

**THE TRIAL NOTEBOOK**  
**A Tried and True Tool, Still Useful in the 21<sup>st</sup> Century**

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**I. SCOPE OF ARTICLE**

This article covers preparation and use of the trial notebook in connection with the trial of a civil case and the reasons a trial notebook should be an essential element of your trial work.

**II. THE TRIAL NOTEBOOK - - THE ORGANIZATIONAL STRUCTURE FOR EFFECTIVE PREPARATION AND EXECUTION**

The keys to success at trial are preparation before trial begins and execution during trial. Effective preparation involves developing a strategy for presenting the case and gathering and marshaling the materials necessary for an effective presentation. Effective execution involves carrying out the predetermined strategy and includes, not only activities in the presence of the jury (such as voir dire, opening statement, presentation of evidence), but also before the court, outside the presence of the jury (such as arguing motions in limine and other major evidentiary points, participating in the charge conference and objecting to the charge). Both effective preparation and effective execution require effective organization.

The importance of organization cannot be over-emphasized. Time is a precious commodity during trial. The court wants to move its docket and, therefore, wants the trial to be as short as possible. Accordingly, the court will look favorably on lawyers who proceed expeditiously and may consciously or unconsciously punish those who do not. For the most part, the jurors just want the trial to be over, so that they can go about their business. Thus, jurors tend to penalize lawyers who waste time at trial as the result of apparent disorganization. Applying the discipline necessary to compile a complete trial notebook encourages organization which compels effective preparation and aids effective execution.

**III. CONTENTS AND ASSEMBLAGE OF THE TRIAL NOTEBOOK**

**A. The Raw Materials.**

There is nothing high tech about assembling a trial notebook. It is all in old fashioned, tangible form. The notebook itself should be a black, three-ring binder of sufficient spine width to accommodate all of the materials that will be included (i.e., unless absolutely necessary, no two-volume trial notebooks). The materials in the notebook should be separated by dividers, with one for each category of materials to be included, labeled as appropriate. As we shall see, in some instances, there will be sub-dividers to separate certain materials which are within a broader category. The idea is for the lawyer to be able to flip to the desired materials without having to do any noticeable searching.

## **B. The Empty Trial Notebook as a "To Do" List**

When you direct your assistant to prepare the labels for the dividers and sub-dividers in the trial notebook, you are actually preparing a list of virtually every task that must be performed before trial. Thus, the new trial notebook, consisting of only the notebook and dividers, is your "to do" list for trial preparation.

## **C. The Process of Assembling the Trial Notebook**

Assemblage of the trial notebook should start when trial preparation begins in earnest. This will usually be after the pleadings and discovery are closed. Before that time, the case is too much of a work in process to allow for effective assemblage of the trial notebook. You should place the appropriate materials in the trial notebook as they are finalized or otherwise become available. Most of the necessary materials will have made their way to the trial notebook before the trial begins. However, the process of assembling the trial notebook extends into the trial, because certain materials are not available until the case is called for trial or is in trial. Examples include the jury list, the other parties' motions in limine and bench briefs, and the final version of the court's charge and verdict form. Accordingly, you should always bring a three-hole punch to trial, so that everything that needs to be in the trial notebook can be placed there. It is also a good idea to bring reinforcements or scotch tape to repair pages which may be inadvertently damaged during the trial.

## **D. Categories of Materials to Include in the Trial Notebook and the Reasons for Including Them**

### **1. Pre-Trial Order**

In federal court, and in other instances where a pre-trial order is utilized, the pre-trial order sets forth the framework within which the trial is to be conducted. The pre-trial order usually supplants the pleadings for purposes of setting forth the contested issues to be tried. Accordingly, the pre-trial order should be in the trial notebook, because you may need to refer to the pre-trial order during trial, if questions arise as to whether the case is actually being tried in accordance with the pre-trial order.

### **2. Pleadings**

This section should include the live pleadings upon which the parties are going to trial. It is important to have the pleadings handy in order to test the relevance of evidence, to test requested jury questions and instructions for support in the pleadings and to avoid the trial of issues by consent. There should be a sub-divider for the pleadings of each party which will participate in the trial.

### **3. Exhibit Lists**

Most courts now require the parties to submit lists of the exhibits they intend to offer prior to trial. In this situation, this section should contain the exhibit lists submitted by all parties, separated by sub-dividers. At least your list should contain places to check each exhibit as "pre-admitted," "offered," "admitted" and "excluded," and you should encourage other counsel

to do the same. This will allow you to keep track of the status of all parties' exhibits as the trial progresses.

#### **4. Witness Lists**

As with exhibit lists, most courts now require the parties to submit lists of the witnesses they intend to call prior to trial. In this situation, this section should contain the witness lists submitted by all parties, separated by sub-dividers. This will assist you in making sure that the adverse party does not call any previously undisclosed witnesses.

#### **5. Motions in Limine**

This section should include the motions in limine filed by both parties and the orders on which the court will make its rulings on the motions. You should record the court's rulings on the motions on your copies of the orders which are in the notebook. This will assist you in remembering what matters have been provisionally excluded and cautioning your witnesses accordingly. There should be sub-dividers for each party's motion and order.

#### **6. Voir Dire**

This section should start with the outline of your voir dire examination. As jury selection proceeds, you should add the jury list or questionnaires, your jury seating chart, the notes you and your co-counsel take during voir dire and notes to reflect the jurors who were successfully challenged for cause, those peremptorily challenged and particularly those ultimately selected. In this latter connection, during trial, you may wish to refresh yourself about the backgrounds and apparent attitudes of particular jurors when considering use of specific arguments or examples.

#### **7. Opening Statement**

This section should contain the outline of your opening statement and any demonstrative aids you plan to display during opening statement.

#### **8. Witness Examinations**

Included in this section, separated by sub-dividers, should be the outlines of your direct or cross examination of each witness you reasonably expect to testify. You can update these during trial, if something new occurs to you. You should also include any legal authorities you will need to meet objections which you expect the adverse party to make with respect to questions you plan to ask the witness or documentary evidence which you want the witness to sponsor.

#### **9. Jury Charge**

You should initially place in this section, under one sub-divider, your requested jury questions and instructions and case law or pattern jury charges which support submission of same, and under another sub-divider, the other parties' requested jury questions and instructions and case law or pattern jury charges which support rejection of same. In connection with the

charge conference, you should include your written objections to the charge or notes from which to make oral objections to the charge. This section should ultimately include your copy of the actual charge of the court and verdict form and notations of the jury's answers to the questions.

## **10. Closing Argument**

This section should contain the outline of your closing argument and any demonstrative aids you plan to display during closing argument.

## **11. Law**

In this section, you should place case law, statutes or other legal authorities which are pertinent to the case and which are not included in other sections. It should also contain copies of any bench briefs filed by you or any other party.

## **12. Trial Notes**

This section should contain the notes you and/or your co-counsel take during the trial. These will usually be placed in the notebook after the trial is concluded.

# **IV. TIPS FOR USING THE TRIAL NOTEBOOK AT TRIAL**

## **A. Only One Complete Trial Notebook Per Case**

Because assemblage of the trial notebook extends through the end of the trial, as a practical matter, there can only be one complete trial notebook for a case. Lead counsel should retain possession of the trial notebook when it leaves the courthouse and should be responsible for placing materials, or causing them to be placed, in the trial notebook.

## **B. Remove Materials from the Trial Notebook When Using Them, Then Put Them Back**

It is not a good idea to carry the complete trial notebook to the podium each time you address the court, a witness or the jury. You do not want to risk dropping the notebook or appearing to have difficulty manipulating it when you are in the spotlight. Accordingly, when you need to use certain materials which are in the trial notebook, such as the outline of your opening statement, take them out of the notebook, use them and then put them back in their assigned place. If you like to use a loose leaf notebook when at the podium, bring along a thin one into which you can transfer trial notebook materials for actual use at trial.

## **C. Retain Your Trial Notebooks Intact and Know Where to Find Them**

You will be surprised how relatively often the same or similar issues or situations will recur in the course of a long law practice. Your old trial notebooks are excellent reference materials for arguments, quotes or jury questions and instructions which you may want or need to use again. Accordingly, maintain a library of your trial notebooks and know where you can find them when you want to avoid "reinventing the wheel."