



# A LITIGATOR'S TRIAL NOTEBOOK

by Philip C. Denton

notebook are:

1. Pre-trial matters;
2. Voir Dire;
3. Opening statements;
4. Schedule and summary of the evidence;
5. Responses to the opponent's evidence;
6. Objections, offers of proof, and preservation of points on appeal;
7. Closing argument;
8. Jury instructions;
9. Post-trial motions;
10. Audio-Visual trial aids, Power Points, etc.

## PRE-TRIAL MATTERS

This section will contain: 1. the operative petition and answer(s); 2. Motions in Limine;<sup>1</sup> 3. Trial briefs;<sup>2</sup> and 4. Any issues or matters that need to be presented to the court for consideration or for the court's information and convenience.

## VOIR DIRE

A comprehensive and well thought out list of questions, especially on the critical issues present in your particular case, needs to be prepared and ready to go. Problematic evidence that needs to

be discussed during voir dire<sup>3</sup> may need to be first addressed with the court to ensure inquiry will be permitted in voir dire.

In addition, case.net research on juror panel members and juror information sheets are included here. All notes taken from voir dire can be included in this section.

## OPENING STATEMENTS

Before walking into the courtroom on the morning of trial, a lawyer must have some semblance of a written opening statement.<sup>4</sup> At a minimum, an outline of what your evidence will show, and identification of the damages or relief you are seeking, must be prepared and contained in this section. You must state that the evidence will show or prove the essential elements of your case. A failure to do so risks a motion for a directed verdict at the end of your opening statement.

Take notes of your opponent's opening statements and place the notes here for reference later in cross-examination of your opponent's witnesses, and for use

**A** trial notebook is a multipurpose reference and guide to the preparation and the eventual presentation of a lawyer's case at trial. A well-prepared trial notebook provides an organized outline and synopsis of your case that will assist you in preparing for trial, thinking through the issues beforehand, and executing your planned presentation of your case. This article will identify the essential elements of a trial notebook and discuss the content relating to those elements with suggestions for preparation. The essential elements of a trial

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in closing arguments if applicable. A transcript of opening statements, if available or feasible, would be better than notes.

## **SCHEDULE OF EVIDENCE**

This section should be divided into subsections: liability; damages (or relief sought); and evidentiary foundations. Although it is not always possible to present liability and damages evidence separately, nor do you necessarily want to present them separately during trial, the two subsections are presented separately here for clarity purposes. Having a detailed list of your evidence that you intend to introduce at trial serves the purpose of identifying all evidence that needs to be introduced, and to ensure no evidence is inadvertently omitted. Preparing a sketch calendar with the name of the witness and the day and time the witness is expected to be called helps with planning and coordination of evidence presentation.

The evidence in the liability and damages subsections will contain a list of the witnesses you intend to call, along with a list of the exhibits you are planning to introduce into evidence with each witness. Preparing and including summaries of each witness's anticipated testimony, a detailed list of questions that you need to ask to establish the ultimate facts that will be submitted to the jury, and a list of exhibits to be introduced through each witness, with a brief summary of their evidentiary purpose, will prove

helpful.

Of course, some evidence will not need a witness in order to be admitted and should be listed separately. This evidence includes: answers to interrogatories; admissions; recordings of depositions, or reading of deposition transcripts; reading of documents and records self-authenticated; judicially noticed and recognized facts and documents; or items stipulated to by the parties.

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**“Preparing a trial notebook will assist a litigant to organize the preparation and presentation of a case going to trial. The notebook acts as a catalog of all the evidence, theories, arguments, questions, supporting legal authorities, ideas, or information gathered, pertinent to each separate part of a trial.”**

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Demonstrative evidence is not introduced into evidence as such, but should be listed here as well.

Any evidentiary foundation issues and requirements need to be listed in this subsection. There are specific foundational requirements for various types of evidence, including qualifying an expert witness or lay witness, or introducing into evidence photographs or other media, or records of different types. Including in your trial notebook

the pertinent case law and statutes supporting the introduction of witnesses and documents, or other types of evidence, helps you prepare for your opponent's objections and, hopefully, will obviate any objection altogether. It is important that the foundational requirements of any evidence to be introduced and admitted be listed here with pertinent statutes and cases.

## **RESPONSES TO OPPONENT'S EVIDENCE**

This section will contain your prepared cross-examination of the witnesses your opponent calls to testify. Any objections to the exhibits or witnesses offered should also appear in this section. Any rebuttal evidence also needs to be listed.

## **OBJECTIONS, OFFERS OF PROOF, AND PRESERVATION OF POINTS ON APPEAL**

Trial lawyers often overlook, or underprepare for, trial objections, offers of proof, and preservation of points on appeal. Presentation of evidence, and the court's admission or exclusion of offered evidence, occurs rapidly during the course of trial. The litigant needs to know and articulate the correct form of the objections to evidence, statements and arguments made or offered by the opponent. Appellate opinions repeatedly conclude that objections were not timely and properly made to preserve the point on appeal. Similarly, offers of proof are often ruled inadequate or improperly

made, or untimely preserved, thus losing the point on appeal.

The trial notebook can be used to prepare for the evidentiary issues and legal bases for your objections to evidence. The legal authority and arguments are thus readily available for review and use at trial. Case law on the proper methods, place, and time in making offers of proof and preserving points on appeal can be placed in the notebook for review.

In addition, case law supporting admission of your evidence, and arguments in favor of admission, can be placed in this section of your trial notebook.

Remember, a litigant's focused and calculated efforts in presentation and objections to evidence, rather than "on the fly" statements and objections, has greater persuasive force and will yield better results, as well as preserve the point for appeal.

### **CLOSING ARGUMENTS**

As with opening statements, a written closing argument must be prepared before the trial starts. You will not know yet what evidence introduced at trial will be admitted, but you should have confidence that you will have had the evidence that you need to prove your case admitted by the court.

All of the closing argument ideas – phrases, catchy wordology, analogies, storytelling narratives, etc. – that you have thought about and collected since taking the case on day one should be placed in

this section and put together in a persuasive manner. An effective closing argument is a process that takes time to create.

A review of case law on objections and points of error to closing arguments is helpful and should be placed in this section for quick accessibility.<sup>5</sup>

### **JURY INSTRUCTIONS**

Jury instructions must be prepared before trial starts. What you prepared can be modified depending on the evidence and court's rulings during trial. A litigant should have a firm grasp on what ultimate facts contained in the applicable verdict-directing jury instructions must be proved at trial.

The jury instructions contained in this section should include the proposed instructions with references, and the jury's clean copy. A written and an electronic format must be available. It is also a good idea to have an MAI 2.06 instruction available in case of an inconsistent or erroneous verdict or an error in filling out the verdict forms.

### **POST-TRIAL MOTIONS AND MOTIONS FOR A DIRECTED VERDICT OR FOR JUDGMENT NOTWITHSTANDING THE VERDICT**

Some post-trial motions, such as a motion for a directed verdict, or motion for judgment notwithstanding the verdict (JNOV), are more or less boilerplate, but the motions

must state the specific grounds supporting the motion. Prepare the motions in advance, to have them ready, and insert them in this section. A motion for a new trial has its beginnings in (perceived) erroneous court rulings as the case goes on. The litigant needs to record the rulings that need to be examined and researched and those notes should remain in this section. Motions for a new trial or to amend the judgment or opinion must be filed no later than 30 days after entry of judgment. Motions for mistrial are usually oral, but a written one should be available, and submitted with leave of court after the oral motion is made.

### **AUDIO-VISUAL TRIAL AIDS, POWER POINTS, ETC.**

The use of technology needs to be established with the court and your opponent beforehand. The items used should be listed in this subsection. A written copy of Power Points or similar electronic presentations should be available in the section with a copy available to the court and your opponent.

### **CONCLUSION**

Preparing a trial notebook will assist a litigant to organize the preparation and presentation of a case going to trial. The notebook acts as a catalog of all the evidence, theories, arguments, questions, supporting legal authorities, ideas, or information gathered, pertinent to each separate part of a trial. The notebook is individualized and flexible to meet your needs and purposes. When it is completed, you're essentially ready for trial. ♣