

CREATING A TRIAL NOTEBOOK

A. Advantages and Disadvantages of a Litigation vs. Chronological Notebook

A Trial Notebook, sometimes called a Trial Book, is a collection of documents, arguments, and strategies that an attorney plans to use during a trial. It is often organized as a loose-leaf binder for ease of use by the attorney. The Trial Notebook becomes the attorney's checklist for conducting the trial. It is a blueprint for the trial to come. An attorney can follow through the sections, step by step, when in the courtroom trying a case. Unanticipated situations almost always arise during a trial, but by preparing the Trial Notebook with care, an attorney can minimize surprises.

The first step is to create and develop a theme for the case. This is the central story or principle around which the case must develop and which will be supported by the witnesses and evidence. To that end, the trial attorney should prepare an outline establishing the theme of the case and setting out how the theme will be proven during trial. This outline should identify what witnesses and documents will be used, what issues will be addressed, and what will ultimately be proven at trial. Create a section in the trial notebook or folder system that includes the theme of the case as the first entry.

Next, prepare an "order of proof outline" which will set out the expected progression of the trial. Include the order in which each witness will be called to testify, as well as the documentary evidence that will be introduced at trial. The order of proof should identify all documents that will be introduced and should also describe how and through which witnesses the documents will be introduced. The order of proof outline should be flexible, in as much as the order of witnesses' testimony may vary;

nevertheless, the exercise of planning out how and when the evidence will be presented to the jury is very important.

The paralegal's job is to collect the material that will go into the Trial Notebook, organize it, keep it current, and help make it useful to the attorney as a tool for trial preparation and trial management.

Specifically, the paralegal might:

- Prepare summaries of deposition testimony.
- Prepare a list of every party and witness plus people who are expected to be mentioned during testimony; index this list to the rest of the Trial Notebook.
- Prepare sample questions to ask witnesses, particularly when needed to lay the foundation for evidence to be introduced.
- Prepare a summary description or log of all the exhibits to be used.
- Prepare an abstract of the contents of every document.
- State the location of documents and exhibits that will not be contained in the Trial Notebook itself.
- Cross-index material on particular witnesses or legal theories.
- Collect all the information known about each juror, from voir dire and by other means.
- Prepare end tabs for each section of the Trial Notebook.

- Color-code different kinds of documents and information, such as with blue sheets for citations to authorities supporting claims, and yellow sheets for deposition testimony and other statements of the opposing party.

However, it should be noted that the layout and content of the Trial Notebook varies from attorney to attorney, so therefore; there is no right or wrong way to prepare it. The basic format for a Trial Notebook is a three-ring binder for 8 1/2 x 11" paper (legal-size documents can be folded to fit or, better yet, photographed at a reduced size on 8 1/2 x 11" paper). But not all attorneys use Trial Notebooks to organize their materials for trial; some use file folders or some other sorting and retrieval system. In addition, the Trial Notebook expands as the case advances toward trial, therefore certain trial-related sections will not be finalized until right before the time of trial.

There is an advantage to a Chronological Trial Notebook as compared to a Litigation Trial Notebook. The advantage is that everything in the Chronological Trial Notebook is in the order in which the attorney intends to introduce it at trial. This will allow you to find what you are looking for when you need it. However, what matters most is that there are many practical and technical matters that need to be addressed by attorneys and paralegals prior to trial; and therefore the following elements are generally addressed or included in one form or another, no matter what format you choose. The fact remains that the Trial Notebook provides the attorney with a central location that contains as much useful information as is reasonable and efficient. Many Trial Notebooks contain the following Key Sections.

B. Key Sections and Their Development

1. Jury

Jury Instructions can and should be prepared ahead of time.

Attorneys for both sides normally furnish the judge with suggested instructions. The initial draft of jury instructions, subject to review and revision during the trial are unlikely to be revised substantially; hence they should be prepared in a “polished” draft form.

a. *Voir dire* examination - The jury selection section should contain a basic outline of the types of questions for the attorney to ask in order to select a fair and impartial jury. It should also contain blank sheets or charts for recording information obtained on each juror, as well as preliminary information supplied by the court.

b. Argument – This could consist of a list of all elements to be proven or argued by the attorney. These are the remarks made by the attorney to the judge or jury on the merits of the case or on points of law.

c. Opening argument - The opening argument sections should include a concise outline laying out what will be said and in what order. The outline will guide your attorney in presenting the opening. Alternatively, the full text can be written out, along with notes or prompts which the attorney can use when presenting the argument in court.

d. Closing argument - The closing argument section should include a concise outline laying out what will be said and in what order the arguments will be presented. This outline will guide your attorney in presenting the closing. Alternatively, the full text can be written out,

along with notes or prompts which the attorney can use when presenting the argument in court. Extra space or blank sheets should be included for notes and comments based on the actual course of the trial, which might lead to some changes in the closing argument.

2. Testimony

a. Witness list – The contents of this section will vary with the attorney. Set up the columns as follows: Names, Address and Telephone Number, Topic, and Time/Date for Testimony. You can also include: background information on each witness (i.e. age, residence, employment, etc.); outline of anticipated testimony, including analysis of the key areas to emphasize; outline of examination (direct or cross, depending on who will be calling the witness; level of detail depends on level of experience of attorney); copies of subpoenas served on witness, if any; digests of depositions or statements given, and possibly the full draft of a statement if not too lengthy; and copies or lists of documents relevant to the witness's testimony.

Prepare the Witness list before the pretrial conference. Give one copy of the witness list to your attorney to take to trial; keep one copy at the office for you or the secretary. Locate and schedule all witnesses (get assistance if necessary). Fill in the list as each witness is scheduled.

b. Client's statement – The attorney meets with the client to prepare for testimony at trial. The paralegal may also be instructed to do this if it is routine.

c. Witnesses' statements – Expert Witness Conference. Have the attorney organize the expert's testimony so that they buttress each other, cover gaps, and eliminate inconsistencies. Set and attend the expert witness conference with the attorney. Take notes at the conference to prepare a memo of the conference. The position of each expert must be itemized by the paralegal for the attorney. Background data on each expert witness must itemized by the paralegal for the attorney. A memo of the expert witness conference should be circulated among all the experts. Place the conference memo in the Testimony section of the Trial Notebook.

d. Preparing and serving subpoenas – Prepare subpoenas or have them prepared. Use a standard form. Send to the process server or sheriff.

3. Evidence

You should have copies of all documents to be introduced into evidence, unless too voluminous. In addition, summaries of key documents are very desirable. Any exhibit numbers or other designation at the final pretrial conference should be indicated. Also include lists or descriptions of non-documentary exhibits, together with identification of exhibit number or designation, if any, assigned at a final pretrial conference.

a. Defendant's deposition – Prepare a deposition analysis or summary. You can also put this out into the Trial Notebook under the Testimony Section.

b. Plaintiff's deposition – Prepare a deposition analysis or summary. You can also put this into the Trial Notebook under the Testimony Section.

c. Exhibit list – Set up the columns as follows: Exhibit Number, Description, In/Out. The name of the case and your office file number (if any) should appear at the top. Prepare before the pretrial conference. Use In/Out for admission (in) or rejection (out). Use the same exhibit numbers throughout the pretrial and court hearings for easy cross-referencing.

d. Legal authorities and case decisions – Research any legal questions (read carefully all pleadings to determine the legal questions involved in the lawsuit). Insert copies of relevant cases, statutes, and regulations. You can also include internal office memoranda and other research on legal issues.

e. Interrogatories – Paste each question on a blank sheet followed by the answer (if necessary for clarity). Otherwise arrange, as filed, in logical order. Discovery responses of reasonable convenient page-length (for example, interrogatory responses or responses to request for admission) should be kept at hand. Separate sections may be maintained for the responses of each separate party. Depending on the extent of the production response, original documents may be included as well. Where originals are too voluminous to include in the Trial Notebook, summaries are useful.

d. Investigation – Certain basic information should be maintained in this or perhaps, a similarly-titled section: such things as phone numbers (for witnesses, other involved law firms, the client, experts, the courthouse, a sheriff for service of subpoenas, etc.); FAX numbers, email addresses, and regular mailing addresses which may be relevant.

In addition, there may be aspects of your actual investigation of the case which do not fit into any other category (such as Discovery Responses, Documents, or Exhibits). An example might be the basic corporate information regarding an opposing party obtained from the Secretary of the State. It may be useful to have some of these materials readily available, if so, they should be maintained in this or a similarly-titled section.

4. Pleadings

The final, operative version of all pleadings is essential. Earlier versions which were filed but later replaced by amended pleadings are optional; in general, it is best to have these in another file, but not in the Trial Notebook. Note also that, depending on the complexity of the case and the pleadings, summaries of pleadings are often helpful (for example, a summary of a complex, multi-count complaint would quickly identify in shorthand fashion, the causes of action and major facts asserted).

Major motions (such as a Motion to Dismiss or a Motion for Summary), together with supporting memoranda and court rulings, often supply useful discussions of certain of the legal issues presents in the case, and should be included. Often a trial memorandum is filed at some point during a trial, addressing disputed issues of law.

- a. Plaintiff's original petition or complaint – A copy of Plaintiff's original petition or complaint should go into the Pleadings Section.
- b. Defendant's answer – A copy of the Defendant's answer should also go into the Pleadings Section right after the Plaintiff's petition or complaint.

c. Last-minute pleadings (*motion in limine*)

The *motions in limine* section should contain the actual motions that you will argue at trial as well as relevant case law and statutes.

d. Post Trial Motions – Trial documents that may be needed at the conclusion of the evidence. An example would be a Motion for Directed Verdict if it is a jury trial. Therefore, it may be useful to draft this or any other motions ahead of time so that the drafts can be quickly finalized and file when necessary.

I have also included a more complete listing of sections for your reference.

Table of Contents to Trial Notebook

- Things to Do
- Trial Schedule/Deadlines
- Trial Team (addresses, phone numbers)
- Case Outline
- Statement of Facts
- Pleadings
- Trial Briefs/Trial Memoranda (submitted to the court)
- Law
- Outline of Liability
- My Exhibits
- Opposition Exhibits

- My Witnesses
- Opposition Witnesses
- Witness Statements
- Requests for Productions and Responses
- Requests for Admissions and Responses
- Direct Examination Outline of Questions
- Anticipated Cross-Examination Questions
- Outline of Damages
- Motions
- Deposition Index and Outlines
- Voir Dire Questions
- Juror Information
- Jury Chart
- Records
- Opening Statements
- Plaintiff Testimony
- Jury Instructions Requests
- Defendant Testimony
- Final Arguments

C. Cross-Referencing

1. Cross-index material on particular witnesses or legal theories, etc. You can use color coding to flag sections (if used by your office).

Red: The client's testimony outline, deposition analysis, and interrogatories.

Yellow: The adverse party's deposition analysis, statement, and interrogatories.

Green: General trial matters such as outline of the case and *voir dire* opening argument.

Blue: Legal authorities relevant on evidentiary and substantial law points.

Purple: Procedural portions.

2. Defendant's deposition – Can be cross-referenced into the Trial Notebook under the Testimony Section and under the Evidence Section.

3. Plaintiff's deposition – Can be cross-referenced into the Trial Notebook under Testimony Section and under the Evidence Section.

4. Exhibit list – Can be cross-referenced using the same exhibit numbers throughout the pretrial and court hearings.

