1-10 (2019).

140. *Id.*

141. *Id.* (emphasis added).

142. *See* RESTATEMENT (THIRD) OF L. GOVERNING LAWS. § 68. (AM. L. INST. 2000).

Intent statement is an internal tool that need not be perfectly drafted. It can provide clear, transparent guidance of the client's wishes. To ensure that everyone on the trial team understands the Client's Intent, the First Chair should draft the first version after the initial client interview, share the draft with the client, and revise it in response to client feedback and subsequent events.

Depending on the depth and breadth of the client's intentions, the statement should only be as long enough as necessary to communicate adequately in writing the client's wishes. At a minimum, the Client's Intent should cover the main claims, remedies, expected defenses in the pleadings,[143] and the client's current best alternative to negotiated agreement ("BATNA")[144] and corresponding reservation value.[145]

ii. First Chair's Intent

Second, the First Chair's Intent is the most analogous to the military's Commander's Intent, defined as:

> a clear and concise expression of the purpose of the operation and the desired . . . end state that . . . helps subordinate and supporting commanders act to achieve the commander's desired results without further orders, even when the operation does not unfold as planned. . . . The higher commander's intent provides the basis for unity of effort throughout the larger force. Each commander's intent nests within the higher commander's intent.[146]

Although a higher commander usually gives subordinates a clear mission[147] stating the subordinate unit's primary collective task—what they are supposed to accomplish[148]—and purpose—in the specific operational context, why they need to do it—more than any other

143. *See generally* FED. R. CIV. P. 7(a).

144. *See generally* ROBERT H. MNOOKIN ET AL., BEYOND WINNING 19 (2000) (defining BATNA as "Best Alternative to a Negotiated Agreement—of all [of a party's] possible alternatives, this is the one that best serves [the party's] interests—[the one] that [the party's would] most likely take if no deal is reached").

145. *See generally id.* (defining "Reservation Value" as the "[t]ranslation of the BATNA into a value at the table—the amount at which [one is] indifferent between reaching a deal and walking away to [one's] BATNA").

146. U.S. DEP'T OF ARMY, ADP 6-0, MISSION COMMAND 1-10 (2012).

147. *See* SUTHERLAND, *supra* note 90, at 142.

148. *See supra* notes 134-137 and accompanying text.

guidance, the higher Commander's Intent provides the necessary parameters for subordinate initiative.[149]

Like the Client's Intent, the First Chair's Intent should cover the main claims, remedies, expected defenses in the pleadings,[150] and their current BATNA[151] and corresponding reservation value.[152] Unlike the Client's Intent, however, the First Chair's Intent might also incorporate more tactical "inside baseball" attorney work product considerations[153] like key evidentiary or proof requirements, or the First Chair's perceived strengths and weaknesses of each side's case. The First Chair's Intent provides subordinate trial team members with the most guidance.

If helpful, the First Chair can also provide narrower Intent statements to guide individual litigation stages or tasks. In that case, the First Chair's narrower Intent statements should nest with the First Chair's broader Intent statement for that particular litigation stage or the entire litigation.

iii. The Court's Intent

Third, once formal litigation proceedings have begun, a Court's Intent statement might be useful if the court has clearly articulated guiding principles—orally, through courtroom rules or judge's standing orders,[154] or in previous cases—for litigation stages like settlement, discovery, or trial.[155]

c. Task Analysis

The Task Analysis employs at least four subsidiary task analyses: (i) a specified and implied task analysis; (ii) a jurisdictional checklist; (iii) a proof checklist; and (iv) a remedies checklist.

149. SUTHERLAND, *supra* note 90, at 142.
150. *See generally* FED. R. CIV. P. 8(a).
151. *See generally* ROBERT H. MNOOKIN ET AL., *supra* note 137.
152. *See generally id.*
153. *See* FED. R. CIV. P. 26(b)(3).
154. *See generally* COMM. ON RULES OF PRAC. & PROC. JUD. CONF. U.S., REPORT AND RECOMMENDED GUIDELINES ON STANDING ORDERS IN DISTRICT AND BANKRUPTCY COURTS (2009), https://www.uscourts.gov/sites/default/files/standing_orders_dec_2009_0.pdf.
155. The same logic applies to other forms of dispute resolution like an Arbitrator's Intent for arbitration, a Mediator's Intent for mediation, an Administrator's Intent for administrative law, or a Legislator's Intent for legislation.

i. Specified and Implied Task Analysis

Using the Mission and Intent statements as guides, the First Chair should analyze the specified and implied tasks of the representation. There is, of course, no reason to reinvent the wheel. Once a trial team has brainstormed as comprehensively as possible the specified and implied tasks for a particular matter, that trial team—or broader law office—can either turn the list into a generic task checklist or maintain collections of actual task lists from past cases for reference categorized by type of claims and defenses.[156]

Specified tasks are clearly stated in written documents like emails from the First Chair, office policies and procedures, litigation handbooks, roles and responsibilities,[157] court rules, court orders, pleadings, motions, or briefs. Specified tasks do not require any deduction.[158] Anyone familiar with the law and the facts of the case could parse through the relevant documents to copy and paste a list of specified tasks from those documents. Because specified tasks have been explicitly assigned to your trial team, you have to get them done to accomplish the Mission and realize the Client's Intent.

While specified tasks are easy to identify, ***implied tasks*** are more difficult.[159] They require deduction.[160] You can extract implied tasks from a specified task by reading between the lines to determine what implied subtasks must first be done before the specified task can be completed.[161]

Another way of thinking about the difference between specified and implied tasks is David Allen's distinction between projects and next action steps in his popular Getting Things Done ("GTD") productivity system.[162] While Allen defines a project as "any outcome you'[ve] committed to achieving that will take more than one action step to complete,"[163] he defines a next action as "the next physical, visible

156. Such detailed tasks lists could be institutionalized in a law office's searchable Lessons Learned database. *See infra* Section III.H.4.

157. *See* SUTHERLAND, *supra* note 90, at 56; *see also infra* Appendix.

158. *See id.* (explaining specified and implied tasks).

159. *See id.*

160. *See id.*

161. *See id.*

162. *See* DAVID ALLEN, GETTING THINGS DONE 34 (2001).

163. *Id.* at 136. Allen claims to have formally trained over two million people on the productivity system named after his bestselling book (and often abbreviated "GTD"). *See Join the Global Productivity Movement*, GTD, https://gettingthingsdone.com/ (last visited Mar. 6, 2021). In 2015, *Forbes* magazine called *Getting Things Done* an "Entrepreneur's Bible." *See* Amy Guttman, *Why David Allen's 'Getting Things Done' Remains an Entrepreneur's Bible*, FORBES (Apr. 8, 2015, 12:57 PM), https://www.forbes.com/sites/

activity that needs to be engaged in, in order to move the current reality toward completion."[164] While a project might be a specific task, its next action step might be an implied task.

Why should a trial team brain dump specified and implied tasks? For two reasons. First, to ensure everything that has to be done has been properly delegated so someone on the trial team is clearly accountable for accomplishing every task. Second, to make sure that no ***critical task***—a task which if not accomplished successfully could jeopardize the entire Mission[165]—gets overlooked.

Although this process is quite tedious, better to do it at the beginning of the representation to ensure that everything that needs to get done gets done than to compromise your case by overlooking something important. If later in the representation new information might lead to additional specified and implied tasks, then the trial team of course should do another brain dump.

As David Allen observed, too often people—or trial teams—drop the ball because they only think of their to-do list at the specified task project level.[166] When they finally get to accomplishing their project to-do, only then do they realize, often too late, that there are implied task next action steps either time sensitive or reliant upon another third party.[167] The problem with implied tasks, however, is that any task can be broken down to absurd "next action" levels.

Accordingly, a trial team should brain dump specified and implied tasks only as much as necessary to ensure that no critical tasks—especially ones with deadlines or requiring third-party coordination—remain hidden without personal accountability for their completion.

The easiest way might be to delegate project-level specified tasks and implied tasks to individual trial team members to brainstorm by a deadline; the ***"project delegation task generation approach"***. For an example, see Figure 5.[168] No later than the deadline, the team member should share their brainstormed specified and implied tasks list with the rest of the team, highlighting any time sensitive or third-party coordination tasks that should be added to the ***Advanced Notice***

amyguttman/2015/04/08/why-david-allens-getting-things-done-remains-an-entrepreneurs-bible/#2b6b70393368.

164. ALLEN, *supra* note 162, at 34. *See also* Michael Keithley, *The Difference Between a Project and a Next Action*, GTD FOR CIOS (May 20, 2012), https://gtdforcios.com/2012/05/20/the-difference-between-a-project-and-a-next-action/.

165. For a discussion of the Mission statement, see *supra* Section III.D.1(a).

166. *See* ALLEN, *supra* note 162, at 7–9.

167. *See id.* at 3–4, 14.

168. *See infra* Figure 5.

Chart.[169] Then, the rest of the team would have until another deadline to critique and finalize the initial brainstormed list.

After brainstorming a comprehensive list of all possible litigation tasks, the trial team then should create three checklists concerning the most common specified trial tasks—establishing court jurisdiction over the matter and the parties; proving/disproving claims or defenses; and proving/disproving remedies.

ii. Jurisdiction Checklist

Before filing a lawsuit in court, the plaintiff must ensure that they can plead jurisdiction sufficiently. In the federal courts, a plaintiff must be able to plead four jurisdictional requirements plausibly to file a lawsuit: (1) subject-matter jurisdiction; (2) personal jurisdiction; (3) service of process; and (4) venue.[170]

iii. Proof Checklist

In litigation, the most common tasks revolve around proving or disproving the plaintiff's legal claims or the defendant's negative and affirmative defenses.[171] The elements of these legal claims and defenses are commonly analyzed in a ***Proof Checklist***.[172] Whether analog or digital,[173] every Estimate of the Situation should include a Proof

169. See *infra* Figure 4.

170. *See, e.g.*, Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 224 (D.N.J. 1966). For a sample jurisdiction checklist, see *infra* Figure 6.

171. *See generally* Amy St. Eve et al., *The Forgotten Pleading*, 7 FED. CTS. L. REV. 152 (2013). In federal court, the seven motion to dismiss defenses are in Rule 12(b). *See* FED. R. CIV. P. 12(b)(1)–(7). A negative defense is an "attack on the plaintiff's prima facie case." *Id.* at 160 (citing Gen. Auto. Parts Co. v. Genuine Parts Co., No. 04-CV-379, 2007 WL 704121, at *6 (D. Idaho Mar. 5, 2007)). In contrast, an affirmative defense "admits the allegations in the complaint, but seeks to avoid liability, in whole or in Section, by new allegations of excuse, justification, or other negating matter." *Id.* (citing Riemer v. Chase Bank USA, N.A., 274 F.R.D. 637 (N.D. Ill. 2011)).

172. Practitioners are of course familiar with proof checklists and there is ample published guidance. *See* Robert E. Jones et al., *Trial Preparation Checklist*, *in* RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL TRIALS & EVIDENCE ¶ 1:2 (2020); Ronald M. Price, *Order-of-Proof Checklist*, *in* N.C. CRIM. TRIAL PRAC. FORMS § 24:1 (6th ed., 2020); DOUGLAS DANNER ET AL., *Elements of proof—Checklists*, *in* 4 PATTERN DISCOVERY: PREMISES LIABILITY § 43:8 (3d ed., 2020).

173. A digital proof checklist can be as simple as a shared spreadsheet or a dedicated feature in a litigation fact database like CaseMap. *See* LEXISNEXIS, USING CASEMAP USER GUIDE 188–195 (2018), http://www.lexisnexis.com/Casemapsuitesupport/cm_docs/cm13/CaseMap_User_Guide.pdf [hereinafter CASEMAP USER GUIDE].

Checklist.[174] In the Proof Checklist, it is a best practice to have at least two evidentiary sources for every key fact.[175]

iv. Remedies Checklist

In civil litigation, every claim also needs a remedy.[176] The trial team therefore should create a ***Remedies Checklist*** to accompany their Proof Checklist. A possible acronym for the Remedies Checklist is ***CDRAD*** (with the mnemonic "***That CD is RAD!***"):

- *Coercive remedy*: Do you need a temporary restraining order/preliminary injunction,[177] specific performance of a contract, or other equitable remedy?[178]
- *Damages*: Do you seek compensatory or punitive/exemplary damages?[179]
- *Restitution*: Has the defendant been unjustly enriched?[180]
- *Attorneys' Fees*: Are you entitled to attorneys' fees from the opponent?[181]
- *Declaratory relief*: Do you need to seek a declaratory judgment?[182]

d. Restraint/Constraint Analysis

Like a Task Analysis, a Restraint/Constraint Analysis identifies specified and implied restraints and constraints. A ***restraint*** is "what

174. *See infra* Figure 7.

175. Although beyond the scope of this Article, a computer-generated Bayesian or Wigmore evidence chart or decision tree could also be required here for trial teams that find such tools helpful. *See* TERENCE ANDERSON ET AL., ANALYSIS OF EVIDENCE (2d ed. 2005) (Wigmore evidence charts); PAUL ROBERTS AND COLIN AITKEN, THE LOGIC OF FORENSIC PROOF: INFERENTIAL REASONING IN CRIMINAL EVIDENCE AND FORENSIC SCIENCE 61-152 (Royal Stat. Soc'y Communicating and Interpreting Stat. Evidence in the Admin. of Crim. Just. Prac. Guide No. 3 2014) (Neo-Wigmorean analysis and Bayesian networks); Norman Fenton et al., *A General Structure for Legal Arguments about Evidence Using Bayesian Networks*, 37 COGNITIVE SCI. 61 (2012); Marc B. Victor, *Decision Tree Analysis: A Means of Reducing Litigation Uncertainty and Facilitating Good Settlements*, 31 GA. ST. UNIV. L. REV. 715 (2014) (decision trees).

176. *See* FED. R. CIV. P. 8(a).

177. *See* FED. R. CIV. P. 65. *See generally* DAN B. DOBBS ET AL., LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 5–6 (3d ed. 2018).

178. *See* DOBBS ET AL., *supra* note 177, at 212.

179. *See id.* at 213–366.

180. *See id.* at 369–402. *See also* Doug Rendleman, *Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages*, 68 WASH. & LEE L. REV. 973 (2011).

181. *See generally* ROBERT L. ROSSI, ATTORNEYS' FEES (3d ed. 2020).

182. *See* 28 U.S.C. § 2202 (West 1948).

cannot be done" and ***constraints*** are "the options to which one is limited."[183] For example, an applicable statute of limitations[184] would be a restraint on an otherwise legitimate claim. The most common constraints in litigation involve settlement offers like the upper and lower monetary bargaining boundaries[185] or the need to inform a client every time the other side makes a settlement offer.[186]

e. Decisive Points/Effects[187]

Inspired by European military theorists, the French-Swiss Baron Antoine-Henri Jomini and Prussian General Carl von Clausewitz,[188] the ***decisive point or effect*** is a useful planning concept. The decisive point or effect's theoretical assumption is that every contested event—from the broad scope of the entire litigation to the narrow scope of a specific claim or defense, an individual pleading, a motion, a discovery request, or a witness examination—has a decisive point (for an actual location or event) or effect (for a broader state or boundary)[189] where that particular adversarial battle shall be won or lost by the side with the greatest relative power advantage.[190] In so doing, the First Chair spotlights the trial team's attention and efforts on what really matters.

For example, a pre-trial motion in limine to determine whether critical evidence is admissible at trial might be the decisive point for an entire lawsuit.[191] If the evidence is admitted, the defendant probably will

183. USMC, MARINE CORPS WARFIGHTING PUBLICATION ("MCWP") 5-10, MARINE CORPS PLANNING PROCESS 2-5 (2010).

184. *See, e.g.*, James Buchwalter et al., *Construction of Statutes of Limitations*, 54 C.J.S. LIMITATIONS OF ACTIONS § 10 (2020).

185. The "minimum or maximum a negotiator would accept given the alternatives to a negotiated settlement" is called the "reservation value" or "reservation point." If the reservation points of parties in a negotiation overlap, the range of the overlap is called the "zone of possible agreement." Jay E. Grenig, *Reservation Value*, *in* 1 ALT. DISP. RESOL. § 3:7 (4th ed. 2019).

186. *See* MODEL RULES OF PRO. CONDUCT r. 1.4 cmt. 2 (AM. BAR ASS'N 2018).

187. For an example of a decisive effect in a lawsuit, see *infra* Section IV.B.4(a)v.

188. *See generally* WALTER A. VANDERBEEK, THE DECISIVE POINT: THE KEY TO VICTORY (1988); *Henri, baron de Jomini*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Henri-baron-de-Jomini (last visited Mar. 7, 2021); Azar Gat, *Carl von Clausewitz*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Carl-von-Clausewitz (last visited Mar. 7, 2021).

189. *See* SUTHERLAND, *supra* note 90, at 140–50.

190. *Id.*

191. *See* Luce v. United States, 469 U.S. 38, 40 n.2 (1984) (A motion in limine is "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered."); Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064,

settle. If not, the defendant probably will go to trial. Similarly, the decisive point of a key witness' cross examination might be their impeachment with a prior inconsistent statement.[192] If the impeachment is accomplished persuasively, then the jury probably will conclude that the witness is not credible. If the impeachment is ineffective, then the jury might still believe the witness' devastating testimony.

The decisive point or effect is the analytical equivalent of a climax in a fiction novel or Joseph Campbell's *Ordeal* during the Hero's Journey, the monomyth for every heroic story, when the Hero faces their greatest fear or confronts their most difficult challenge.[193] Reflecting on the decisive point's universality, Field Marshal Paul von Hindenburg claimed that an "operation without [a decisive point] is like a man without character."[194]

For every identified decisive point or effect, the trial team member or members tasked with winning the decisive point or effect is called the ***main effort***.[195] At that decisive point or effect, the rest of the trial team is called the ***supporting effort*** because their job then is to coordinate and support the main effort.[196] Different tasks at different times can have different decisive points or effects and different main and supporting efforts.

Decisive points or effects tend to be where there is a "center of gravity" or "critical vulnerability." A ***center of gravity*** is

> [a] source of power that provides moral or physical strength, freedom of action, or will to act. Depending on the situation, centers of gravity may be intangible characteristics, such as resolve or morale; they may be . . . units . . .; or they may be the cooperation between two arms, the relations in an alliance, or forces occupying key terrain that anchor an entire defensive

1069 (3d Cir. 1990) ("[A] motion *in limine* is designed to narrow the evidentiary issues for trial and to eliminate unnecessary trial interruptions.").

192. *See generally* FED. R. EVID. 613; JAMES KENWAY ARCHIBALD & PAUL MARK SANDLER, MODEL WITNESS EXAMINATIONS 253-270 (3d ed. 2010) (explaining the rule on prior inconsistent statements).

193. *See* JOSEPH CAMPBELL, THE HERO WITH A THOUSAND FACES 89–100 (Princeton Univ. Press, Commemorative ed. 2004) (1949).

194. Milan Vego, *Clausewitz's Schwerpunkt: Mistranslated from German, Misunderstood in English*, MIL. REV., Jan.–Feb. 2007, at 101.

195. *See* SUTHERLAND, *supra* note 90, at 104.

196. *Id.*

> system. In counterinsurgency operations, the center of gravity may be the support of the local population.[197]

Conversely, a ***critical vulnerability*** is a weakness "that, if exploited, will do the most significant damage."[198] While a center of gravity looks at how to attack "from [a] perspective of seeking a source of strength,"[199] a critical vulnerability looks at how to attack from the perspective of seeking weakness.[200] A critical vulnerability can be "a pathway to attacking the center of gravity."[201]

The trial team should constantly be looking for centers of gravity and critical vulnerabilities in both its side and the other side because determining them is the first step to determining the decisive point or effect. Any decisive point or effect will have a nexus with an enemy or friendly center of gravity or critical vulnerability.[202] Ideally, a decisive point or effect will allow your center of gravity to attack an enemy's critical vulnerability.[203]

Ultimately, the decisive point is an analytical tool to determine the "place, event, time, or combination of the three" where, based on what little you know now, you think the future battle will be won or lost.[204] There is no right decisive point but there can be wrong ones. The purpose of selecting a decisive point therefore is to go through the analytical process of determining where you think it would be, not to successfully predict the future.[205]

In German military theory and practice, the purpose of analyzing decisive points or effects was for each commander to determine when and where to concentrate its forces' "weight of effort" to obtain a relative combat power advantage over the enemy.[206] In that vein, there can be

197. USMC, MARINE CORPS DOCTRINAL PUBLICATION ("MCDP") 1-0, MARINE CORPS OPERATIONS 3-14 (2011).

198. *Id.*

199. *Id.* at 3-14 to 3-15.

200. *Id.* at 3-15.

201. *Id.*

202. *See id.* at 3-13 to 3-15.

203. *See id.*

204. SUTHERLAND, *supra* note 90, at 103. Major Sutherland explained that a leader analyzes their situation to determine a decisive point, where gaining a "relative combat power advantage" could mean the difference between victory and defeat. *Id.* The decisive point is "where we will begin to win the fight and the enemy will begin to lose. If you could leap forward in time, to the end of the battle, the decisive point would be that time, place, or event, where you could say[,] 'I knew we had them when. . . .'" *Id.*

205. *See id.*

206. *See* Milan Vego, *Clausewitz's Schwerpunkt: Mistranslated from German—Misunderstood in English*, MIL. REV., Jan.–Feb. 2007, at 101, 108–09. (2007).

multiple decisive points, or even a smaller decisive point within a larger one, anywhere or anytime a relative combat power advantage might make the difference in a battle.[207]

2. Time Analysis

Because federal civil litigation is composed of many deadlines,[208] trial teams are already very familiar with Time Analysis. A Time Analysis "assess[es] the time available for planning, preparing, and executing tasks and operations."[209] Federal civil litigation Time Analysis is logically organized by stage of litigation: (a) pre-filing;[210] (b) pleading;[211] (c) discovery;[212] (d) trial;[213] (e) post-trial;[214] and (f) appeal.[215]

At a minimum, this Time Analysis should create three self-explanatory timelines that form the acronym ***DEI*** (with the mnemonic "***What time of DEI is it?***") (1) dispositive deadlines—further broken down into substantive law deadlines, procedural law deadlines, and client deadlines—with the acronym ***SPC*** and mnemonic "***Dispositive deadlines are very SPeCial.***"; (2) evidentiary deadlines; and (3) internal—trial team—deadlines. The first internal deadlines to schedule are inspection and rehearsal times, to allow trial team members to plan backwards.[216]

Because of the critical importance of meeting all litigation deadlines, the trial team should follow two tried-and-true practices when planning deadlines. First, the trial team should *always* observe the TLP's ***1/3-2/3 Rule*** where the "leader uses 1/3 of available planning and preparation

207. *See id.* at 104.

208. *See generally* Practical Law Litigation, *Common Deadlines in Federal Litigation Chart*, WESTLAW (2021), https://us.practicallaw.thomsonreuters.com/7-517-4421 [hereinafter Practical Law Litigation, *Common Deadlines*].

209. NORMAN M. WADE, THE BATTLE STAFF SMARTBOOK 1-17 (3d rev. ed. with Change 1 2012) (citing TRADOC, FM 5-0: THE OPERATIONS PROCESS 1-9, tbl.1-3 (2010)).

210. *See* Practical Law Litigation, *Common Deadlines*, *supra* note 195 (explaining the litigation events and deadlines within a table under process and pleadings).

211. *See id.*

212. *See id.* The applicable discovery plan sets most discovery deadlines. *See* FED. R. CIV. P. 26(f).

213. The applicable pretrial order or orders sets most trial deadlines. *See* FED. R. CIV. P. 16(b), (d)–(e).

214. *See* Practical Law Litigation, *Post-Judgment Motion Toolkit (Federal)*, WESTLAW (2021), https://us.practicallaw.thomsonreuters.com/w-001-4105.

215. *See* Practical Law Litigation, *Common Deadlines*, *supra* note 195 (explaining the litigation event and deadline of appeals).

216. For further discussion of inspections and rehearsals, see *infra* Section III.H.2-3.

time, and subordinates use the other 2/3."[217] The First Chair's scrupulous adherence to the 1/3-2/3 Rule ensures that everyone on the trial team has enough time to do their job.[218] If a leader is unable to finish their share of the task within one-third of the available time, then the leader should still provide their subordinates with what they have finished at the end of the one-third time period and then supplement with the rest as soon as they are done.

Second, even though there are helpful online litigation deadline calculators,[219] at least three trial team members—with at least one of them a lawyer—should triple check projected deadlines using an old-fashioned paper calendar and the text of the date-counting Rule.[220]

3. Adversary Analysis

A typical Adversary Analysis examines the strengths and weaknesses of (1) opposing parties; (2) their lawyers; (3) the lawyers' support staff; and (4) the parties' applicable resources. Furthermore, any Adversary Analysis should consider the opposing side's ***most probable course of action*** and ***most dangerous***—to the friendly party's case—***course of action***.[221]

Just as the trial team and client should create and revise a working theory of the case and theme of the case,[222] the Adversary Analysis should brainstorm possible opposing party theories and themes of the case. As the opposing side communicates more information relevant to their possible theory and theme through pleadings, motions, discovery

217. *See Ranger Handbook*, *supra* note 20, at 2-1.

218. *See id.* And avoids Senior Paralegal Dyson's all-too-common predicament. *See* Ferm et al., *supra* note 121, at 41.

219. *E.g.*, *Free Legal Deadline Calculator*, COURT DEADLINES, https://www.court deadlines.com/ (last visited Mar. 7, 2021); *Deadline Calculator*, U.S. BANKRUPTCY CT. FOR SO. DIST. OF OHIO, https://www.ohsb.uscourts.gov/deadline-calculator (last visited Mar. 7, 2021).

220. *See* FED. R. CIV. P. 6. There is of course ample published guidance about planning litigation deadlines in federal court. *See*, *e.g.*, MICHAEL C. SMITH, O'CONNOR'S FEDERAL RULES: CIVIL TRIALS app. X (2018) (including the following timetables: "Pleadings & Pretrial Motions Schedule," "Pretrial Disclosures & Conferences," "Discovery Status Sheet," "Removal and Remand," "Temporary Restraining Order & Injunction," "Request to Clerk for Default Judgment," "Motion to Court for Default Judgment," "Summary Judgment," and "Appeal of Civil Trial"). Much anecdotal preparing-for-trial literature employs a 30/60/90/180 days before trial time deadline framework. *See, e.g.*, KARL BECKMEYER, GOING TO TRIAL: A STEP-BY-STEP GUIDE TO TRIAL PRACTICE AND PROCEDURE (Cameron C. Gamble ed. 1989); Marcellus A. McRae et al., *Corporate Counsel Trial Readiness Checklist*, PRAC. L. CHECKLIST 5-506-5277 (2020).

221. *See infra* Figure 3.

222. *See infra* Section III.D.4.

requests, and other oral and written statements, this brainstorm should be refined and updated.

At a minimum, the Adversary Analysis should incorporate any information available online from the opposing parties' and opposing counsel's websites, social media, and legal research databases. In addition, if anyone in the law firm or any lawyers known to the trial team have gone against the same parties or counsel, it is worth reaching out to them to obtain useful intelligence.

Ultimately, this Adversary Analysis informs the ***Critical Needed Discovery—What We Need to Know about Them***—in the Trial Outline.[223] The Adversary Analysis is by default assigned to an Associate Attorney.[224]

4. Friendly/Other Party Analysis

This Analysis applies the Adversary Analysis to the trial team—and client—and any non-adversarial co-parties and the court. In particular, this Analysis generates working theories and themes of the case for those parties. At the beginning of the litigation, there should be at least two potential theories and themes for each possible claim or defense.[225] The Friendly Analysis should be limited to information useful to the trial team. It should not state the obvious. Likewise, the Other Party Analysis is unavoidably limited to information to which the trial team and client have access.

By so doing, the Friendly/Other Party Analysis accomplishes three goals. First, it puts relevant litigation-specific information about the client, the trial team, and the law office in one place. Second, it can provide insight into the opposing side's own probable analysis of the trial team and client. Specifically, such insight results in the adversary portion of ***Critical Needed Discovery—What They Need to Find Out about Us (and We Don't Want to Disclose)***—in the Trial Outline.[226]

Third, this Analysis also creates the third-party portion of Critical Needed Discovery—What We Need to Know about Them—in the Trial Outline.[227] Even if there are no third parties, this section of the Trial Outline can synthesize all available intelligence about the assigned judge, or other decisionmaker. At a minimum, this section should include publicly available information from the *Almanac of the Federal*

223. *See infra* Section III.F.
224. *See infra* Appendix, Section B.10.
225. For further discussion, see *supra* Section III.D.1.
226. *See infra* Figure 3.
227. *See id*.

Judiciary,[228] litigation analytics about the judge or court,[229] and internal comments from colleagues who have previously appeared in front of the same judge.

The Friendly/Other Party Analysis is by default assigned to an Associate Attorney.[230]

5. Negotiation Interest and Risk Assessment

This Estimate step combines the well-established Harvard Program on Negotiation ("PON") seven negotiation elements[231] with a litigation interest and risk assessment ("LIRA").[232] Putting them both together results in a ***negotiation interest and risk assessment*** ("***NIRA***"). The NIRA steps can be recalled with the acronym ***NLRCTIN*** (with mnemonic "***Nasty Lead Rust-Coated TIN***"). The steps in order are:

a. Negotiation Elements[233]

The PON seven negotiation elements can be recalled with the acronym "***RIC COLA***": (i) Relationship; (ii) Interests; (iii) Communication; (iv) Commitment; (v) Options; (vi) Legitimacy; and (vii)

228. *See* ALMANAC OF THE FEDERAL JUDICIARY (Wolters Kluwer 2020).

229. See Kayla Matthews, *Using Data Analytics to Track Legal Insights on Judges,* L. TECH. TODAY (Jan. 6, 2020), https://www.lawtechnologytoday.org/2020/01/data-analytics-to-track-legal-insights/.

230. *See infra* Appendix, Section B.11.

231. *See* Bruce Patton, *Negotiation, in* THE HANDBOOK OF DISPUTE RESOLUTION 279–85 (2005). *See generally* ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON 9 (2005); ROGER FISHER & DANNY ERTEL, GETTING READY TO NEGOTIATE 6 (1995).

232. *See* MICHAELA KEET ET. AL, LITIGATION INTEREST AND RISK ASSESSMENT 75 (2020).

233. For a cross-cultural negotiation, consider also using these 15 factors for analysis, with the acronym and mnemonic ***GREAT FISH CAR, CAP!*** (for each factor, the possible "range of influence from a lower to a higher context" is summarized in parentheses): (1) **G**oal ("Contract to a relationship"); (2) **R**egards to time ("Viewed as a resource to use or a gift to share"); (3) **E**motion ("Expressed to suppressed"); (4) **A**ttitude ("Collaborative to competitive"); (5) **T**eam ("Consensus-builder(s) to empowered decision maker(s)"); (6) **F**ace and honor ("Important to critical and central"); (7) **I**dentity ("Nationalistic to tribal; may be multiple identities at play"); (8) **S**uccess means ("Finality to progress"); (9) **H**orizon ("Immediate to long-term"); (10) **C**ontrol ("Deterministic to fatalistic"); (11) **A**greement form ("Detail-oriented to vague/general"); (12) **R**isk taking ("High to low"); (13) **C**ommunications style ("Facts to stories (Direct to indirect)"); (14) **A**greement building and processes ("Inductive to deductive (From bottom up to top down; from simple to complex)"); and (15) **P**ersonal styles ("Egalitarian to hierarchical"). U.S. DEP'T OF ARMY, GRAPHIC TRAINING AID ("GTA") 21-03-012, NEGOTIATIONS 21-24 & tbl.1 (JULY 2012) (citation omitted).

Alternatives.[234] If applicable, estimate each parties' BATNA,[235] WATNA,[236] and Most Likely Alternative to Negotiated Agreement ("MLATNA").[237]

b. Liability Risk Estimate

Focus only on the substantial risks of winning or losing the legal case as expressed through the probability of proving or disproving your Proof Checklist.[238] Quantify your risk estimate, basing it whenever possible to something objectively measurable.

c. Remedies Estimate

Likewise, determine the probability of proving or disproving your Remedies Checklist.[239] Quantify your remedies estimate, translating all of your potential remedies into a form of damages solely for the purposes of this analysis.

d. Court Outcome Expected Value

Multiply the probability of establishing liability by the remedies estimate to obtain the court outcome's expected value.[240]

e. Tangible Costs of Proceeding to Trial Estimate

Next calculate tangible costs—like future litigation costs—other than the court outcome's expected value.[241]

f. Intangible Costs of Proceeding to Trial Estimate

Calculate the intangible costs (e.g., feeling humiliated at trial) the best you can. The point is not to calculate them accurately, which might

234. *See generally* FISHER & SHAPIRO, *supra* note 231, at 9; Patton, *supra* note 231, at 279–85; FISHER & ERTEL, *supra* note 231, at 6.

235. *See generally* ROBERT H. MNOOKIN ET AL., BEYOND WINNING 19 (2000).

236. *See generally* Ayelet Sela et. al., *Judges As Gatekeepers and the Dismaying Shadow of the Law: Courtroom Observations of Judicial Settlement Practices*, 24 HARV. NEGOT. L. REV. 83, 112–13 (2018).

237. *See generally* Nancy L. Schultz, *Law and Negotiation: Necessary Partners or Strange Bedfellows?*, 15 CARDOZO J. CONFLICT RESOL. 105, 110 (2013).

238. *See* KEET ET AL., *supra* note 232, at 70–71. *See also infra* Section IV.B.4(a)iii, Figure 7, for a sample Proof Checklist.

239. *See infra* Section IV.B.4(a)iii, Figure 8.

240. *See* KEET ET AL., *supra* note 232, at 75.

241. *See id.* at 75–76.

be impossible, but rather to recognize that intangible costs must be factored into the NIRA.[242]

g. Net Expected Value of Court Outcome[243]

Finally, adjust your court outcome expected value (step d) with the tangible and intangible costs (steps e and f) to obtain the net expected value of your probable court outcome.[244]

To reiterate, the NIRA process is more important for its systematic comprehensiveness than for its accuracy. For example, while it might be impossible to estimate intangible costs accurately, including intangible costs in the process nevertheless helps balance the overall risk. Much like the entire TrialPrepPro, NIRA is more of an analytical tool than a predictive soothsayer.

6. Psychological Traps

Because trials and negotiations ultimately involve humans and human behavior, psychology is an extremely useful tool for preparing for trial.[245] In particular, it is useful to check to see if your party, opposing parties, or third parties might be suffering from a psychological trap.[246] Here are ten of the most common.[247] They can be recalled with the acronym ***LFCANCROSS*** (with the mnemonic, ***"Little Fella CAN CROSS"***):

- *Loss aversion (status quo) bias.* We tend to overvalue losses more than gains.[248]
- *Framing*. Could the way the relevant question was presented have influenced the answer?[249]
- *Confirmation bias.* We tend to give more credit to information that confirms our preexisting bias than information that challenges it.[250]

242. *See id.* at 77.
243. *See id.* at xviii.
244. *See id.* at 78–79.
245. *See generally* ROBBENNOLT ET AL., *supra* note 91.
246. *See* JAY FOLBERG ET AL., *Top Ten Psychological Traps in* RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 43–45 (3d ed. 2016).
247. *Id.*
248. *See id.* at 44.
249. *See id.*
250. *See id.* at 43.

- *Anchoring*. When we compare a known number to an estimate of an uncertain number, the known number can overly influence our thinking about the uncertain number.[251]
- *Naïve realism*. We tend to believe that our way of seeing the world is realistic and dismiss anyone seeing it differently as naïve.[252]
- *Consensus error (projection).* We can assume that others think the same way we do or share our same values.[253]
- *Reactive devaluation.* Automatically mistrusting any proposal from the other side without examining its substance.[254]
- *Overconfidence (egocentric bias).* We tend to overrate our own abilities, rightness, or good fortune.[255]
- *Selective perception.* When in a new, unfamiliar situation, our initial hypothesis might have excessive influence over what we see and hear.[256]
- *Self-serving bias (attribution error).* When we justify our own behavior but "see[] the same behavior in someone else as a shortcoming."[257]

A self-reflective trial team or client can customize these psychological traps with specific ones that the trial team or client know from the Friendly Analysis,[258] past experience, or psychological profiling are particularly perilous to the home team.[259] An Adversary or Other Party Analysis[260] can also reveal other psychological traps that the opposing side or a third party might have exhibited in past litigation or negotiations. The key is to limit such psychological traps to working hypotheses or presumptions and never abuse them to make unsupported conclusions.

Plans constantly change. The point of planning is collectively and comprehensively as a team is to think through all the possible contingencies—and your team's possible responses—and to ensure that everyone is starting on the same page when inevitably the team needs to

251. *See id.*
252. *See id.* at 44.
253. *See id.* at 43.
254. *See id.* at 44.
255. *See id.*
256. *See id.*
257. *See id.* at 45.
258. *See supra* Section III.D.4.
259. FOLBERG ET AL., *supra* note 246, at 51–52.
260. *See supra* Section III.D.3-4.

change the plan in response to new circumstances.[261] Instead of resenting when your plan fails to work with a new reality, embrace the fact that all plans must adapt to current conditions and plan accordingly.

E. Step 5: Coordination[262]

This step constantly asks if the trial team needs to coordinate anything. The acronym ***PIT*** (with the mnemonic "***Coordinate well to avoid falling into the PIT.***") stands for party coordination (i.e., with one of the lawsuit parties), internal team coordination (i.e., with the trial team), and third-party coordination (i.e., with someone outside the lawsuit like a mediator).

When coordinating with people outside the trial team, it is important to schedule, plan, and follow through to obtain the necessary information or assistance in time. As with Step 3—initiate necessary advanced notice or process—throughout the entire litigation, the trial team must constantly ask with *whom* do I need to coordinate *now* to make the team's life easier later? This Step seeks to avoid (1) untimely requests that are too late (i.e., "Unfortunately, I can't help you now. If you had only asked me earlier I could have fit you into my schedule."); and (2) learning only after the fact that third parties could have helped if they had only been asked (i.e., "If I had only known that you needed my help, I would have made the time to help you.").

F. Step 6: Trial Outline

The Trial Outline is the TrialPrepPro's equivalent of a military operations order.[263] It is the product of the Estimate of the Situation.[264] In fact, every Section of the Trial Outline comes from a portion of the Estimate as summarized in Figure 2 below. The Trial Outline format is explained in Figure 3 below.

261. For the previous discussion on planning as a means and not an end, see *supra* Section II.C.

262. Similar to TrialPrepPro Step 3 (initiate necessary advanced notice or process), this step does not reflect one particular TLP Step but rather applies the general principle behind TLP Steps 2-8 of initiating and completing necessary coordination with anyone outside the trial team (whether in the law office or outside the law office). *See Ranger Handbook*, *supra* note 20, at 2-1 tbl.2-1.

263. *See* SUTHERLAND, *supra* note 90, at 126. TrialPrepPro Step 6 is analogous to TLP Step 7, Issue the Operations Order ("OPORD"). *See id.* Instead of an OPORD, the TrialPrepPro uses a Trial Outline. Parts of the Trial Outline, however, were inspired by parts of the OPORD.

264. For a discussion of the Estimate of the Situation, *see supra* notes 90 and 125 and accompanying text.

Figure 2: The Relationship Between the Trial Outline and Estimate Analyses.

Trial Outline	Estimate
1. SITUATION:	Adversary, Friendly, and Other Party Analyses.
1.1. Adversary.	Adversary Analysis.
1.2. Friendly.	Friendly Analysis.
1.3. Other.	Other Party Analysis.
2. MISSION.	Mission Analysis.
3. EXECUTION:	
3.1. Concept and Intent.	Task and Intent Analyses.
3.1.1. Proof Checklist.	Task and Restraint/Constraint Analyses.
3.1.2. Remedies Checklist.	
3.1.3. Theory Statement.	Friendly Analysis.
3.1.4. Theme Statement.	
3.1.5. Decisive Points/Effects.	Decisive Point/Effect Analysis.
3.1.6. Negotiation Factors.	Negotiation Interest and Risk Assessment (NIRA) and Psychological Traps.
3.2. Tasks to Trial Team Members.	Adversary, Friendly, Other Party, Time, Task and Restraint/Constraint Analyses.
3.3. Coordinating Instructions.	
3.3.1. Critical Needed Discovery.	Adversary, Friendly, and Other Party Analyses.
3.3.2. Time Schedule.	Time Analysis.
4. SUPPORT.	Task and Friendly Analyses.
5. COMMUNICATION.	Task, Adversary, Friendly, and Other Party Analyses.
ANNEXES.	

Figure 3: Trial Outline Format

TRIAL OUTLINE FORMAT

1. **SITUATION:** *This Section gives the big picture about the opposing side(s), third parties, the trial team, and the court (or other decisionmakers). Only include information that is relevant to the lawsuit.*
   - 1.1. Adversary. *Overview of the opposing side. The purpose of this information is to assist with (1) wargaming expected counterarguments and replies to friendly tactics; and (2) anticipating their negotiating interests and BATNA. Always estimate their* ***most probable course of action*** *and* ***most dangerous course of action****.*
     - 1.1.1. Parties. *The opposing side's client.*
     - 1.1.2. Counsel. *The opposing lawyer(s).*
     - 1.1.3. Support staff and resources. *The opposing trial team and the client/firm's resources.*
     - 1.1.4. Most probable course of action.
     - 1.1.5. Most dangerous course of action.
   - 1.2. Friendly. *Analysis of the trial team. Only put useful or necessary information here. Do not restate the known or obvious.*
   - 1.3. Other. *This section analyzes third parties and the court.*
     - 1.3.1. Co-Parties.
     - 1.3.2. Court/Decisionmaker.
2. **MISSION.** *The 5Ws—who, what (task), where (location), when (time), and why (purpose).*
3. **EXECUTION:** *This Section explains how the trial team is going to accomplish the Mission.*
   - 3.1. Concept and Intent: *The Concept expands on the Intent by stating "the principal tasks required, the responsible subordinate[s], and how the principal tasks complement one another."*[265] At a minimum, the Concept should contain six elements, abbreviated with the acronym ***PRTTDN*** (mnemonic ***"The PR at Texas Toast has gone DowN"***).
     - 3.1.1. **Proof Checklist**.
     - 3.1.2. **Remedies Checklist.**

265. *See* Richard Dempsey et al., *Commander's Intent and Concept of Operations*, MIL. REV. Nov.–Dec. 2013, at 58, 63 .

TRIAL OUTLINE FORMAT

3.1.3. **Theory Statement**.
3.1.4. **Theme Statement**.
3.1.5. **Decisive Point(s)/Effect(s).**
3.1.6. **Negotiation Factors**.

3.2. Tasks to Trial Team Members:[266] *A place to list tasks that only apply to one or a subset (as opposed to all) trial team members, organized by litigation stage.*
3.2.1. Pre-Trial.
3.2.2. Trial.
3.2.3. Post-Trial.

3.3. Coordinating Instructions:[267] *Coordinating instructions are tasks and information that apply to every member of the trial team, organized by litigation stage.*
3.3.1. Pre-Trial.
3.3.2. Trial.
3.3.3. Post-Trial.
3.3.4. Time Schedule. *Remember the 1/3-2/3 Rule.*[268]
3.3.5. Critical Needed Discovery:[269]
3.3.5.1. **What We Need to Find Out about Them.**
3.3.5.2. **What They Need to Find Out about Us (and We Don't Want to Disclose).**

4. **SUPPORT:**[270] *This Section concerns essential administrative support information not directly related to the trial claims and defenses. The Lead Paralegal prepares this Section by default.*[271]
4.1. Document management.
4.2. Contract attorneys.
4.3. Travel arrangements.

5. **COMMUNICATION:**[272] *This Section is a one-stop shop for all trial team scheduling and contact information. The Lead Paralegal prepares this Section by default.*[273]
5.1. Trial team member schedules.
5.2. Times when trial team members are unavailable.
5.3. Trial team contact information.
5.4. Client contact information.
5.5. Opposing/Other party contact information.
5.6. Weekly check-in meeting time.
5.7. Reporting requirements.

266. *See Ranger Handbook*, *supra* note 20 at 2-1 tbl.2-1.
267. *See id.*
268. *See* SUTHERLAND, *supra* note 90, at 46–47.
269. This Section is inspired by the U.S. military's "priority intelligence requirements" (PIR). *Ranger Handbook*, *supra* note 20, at 2–15.
270. This Section is inspired by the "Administration and Logistics," "Sustainment," or "Service Support" paragraph of a U.S. combat order. *See* U.S. DEP'T OF ARMY, FM 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS 33 (2014); MILLEN, *supra* note 102, at 35; LTH, *supra* note 90 at 76. It contains the essential support information not directly relevant to combat. The USMC employ the simple mnemonic of the 4 B's—Beans (food and water); Bullets (ammunition and other mission critical supply); Bandages or Band-Aids (medical/nuclear, biological, and chemical warfare supplies and services); and Bad Guys (what to do with enemy prisoners of war). USMC, FIELD MED. TRAINING BATTALION, FMST 209, FIVE PARAGRAPH ORDER 1-107 (2011).
271. *See infra* Appendix, Section C.5.
272. This Section is inspired by the "Command and Signal" paragraph of a U.S. combat order. It describes where the leader will be throughout the mission, the chain of command, any special reporting requirements (other than the norm), and how subordinate units and key leaders will communicate with each other and higher command during the operation. *See* SUTHERLAND, *supra* note 90, at 51.
273. *See infra* Appendix, Section C.5.

TRIAL OUTLINE FORMAT

ANNEXES:[274] *Special litigation contexts require appendices that cover additional details the regular Trial Outline might not cover.*

A. Expert witness. B. Multidistrict/complex litigation. C. Complex joinder.

To save time, the First Chair can delegate preparing and even briefing portions of the Trial Outline. An Associate Attorney can prepare or brief any Section. A Paralegal can prepare or brief Sections 4 (Support) or 5 (Communication). Such delegation also is an excellent professional development and team-building opportunity. When delegating preparation or briefing, the First Chair must give the tasked trial team member a deadline before the First Chair's scheduled Trial Outline briefing that gives the First Chair sufficient time to review the delegated parts and, if necessary, revise them.[275]

The First Chair should orally brief the Trial Outline in person to everyone on the trial team and, if possible, the client. While a written Trial Outline of course is helpful, it is essential that the First Chair still orally brief the Trial Outline and that finalizing and distributing the written product not violate the 1/3-2/3 Rule.[276] Alternatively, the First Chair could write only the key information on a skeletal outline.[277]

274. For specialized tasks that are necessary but not Section of the actual mission (*e.g.*, specialized movement to the mission objective like a truck convoy, helicopter assault, small boats, or stream crossings), there are preformatted annexes that come after the U.S. combat order. *See* USMC, *supra* note 270, at 1-107.

275. *See* Gruber et al., *supra* note 65, at 8, 10.

276. *See supra* notes 217-18 and accompanying text.

277. In the United Kingdom, advocates are required to submit concise "skeleton arguments" in all civil cases. *See* MICHEL KALLIPETIS ET AL., SKELETON ARGUMENTS: A PRACTITIONERS' GUIDE 1, BRITISH INST. OF INT'L & COMPAR. L. (2004), https://www.biicl.org/files/2223_skeleton_arguments_guide.pdf.

The Trial Outline, like the entire TrialPrepPro, is a means to the end of the best possible client outcome. It should never become an end to itself.[278] The purpose of the Trial Outline is to provide the entire trial team with the First Chair's big picture game plan. Instead of a static written document, a more dynamic oral dialogue is preferable. Briefing the Trial Outline orally not only is much faster but also allows the trial team to contribute actively to improving the Trial Outline in real time. The analysis is more important than any written product.[279]

278. As British military theorist Sir Basil Henry Liddell Hart observed, "a reasonably well-worded order in time for action to be taken" is preferable to an "immaculate" order issued only after the "situation changes or the opportunity passes." Thomas Doherty with Welton Chang, *Failing to Plan is Planning to Fail: When CONOPS Replace OPORDs*, SMALL WARS J. 11 (Aug. 28, 2012, 11:27 AM), https://smallwarsjournal.com/jrnl/art/failing-to-plan-is-planning-to-fail-when-conops-replace-opords.

279. Although strategically outmatched, the German Wehrmacht in World War II was tactically far superior to many U.S. forces. *See* JOHN F. ANTAL, COMBAT ORDERS: AN ANALYSIS OF THE TACTICAL ORDERS PROCESS 52–54 (1990). One Wehrmacht tendency that the TrialPrepPro aspires to emulate is the German propensity for concise oral orders. Remarkably, orders at division level—12,500–20,000 troops!—and below were almost always given orally by the commander. *See id.* at 59; Warner R. Schilling, *Weapons, Strategy, & War: The Organization of Armies*, COLUMBIA FOR CTR TEACHING & LEARNING, https://ccnmtl.columbia.edu/services/dropoff/schilling/mil_org/milorgan_99.html (last visited Apr. 14, 2021) (summarizing World War II German military organization).

The Wehrmacht official 1933 *Truppenfuhrung* ("Command of Troops") manual concisely stressed the importance of flexible, minimal, *oral* orders:

> 37. . . . [I]n the vicissitudes of war an inflexible maintenance of the original decision may lead to great mistakes. Timely recognition of the conditions and the time which call for a new decision is an attribute of the art of leadership.
> * * *
> 68. The more pressing the situation, the shorter the order. Where circumstances permit, *oral* orders are given in accordance with the terrain, not the map. On the front lines and with the lower commanders this is particularly so.
> * * *
> 73. An order should contain everything a subordinate must know to carry out his assignment independently, and only that. Accordingly, an order must be brief and clear, definite and complete, tailored to the understanding of the recipient and, under certain circumstances, to his nature. The person issuing it should never neglect to put himself in the shoes of the recipient.
> * * *
> 75. Orders may bind only insofar as they correspond to the situation and its conditions.
> 76. Above all, orders are to avoid going into detail when changes in the situation cannot be excluded by the time they are carried out.
> 77. In so far as the conditions permit, it is *often best for the commander to clarify his intentions to his subordinates by word of mouth and discussion*.

JOHN F. ANTAL, COMBAT ORDERS: AN ANALYSIS OF THE TACTICAL ORDERS PROCESS 55-56 (1990) (quoting CENTER FOR ARMY TACTICS, U.S. COMMAND AND GENERAL STAFF COLLEGE,

When briefing the Trial Outline, the First Chair should ask the trial team to hold all questions until the end to avoid interruptions.[280] At the end of the briefing, however, the First Chair must encourage robust dialogue among the entire team and, if possible, the client.

To ensure the most constructive dialogue, the First Chair must make it clear at the end of the Trial Outline brief that the First Chair does not know everything, is open to learning from everyone, and sincerely welcomes constructive criticism as an invaluable Section of this process.[281] Throughout the representation, the First Chair needs to reinforce a collaborative climate on the trial team where the focus remains the client's best interests and not anyone's ego.

If resources allow, recording then transcribing the oral presentation and following discussion could provide a quicker reference document than writing out the Trial Outline.

G. Step 7: Trial Notebook

Prepare and maintain the Trial Notebook as a comprehensive reference document for the trial. As trial attorneys are well aware, digital and paper Trial Notebooks are a simple and effective tool to assess the details of trial preparation and provide a ready reference document for the actual trial.[282] Like everything in the TrialPrepPro, the Trial Notebook must be a useful tool and not a paper drill.

TRUPPENFUHRUNG (1933) 5-13 (1989) (internal citation omitted in original) (emphasis added)).

280. *See Ranger Handbook*, *supra* note 20, at 2–12 (instructing to begin OPORD briefing, "Please hold all questions until the end").

281. The Army Research Institute has noted that a commander must promote discourse throughout the TLP:

> A significant role of the commander is promoting and encouraging discourse . . . . Discourse is not a discussion, not a debate, and not an exchange of information. Discourse is candid professional interactive dialogue without fear of retribution with the purpose of achieving in-depth analysis, synthesis, and evaluation of key ideas and concepts during the execution of planning.

JIM GREER ET AL., AN INTEGRATED PLANNING SYSTEM: COMMANDER AND STAFF HANDBOOK 7, U.S. ARMY RSCH. INST. FOR THE BEHAV. AND SOC. SCIS. (2018) (citation omitted).

282. Because there is ample published guidance about trial notebooks, we need not elaborate further here. *See generally* LEONARD H. BUCKLIN, BUILDING TRIAL NOTEBOOKS (2013).

H. Step 8: Review, Rehearse, and Refine[283]

This final TrialPrepPro Step might be the most important and, unfortunately, the most neglected. The U.S. military has a key training principle—"Train as You Will Fight."[284] Another way this principle is often stated is "train as you fight, fight as you train."[285] Furthermore, in the U.S. military, the buck should stop with leaders. They should be responsible for everything their units do or fail to do.[286]

Consequently, this final TrialPrepPro Step requires the First Chair and anyone else on the trial team with supervisory authority "to check everything important for mission accomplishment."[287] In other words, it is not enough for leaders to assume that their followers will do as they are told. Leaders must actually physically check to make sure everything gets done appropriately. As the saying goes, "trust but verify."[288] There are at least four supervisory tools to do that: (1) ***backbriefs***; (2) ***inspections***; (3) ***rehearsals***; and (4) ***the after-action review and lessons learned***. All four tools need to become habitual.

1. Backbriefs

Backbriefs are where the subordinate answers the leader's leading questions or repeats in their own words the leader's instructions back to the leader.[289] Whenever the First Chair gives instructions to another trial team member, the First Chair should *always* ask the subordinate to backbrief the instructions in their own words. If pressed for time, the First Chair can instead use leading questions to ask the subordinate about the most important details. This way, the First Chair confirms that the trial team member truly understands the instructions.

283. This TrialPrepPro Step was inspired by TLP Step 8, "Supervise and refine." *See Ranger Handbook*, *supra* note 20, at 2-1 tbl.2-1.

284. U.S. DEP'T OF ARMY, ADP 7-0, TRAINING, 3-1 (2019).

285. Melody Everly, *'Train As You Fight, Fight As You Train,'* U.S. ARMY (June 8, 2017), https://www.army.mil/article/189059/train_as_you_fight_fight_as_you_train.

286. *See, e.g.*, *Ranger Handbook*, *supra* note 20, at 1-2.

287. ATTP 3-21.8, *supra* note 90, at A-35.

288. U.S. President Ronald Reagan was fond of quoting the old Russian proverb, "Trust but verify." *See* Editorial, *Trust But Verify*, N.Y. TIMES, Dec. 10, 1987, at A30.

289. *See* ATTP 3-21.8, *supra* note 90, at A-36.

2. Inspections

Inspections are where subordinates show the leader ***mission-critical equipment*** or ***actions***,[290] defined as actions that if not completed by a certain time or equipment that if not available at a particular location could jeopardize Mission success.[291] If anything is essential to accomplishing the mission and obtaining the best outcome for the client, then the First Chair should *always* physically inspect it. If distance or circumstances makes it impossible for the First Chair to be physically present to inspect, the First Chair can require the subordinate to take a photo of the essential item and text/email it to the First Chair.

Because the buck stops with the First Chair, "You promised . . ." or "I thought you were going to . . ." are no longer excuses. If a mission-critical item fails to be in the right place at the right time, then by definition the cause of that oversight was a failure to inspect.

3. Rehearsals

Rehearsals are the military equivalent of mooting an argument or presentation. Rehearsals, however, should not be limited to oral argument or examination preparation. Every critical task is worth rehearsing. For instance, if finding and coding key documents is a critical task, then contract attorneys should rehearse finding and coding documents before actually doing it.

Rehearsals can be full-force (i.e., the entire trial team) or reduced-force (i.e., select trial team members).[292] They should follow the ***crawl-walk-run methodology*** where initial "crawl" rehearsals are done slowly with interruptions and questions, next "walk" rehearsals are done faster with fewer interruptions and questions, to "run" rehearsals that are done at combat speed with no interruptions and questions limited to after the rehearsal is finished.[293] If possible, all rehearsals should be video recorded and the videos should be reviewed as Section of the After-Action Review after rehearsal completion.[294]

290. *See id.* at A-39.
291. For a discussion of the Mission statement, see *supra* Section III.D.1(a).
292. *Id.* at A-37.
293. *Id.* The U.S. Department of Justice, Office of the Solicitor General follows a similar "informal and formal moot court" process for rehearsing U.S. Supreme Court oral argument. *See* DAVID C. FREDERICK, THE ART OF ORAL ADVOCACY 82 (3d ed. 2019).
294. For further discussion of the After-Action Review, see *infra* Section III.H.4.

As soon as possible, as Section of their Estimate of the Situation Time Analysis,[295] the First Chair should schedule all necessary rehearsals. Providing a rehearsal deadline helps other trial team members with their own backwards planning and communicates accountability. While the rehearsal time can be rescheduled if necessary, if it is important enough to the representation, it is important enough to rehearse.

When planning the rehearsal, consider if it should involve some or all of the trial team. Further, consider whether it should be a "crawl," "walk," or "run" rehearsal. Scheduling all three types of rehearsals in succession with some time in between each one to digest the lessons learned might be the best approach.

Never underestimate the value of rehearsals. Leaders must always make time for rehearsals. In the authors' experience, too many trial teams fail to prioritize rehearsals. The only way to ensure adequate rehearsals is to plan for them from the get-go, during your initial Time Analysis,[296] and to safeguard them. Rehearsal deadlines provide excellent, practical benchmarks with which to assess the trial team's progress. Because rehearsals actively involve the entire trial team and can wargame problems better than any passive analysis, leaders should always err on the side of having more time for rehearsals and less for planning.[297] An 80 percent plan with ample rehearsals is superior to a perfect plan with no rehearsals.[298]

4. The After-Action Review and Lessons Learned

Although not explicitly a Section of the TLP, the ***after-action review*** ("***AAR***") and maintaining unit "***lessons learned***" are institutionalized U.S. military habits. An AAR is where the entire trial team is given an opportunity to review what it just did (during simulation or actual representation) to determine what it should continue to do (sustain) or change (improve). Ideally, there would be a video recording, transcript, or similarly accurate contemporaneous record to review before and during the AAR.

Unless there is a designated external reviewer, the First Chair should lead the AAR. An AAR asks four questions:

1. What was supposed to happen?
2. What happened?

295. *See supra id*.
296. For further discussion of Time Analysis, see *supra* Section III.D.2.
297. *Id*.
298. For further discussion, see *supra* notes 102-106 and accompanying text.

3. What was right or wrong with what happened?
4. How should the task be done differently next time?[299]

The First Chair should designate a scribe—like the Paralegal—to write down every AAR's key points. As soon as possible, the law office leadership should decide whether to make any changes in *writing* to organizational policies and procedures like the TrialPrepPro in response to the AAR. As a learning organization, a law office should institutionalize its AAR points in writing as lessons learned.[300] These lessons learned should be indexed and searchable so that all law office members can benefit from experience.[301]

The TrialPrepPro is iterative. Subsequent review and rehearsals might require revisiting previous Steps. The TrialPrepPro is merely a means to the end of accomplishing the Mission and should never be treated as an end to itself.

IV. THE TRIAL PREPARATION SYSTEM IN ACTION

To demonstrate the TrialPrepPro Steps, we shall use a simple "texting while driving" negligence case, *Sidney Young v. Riley Gardner*.[302] The U.S. District Court for the Middle District of Florida uses this case in mock trials with middle-school and high-school students.[303]

299. Susanne Salem-Schatz et al., *Guide to the After Action Review, Version 1.1.*, U.S. DEP'T OF VETERANS AFFS. (web conference seminar), Oct. 2010, https://as.vanderbilt.edu/overview/faculty/facultycouncil/archive/sitemason.vanderbilt.edu/files/cHpJCw/Guide%20to%20the%20After%20Action%20Review.pdf.

300. *See* Marilyn Darling et al., *Learning in the Thick of It*, HARV. BUS. REV. (July-Aug. 2005), https://hbr.org/2005/07/learning-in-the-thick-of-it.

301. *See generally* U.S. DEP'T OF ARMY, AR 11-33, ARMY LESSONS LEARNED PROGRAM (2017).

302. *See* Sidney Young v. Riley Gardner*: Mich. High Sch. Mock Trial Tournament 2009 Materials*, MICH. CTR. FOR CIVIC EDUC., http://mail.miciviced.org/index.php?option=com_mtree&task=att_download&link_id=21&cf_id=24 (last visited Mar. 7, 2021) [hereinafter Young v. Gardner *Mock Trial*].

303. *Sample Mock Trial Scripts, Texting While Driving Case (For Middle and High School Students)*, U.S. DIST. CT. MIDDLE DIST. FLA., https://www.flmd.uscourts.gov/sites/flmd/files/forms/mdfl-texting-while-driving-script-jrk.pdf (last visited Mar. 7, 2021) [hereinafter *Fla. Mock Trial Script*]. All dates in this scenario have been accelerated by four years to make the scenario more contemporaneous with this Article. In addition, certain facts were either added or changed from the original script. The case was apparently adopted from a Michigan Center for Civic Education 2009 Mock Trial Tournament casefile for use in federal court. *See* Young v. Gardner *Mock Trial*, *supra* note 278. This casefile was adopted with permission from a similar casefile authored by the Young Lawyer's Division of the Tennessee Bar Association. *Id.* at 2. In addition, certain facts were either added or changed from the original script.

A. The Scenario

The Florida law firm Eagleton, Thomas, and Charles ("ETC") represents the Plaintiff Sidney Young, an eighteen-year-old Michigan citizen.[304] The TrialPrepPro of course is equally applicable to plaintiffs or defendants. Because Young is the niece of one of ETC's best clients, ETC has agreed to represent her pro bono in federal court. Young was visiting the client's son, Paul Perez, for the weekend to celebrate Perez's soccer team winning a regional championship when she was severely injured in a car accident.[305]

On May 11, 2019, at approximately 1:30 AM, a 2018 Honda Accord heading south on Wells Gate National Parkway in Jacksonville, Florida, suddenly slid into the median and crashed into a light pole.[306] Young, who was seated in the front passenger "shotgun" seat, suffered severe injuries.[307] The driver, Riley Gardner, and the two rear passengers, Alex Williams, who was seated directly behind Gardner, and Perez, who was seated directly behind Young, only suffered minor injuries.[308]

Young's right leg and foot were crushed in the accident.[309] She broke three ribs, and also sustained injuries to her head, chest, and right arm and hand, though they were less severe.[310] Young was quickly rushed into surgery for injuries in her right leg and foot.[311] Surgeons placed metal rods and pins, which eventually will have to be replaced, in her bones.[312] Young's injuries have inflicted pain so intense in her back and legs that she cannot sit through school classes.[313]

These facts are undisputed.[314] Up until the accident, Gardner was Perez's friend.[315] Williams was and remains Gardner's friend.[316] Young had just met Gardner at Perez's party.[317] Young and Gardner appeared

304. *Fla. Mock Trial Script*, *supra* note 303, at 12. Young's Michigan citizenship was added to this scenario to enable diversity subject-matter jurisdiction in federal court. *See generally* 28 U.S.C.A. § 1332 (West 2020).
305. *Fla. Mock Trial Script*, *supra* note 303, at 7–8.
306. *Id.* at 2.
307. *See id.*
308. *Id.*
309. *Id.* at 8.
310. *Id.* at 2, 8.
311. *Id.* at 8, 14.
312. *Id.* at 8.
313. *Id.*
314. *See id.* at 10 ("What Defendant does dispute is how Riley handled the situation and what happened just before the accident.").
315. *See id.* at 19.
316. *Id.* at 24.
317. *Id.* at 12.

to really hit it off.[318] Young, Gardner, Perez, and Williams piled into Gardner's car, owned by Gardner's mother, to go get some burgers from a local restaurant.[319]

It was raining right before the accident.[320] Before the accident, Gardner's car passed by at least two cars that had spun out of control on the Parkway.[321] While driving, Gardner viewed a text message on his cell phone from his girlfriend Taylor Browning saying, "Call me NOW."[322] Gardner texted back on his phone, "soon."[323] To which Browning texted back, "NOW!"[324] Gardner then tossed his cell phone to Young.[325] After Gardner tossed his phone to Young, the car started skidding, spun out of control, and hit the light pole.[326]

What Gardner did and said concerning his cell phone and Browning's text message right before the accident remain disputed.[327]

B. Applying the Eight TrialPrepPro Steps

Because the TrialPrepPro is iterative, its Steps can and should be applied and re-applied multiple times throughout the different litigation stages as the trial team obtains more information or changes its strategy and tactics. We apply the TrialPrepPro's eight steps for the first time, of many, during the brainstorming pre-filing investigation phase.

1. Begin Representation[328]

ETC's management committee has assigned the *Young* matter to Kayce Scott,[329] a very capable and professional mid-level associate consistently rated the highest for her year group in the firm. Although Scott could easily handle such a simple case alone, Scott successfully lobbies to have a new associate right out of law school, Jonathan Jordan, assigned to her trial team for professional development. Coincidentally, Jordan's family has long been friends with the Perez family. He has even

318. *Id.*
319. *Id.* at 17–19.
320. *Id.* at 10.
321. *Id.* at 20.
322. *Id.* at 11, 20.
323. *Id.*
324. *Id.* at 11.
325. *Id.* at 11, 20.
326. *Id.* at 11, 23–24.
327. *Id.* at 8, 10–12.
328. For an explanation of TrialPrepPro Step 1, see *supra* Section III.A.
329. *Id.* at 1, 4.

met Young before although fortunately does not know her well and was not present the night of the incident. Scott's favorite Paralegal, Jenny Jones, was also assigned to the case. Finally, Scott obtained permission to coordinate with her favorite Courtroom Tech, Ken Price, who works for Courtroom Home Information Presentation Services ("CHIPS"), the firm's contracted information technology support and courtroom presentation vendor.

While Scott has extensive experience working with Jones and Price, she has never worked with Jordan before. After briefing Jordan in writing on his Associate Attorney and Second Chair roles,[330] Scott decides to let Jordan take the lead on beginning the representation under her supervision.

Having adopted the TrialPrepPro, ETC's litigation department mandates using it with every case. Starting at Step 1, Jordan and Scott make sure to check the four most important tasks for beginning the representation: (a) the client retainer agreement/privacy waivers; (b) former counsel handoff; (c) a litigation hold; and (d) the initial client interview.[331]

a. Client Retainer Agreement/Privacy Waivers

Having received an emailed report that there were no conflicts between Young and ETC's former or current clients,[332] Jordan reviews the firm's standard retainer agreement with Sidney Young and her parents (the "Youngs") at the firm's offices on Saturday, May 25, 2019. Scott and Jordan agreed to meet with the Youngs on Saturday to accommodate their schedule. While not present, Scott is a phone call away if Jordan or the client has any questions. Given that the firm is not charging the Youngs for its services, the Youngs not surprisingly have few questions and quickly sign the retainer agreement.

After reviewing the retainer agreement, Jordan then reviews ETC's standard medical records request form. Because medical records are an essential Section of proving damages in this case, Jordan explains the need for the Youngs to sign a privacy waiver so that ETC can access all of Sidney's relevant medical records. He reiterates that ETC shall

330. For further discussion of counseling trial team members about their role and responsibilities, *see supra* Section III.B.

331. *See supra* Section III.A.

332. *See* MODEL RULES OF PRO. CONDUCT r. 1.7, 1.9 (AM. BAR ASS'N 2009).

safeguard Sidney's privacy. Having no questions, the Youngs sign multiple copies of ETC's medical records form.[333]

b. Handoff from Former Counsel[334]

Because there was no prior counsel in the *Young* matter, Jordan and Scott skip this task.

c. Litigation Hold or Alert[335]

Because the Youngs have travelled from their home in Ann Arbor, Michigan, to the law firm's Jacksonville, Florida, offices, Jordan—now joined by Scott, moves immediately to the initial client interview.[336] Although the *Young* matter lacks the voluminous discovery and e-discovery issues common to more commercial cases, spoliation issues can still arise in personal injury cases.[337]

When reviewing the TrialPrepPro and preparing for the initial client interview, Scott and Jordan agreed to ask to review the Youngs' social media accounts and, specifically, if they knew of any social media posts made by them or anyone else related to the accident. Fortunately, the Youngs are private people who did not make any social media posts about the accident. Nor are they familiar with any other social media posts about the accident. In fact, they have been so busy with Sidney's hospitalization and treatment, they have not made any social media posts at all since the accident. After reviewing the Youngs' social media accounts, with their permission, Scott and Jordan conclude that a formal litigation hold is unnecessary.

d. Initial Client Interview[338]

Scott decides to let Jordan conduct the initial client interview under her supervision. The interview is divided into two parts. During the first

333. Every law office is familiar with medical records requests and there already exists ample published guidance about them. *See* KRISTYN S. APPLEBY ET AL., *Sample Written Request for Medical Records*, *in* MED. RECS. REV. 7-54 form 7-4 (2010); JACOB A. STEIN, *Request for Medical Records—Letter—Alternate Form*, *in* 7 STEIN ON PERSONAL INJURY DAMAGES PRACTICE AIDS § 5:61 (3d ed. 2020).

334. For further discussion of former counsel handoff, see *supra* note 114 and accompanying text.

335. For further discussion of the litigation hold, see *supra* note 115.

336. *See id.*

337. *See* Crystal, *supra* note 115, at 715–16. (raising the need for a litigation hold of social media posts in a personal injury case).

338. For further discussion of the initial client interview, see *supra* note 116.

Section, Scott and Young's parents are present. Sidney's mother Sarah monopolizes most of the first Section of the interview, with Sidney and her father Josh mostly agreeing with what Sarah said. Jordan skillfully follows up Sarah's answers with gentle leading questions to get more details out of Sidney and Josh.

When asked about Gardner's throwing the cell phone to Young right before the accident, Young says that she remembers Gardner telling her something immediately before throwing her the cell phone but cannot recall what. Perez, she said, would be willing to be interviewed or testify for her if Scott or Jordan asked. Williams, Young thought, probably would remain loyal to Gardner no matter what.

During the second Section, Scott escorts Sidney's parents out of the room to let Jordan interview Sidney alone. Because Jordan is only eight years older than Young, who is about to graduate from high school, and has a prior relationship with Young's family, Scott and Jordan agreed that Jordan should interview Young alone with two goals—to establish rapport with her and to probe her gently to learn of any additional relevant information that Sidney might not have felt comfortable disclosing in front of her parents.

After some small talk, Jordan learns that Sidney remains romantically attracted to Riley Gardner, the driver and potential defendant. Young admits that she still has a "crush" on Gardner and feels bad for him. Young candidly admits that she does not know if Gardner was responsible for the accident. She also is afraid about her future and the extent of her injuries, but states that she cannot get herself to see Gardner as a "bad guy."

Jordan then asks Young if she has communicated with Gardner since the accident. Young says no, explaining that her parents forbade her from contacting him. Gardner also has not reached out to her. But Young admits that she wants to reach out to Gardner, just to see how he is doing and to let him know that she still likes him.

Gently and carefully, Jordan reminds Young about the Section of the retainer where she and her parents agreed never to contact any parties, witnesses, or their agents without going through Jordan or Scott first. He also reiterates the importance of keeping all communications about her case confidential.[339] He explains how Gardner might have been reckless or negligent without actually intending to hurt Young. Jordan ends the initial interview by reiterating that Young deserves compensation for her

339. *See* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2009).

injuries and asking her to trust him and Scott to do their best to get Young what she deserves while treating Gardner professionally.

Jordan pages Scott, who brings Young's parents back into the conference room. After reminding them about the attorney-client privilege and confidentiality, and asking the Youngs to contact them with any questions or new information, Scott wishes the Youngs a safe trip back to Ann Arbor.

Jordan drives the Youngs to the airport and sees them off through security. He then drives home and memorializes his initial client interview in a detailed memorandum that he emails to Scott that evening.

2. Roles and Responsibilities[340]

First Chair Scott has already worked extensively with Paralegal Jones and Court Tech Price. Consequently, Jones and Price are already well-acquainted with their written roles and responsibilities. Because the TrialPrepPro are included in ETC's litigation department's *Litigation Handbook* and are briefly covered during new lawyer orientation, Jordan is already familiar with the roles and responsibilities.

Because Jordan and Scott have never worked together before, Scott still wisely takes the time to meet one-on-one with Jordan to go over the First Chair, Associate Attorney, Paralegal, and Court Tech roles and responsibilities.[341] As Second Chair, Jordan must understand the other trial team members' roles and responsibilities as well as his own to ensure everyone on the trial team is working as efficiently and effectively as possible.

Finally, Scott asks Jordan if he wants to modify any of the reviewed roles or responsibilities, repeating the importance of clearly communicating expectations up front in writing to avoid future misunderstanding. Jordan replies that he understands the importance of clear expectations and has nothing to add or change to the job descriptions. Both Scott and Jordan sign a document acknowledging the date and time when they met to discuss and accept these roles and responsibilities.

Scott provides Jordan a copy of the signed document, with the job descriptions attached, encouraging Jordan to refer to the written roles and responsibilities frequently during planning to ensure there is clear accountability for everyone—including Scott—on the trial team.

340. For an explanation of TrialPrepPro Step 2, see *supra* Section III.B.

341. *See generally infra* Appendix.

3. Initiate Necessary Advanced Notice or Process[342]

At the pre-filing stage, before they have completed their Estimate of the Situation,[343] Scott and Jordan look at their busy calendars and tentatively give themselves a one-week deadline (Saturday, June 1, 2019) to draft a demand letter and complaint, a two-week deadline (Monday, June 10, 2019) to serve Gardner with the demand letter, and a three-week deadline (Monday, June 17, 2019) to file the lawsuit if Gardner refuses to respond to the demand letter.

This hasty initial analysis is merely to determine who should receive a heads up right now to clear their calendar or start coordinating with third parties outside the trial team. While this TrialPrepPro Step should iterate continuously throughout the representation, ideally it should at least initially be completed within *one day* after the completion of TrialPrepPro Step 1, begin representation.

On May 26, 2019, one day after the initial client interview, Scott and Jordan brainstorm the initial ***Advanced Notice Chart*** in Figure 4.

Figure 4: Sample Advanced Notice Chart.

Young v. Gardner, Client #19-YG-1245, **Advanced Notice Chart** AS OF 5/26/19, 4:30 PM[344]			
What kind of notice?	***To whom?***	***Why?***	***Responsible trial team member? (By when?)***
Need colleagues to comment on draft demand letter and complaint (receive draft 6/1/19, return comments no later than 6/8/19).	1 partner, 2 associates	To ensure the demand letter and complaint meet our firm standards before sending them to the client for approval.	Scott (by 5/27/19)
Need to ask client if they can (1) comment on demand letter in one day (6/9/19); (2) comment on complaint in one week (6/16/19); (3) what is the best way to serve the demand letter on Gardner; and (4) their availability from 6/10-17/19 (the two week period for a response in the demand letter) to discuss any possible settlement offer from Gardner.	YOUNGS	To get client approval of demand letter and complaint and ensure they are available to consult about any settlement offer.	Jordan (by 5/30/19)
Heads up about trial team	JONES	E-mail about new matter,	Scott

342. For an explanation of TrialPrepPro Step 3, see *supra* Section III.C.

343. For further discussion of the Estimate of the Situation, see *supra* notes 90, 125.

344. Although we present Figures 4–8 graphically for simplicity, they can be digitized into a shared spreadsheet or a standardized tag in a litigation fact database like CaseMap. *See* CASEMAP USER GUIDE, *supra* note 173.

membership.		attach old written roles and responsibilities to see if want to make any changes.	(by 5/36/19)
Heads up about trial team membership.	PRICE	E-mail about new matter, attach old written roles and responsibilities to see if want to make any changes.	Scott (by 5/36/19)
Personal service of demand letter to Gardner on 6/10/20.	JONES	Can Jones personally serve the letter or will she need to hire a process server?	Jordan (by 5/29/19)
Young v. Gardner, Client #19-YG-1245, **Advanced Notice Chart** As of 5/26/19, 4:30 PM			
What kind of notice?	***To whom?***	***Why?***	***Responsible trial team member? (By when?)***
Filing complaint in U.S. Dist. Ct. M.D. Fla. (Jax Div.) on 6/10/20.	JONES	Can Jones personally e-file the complaint and summons on 6/10/29 or will we need to find someone else?	Jordan (by 5/29/19)
Personal service of complaint and summons at D's residence on 6/10/20.	JONES	Can Jones hire a process server?	Jordan (by 5/29/19)
Contact experts on ETC automobile liability expert list to see potential availability.	JORDAN	To give potential experts a heads-up in case liability expert testimony necessary.	Jordan (by 6/10/19)
Contact doctors on ETC medical expert list to see potential availability.	JORDAN	To give potential experts a heads-up in case damages expert testimony necessary.	Jordan (by 6/10/19)
Contact Price's Courtroom Home Information Presentation Services (CHIPS) to obtain price and time estimates for a "day-in-the-life" damages video for Young.	CHIPS (THROUGH PRICE)	Contact Price's Courtroom Home Information Presentation Services (CHIPS) to obtain price and time estimates for a "day-in-the-life" damages video for Young.	Price (by 6/17/19)

Upon completion, Jordan emailed a copy of the initial Advanced Notice Chart to everyone on the trial team—even the new members who had not yet been informed. Jordan shall continue to update this chart, removing completed items, throughout the representation.

4. Plan[345]

Having brainstormed the Advanced Notice Chart above,[346] Scott and Jordan move on to conduct their initial Estimate of the Situation. Although it is very early in the representation, before the defendant has

345. For an explanation of TrialPrepPro Step 4, see *supra* Section III.D.

346. *See supra* Figure 4.

even received their demand letter, it nevertheless is useful to go through the Estimate steps to brainstorm what questions they might have and what additional information they need.

Other than for negotiation-specific analysis, Scott and Jordan agree to assume for the purposes of their tentative plan that Gardner will refuse to negotiate a settlement and force them to file a lawsuit. They know that this initial Estimate is merely their first of potentially many; they shall continue to update it throughout the entire representation with new information or new events. Jordan pulls out his laptop, opens up a template with the Estimate steps in his word processor, and starts taking notes as they discuss each sub-analysis: (a) Mission analysis; (b) Time analysis; (c) Adversary analysis; (d) Friendly/Other party analysis; (e) Negotiation interest and risk assessment; and (f) Psychological traps.

a. Mission Analysis[347]

First, Scott and Jordan conduct a Mission Analysis, analyzing and drafting the matter's (i) Mission; (ii) Client's Intent; (iii) Specified and Implied Tasks; (iv) Specified and Implied Restraints/Constraints; and (v) the Decisive Point/Effect.[348]

i. Mission Statement[349]

After some discussion, Scott and Jordan come up with this draft litigation Mission statement with the 5Ws labelled:

> The ETC *Young* trial team—composed of First Chair Scott, Second Chair Jordan, Paralegal Jones, and Court Tech Price—, representing plaintiff Sidney Young, [*who*] shall litigate a Florida comparative negligence claim [*what*] against defendant Riley Gardner [*who*] in the Jacksonville Division of the U.S. District Court for the Middle District of Florida [*where*] starting in June 2019, [*when*] to recover compensatory damages [*why*].

Because this Mission statement is only for internal trial team use, more important than wordsmithing it to perfection is (1) making sure that it captures all the useful information and (2) using it as a quick reference throughout the litigation.

347. For further discussion of Mission Analysis, see *supra* Section III.D.1.
348. *See supra* Figure 3.
349. For further discussion of the Mission statement, see *supra* Section II.D.1(a).

Although brainstorming at least two courses of action is generally a best practice, it is not applicable here given the matter's simplicity. Neither Scott nor Jordan is able to brainstorm any alternative claims.

Like everything else in the TrialPrepPro, a Mission Analysis is iterative. With further information and more analysis, the Mission statement can and should be updated. For example, ideally the Mission statement would have a more detailed statement of damages. For now, Scott and Jordan simply wrote "compensatory damages" as a placeholder but shall update it with more specifics after their Negotiation Interest and Risk Assessment ("NIRA") analysis[350] and receiving more information.

ii. Intent Statement[351]

In light of the *Young* matter's relative simplicity, the only Intent statement needed for now is the Client's Intent statement. Based upon their interview notes, Scott and Jordan draft this client intent statement with the expanded purpose, key tasks, and end state labelled:

> The Youngs' intent is to (1) maximize the compensatory damages available to pay for Sidney's past and future pain and suffering, permanent impairment, emotional distress, loss of enjoyment of life, and any other general and special damages;[352] and (2) ensure that Gardner is held appropriately accountable for his negligence [*expanded purpose*] by entrusting ETC to (1) negotiate with Gardner to avoid litigation and (2) file a negligence lawsuit against Gardner in Florida federal district court if negotiations fail [*key tasks*]. A successful lawsuit will pay off all of Sidney's current medical bills, provide enough money for Sidney to live comfortably despite her permanent impairment, and publicly hold Gardner accountable for his negligence [*end state*].

Jordan plans to review this draft Client's Intent statement with the Youngs during their next meeting. Again, the Intent statement is an internal tool and need not be perfectly drafted. Jordan and Scott acknowledge that their draft Client's Intent statement needs more specific details about the client's desired end state.

350. For further discussion, see *supra* Section III.D.5.
351. For further discussion of the Intent statement, see *supra* Section II.D.1(b).
352. Young v. Gardner *Mock Trial*, *supra* note 302, at 6.

iii. Task Analysis[353]

Four task analyses essential to any litigation are (1) specified and implied tasks; (2) a jurisdictional checklist; (3) a proof checklist; and (4) a remedies checklist.

(1) Specified and Implied Tasks

Guided by the Mission[354] and Intent statements,[355] Scott and Jordan now analyze the specified and implied tasks of the representation. They decide to use the project delegation task generation approach,[356] as illustrated in Figure 5 below.

Figure 5: Sample Project Task Delegation Chart

Young v. Gardner, Client #19-YG-1245, **Project Task Delegation Chart** As of 5/26/19, 6:00 PM		
Project	***Assigned to?***	***Task List Share Deadline***
Serve demand letter on Gardner.	Jordan	5/28/19
File complaint in M.D. Fla.	Jordan	5/28/19
Prepare to negotiate with Gardner.	Jordan	5/30/19
Jurisdiction Checklist	Jordan	5/26/19
Proof Checklist	Scott	5/26/19

(2) Jurisdiction Checklist

Before filing a lawsuit in court, the plaintiff must ensure that they can plead jurisdiction sufficiently.[357] In the federal court, a plaintiff must be able to plead four jurisdictional requirements plausibly to file a lawsuit: (1) subject-matter jurisdiction; (2) personal jurisdiction; (3) service of process; and (4) venue.[358] Having filed many cases in federal court, Scott recycles the below federal jurisdiction checklist, illustrated in Figure 6.

353. For further discussion of Task Analysis, see *supra* Section II.D.1(c).
354. *See supra* Section III.D.1.(a).
355. *See supra* Section III.D.1.(b).
356. *See supra* Section III.D.1.(c).i.
357. *See infra* Figure 6.
358. *See* Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 224 (D.N.J. 1966). *See also* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

Figure 6: Sample Jurisdiction Checklist

Young v. Gardner, Client #19-YG-1245, **Federal Jurisdiction Checklist** As of 5/26/19, 6:30 PM		
Jurisdiction	***Standard***	***Evidence Proving/Disproving***
Subject-matter jurisdiction—diversity (U.S. Const. Art. III, § 2; 28 U.S.C. § 1332).	(1) State-law claim.	(1) Fla. Negligence (F.S. §768.81).
	(2) Complete diversity of parties.	(2) P (Mich.) v. D (Fla.)—information and belief, public records, request to admit.
	(3) Amount-in-controversy > $75k.	(4)Medical records, P's deposition.
Personal jurisdiction (Fed. R. Civ. P. 4(k); *Miliken v. Mayer*, 311 U.S. 457 (1940)).	A state court can exercise general in personam jurisdiction over a defendant domiciled in the forum state.	D is domiciled in Fla.—information and belief, public records, request to admit.
Service of Process (Fed. R. Civ. P. 4(e)(2)(B)).	Leaving a copy at D's residence.	Personal service at D's home. Unlikely to evade service.
Venue—D's residence; "substantial Section" of events (28 U.S.C. § 1391(a), (b)).	(a) All Ds reside in the forum state and ct. division.	(a) Gardner, sole D, is domiciled in Jax, Fla.—information and belief, public records, request to admit.
	(b) Substantial Section of events giving rise to the claim took place in the forum state and ct. division.	(b) Accident occurred in Jax, Fla.—information and belief, public records, request to admit.

(3) Proof Checklist

Having tried personal injury cases before, Scott already has a Florida comparative negligence proof checklist she can recycle for the *Young* case in Figure 7 below. But Scott has no experience with the brand-new Florida Ban on Texting While Driving Law.[359] Anything on the proof checklist not yet verified is followed by a question mark in parentheses ("(?)").

If this case goes to trial, Scott will want to have at least two pieces of evidence for every essential element. But this early in the representation, it is premature to know what subsequent fact investigation and discovery might reveal.

359. FLA. STAT. § 316.305 (West 2020); *see also* JOSEPH BASSANO, ET AL., *Texting While Driving; Use of Wireless Communications Device in Handheld Manner, in* AUTO. AND OTHER VEHICLES, 4A FLA. JUR. 2D § 597 (2020).

Figure 7: Sample Proof Checklist

Young v. Gardner, Client #19-YG-1245, **Proof Checklist**
As of 5/26/19, 7:00 PM

Claim/Defense	***Elements***	***Evidence Proving/Disproving***
Negligence Claim (Fla. Stat. §768.81; *Clay Elec. Co-op*); Statute of Limitations 4 yrs.[360]	(1) Duty;	(1) Undisputed.
	(2)Breach;	(2) Witness testimony—could be he said/she said (?), police officer testimony (?), forensic reports, car data (?), *per se* (?). Bad weather Δ.
	(3)Causation;	(3) Same as above.
	(4)"Actual loss or damage."[361]	(4) Undisputed.
Comparative Fault Defense (Fla. Stat. §768.81)	Same as negligence.	No evidence that P was comp. neg.
Bad Weather Defense	D exercised reasonable care but bad weather made accident unavoidable.	Could have pulled over, stopped driving. Saw two other cars spin out. Need expert testimony?
Ban on Texting While Driving Noncriminal Traffic Infraction (Fla. Stat. §316.305)	•Can we argue negligence per se with this traffic infraction (?). •§316.305(3)(d) allows discovery (?). •Did the police issue Gardner an infraction (?).	

(4) Remedies Checklist

While Scott and Jordan presently lack the medical records and insurance information to estimate their potential remedies, they create a working Remedies Checklist in Figure 8 below.

360. *See* FLA. STAT. § 95.11(3)(a) (West 2020).

361. Evanston Ins. Co. v. William Kramer & Assocs., 815 F. App'x 443, 445 (11th Cir. 2020) (quoting Clay Elec. Co-op., Inc. v. Johnson, 873 So. 2d 1182, 1185 (Fla. 2003)).

Figure 8: Sample Remedies Checklist.

Young v. Gardner, Client #19-YG-1245, **Remedy Checklist** As of 5/26/19, 7:00 PM		
Type of Remedy	***Details***	***Evidence Proving/Disproving***
Coercive Remedy	Not applicable.	
Damages	Compensatory only. Probably not seeking punitive/exemplary (?).	
Restitution	Not applicable.	
Attorneys' Fees	Probably not applicable.	
Declaratory Relief	Not applicable.	

iv. Restraint/Constraint Analysis

At present, Scott and Jordan still lack sufficient information to determine Youngs's reservation value—the bottom-line, least amount of money the Youngs would be willing to accept to settle the case.[362] Scott and Jordan have also already informed the Youngs that they shall contact the Youngs whenever they receive a settlement offer.

v. Decisive Point/Effect

In their initial Mission Analysis, Scott and Jordan consider Young's apparent lack of any possible comparative negligence the plaintiff's center of gravity.[363] As far as they can tell, Young lacks a critical vulnerability[364] in this case. Scott and Jordan do not see any applicable affirmative defense like comparative negligence.[365] At present, the only defense they can wargame for Gardner is reasonable due care under the circumstances, that a reasonable person exercising due care would not have been able to avoid the bad weather accident.

Based on the extremely limited information available about Gardner at present, Scott and Jordan identify two possible centers of gravity for Gardner. First, Young's ignorance about what was said or happened right before the accident and her apparent reticence to sue Gardner could be a center of gravity for Gardner. At present, there are two possible eyewitnesses, Perez and Williams. While neither have been interviewed, Scott expects Perez to agree with Young and Williams to agree with Gardner. A probable "he said/she said" split. Second, Gardner's car

362. *See* Noah G. Susskind, *Wiggle Room: Rethinking Reservation Values in Negotiation*, 26 OHIO STATE J. ON DISP. RESOL. 79, 79–80 (2011) (defining "reservation value" in settlement negotiation as the minimum amount a party is willing to accept).

363. For further discussion, see *supra* Section III.D.1(e).

364. For further discussion, see *supra id*.

365. Florida is a comparative negligence state. *See* FLA. STAT. ANN. § 768.81 (West 2020).

insurance company is the Acme Car Insurance Company. From previous litigation against Acme, Scott knows that Acme's insurance defense counsel tends to be aggressively adversarial, prone to avoid early settlement, and not afraid to go to trial.

As far as Gardner's critical vulnerabilities, at present Scott and Jordan identify two. First, Gardner's driving during the storm, perhaps too fast, might be negligent even without the added texting while driving. A reasonable person who saw two cars spin out on a highway should have slowed down or exited the highway until weather conditions changed.

Second, Gardner admits that he at least texted the word "soon" while driving. The Florida Ban on Texting While Driving Law[366] might justify a negligence per se argument. Jordan agrees to research the issue and send Scott an email with his initial findings in two days.[367]

After some discussion, Scott and Jordan tentatively agree that the decisive effect of this lawsuit will probably be the available forensic and cell phone evidence. Scott knows that a 2018 Honda Accord has the Honda Driver Information Interface ("DII")[368] which might be able to provide critical real-time data about Gardner's car at the time of the accident. Furthermore, when they get a copy of the police report, they will have a better idea about the forensic information gathered by Florida State Troopers after the accident.[369] The investigating officer might be another potential witness. Gardner's cell phone records might be able to establish if he was texting right before the accident.

If Gardner's Acme defense attorneys play hardball as expected, they might be willing to settle if the forensic evidence is so one-sided, particularly because a trial might require expensive expert testimony.

366. *See* FLA. STAT. ANN. § 316.305(3)(a) (West 2020).

367. Florida defines negligence per se as arising "from a violation of any statute which establishes a duty to take precautions to protect a particular class of persons from a particular injury or type of injury." Torres v. Offshore Pro. Tour, Inc., 629 So. 2d 192, 193-94 (Fla. Dist. Ct. App. 1993). *See generally* J. Richard Caldwell, Jr. & Jessica R. Baik, *Negligence Per Se,* 39 TRIAL ADVOC. (FDLA) 20 (2020) (explaining the history of negligence *per se* in Florida); Norm La Coe, *Negligence Per Se,* 1 LA COE'S FLA. R. CIV. P. FORMS R. 1.110(732) (2020 ed.) (explaining the pleading requirements under Rule 1.110 for Florida's negligence per se standard).

368. *See 2018 Accord Sedan: Driver Information Interface (DII)*, HONDA, https://owners.honda.com/vehicles/information/2018/Accord-Sedan/features/Driver-Information-Interface (last visited Mar. 7, 2021).

369. See Allister R. Liao, *Car Accidents and Police Reports*, NOLO, https://www.nolo.com/legal-encyclopedia/car-accidents-police-reports.html (last visited Mar. 7, 2021).

b. Time Analysis[370]

At present, there is not much more backwards time planning Scott and Jordan can do beyond what they have already done.[371] Only after they serve the demand letter on Gardner and, if necessary, initiate the lawsuit will there be a need for more deadline planning.

c. Adversary Analysis[372]

If this matter becomes a federal lawsuit, then Scott and Jordan will have more information—from the pleadings and other court filings—with which to conduct an Adversary Analysis.[373] Because Scott is more experienced and at present there is little information, Scott decides to be more intuitive and less deliberative with her analysis.[374] At present, Scott expects Gardner to settle the case. With the limited information known now, neither Gardner nor Scott can yet identify a most dangerous course of action. The only theory of the case they can brainstorm for Gardner right now is some force majeure-like argument[375] that the accident was unfortunate and unavoidable under the circumstances. Provided Young can establish that Gardner must have seen the two cars spin out of control, that argument appears flawed right now.

d. Friendly/Other Party Analysis[376]

Because there is only one potential plaintiff in this case, Scott and Jordan only need to analyze the Youngs and their own plaintiff's trial team. Included in this analysis is the typical theory of the case statement and theme of the case statement.[377] If the trial team has the time and resources, it is always helpful to formulate theory and theme statements for the opposing side and, if applicable, third parties.

370. For further discussion of Time Analysis, see *supra* Section III.D.2.

371. For a discussion of their initial deadlines, see *supra* Figure 4.

372. For further discussion of Adversary Analysis, see *supra* Section III.D.3.

373. *See supra* Section III.D.3.

374. For further discussion of slower deliberative versus faster intuitive planning approaches, see *supra* Section II.B.

375. *See, e.g.*, Jennifer Sniffen, *In the Wake of the Storm: Nonperformance of Contract Obligations Resulting from a Natural Disaster*, 31 NOVA L. REV. 551, 552 (2007) (defining force majeure as "a supervening force" sometimes invoked as an affirmative defense to breach of contract).

376. For further discussion of Friend/Other Party Analysis, see *supra* Section III.D.4.

377. *See supra* Figure 1b. Practically every trial advocacy book discusses theory of the case and theme of the case. *See, e.g.*, D. SHANE READ, WINNING AT TRIAL 6–14 (2007); CHARLES H. ROSE III, MASTERING TRIAL ADVOCACY 7–9 (2014).

Scott and Jordan brainstorm two possible friendly theories and themes of the case. First, the typical personal injury plaintiff theory and theme that Young was innocently injured by Gardner's avoidable negligence and deserves justice. Second, that Gardner was a "player" trying to play both his existing girlfriend Browning and his potential new girlfriend Young in an unsavory love triangle and therefore needs to "pay."

Scott dislikes both working theories and themes. The first is too default and the second appears to be a reach factually. Instead, Scott wants a better theory and theme tailored to Young herself. Perhaps some accomplishment or memorable positive story from her life could inspire a better theme. Scott tells Jordan to talk to Young's parents for ideas and circle back.

e. Negotiation Interest and Risk Assessment[378]

Scott and Jordan brainstorm this initial NIRA:

1. *Negotiation elements*:
    a. Relationship: Young and Gardner were initially attracted to each other. In addition, Perez, Williams, and Gardner are all classmates. But considering that they are all about to graduate from high school and that Young lives in Michigan, far away from Gardner in Florida, current or future relationships probably will not influence this litigation significantly. Perhaps Perez's previous friendship with Gardner and family relationship with Young might give Perez or his parents an opportunity to serve as an intermediary between the two parties.
    b. Interests*:* While this is the heart of so-called interest-based negotiation, neither party unfortunately appears to have interests beyond money that could provide an alternative means of settlement. Personal injury cases like this one where only one party suffered serious physical injury tend to be zero sum. The Youngs said that they intend for Gardner to be held accountable for what he did. Perhaps an apology from Gardner to Young could be one form of interest-based settlement.
    c. Communication: How well or poorly the parties communicate with each other has yet to be determined.

378. For further discussion of NIRA, see *supra* Section III.D.5.

d. Commitment: Commitments are yet to be determined.
e. Options: Given the apparent lack of interests beyond money discussed above, it might be challenging to generate alternative settlement options.
f. Legitimacy: Both Young and Gardner appear to have been otherwise exemplary young adults involved in a tragic accident. The Florida Ban on Texting While Driving Law[379] might provide an objective standard of care.
g. Alternatives: Given the zero-sum nature of personal injury cases, the best—really the *only*—BATNA[380] is litigation. Once litigation starts, there might be an increased willingness to settle depending on what the forensic discovery reveals.
h. *Liability risk estimate*. Scott and Jordan start with the very rough estimate that they have a 70 percent chance of being able to prove their liability case.
i. *Remedies estimate*. They estimate that their probability of proving their damages is even higher, about 80 percent, because most of Young's injuries will probably be undisputed. Because they are still gathering all the medical records—and have yet to consult actuarial tables for an estimate of her future lost wages/earnings/opportunities from her injuries—they cannot yet calculate Young's working damages.

2. *Court outcome expected value*. It is premature to calculate this value.
3. *Tangible costs of proceeding to trial estimate*. They roughly estimate future litigation costs.
4. *Intangible costs of proceeding to trial estimate*. They identify a relative small intangible cost, Young's feelings of guilt and regret in suing Gardner while she still has feelings for him.
5. *Net expected value of court outcome*. It is premature to calculate this value.

379. *See* FLA. STAT. ANN. § 316.305 (West 2020).
380. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 99–110 (1st ed. 1983).

f. Psychological Traps[381]

Although none of the psychological traps appear relevant now, Scott and Jordan will remain vigilant to consider if anyone falls for any of them.

5. Coordination[382]

While at present Scott and Jordan do not need to coordinate further, they should continue to ask whether they need to coordinate more as the dispute progresses.

6. Trial Outline[383]

Although it is too soon for Scott to complete her Trial Outline, when she does, she probably should give it *orally* to her entire team—perhaps video recording and transcribing it for reference—instead of writing out the entire Trial Outline. Alternatively, she could write only the key information on a skeletal outline.[384] While Paralegal Jones will brief Sections 4 (Support) and 5 (Communication) of the Trial Outline,[385] Jones shall rehearse the brief with Scott no later than one day before Scott's Trial Outline briefing to ensure that Scott agrees with everything Jones says.

7. Trial Notebook[386]

Although it is still premature to create a full-blown Trial Notebook, Scott knows that Jones is familiar with ETC's hard-copy and electronic Trial Notebook formats. Scott instructs Jones to maintain both hard-copy and electronic versions of the case's relevant files and documents in Trial Notebook format.

381. For further discussion of Psychological Traps, see *supra* Section III.D.6.
382. For an explanation of TrialPrepPro Step 5, see *supra* Section III.E.
383. For an explanation of TrialPrepPro Step 6, see *supra* Section III.F.
384. *See* MICHEL KALLIPETIS ET AL., BRITISH INSTITUTE OF INT'L & COMPAR. L., SKELETON ARGUMENTS: A PRACTITIONERS' GUIDE 1 (2004), https://www.biicl.org/files/2223_skeleton_arguments_guide.pdf.
385. For discussion of the Paralegal's roles and responsibilities, see *infra* Appendix C.
386. For an explanation of TrialPrepPro Step 7, see *supra* Section III.G.

8. Rehearse, Supervise, and Refine[387]

At this early brainstorming stage, the only supervisory technique being used is the backbrief. Scott has made Jordan orally backbrief many of her instructions. Likewise, Jordan has had Paralegal Jones verbally backbrief what Jordan has asked her to do.

CONCLUSION

While practitioners are encouraged to use the TrialPrepPro freely, we please ask that any practitioners using the TrialPrepPro visit the accompanying website, http://www.wvcle.wvu.edu/trialprepro, to (1) download the TrialPrepPro in editable word processing formats; (2) share with the authors any modified versions of the TrialPrepPro; and (3) compete a brief survey detailing your opinion of the TrialPrepPro and how you are using it.

We hope to incorporate regular lessons from this website and from practitioners to improve the TrialPrepPro. Moreover, the qualitative information we can obtain from this website hopefully can help us move past "learning by doing" to a higher level learning *from* doing.[388] Finally, in a follow-up article, we shall apply this system to federal criminal litigation through the TrialPrepPro—Criminal.

387. For an explanation of TrialPrepPro Step 8, see *supra* Section III.H.
388. *See* Will Rhee, *supra* note 10, at 311.

APPENDIX: MODEL TRIAL TEAM ROLES AND RESPONSIBILITIES

To ensure clear accountability for everything that must get done when preparing for trial, there should be clear *written* roles and responsibilities for everyone on the trial team. Although roles and responsibilities need to be customized for the particular law office and even the particular matter, here for reference are general responsibilities for the: (A) First-Chair Attorney; (B) Associate Attorney; (C) Paralegal; (D) Courtroom Tech; (E) Legal Intern; (F) Intern; and (G) All Trial Team Members.

Although every role ideally would be occupied by only one person, if necessary, a trial team member can of course fill multiple roles. In that instance, the roles and responsibilities below remain applicable. To avoid role confusion—and dropping the ball, a double-dipping trial team member should nevertheless remain clear about what particular role they are currently filling.

There should always only be one First Chair.[389] Otherwise, depending on the litigation's complexity and scope, there may be multiple people assigned to the same role. When that happens, the First Chair should designate a "lead" person for every role. Absent such designation, the default guidance is that the most senior person—as measured by years of experience or years of schooling/training—should serve as the lead.

A. First-Chair Attorney Duty Description

The First-Chair Attorney is ultimately responsible for everything the trial team does or fails to do. In short, the buck stops with them. In particular, the First Chair:

1. Counsels every trial team member in writing, ensuring that each member understands their specific role and responsibilities. While this ideally should be done face-to-face with a shared signed document,[390] at a minimum the First Chair should send each trial team member an email detailing their responsibilities,

389. This is consistent with the military principle of war, Unity of Command, which means "all forces operate under a single commander with the requisite authority to direct all forces employed in pursuit of a common purpose." ARMED FORCES OF THE UNITED STATES, JOINT PUBL'N 1: DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES V-1 (2013).

390. *See* THE COUNSELING PROCESS, *supra* note 118, at 2-5 (discussing the Army counseling process which mandates an initial in-person meeting).

requiring an emailed reply acknowledging complete understanding and some form of backbrief.[391]

2. Revises these roles and responsibilities in writing to ensure that all essential trial team tasks are covered. Whenever a trial team member's responsibilities have been modified, the First Chair must personally counsel the trial team member in writing.
3. When possible and necessary, seeks input from the law firm senior management.
4. Provides law firm senior management with bi-weekly emailed litigation progress reports.
5. Responds to law firm senior management questions and inquiries in a timely fashion.
6. Completes the Estimate of the Situation.
7. Is ultimately responsible for drafting and briefing the Trial Outline.
8. Is ultimately responsible for assembling and maintaining the Trial Notebook.
9. Schedules and oversees all reviews and rehearsals.
10. Can delegate duties to other trial team members with proper supervision.
11. Signs all pleadings, motions, discovery, other court filings, and official correspondence.
12. Conducts all hearings, arguments, and examinations.
13. Is usually assigned the depositions or examinations of witnesses critical to the decisive point/effect.
14. Usually role plays opposing counsel for the Associate's witnesses (unless another associate can play that role).
15. When the trial team is in the office, schedules and leads the trial team's weekly check-in. Keep the check-in as short as possible and do not waste anyone's time.

391. For further discussion of backbriefs, *see supra* Section III.H.1.

16. When the trial team is in a deposition, trial, or hearing, schedules and leads the trial team's daily check-in. Keep the check-in as short as possible and do not waste anyone's time.
17. Directly supervises the Associate Attorney(s).
18. Schedules and leads trial team after-action reviews.[392]
19. Uses backbriefs and inspections throughout the TrialPrepPro.
20. Schedules and leads rehearsals.
21. Has the final say on all trial team related matters.
22. Serves as the trial team's point of contact for all other law office lawyers.

B. Associate Attorney Duty Description

The Associate Attorney is the Second Chair of the trial team. Other than the First Chair, they are the only other attorney(s) assigned to the case. In particular, the Associate Attorney(s):

1. Shall assume the First-Chair Attorney's duties in an emergency if the First Chair is unavailable or incapacitated. If there is more than one Associate Attorney assigned to the case, unless the First Chair has already designated which Associate is the First Chair's second-in-command, the most senior Associate will serve as the Second Chair.
2. As the Second Chair, directly oversees discovery and all file/information management with the Lead Paralegal.
3. As the Second Chair, responsible for brainstorming less promising courses of action for every possible claim or defense during Mission Analysis.[393]
4. Can delegate duties to other trial team members with proper supervision.
5. Can sign pleadings, motions, discovery, other court filings, and official correspondence.
6. Uses backbriefs and inspections throughout the TrialPrepPro.

392. For further discussion of after-action reviews, *see supra* Section III.H.4.

393. For a discussion of Mission Analysis and analyzing more than one course of action, see *supra* Section III.D.1.

7. Can conduct hearings, arguments, and examinations.
8. Is usually assigned the depositions and examinations of less critical witnesses.
9. Usually role plays opposing counsel for the First Chair's witnesses.
10. Is usually assigned the role of researching and wargaming the adversary parties and their counsel (Adversary Analysis).
11. Is usually assigned the role of researching and wargaming the client and trial team (Friendly Analysis).
12. Is usually assigned the role of researching and wargaming the assigned judge and other relevant public officials to include mediators and arbitrators (Other Party Analysis).
13. Is responsible for completing and updating all legal research as directed by the First Chair.
14. Maintains the CaseMap or other litigation information database.[394]
15. Maintains the trial team's after-action review points and lessons learned.[395]
16. Prepares first drafts of hearing/argument/examination outlines as directed by the First Chair for the First Chair's review.
17. Directly supervises the Paralegal(s), Court Tech(s), and Legal Intern(s).
18. As necessary, directly supervises contract attorneys.
19. With the Lead Paralegal, directly supervises the legal aspects of all discovery inquiries.

394. *See generally* Jeffery Huron et al., *The Second Chair*, CORP. COUNS. BUS. J. (Dec. 19, 2014), https://ccbjournal.com/articles/second-chair (discussing the importance of technology in making an effective trial presentation); Nicole Black, *Here Are Tips to Uncomplicate Litigation Fact Management Software*, AM. BAR ASS'N J. (May 24, 2018, 7:15 AM), https://www.abajournal.com/news/article/here_are_tips_to_uncomplicate_litigation_fact_management_software1.

395. For further discussion of after-action reviews, *see supra* Section III.H.4.

C. Paralegal Duty Description

The Paralegal is responsible for all trial team tasks that do not require a law degree and Bar membership. If there is more than one Paralegal, the First Chair should assign a Lead Paralegal. Otherwise, the most senior Paralegal will serve as the Lead Paralegal. In particular, the Paralegal:

1. Shall manage all original documents and information for the case. Whenever the trial team receives any adversary discovery responses or other original information—whether digital or hard copy—the Paralegal is always the first person to process it. Other trial members are only allowed to receive copies of these originals.
2. Maintains the TimeMap, TextMap, Sanction or similar litigation support databases.[396]
3. Maintains the shared contact information for the entire trial team.
4. Maintains the shared calendar for the entire trial team. Make sure to post clearly on the calendar when trial team members are unavailable to work on the matter because of conflicting cases, vacations, personal or family issues, or other professional duties. If notices an actual or potential scheduling conflict, lets the Second or First Chair know immediately.
5. Prepares the Support and Communication Sections of the Trial Outline[397] for the First Chair by default. If there is more than one Paralegal, the Lead Paralegal is responsible for preparing these Sections.
6. Uses Backbriefs and inspections throughout the TrialPrepPro.
7. With the Associate Attorney, directly supervises the administrative and logistical aspects of all discovery inquiries.

396. *See* David McFarlane et al., *Using Computer Programs for Case Preparation and Trial Presentation: What Can You Do On Your Own?*, WIS. DEF. COUNS. ONLINE, http://www.wdc-online.org/application/files/8014/8027/4370/McFarlane_Outline.pdf (last visited Mar. 7, 2021); *see* Black, *supra* note 394.

397. *See supra* Figure 3.

8. With depositions, hearings, and trials, responsible for all travel arrangements, case-related shipments, and court/hearing/deposition room coordination.
9. During trial, responsible for managing all exhibits and courtroom digital or non-digital demonstrative aids.
10. Coordinates with courtroom deputy or judicial law clerk as necessary to make all trial team courtroom presentations as smooth as possible.
11. Directly supervises the Court Tech and, for nonlegal tasks, the Legal Intern.
12. Serves as the point of contact for the law office's information technology, word processing, and other administrative staff.

D. Courtroom Technology Technician Duty Description

The Courtroom Technology Technician ("Court Tech") is the trial team member responsible for all digital courtroom technology during a hearing or trial. Ideally, the Court Tech will be a dedicated, full-time member of the trial team but they also may be a contractor attached to the trial team before a trial, hearing, or deposition. In particular, the Court Tech:

1. Is responsible for all the audio-visual presentations during a particular trial, hearing, or deposition.
2. Is responsible for coordinating with opposing counsel, courtroom deputies, or other third parties to allow for confidential presentation rehearsals on the actual equipment before the scheduled event. Although the Court Tech can conduct these rehearsals alone, they should include the relevant lawyer or lawyers whenever possible.
3. Should always have at least one backup—preferably two—of any computer with the same audio-visual presentation ready to go on the backup.
4. Shall let the First or Second Chair know as soon as possible if they anticipate any problems with a particular audio-visual presentation.
5. Should be an expert in using all audio-visual equipment and software.

6. Should provide the Second Chair with digital and color 8½ x 11" paper copies of every presentation.
7. Should seek out other Court Techs with prior presentation experience in front of the same neutral or witness (i.e., judge, arbitrator, mediator, special master, expert) to obtain lessons learned from them.
8. Should know how to publish exhibits to the jury or judge.
9. Should know how to hide exhibits from the jury and only publish them with the judge.
10. Should be familiar with a court's local rules or judge's standing orders concerning presentations.

E. Legal Intern/Extern Duty Description

A Legal Intern/Extern is a law student or law graduate who has not yet passed any Bar examination or been sworn in as a lawyer. Legal Interns/Externs are primarily used for legal research or fact/discovery investigation. Specifically, a Legal Intern/Extern should:

1. Never practice law or give the appearance of practicing law.[398]
2. Should make sure to have a trial team lawyer review any legal work they accomplish.
3. Keep the First or Second Chair informed of any relevant news or required coordination with their law school.
4. Encourage other law students to work with the law office if they feel comfortable doing so.
5. Unless told otherwise, complete legal memoranda to the same standards as their law school legal writing program.

F. Intern/Extern Duty Description

An Intern/Extern is a college or non-legal graduate student who will primarily complete non-legal tasks. Unless the First or Second Chair say otherwise, the Lead Paralegal shall supervise the Intern/Extern. Specifically, an intern/extern should:

1. Never practice law or give the appearance of practicing law.[399]

398. *See* MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS'N 2009).
399. *See id.*

2. If ever assigned a legal task—or what the Intern/Extern suspects might be a legal task—ask the assigning person for clarification.
3. Keep the First or Second Chair informed of any relevant news or required coordination with their school.
4. Encourage other college or graduate students to work with the law office if they feel comfortable doing so.

G. Common Responsibilities for All Trial Team Members

These responsibilities apply to all trial team members. They may overlap with preexisting general law office expectations. All trial team members should:

1. Maintain the attorney-client privilege and client confidentiality.[400] If not 100 percent certain they understand attorney-client privilege and client confidentiality, then let the First Chair know as soon as possible.

   Whenever anyone receives a task for the trial team, that person or people—the "tasker"—should know "*TPE*": (1) the task (what to do); (2) the *purpose* (why); and (3) *endstate* (what does appropriate accomplishment of the task look like)[401] (the "TPE statements").

2. Use the familiar ***S.M.A.R.T.*** goal questions as a confirmatory checklist to ensure that the tasker's TPE statements are sufficiently detailed. Avoid getting hung up on which particular S.M.A.R.T. goal question corresponds to a specific statement. Merely ensure that the three statements together answer all of the S.M.A.R.T. goal questions.
   - *Specific:* Specifically define what the tasker is expected to do or deliver. Avoid generalities and use action verbs. The level of detail can be adjusted to the tasker's personality or experience.[402]

400. *See* FED. R. CIV. P. 26(b)(3); FED. R. EVID. 502; MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2009).

401. For further discussion of the TPE, see *supra* Section III.D.1.

402. *See Performance Management —Creating SMART Goals*, UNIV. OF N.C. – CHARLOTTE, https://hr.uncc.edu/sites/hr.uncc.edu/files/media/documents/Performance%20Management%20-%20Creating%20Smart%20Goals.pdf (last visited Mar. 7, 2021) [hereinafter *Performance Management*].

- *Measurable:* How will the tasker be able to measure success? How will the tasker have tangible evidence that they accomplished the goal? Usually success is measured in terms of quantity, quality, timeliness or cost.[403] Try to have at least two indicators. Both overall long-term and intermediate short-term goal measurements might be necessary.[404]
- *Achievable:* Is the goal doable? Make sure that accomplishing the goal is within the tasker's authority and capability.[405] Does the tasker possess the requisite knowledge, skills, abilities, certifications, and resources?[406]
- *Realistic and Relevant:* Is the goal practical and workable?[407] Is there a reasonable probability of the goal's successful achievement? Does the goal make a possible trial claim or defense more or less probable?[408]
- *Time-bound:* By when exactly does the goal need to be accomplished?[409] If there are critical intermediate milestones, by when do they have to be accomplished? Are deadlines internal or external? Court-imposed, party-imposed, or client-imposed? Flag any mission-critical deadlines (i.e., deadlines that, if missed, will negatively impact the lawsuit).

3. Attempt to resolve all internal conflicts at the lowest possible level before seeking supervisor assistance. Likewise, they should always give the First Chair a full and fair opportunity to resolve any problem before going outside the trial team for assistance or intervention.
4. Let the First Chair know as soon as possible if foresee any immediate or future obstacles to the trial team's success.
5. Keep the Lead Paralegal informed of their schedule and, in particular, any possible conflicts with the trial team's schedule.

403. *See id.*
404. *See id.; Writing S.M.A.R.T. Goals*, UNIV. OF IDAHO, HUM. RES., https://www.uidaho.edu/-/media/UIdaho-Responsive/Files/human-resources/forms/manager-resources/performance-development/writing-smart-goals.pdf (last visited Mar. 7, 2021).
405. *See Performance Management*, *supra* note 402.
406. *See* UNIV. OF IDAHO, HUM. RES., *supra* note 404, at 1.
407. *Performance Management*, *supra* note 402.
408. *See* FED. R. EVID. 401.
409. *See Performance Management*, *supra* note 402.

6. Ensure that they understand their Supervisor's Intent, the trial team's Mission, and the Client's Intent.
7. When possible, take the initiative. Do not be afraid to make a mistake but do not repeat a past mistake.
8. Feel free to state your opinion candidly and professionally without fear of repercussion or retaliation. If complaining, always suggest a solution to the problem.
9. When the trial team is in the office, attend the First Chair's weekly check-in. The First Chair promises to keep the check-in as short as possible and not waste your time.
10. When the trial team is in a deposition, trial, or hearing, attend the First Chair's daily check-in. The First Chair promises to keep the check-in as short as possible and not waste your time.
11. Understanding the importance of unity of command,[410] all trial team members will whenever possible observe the following chain of responsibility from increasing to decreasing responsibility: (1) First Chair attorney; (2) Second Chair Associate Attorney; (3) other Associate Attorneys in order of seniority; (4) Lead Paralegal; (5) other Paralegals in order of seniority; (6) Lead Court Tech; (7) other Court Techs in order of seniority; (7) Lead Legal Intern/Externs; (8) other Legal Interns/Externs in order of law school experience; (9) Lead Intern/Extern; and (10) other Interns/Extern in order of college or graduate school experience.
12. Make sure to enter your billed client time or equivalent correctly at least once a week.
13. Memorialize all essential tasks and actions in confidential emails to the trial team. When in doubt, err on the side of documenting your instructions or actions in an email and err on the side of including more trial team members. Trial team members can subsequently delete an email or instruct the sender individually whether they need to be included in the correspondence. If secure and established with the trial team, other online communication

410. For further discussion of after-action reviews, see *supra* Section III.H.4.

and collaboration platforms like Slack or Microsoft Teams[411] can be employed instead of email.

14. When sending or replying to a trial team email, make sure to identify the client matter clearly in the email, through a previously agreed upon tag or subject heading. Always summarize the bottom line up front in the email subject line. If there is a deadline, flag the email as important and write "DUE [date/time of deadline]" at the beginning of the subject line after the client matter identifying information.
15. When asked to reply and acknowledge receipt of an email or voicemail, reply and say/text/type, "I have read the email and acknowledge receipt," or something similar.
16. Always check your work email at least once a day during regular business hours and your work voicemail once a day during regular business hours, even when you are on vacation.
17. Never simply robotically reply or reply all to a trial team email. Make sure to think about who would need to see this email—and why—and carefully craft the subject line or first few sentences of the email to make it as easy and economical as possible for the receivers to understand the point of the email.
18. When emailing people outside the trial team—especially an opposing trial team, the court, or a third-party master/mediator/arbitrator—consider if the First or Second Chair has already approved the substance of the email. If the email is clearly within their Intent, send the email, copying or blind copying them.
19. Encourage the trial team to conduct after-action reviews as frequently as possible.

411. *See generally* Dom Nicastro, *Collaboration Tools: How Microsoft Teams, Slack, Workplace from Facebook Stack Up*, CMS WIRE (Mar. 30, 2020), https://www.cmswire.com/digital-workplace/collaboration-tools-how-microsoft-teams-slack-workplace-from-facebook-stack-up.