

TRIAL NOTEBOOKS, BIG CHIEF TABLETS, AND OTHER HIGH-TECH METHODS OF TRIAL PREPARATION

Opening

Keys to Trial Preparation¹

If you don't know where you are going, any road will get you there.

You can't tell which way a train went by looking at the railroad tracks.

Even if you are on the right track, you will get run over if you just sit there.

It always gets the darkest just before it turns black.

Discovery these days is like playing leapfrog with a unicorn.

You're in a world of hurt if the sumbitch done has ya et up before ya even knowed it was hungry.

The armorers, accomplishing the knights, With busy hammers closing rivets up, Give dreadful note of preparation.²

If trial attorneys serve as modern-day knights and paralegals their erstwhile squires, the trial notebook is essential accouterment for battle. The trial notebook achieves a dual purpose by assisting trial preparation and facilitating effective presentation in the courtroom. By developing an outline that can be modified for each case, the lawyer can rely on his staff to put together each notebook with a minimum of lawyer input. Preparation of a notebook should begin at the same time you begin preparing for trial – the day the case comes into the office. The final trial notebook (as is your jury presentation) is a well-honed assimilation of the facts of your case.

In modern litigation, the days of helter-skelter, seat-of-the-pants preparation are history. Old silver haired attorneys, who feel that law practice was ruined when the copy machine appeared, dream about the days when they would announce ready at docket call on Friday and if their case were up for trial Monday, they would spend the weekend looking for the client while their secretary looked for the file. If they found

¹ The first four sayings, the author attributes to Will Rogers, if he did not say them he should have. The saying on discovery is from the Texas Supreme Court (per curiam). The last saying is from the Sheriff in *Best Little Whorehouse in Texas*. The saying on armorers is from Shakespeare, *Henry IV*.

² In rural Texas, when an attorney uses a quote of unknown origin, he simply says it is either from Shakespeare or the Bible. It seems that the scholars of each are mutually exclusive groups.

either one, they went to trial. Today's advocate must have an organized, effective system to prepare for trial. With most jurisdictions having draconian discovery deadlines, the trial attorney must have a system that assures that he will not only effectively present his case at the courthouse, but also that will not have lost the case before getting to the courthouse because he did not meet some obscure deadline.

The first thing an efficient person always does when undertaking any task is get organized. The wise attorney should be no different when he takes in a new case. Every trial lawyer should have a system that not only is useful at trial, but also is useful in preparing the case and in making sure that you do not miss critical deadlines. This article gives some suggestions about developing and organizing a system to prepare for a case trial. First, we will discuss how to prepare notebooks that will assist you in trial preparation. Next, we will explore how to make effective use of the notebooks, not only in trial, but also in preparing the case. Although the main focus is the trial notebook, we will also discuss other systems that we have found helpful. The author feels safe in representing to the reader that there is probably not an original idea in this article. Every suggestion has been "stolen" from ideas of other successful attorneys.

Developing a trial preparation system

If you are not currently using a trial notebook, start doing so. In developing your own trial notebook system, there are three keys to remember in creating an effective trial preparation system:

- KISS (Keep it simple, stupid).
- Standardize your form, then adapt.
- Plagiarize then personalize.

Although it is tempting to put everything related to a case in the trial notebook, this has proven to be inefficient and self-defeating. Having everything in one notebook may seem like a good idea until one cannot find the particular case the judge has asked for or the notes on the critical witness when, with a look of smug satisfaction on his face, opposing counsel says, "Pass the witness." Experience has taught that the trial notebook itself should be limited only to essential contents and space for making notes during trial. Just as the trial is a fine-tuned presentation of the essential evidence, the trial notebook should contain only the essential information. After experimenting with your system, you will find that after using it in several trials, your notebook will become simpler and more useful.

The trial notebook and other trial preparation aids should be standardized. This will enable a legal assistant to put the notebook together with a minimum of effort. A standardized form will make it much easier for the lawyer to review, prepare, and quickly put his hands on what he needs. Further, other attorneys in the firm covering for the attorney in charge can pick up the notebook and immediately find what is needed. Standardized notebooks have been extremely helpful in our firm in the "my

case, our case, your case" scenario. A trial notebook is very useful to the younger attorney who inherits a case that is going south from an older attorney.

Each lawyer should personalize his trial notebook, like well-fitted armor. Our trial notebooks have developed over time, mainly as an effort to avoid mistakes we have made in preparation or at the courthouse. Like almost everything else in our practice, our system is not original, but has been plagiarized from successful trial attorneys we have seen in action. Legendary East Texas trial lawyer, Scotty Baldwin, prepared the first trial notebook that I ever saw. Later, I heard him speak on the subject. Since Mr. Baldwin had flown to the seminar in his private jet, I thought I would "borrow" his idea. Now every case in our office has its own trial notebook. By taking Mr. Baldwin's notebook as a foundation, we have added ideas from various attorneys over the years and have developed a system that works well for our office. If you see another attorney who has a good trial notebook, or some effective preparation tool, ask him about it. Better yet, commend it. With rare exceptions, attorneys are more than willing to share anything that another attorney praises. Take what others have used successfully, adapt it to fit your needs, and make it your own.

Physical Make-up of the Trial Notebook

Our office uses three-ring binders for the trial notebook. In fact, our office uses three-ring binders, for everything in the file – pleadings, discovery, correspondence, cases and briefing, etc. Notebooks are much easier to use than the old file folders. You can retrieve and review documents more easily. If you need a copy of a document, it is much simpler to remove and replace in a notebook. The notebooks should have pockets in the inside of the front and back cover. These pockets are useful for storing items until you can file them in the appropriate location. When you are given a document at a deposition, put it in the pocket until you can turn it over to the safe hands of your legal assistant. Pockets are excellent for placing items you will need for certain occasions, such as maps to the deposition location or the deposition notice.

Do not place any original documents in the trial notebook. Again, do not place any original documents in the trial notebook. There are two ways for an employee to be fired in our office: steal firm money or give an original document to an attorney. By using copies, the attorney is free to highlight documents and to make notes on them. For photographs, we use color copies or have an additional set made. If an attorney loses a document, which seems to be a trait learned in law school, the original is safe in the office in the hands of the legal assistant.

As for original documents, legal assistants, not attorneys, place these in file boxes. Our office uses banker's boxes with hanging files. Normally these boxes are entitled, "Plaintiffs Evidence", "Defendant's Documents", "Medical Records", "Technical Literature", "Depositions", etc. "Plaintiff's Evidence" contains all original documents related to the plaintiff such as birth certificates, death certificates, accident report, photographs, etc. The "Defendant's Documents" contain documents related to the

defendant, with care being taken to separate documents that have been produced in discovery and those that we obtain by other means. The "Medical Records" box contains the originals of medical records and bills separated out by medical provider. Each document or set of documents is in a separate hanging folder. Each folder is then labeled for speedy retrieval.

For convenience, all our notebooks are color-coded. For each new file, we create a green trial notebook and a blue "General Notebook". As the file grows, we make additional notebooks when needed. The "General Notebook" is divided into separate notebooks for pleadings, discovery, and correspondence. Each notebook is labeled with the case name and number and is color-coded according to documents contained - blue for pleadings, red for discovery, green for trial notebooks, and black for other information. Each notebook is labeled on the front and on the spine so that it can be readily identified on the shelf. This saves the embarrassment of showing up for a deposition and finding you have the correspondence notebook from an unrelated file. As cases are tried or settled, the contents of each notebook are removed and the binders reused.

Once you have devised a method that works, standardize an outline for each of these tools to the point that your support staff understands with minimal instruction which items should be contained in each type of notebook. Keep the system flexible enough for each individual case's needs. The following outlines have evolved from the trial experiences of our office and may perhaps prove beneficial to your practice.

Preparation of the trial notebook

The trial notebook begins in a skeleton form when work begins on the case. When we open a new file, the legal assistant automatically starts a trial notebook and a general notebook. Since our notebooks are standard, we have form tabs professionally printed and the legal assistant simply labels the notebook and inserts the form tabs. For the general notebook (pleadings, correspondence, and discovery), place blue numbered tabs behind the pleadings tab and red numbered tabs behind the discovery tab. Have pre-printed, pre-numbered index sheets in front of both pleadings and discovery and, as documents are filed, record these on the index in legible handwriting. Correspondence is not numbered or tabbed, but is filed with the most recent letter or fax at the end.

The legal assistant opens the trial notebook by placing the appropriate printed tabs (Data, Pretrial, Jury, Evidence, Witnesses, Charge and Summation and Notes & Law) in the notebook. A sample of the index is below. Behind each topical tab, color-coded number tabs are placed. The form tabs are already printed and the form of the notebooks are standardized, so a legal assistant can open the notebooks in a matter of minutes. As the case develops, relevant material is automatically placed behind its proper tab. By using this method, notebooks "come together like butter in a churn" over the life of the case. This is a much more reliable method than the mad scramble searching the office and assembling documents the weekend before trial. After

becoming familiar with the system, legal assistants and attorneys both greatly appreciate its efficiency and simplicity.

One of the benefits of beginning the trial notebook at the beginning of the case is consolidating all relevant material in one place. When preparing for a deposition, the trial notebook should have everything necessary. When a lawyer goes to deposition, he normally only has to take the trial notebook. When a lawyer needs to review the file or check a certain fact, he can quickly turn to the proper tab in the trial notebook, and he has all of the factual material that he needs. A standardized trial notebook is an excellent tool at any stage of development to review your case at a glance.

To reduce bulk, material copied for the notebooks should be double-sided, or even printed or copied in four-plex format (four pages printed on each page). It has been our experience that the older a lawyer becomes, the easier he finds it is to read smaller print. Adding condensed versions of depositions in the witness section is another means of reducing the bulk of the trial notebook. Reduced copy size not only allows us to get more vital information in the notebook, but also has reduced the number of worker's compensation claims for injured backs.

Contents of the trial notebook

At the beginning of the trial notebook is an index, a sample of which is below. The form of the index is on the computer, and the legal assistant simply fills in any known information and prints it for each new case. When information is added, it is placed in the hard copy of the index by hand. Periodically, such as before a deposition or hearing, the Index is updated on the computer and a current hard copy is placed in the front of the notebook.

- | | | |
|------|---------------------|-------------|
| I. | DATA | blue tabs |
| | 1. Case Sheet | |
| | 2. Incident Summary | |
| | 3. Chronology | |
| | 4. Cast | |
| II. | PRE-TRIAL | |
| | Pleadings | blue tabs |
| | Discovery | red tabs |
| | Motions | yellow tabs |
| III. | JURY | blue tabs |
| | 1. List of Jurors | |
| | 2. Voir Dire | |

3. Opening Statement

IV. EVIDENCE yellow tabs

Liability tabs 1 - 20
List each item by number.
Damages tabs 21 - 30
List each item by number.

V. WITNESSES

Plaintiff's blue tabs

Fact tabs 1 - 20
List each witness by number.
Expert tabs 21 - 30
List each witness by number.

Defendant's red tabs

Fact tabs 1 - 20
List each witness by number.
Expert tabs 21 - 30
List each witness by number.

VI. CHARGE AND SUMMATION

VII. NOTES & LAW

An explanation of these sections is below.

I. Data

We designed this section to contain all of the "essential" information about the case. The attorney may rely on this information when discussing the case with insurance adjusters, witnesses, experts, or opposing attorneys.

A. Client Case Sheet

This contains client's name(s), address, phone numbers and contacts; information about the client's family; information about the court (including cause number, judge, court reporter, clerk, bailiff, and judge's secretary - or court coordinator - and the phone numbers and addresses of each (see sample case sheet, Attachment 1).

We have found that putting vital statistics such as date of birth, driver's license number, and social security number can really come in handy. An additional contact, parents, family member or close friend helps locate the client if you have been unable to locate him. It is amazing how many times you need to talk to a client immediately and he is out of town for the day.

Always put the name of the judge's secretary on the case sheet. People respond better when you call them by name. It has been our experience that endearing yourself to court personnel never harms the trial of your case.

We keep the case sheet on the computer, and the legal assistant or attorney updates it when new information comes along. For example, when the lawsuit is filed, the court information is added; when the suit is answered, the information about the opposing attorney is added. By adding information as it becomes available, the case sheet is always current. The legal assistant or attorney just takes a moment's time every now and then to update the information, instead of using large blocks of time when there are bigger fires to put out. Periodically, such as before a deposition, before a hearing, before a meeting on the case or before trial, a hard copy of the case sheet is printed and placed in the notebook.

B. Incident Summary

This will be a concise narrative of the incident that is the basis of the case. As opposed to being patterned after a legal pleading, it tells the story in a concise manner similar to an opening statement, but more objective. In fact, it is a good starting point for preparation of the opening statement.

C. Chronology

A chronological "date-time-event" chart listing all dates and events related to the case is behind this tab. The first dates listed are normally the client's date of birth, then other major events before the incident that is the basis of the law suit, such as marriages, birth of children, etc. Any relevant dates leading up to the lawsuit, such as when a product was designed or manufactured, are listed in date order. If actual time is critical to the liability facts, as often is the case in a medical malpractice case, events surrounding the incident are recorded as close to the actual time they occurred as possible. The Chronology is kept on the computer so that it can be updated quickly when discovery reveals new dates. Hard copies are printed when changes are made and inserted into the notebook.

D. Cast of Characters

This section contains a "cast of characters" or list of all people involved, identifying individuals and the role that each has played or will play. Always put phone numbers with the individual's name in case you need to call on the spur of the moment.

II. Pretrial

In our system, we use blue numbered tabs for pleadings and red numbered tabs for discovery. Under both pleadings and discovery, we have a separate tab for each party in the case.

A. Pleadings

This contains the latest pleadings (live pleadings) for all plaintiffs and all defendants. These are printed or copied four-plex to save space.

B. Relevant discovery

This contains key discovery answers for plaintiff and defendant. If discovery is voluminous, we use summaries of the relevant and important items instead of actual copies of the documents. These summaries can be as brief or as detailed as the attorney feels necessary. As in pleadings, these are printed or copied four-plex to save space.

C. Motions

In this section, include plaintiff's and defendant's Motions in Limine and any other motions you may have to take up with the court. It is strongly recommended not to file a "stock" motion, but rather one tailored to the particular case. If you have a case, rule of evidence, or rule of procedure on a critical point, put a copy of the case in this section of your notebook.

III. Jury

Add this information within a month or so before trial. Add the jury list when obtained and keep it as a handy reference throughout the trial.

A. List of Jurors

This contains the jury panel list. After the jury has been selected, you can put the jury chart here as well as the juror questionnaires of the jurors who are selected. If time permits at trial, have a member of your staff prepare a concise, one-page profile of the jury from the questionnaires.

B. Voir Dire

This contains your voir dire questions and notebook paper for notes about the panel. Use this section to put ideas and reminders for your voir dire as the case develops. This

keeps you from forgetting that important idea you had a few months ago while reviewing the file.

Consider placing notes and thoughts in this section from day one in the life of your case. When you interview the client for the first time, you are hearing the about the case for the first time, which is kind of like the jury will be at trial. After the initial interview, consider jotting down the strong points of the case - if there are none, better rethink whether you want to invest your blood and treasure. Write down the weak points, what are you afraid of, worried about in this lawsuit. File these notes in the voir dire section and refer to them from time to time as the case develops. Many times, an attorney becomes so involved in developing certain aspects of the case that she loses sight of the big picture. Your original notes will help to bring you back in focus.

In preparing your voir dire, a well thought-out, well-constructed trial notebook can be invaluable. All of the information and all of the references that you need should be only a tab away. Consider the information that you want to cover in voir dire and most if not all should be in the trial notebook. For example:

1. Consult final petition to be sure that you cover all the elements of damages and all the theories of liability.
2. Read the Defendant's responsive pleadings carefully to make sure that you discuss the defenses that he will assert before the jury.
3. While outlining the facts of the case, you can refer to your incident summary and critical evidence, such as accident reports, incident reports, and medical summaries.
4. Consult the tabs of various witnesses whom you will call to make sure that you do not misstate the evidence. Since a careful attorney will want to reveal all of the weaknesses, or soft spots, of her case (i.e. drinking, drug usage, criminal convictions, lack of employment, etc.), a quick reference to witness statements often assures that you are stating the evidence correctly.
5. Many judges have an attorney list the witnesses to be called for the jury panel to see if any prospective jurors are familiar with anyone. A quick glance at the index will show the list of all witnesses you plan to call. The flip side of the coin is just as shiny, because you can check the defense witnesses so that you can be sure you do not leave any out when you ask if the panel knows them.
6. Reviewing the charge is an invaluable aid in preparing your questions for the venire. When all is said and done, these are the issues the jury will be trying to answer.

You will save valuable time if you have everything you need for voir dire in one place and at your fingertips. You can spend your time and energy focusing on what you need to find out from the jury instead of searching the file for information

Challenge for cause

All jurisdictions have basic qualifications that a juror must satisfy to serve on any jury. For example, in Texas state courts, a prospective juror must be able to read and write, be over the age of eighteen, not have been convicted of or be currently indicted for a felony and have visited

the Alamo at least once.³ In our office, we have listed each of the statutory disqualifications on a single sheet of paper. For each trial, we print this and place it behind the juror tab of the trial notebook. This can be a quick and convenient reference for the attorney or to show the judge if questions come up on the qualifications of a particular juror. It is suggested that you prepare a similar sheet for your jurisdiction. Just prepare it once and add to or modify it if the law changes.

Every jurisdiction has certain criteria for determining if a juror has bias or prejudices that make him or her unfit to serve on a specific case. As with statutory disqualifications, we have the key cases and a summary of the holdings reduced to a single sheet and placed in the voir dire section.⁴ We have found it helpful to have a copy of these cases, with relevant parts of the opinions highlighted, in the notebook. In the heat of battle, when the judge wants to "move along," you can hand the key case to the judge to review on the spot. We have found it much more successful than citing a case, with the judge having to stop the proceedings and keep potential voters squirming in their seats while he retires to the library. If there are critical cases in your jurisdiction, it is strongly suggested that you not only prepare a sheet listing and quoting the critical cases, but also make a copy and highlight the opinions.

Furthermore, Texas has specific steps that you must take and certain times to preserve error if the judge refuses to strike a juror whom you feel is disqualified. We have these listed on our sheet, so that the attorney can quickly refresh his memory. If this is the same in your jurisdiction, the preparation of such a sheet may prevent the anguish of thinking that you have preserved error only to determine later that you have left out step three and waited too late to perform step four.

C. Opening Statement

This contains notes for your opening statement. Just as in the voir dire section, insert a few sheets of notebook paper to immortalize your brilliant thoughts before they escape. Oft times in a deposition, preparing for a meeting while flying on a plane or while

³ Tex. Govt. Code Ann. §62.102 (Vernon 1988)

⁴ On our sheet, we have cited for Texas the following cases: *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963), "Statutory disqualification of bias or prejudice extends not only to the litigant personally, but to the subject matter of the litigation as well." *Ramirez v. Wood*, 577 S.W.2d 179 (Tex. Civ. App. -Corpus Christi 1978, no writ), juror disqualified who did not believe in personal injury lawsuits; *Cavanar v. Quality Control Parking, Inc.*, 678 S.W.2d 548 (Tex.Civ.App. -- 14th Dist. 1984), modified on other grounds, 696 S.W. 2d 549 (1985), "Bias against damages is sufficient to challenge prospective juror for cause." *Carpenter v. Wyatt Construction Co.*, 501 S.W.2d 748, 750 (Tex.Civ.App. -- Houston 14th 1973, writ ref'd n.r.e.), "Once bias established, statute does not involve a matter of discretion but a matter of law. When a juror is biased or prejudiced, his affirmation that he can set this aside and try the case fairly upon law and evidence shall be disregarded. Cannot be 'rehabilitated.'"

preparing for a hearing, you will have a revelation that needs to be covered in opening statement; write it in the notebook.

As mentioned above in the section about voir dire, the trial notebook should contain everything, or almost everything, that you need to prepare your opening statement. Refer to the incident summary for the basic facts. Look at witness statements and the evidence section to make sure that you are accurately citing the evidence. Look at the depositions if you want a short quote from a critical witness.

Any trial consultant and more importantly, any good trial lawyer, will tell you that you should have a theme for your case. The theme of your case provides the overall rationale for why your client should prevail. Anything you present to the jury during the opening statement and during the rest of the trial should be directly tied to your theme. Your theme will be linked to your legal theories, but it is the theme of the case that you will use to convince the jury that your side should prevail. Since studies show that 90 percent of jurors are human, your theme should relate to common human experiences. During the life of the case, write down potential themes on the notebook paper in this section of the notebook. Some potential areas for developing a theme include:

- Popular television shows or movies;
- Television commercials (Madison Avenue has spent millions and millions of dollars coming up with catch themes that persuade ordinary people to act.);
- Classical and modern literature;
- The Bible (Jesus used simple, but powerful, parables to teach and persuade his audiences.);
- Fairy tales, fables and stories we learned as children. (The reason your grandmother read them to you was because they had a moral.);
- Well-known events in history; and
- Themes of modern, everyday living (personal responsibility, the big corporation versus the individual, the American Dream, the inability for your client to now obtain it, etc.).

If you have jotted down your strong points and your weaknesses, your hopes and your fears, as the case proceeds, you have them all in one place when the time comes to focus on your opening statement.

IV. Evidence

In our system, we use yellow numbered tabs (1 to 20 for liability and 21 and above for damages) for this section

A. Liability

As the title indicates, use this section to file documentary evidence that is relevant to liability issues in the case. For example, in an personal injury case involving a car wreck, this section will include items such as maps, police reports, photos of the scene and the vehicles, weather reports, driving records of the parties insurance policies, and all documentary materials (except those to be placed in the Damages section below) which you feel are relevant to the case. Place documents that you may use as exhibits at depositions and at trial, along with other important information, such as defendant's insurance (copy of the declaration sheet), reports from investigators, and important documents about the defendant or plaintiff, such as driving records and criminal records.

As emphasized above, everything in this section is a **copy**, not an original. By using copies, the attorney is free to make notes on the documents and to highlight salient information. The photographs in this section are photocopies or reprints of the most essential photographs.

When making final trial preparations, most of your exhibits will be in this section. Using the Liability section as a start, you can compile your trial exhibit list. Although it may not contain all of the exhibits that you will need for trial, it is an excellent place to start. List the exhibits in the order that you "think" they will be introduced at trial. On the exhibit list, have a place for a brief description of the exhibit, witness through whom you intend to introduce it, court number of exhibit, and space to check off when the item is offered and whether it was admitted (see Attachment 2).

B. Damages

This section will contain all items relating to damages. In a typical personal injury case, it will contain documents such as medical summaries; summaries of doctors' and hospital's bills; reports of doctors, pathologists, hospitals and clinics, etc.; automobile repair bills; and reports of lost wages. In most cases, it is not practical or useful to put all medical records in the trial notebook. We use summaries of the medical records and occasionally a relevant discharge summary or doctors report. In the medical bills section, we only use a summary of the bills that lists the health care provider and the amount. At the bottom of the list is the total amount. Both of these summaries are kept on the computer and updated as new records come in. Periodically, we print updates for the trial notebook.

The earnings section contains summaries of relevant wage information, such as income taxes, W-2 forms and statements from employers concerning time missed from work. Normally, it is more useful to summarize the wage information from the income tax returns or W-2 forms. Not only does this take up less space, but also it is much easier for the attorney to review in preparing for a deposition or trial. If you are using an economist, place his report in this section of the notebook. You can also put vital statistics information (birth certificates, marriage licenses, and death certificates) here.

In preparing evidence for your trial, be creative. As with the liability section, use this section as a starting point for your exhibit list. In this information age there are numerous inexpensive and informal sources of information. Use public records and the Internet to find golden nuggets. Remember state and federal Freedom of Information Acts and your public library. State and federal agencies often have vital information that has been obtained to issue permits and licenses to defendants such as trucking companies. Public sources and the Internet can be useful in finding information about the defendant, such as net worth, prior claims and lawsuits, and articles written by in-house experts.

Contact other attorneys who have been involved in similar litigation or who have litigated against the same party in previous litigation. Copies of the discovery from prior cases may turn up or help locate evidence that can occupy one of your evidence tabs. Another source of evidence that is often overlooked is your client and your lay witnesses. You will be amazed at the time and money that you can save when a client or friendly witness learns what evidence will be helpful and is given an opportunity to become a "private eye".

V. Witnesses

Our system uses blue numbered tabs for plaintiff's and red for defendant's witnesses. We use tabs of the appropriate color numbers 1 to 20 for fact witnesses and 21 and above for experts. At the very beginning of this section is an index listing the names, addresses, and phone numbers of all witnesses. You can easily prepare this by cutting and pasting from the cast of characters in the data section.

Information for each witness shall include a summary or outline of the deposition, a condensed copy of the deposition, copies of any statements that the witness gave, or an itemized summary of facts that the witness can establish. You can save valuable space by printing or copying documents in four-plex format. For expert witnesses, include a copy of the curriculum vitae (if the person is a genius, or wants the world to think so, four-plex it) and any written reports furnished.

As you begin trial preparation, place your notes or outline of what you intend to prove by each witness at trial. If you have tabs for witnesses who are not going to be called at trial, remove their tabs and the information behind them. Before you remove a tab, make sure that the other side will not call the witness.

A. Plaintiff's Witnesses

Fact

This section contains a tab for each fact witness who will swear for your side of the case. Place the following behind each witness' tab: statements; condensed versions of depositions, deposition summaries, and any relevant drawings or exhibits attached to

the depositions. In other words, this will contain any information that you might need about this witness at trial. Although you may not want copies of all deposition exhibits, be sure to copy those that may be helpful. Few things are more exasperating than reviewing a deposition for trial, with the witness constantly referring to marks he has made on a drawing that you do not have in front of you.

Since statements taken from witnesses are discoverable in Texas, we are careful about from whom we take a statement and almost never take a statement from a friendly witness or damage witness. If the witness is unfriendly, or parts of his testimony are harmful, the attorney has to make a judgment call. Is your desire not to educate the other side outweighed by your desire to "tie down" the witness's testimony? If you decide to go on and take a statement, we have found it is helpful to interview the witness fully and then attempt to "control" the information that goes into the statement to minimize the harm. Always remember to tie down a witness about things he does not know. We have found witnesses who said that they did not know how fast a car was traveling suddenly remember at trial that it was going over 70 MPH. It is not so much that witnesses are lying as they have been "woodshedded" by opposing counsel who has told the witness that the police officer and everyone else has said the car was going over 70 MPH. Suddenly, 70 MPH sounds about right.

If you elect not to take a statement, prepare a detailed summary of the interview. This should be done as soon as possible, while information is still fresh and easily recollected. Another helpful tip is to have your investigator, or staff member who takes the statement dictate observations about the witness. If the witness is inarticulate or speaks poor English, has Satanic cult tattoos or extensive pierced body parts, you need to know. If the witness has potentially harmful knowledge that was not included in the statement, you need to know. Always have the observations printed on a separate sheet of paper, not on the same sheet as the statement. Many times in preparing for trial or deposition, it is helpful to show the witness the statement that he or she has given or the summary of the interview given months, or even years, before the trial or deposition. The advantages of using the document are quickly lost if there are unflattering references to the witness's weight, hair style, or body adornments.

On "damage" witnesses who will testify about the suffering that the Plaintiff has endured since the injury or the differences in the Plaintiff's life since the incident, we often ask them to make a list of things they have observed. Do this after a lengthy meeting discussing what the witness has observed and carefully explaining what testimony is needed to paint an accurate picture of the Plaintiff's life before and after the incident. Always ask the witness to make the list as specific as possible. You need to know specific examples to paint a graphic picture that will stick in the jurors minds. "He was a good father" means little, whereas, "he took his vacation time from work to coach Little League" or "when his daughter was sick, he stayed home to read to her" has a powerful and lasting impact on jurors.

In the "Fact" section of Witnesses, we place lay witnesses who are helpful to the Plaintiff, whether their testimony is relevant to liability or damages. We have found this simpler, because a witness often has relevant information on both topics.

Expert

This section has a tab for each expert witness. As in the "Fact" section, our system does not distinguish between liability or damage experts. The curriculum vitae, a condensed version of the deposition, and a deposition summary for each expert are kept here. A copy of the expert's report, or reports, goes behind his tab. If an expert has written any relevant articles, include copies of those in this section. As you prepare for trial, outline your direct examination of the expert and place it behind his or her tab.

Since Federal Courts and most state courts have become "gatekeepers" and must decide not only if the expert is qualified, but also if his testimony is relevant and reliable, we have made a list of the criteria set out by the United States Supreme Court in *Daubert*,⁵ as well as the guidelines set out by the Texas Supreme court. Place this list behind the first expert's tab. We have found this to be invaluable in preparing an expert. It is often helpful to allow the expert to look at the requirements and let him help you find the most effective way to hurdle the gate.

B. Defendant's Witnesses

Fact

This section contains a tab for each fact witness who supports the Defendant's version of the case, be it damages or liability. Place the following behind each witness' tab: statements; condensed versions of depositions, deposition summaries, and any relevant drawings or exhibits attached to the depositions. As the case progresses, place notes or questions you intend to ask each witness behind his tab. When preparing your cross-examination, put your outline behind the tab.

Expert

This section has a tab for each of the Defendant's expert witnesses. Again, we use this section for both damage and liability experts. The curriculum vitae, any reports, a condensed version of the deposition, and a deposition summary for each expert are kept here. If an expert has written any relevant articles that you may want to use for impeachment, include copies of those in this section. As with fact witnesses, place notes or questions you intend to ask each witness behind his tab as you think of them. When preparing for trial, put the outline of your cross-examination behind the tab.

⁵ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993).

Do not forget that the "gatekeeper" required by *Daubert* also applies to your opponents expert witnesses. Use your "*Daubert* sheet" to plan and develop evidence to challenge opposing experts.

VI. Charge and Summation

Charge

This contains your proposed charge and notebook paper to jot down your thoughts as you prepare your case and during trial for your closing argument. You can then construct your argument from this section. An excellent procedure that we have found is to prepare a rough charge at the beginning of the case and place it in this section. Having the charge handy helps the attorney focus on what will have to be proved in court. You can refer to this when preparing for depositions or to assure that you prove all of the elements of your case through the witness.

Having the charge prepared early in the case, can be helpful in preparing the Plaintiff for trial, or settlement, by showing him the ultimate questions that the jury will answer in deciding his case and the effect of the jury's answers to them. Most litigants understand that the jury will determine who wins, but do not understand what questions they will answer. The charge not only is helpful in preparing your client, but also is useful for experts to review and other witnesses to use to get a better understanding of what issues the jury will be trying to answer and how their testimony is relevant to those issues.

We have found it helpful to prepare the complete charge, boilerplate and all. The judge is much more likely to use your charge when it is submitted in this form, before or early in the trial. You gain valuable and needed points with the judge and his staff if you are able to furnish a complete and accurate charge when requested.

If there are complicated or contested issues you desire to submit, prepare two charges. One version is the charge you want the court to submit and the other is an "annotated" version. The "annotated" version is the standard charge with case citations listed after the contested or complicated issues. We have found the annotated charge much more effective than giving the court the standard charge and a list of jury questions.

Summation

Just as in voir dire and opening statement, successful trial lawyers start preparation of the summation with the acceptance of the case. As your case progresses, jot down ideas and points to make in your final argument. During the trial, write down points that you want to make and testimony you want to emphasize to the jury and put it in this section. When it comes time to prepare your final argument, you have all of the material you need under one tab.

As you organize your presentation, you have all of the points you want to cover and can be sure not to leave out any major points. Based on the amount of time the court has allotted, you can hone your argument to the essential points. Having everything together can help you assure that elements of your argument are covered in a logical fashion so the jury can relate your points to

the evidence and testimony. Don't spend all of your time just on one or two points. After preparing your outline, go back over your notes and make sure that you have not left out a critical element, reference to testimony or key analogy.

A quick reference to the charge in this section assures that you are educating the jury about how they should answer the questions and sufficiently citing them to the evidence that supports your suggested answer. Jurors cannot help you if they do not know how to help you. Make sure that those jurors on your side know how to help you.

It is impossible and not helpful to review every piece of evidence and testimony the jury has endured. By looking at your notes, you can glean the evidence which supports your major propositions and the answers your client must have to prevail.

VII.

Notes and Law

This section is a "catch-all" section to contain items you have determined are necessary and helpful to the preparation and trial of the case. Use your prior experience in court, your imagination and modify and adapt to fit each case. We have used this section to file copies of key cases, legal briefing, and preliminary notes of the attorney or investigator. A brief list of cases and cites for your legal position should be in this section. If you have one or two cases that may be relevant to certain points, add these here.

List all potential legal problems in your case. If there is certain evidence that you want to keep out or want to have admitted, list it in this section. This section is also a good place to list your thoughts as the case develops, such as objections or your responses to the defendant's objections, items that you need to include in your motion in limine, etc.

Some attorneys use this section to put the *Daubert* list discussed under expert witnesses and the cases and sheets for juror disqualification mentioned under voir dire. Another item that can be helpful is a list of "Elements of Recovery" for your case. For example, in a personal injury or wrongful death case, you may want to include the following:

A. PERSONAL INJURIES

1. Physical Pain
2. Mental Anguish
3. Disfigurement
4. Physical Impairment
5. Loss of Income
 - a. Loss of Earnings
 - b. Loss of Earning Capacity
 - c. Other Income Losses
6. Loss of Household Services

7. Medical, Doctor & Hospital Expenses
 - a. Past
 - b. Future
8. Nursing Services
9. Loss of Society and Companionship
10. Loss of Enjoyment of Life

B. WRONGFUL DEATH

1. Mental Anguish
2. Bystander's Mental Anguish
3. Loss of Society and Companionship
4. Loss of Inheritance
5. Pecuniary Loss

C. SURVIVAL ACTION

1. Conscious Physical Pain and Mental Anguish
2. Funeral and Burial Expenses
3. Pre-judgment Interest
4. Property Damages
 - a. Partial Loss
 - b. Total Loss

D. EXEMPLARY DAMAGES

Place any items in this section that you feel, or have learned, might be helpful in preparing, trying, or focusing on your case.

Using the Trial Notebook in Case Development and Preparation

As the case develops, place relevant items in the trial notebook as acquired or generated. After using this system over a period of time, filing material in the trial notebook becomes automatic for the attorney and the legal assistant. At each stage of the case, the trial notebook should have everything that you need for your next step in preparation organized and at your fingertips. When an attorney needs to review the case quickly the trial notebook should have what is needed for a review of pertinent materials. A well-organized trial notebook is very helpful in the situations listed below.

Depositions

If the trial notebook is properly organized and currently updated, it will be all the attorney needs to prepare for a deposition or prepare a witness for deposition. As mentioned earlier, if the trial notebook is standardized, another attorney in the office covering for the attorney in charge should be able to use the trial notebook to get up to speed quickly and efficiently on a case. We have found it helpful when preparing for a major deposition to get away from the distractions of the office, and it makes the task much easier when all that the attorney has to take with him is the trial notebook.

During a deposition, it is invaluable to be able to turn to a tab of the witness and refer to the statement he has given or other relevant information. The more prepared and organized you appear, the more honest a hostile witness becomes. It is beneficial to be able to turn to the tabs of other witnesses and check their deposition summary to see what another witness or another expert said. You have available phone numbers of all people relevant to your case if you need to make a phone call in preparation for or during a deposition.

Meetings with Clients

Always have the trial notebook at any meeting with your client. Most plaintiffs have never seen that much paper devoted to themselves. You instill confidence in clients when you can find what you need without fumbling through reams of paper. Many times it comes in handy to show clients what other witnesses have said about the case. You can avoid many pitfalls down the road when the client has seen in black and white that the treating physician does not feel that the injury is quite as devastating as the client believes.

Meetings with Adjusters or Opposing Counsel

The attorney should have the trial notebook handy when talking or meeting with an adjuster or defense counsel. You can quickly answer questions such as amount of medical bills, what dates certain events happened, and vital statistics about the client. It gives the other side the impression, false though it may be, that you know your case.

Settlement

On most cases, we have found it wise to prepare a settlement brochure. The brochure places your case in the best light and has all of the essential information in concise, easily readable form. This brochure should be carefully assembled with the thought in mind that this is your chance to tell the check writer why he should add zeroes to the check he is contemplating writing. This document will more than likely be the only opportunity you have to communicate with the claims committee and to substantiate its recommendation of settlement offers.

With a current and complete trial notebook, this task is much simpler. All of the documents necessary to prepare the settlement brochure are right in front of the attorney. Typical types of information in a settlement brochure that should already be in the trial notebook are:

1. Incident summary: use it as a basis for your case summary. Usually, it is not necessary to add more information, but consider being more of an advocate in your brochure.

2. Relevant documents: accident report, birth and death certificates; photos of the scene and the vehicles, and damaging information about the Defendant, such as driving record.

3. Medical information: use the medical summary and the bill summary from the trial notebook. This gives the claims people a quick review of your client's injuries.

4. Photographs of Plaintiff: of the victim, before and after, in family groups, in military uniform. Avoid photographs of the Plaintiff at his family reunion drinking a cold Budweiser.

5. Expert Witness reports: reports from your experts and copies of the resumes or curriculum vitae.

6. Sample Jury Issues: simply copy and print the liability issues and damage issues from the charge in the trial notebook.

Mediation

In modern practice, mediation has become more and more common. In fact, in the jurisdictions in which we practice, most courts require mediation before a case can go to trial. From the Plaintiff's prospective, if you can obtain top dollar for your case at mediation, you have saved your client time, expense and the anguish that goes with any trial. Obviously, if you are working on a contingent fee, you have wisely invested your time.

As mentioned above in the settlement section, use the trial notebook to prepare your client for mediation, honestly pointing out the documents and the testimony that is detrimental to the case. The pre-mediation information that mediators require can normally be copied from items already in the trial notebook. If a settlement brochure has not been previously prepared, the trial notebook can be used to prepare a mediation brochure for the Defendant. It is suggested you use that the same material in the mediation brochure as in the settlement brochure, all of which should be in the trial notebook. Remember that mediation is not a means of preparation, but a chance to present your case forcefully to people who control the purse strings. Use the information from the trial notebook to educate the opposition about the merits of your case.

Using the Trial Notebook in Trial

The better organized the lawyer is, the more confident he will be in court. Although this holds true for attorneys of all levels of experience, it is especially true for attorneys just starting out. Being organized helps the jury gain confidence in you and what you have to say. It will also help you with the judge who appreciates attorneys who "move along" and do not waste the courts time. Just as the trial notebook can be of great assistance in organizing and preparing for trial, it can assist you in presenting your case as "a finely greased machine."

Examining Witnesses

When the court tells you to call your next witness, merely flip to his tab in the trial notebook and you are ready to go. Instead of having to fumble through legal pads, you can be thinking about your first question or glancing at your outline of direct examination. When the defendant calls a witness, you simply flip to his tab and have all your thoughts and information together about that

witness. This is particularly helpful when a witness is called out of order. You can avoid the chaotic scene in which the lawyer and the legal assistant are frantically searching through files and boxes. While a witness is testifying, you can look immediately at his deposition summary and compare his testimony. If you think his testimony differs from another witness, you can flip immediately to that witness and compare the testimonies.

Further, if something a witness says is relevant to your direct or cross-examination of another witness, you can jot it down under the other witness's tab. If something comes out in court that you want to mention in argument, place it in your notes under argument. We have found it helpful to use letter-sized, three-hole punched legal pads. At the end of the day, you can tear out the notes you have made about a witness's testimony and place it behind his tab. This facilitates quick referral to his testimony, rather than flipping endlessly through numerous legal pads.

Motion in Limine

If you feel that the opposing attorney is about to trample on your motion in limine, you can quickly check it by turning to this section. If you object, you can promptly refer the judge to the relevant section of your motion. If you are concerned that you may be about to violate the opposition's motion in limine, you can avoid disaster with a quick peek at opposing counsel's motion.

Checking on the Jury

It is helpful from time to time to refer to the jury section of the notebook to refresh your memory of the jurors' information. You may gain a helpful insight about how to present certain witnesses or certain evidence. Before preparing your final argument, it is highly recommended that you take a quick journey through the juror information sheets.

Our office has found that one three-ring notebook is sufficient for almost all trials. (Remember KISS.) Some cases, especially those with a large number of witnesses or those that are document intensive, are simply too large for one notebook. We solve this dilemma by dividing the trial notebook into two volumes, one with the Witness section and the other volume with all the remaining sections.

Additional Trial Aids

Depending on the case, we have often found the preparation of additional notebooks and trial aids helpful. Consider the following:

Trial Boxes

Since attorneys are not allowed to fold, mutilate, or spindle original documents, where do the originals go? As mentioned earlier, these go in a trial box. The trial notebook only contains the essential items needed for preparation and trial of the case. We use the trial box, on the other hand, to organize voluminous materials so that each item is readily accessible. We have boxes in all complicated cases that have substantial discovery information. The information is broken down, indexed, and placed in hanging folders.

Contents

1. The trial box is divided into three basic areas: liability, damages, and technical literature. Depending on the volume of information in the case, there may be one box for each area or more than one for some areas.
2. The boxes are an expanded version of the trial notebook. They include all of the depositions that are summarized in the trial notebook, all of the documents that are summarized in the trial notebook, and all other documents and information that have been developed on the case but are not relevant to the trial notebook.

Use in Trial

With the trial box under or behind the counsel table, you have all of the information in the case organized and close at hand. When a witness testifies, you simply pull his hanging folder and have all of the information available on that witness. His folder will include his deposition, deposition summary, curriculum vitae, statements given, articles written, and so forth. After each witness testifies, replace his folder in the box. Otherwise, you may end up with documents mixed up on the counsel table, which can be a disaster that even the best legal assistant cannot unravel.

In the development of your case, it is often helpful to make additional notebooks.

Expert Notebooks

Whenever an expert is retained, our office prepares a notebook to give to him for his personal use. A legal assistant or law clerk can usually construct this notebook from the trial notebook, with a minor amount of guidance from the attorney. The notebook should contain the following: (1) an index with a brief description of each item that is furnished the expert, (2) copies of all relevant depositions and summaries, (3) any documents that are relevant to his testimony, and (4) color copies of important photographs.

This notebook accomplishes three important things. First, it saves the expert time (and you money). With the index and the summaries, he can immediately go to the facts that he thinks are important. Be sure to include the depositions; opposing counsel will ask the expert if he has read the deposition or what the lawyer said in the summary. Second, the expert will begin working on your case not only more efficiently but also more quickly. Instead of having a cumbersome, huge stack of papers to go through, the expert will be able to leaf through the notebook and become more empathetic to your case. Third, a well-organized notebook impresses the expert with your preparation and efficiency on the case.

As new evidence comes in through discovery, make a copy, punch three holes in it and forward it to the expert. Be sure to attach a summary with each deposition. Obviously, keep in mind that everything you forward your expert is discoverable.

Law Notebooks

If you know that there are going to be certain complicated legal issues raised in your case, start a law notebook. Behind each point, put a copy of any briefs you file, copies of any memoranda of law prepared by your office and copies of the relevant cases. If there are only a few cases or

legal points, you can include these in the trial notebook. We normally use a tab for each topic and do not find it necessary to tab each case filed. If we find it necessary to tab individual cases, we use numbered tabs of different colors for the cases behind each legal topic.

To demonstrate your preparedness to the court, always have a short trial brief to cover key legal issues you know will be in dispute. You know what these issues are because you have been worrying about them, so prepare a brief in advance and copies of cases with the relevant points highlighted. When the dispute occurs, produce your brief for the judge. The judge will respond more favorably if he or she has confidence in your ability and preparation. Busy trial judges, ever mindful of the twelve voters anxious to get back to their daily lives, often do not have the time to stop a trial and research a point of law. They are appreciative of the attorney who has done the work for them and often show their appreciation by a favorable ruling. We have found it to be the better practice to have separate briefs prepared for each point. This focuses the judge on the issue before the court and does not remind opposing counsel of other issues that may have been overlooked in the heat of battle. Taking the time to prepare the trial brief often is the difference in winning or losing on a close legal point.

Hearing Notebooks

For every hearing, prepare a Hearing Notebook for the court. It is our experience that judges not only appreciate this aid and find it helpful, but also are better able to follow your argument. It impresses upon the court that you are prepared and that you consider this motion, and more important his time, important. Busy trial judges who do not have the time or the staff to brief issues thoroughly can look at the cases as you cite them and see that you are accurate and reliable.

In the hearing notebook, place the motions and responses of each party relevant to the hearing, along with a copy of each case you are relying on with relevant language of the case highlighted. Place a complete index at the beginning of the notebook with each document, pleading, or case separated with individually numbered tabs. Our office has one color tab for the pleadings and another color for the cases. Place cases in the notebook in alphabetical order.

Daily Trial Notebook

Having a smaller three-ring notebook containing the expected contents of the trial for the present day has proved helpful, especially on cases in which the trial notebook is large or consists of two volumes. Before going to the court house each day, put the tabs for each witness you plan to call or whom the other side expects to call in your daily notebook. After each day of the trial, place the tabs of witnesses that you have used back in the trial notebook. In the daily notebook, place other information that is relevant for every day such as juror information from the jury section, copies of each party's motion in limine from the motion section of the trial notebook, the exhibit list, and the witness list.

Sixty-Day Meeting

At some specific time in advance of trial, all attorneys, legal assistants, and other members of the staff who are working closely on the case should meet to review the file. Place this date, along with any court-ordered deadline, on the calendar. The meeting should be far enough in advance of trial so that all trial deadlines can be met and all necessary, but forgotten discovery can be

completed. Our office uses 60 days, because most critical deadlines in Texas courts are 30 days from trial. By meeting 60 days from trial, we have a month to take care of any forgotten items, amend discovery, or add any new witnesses.

You should have a standard checklist for every case. Every time you take off on American Airlines, the pilot, although he has gone through the same procedure thousands of times, goes through his check list. At the 60-day meeting, go through your checklist to avoid missing critical deadlines and having to notify your malpractice carrier. Discuss and think about your case. Many times, we have found that an excellent witness has been overlooked, an important doctor's records have not been proven up, and that an occasional brilliant idea has not been considered. This is a great opportunity for team members to brainstorm and gear up for trial. Again, schedule this meeting on every case, and put it on the calendar when the case is set for trial. Be sure that you set it far enough in advance so that you can meet critical deadlines.

Trial Kits and Trial Trunks

Work with your staff to assemble a trial kit to have with you in the courtroom during trial. Place in the kit items that experience has shown you frequently need in trial. Our office uses a large leather folder that can be purchased any place that sells office or school supplies. It has compartments for storage and a zipper to keep things from falling out. Some standard items our office has found handy are:

- exhibit stickers
- stapler and paper clips
- tape
- pointers
- pens, pencils, and markers
- scissors and a Swiss Army Knife
- tape measure, rulers, and a protractor
- extra legal pads and blank paper
- hole punch
- small memo pads
- white-out liquid.

These are tools that come during the presentation of your case and often help you "move along" instead of using the court's and jury's time to hunt for items you need. The trial kit can be a godsend when you need to prepare or repair and exhibit during a break. Immediately after each trial, replace the items that you have used. This prevents needing some item at the next trial and coming up empty-handed.

For out-of-town trials, our office has assembled a "trial trunk" that we use to set up an office in the hotel. While the trial kit goes or stays in the courthouse, the trial trunk stays in the hotel. With the assistance of the trial trunk, you can perform most of the functions that you can in your office. Some of the items in our trial trunk are:

- lap top computers and a printer
- portable copier machine and fax
- plenty of paper and office stationery
- spare wires and plugs

- spare ink cartridges for the printer
- extension cords and plug strips
- a coffee pot

As in the trial kit, adapt the trunk to fit your needs. By having it prepared in advance, you increase the odds of your showing up in the hinter lands with all that you need.

Conclusion

Developing an organized system of notebooks and trial boxes will help the lawyer in preparation and in presentation. As a case comes into the office, the responsible staff member opens a trial notebook. As you acquire materials on the case, make a trial box using the same color codes and general divisions used in the trial notebook. Additional notebooks may be needed for expert witness preparation or on anticipated legal issues.

With each case, the system should become more streamlined, the lawyer more organized, and his courtroom efforts more effective. Of course, being organized may not win cases, but being disorganized can lose cases. As the apostle Paul asked the people of Corinth, "Who shall prepare himself to the battle?"⁶

⁶ I Corinthians 14:8.
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