Chapter 11: Trial Preparation

Chapter Outline:

- ✓ **§ 11.1** Litigation: The Process of Advocacy
- ✓ **§ 11.2** The Three Stages of Litigation
- ✓ **§ 11.3** Preparing the Trial Notebook
- ✓ **§ 11.4** Preparing Exhibits for Trial
- ✓ **§ 11.5** Alternative to Trial: Arbitration
- ✓ **§ 11.6** The Paralegal as Advocate

§ 11.1 LITIGATION: THE PROCESS OF ADVOCACY

A client has a legal problem and decides to hire an attorney. The attorney is hired to act as his legal advocate. The process of advocating is not simply the trial itself. In fact, most advocacy is performed in the pretrial stage. It is during this pretrial stage that a paralegal is most involved. The vast majority of lawsuits filed with the courts never get to trial. They are settled, dropped, or dismissed during the pretrial stage. If a paralegal performs the assigned pretrial tasks, he may be as responsible as the attorney for the outcome of the legal matter.

A full understanding of certain concepts and techniques will help you make a fruitful contribution to the pre-trial effort. These concepts include:

stages of litigation
The steps involved in the trial process and the paralegal's role in each.

trial notebook
A trial notebook helps organize the attorney at trial. The key to trial notebook preparation is making sure all documents, notes, and evidence are easy to access.

evidence preparation
Evidence at trial must be admitted by the court. The attorney must have the original evidence and copies for all parties.

the arbitration process
Arbitration is similar to the litigation process in most states, but is less formal and occurs prior to, or instead of, the trial.

advocacy
When a paralegal performs a task at the instruction of an attorney on behalf of a client, the paralegal becomes an advocate for the client's interests.

§ 11.2 THE THREE STAGES OF LITIGATION

Each stage of litigation includes specific activities, as follows:

The Pretrial Stage
The pretrial stage of litigation is the most crucial for both the paralegal and the client. Ninety-five percent of cases never get to trial. The success or failure of a case usually hinges on the work performed during the pretrial stage. Even those cases that go to trial are often decided on work that was done during the pretrial stage. The pretrial stage lasts until the opening statements in the trial. Tasks include:

Client Interview
Many attorneys assign paralegals to conduct, or at least attend, the first consultation along with the attorney. Practice your note taking skills since the information gathered during this interview may guide the initial representative process.

Draft Pleadings
Paralegals often create documents such as complaints, answers, and counterclaims. These documents are created for the attorney's signature under his or her supervision.

Interview Witnesses
A paralegal may be asked to interview individuals who may have information relevant to the matter being litigated.

Draft Discovery
Discovery is the pretrial process of obtaining documents and information from the opposing party. A paralegal is usually deeply involved in the preparation of such documents. The attorney should review the requests before sending them to the opposing party.

Answer Discovery
When the opposing party sends discovery, the paralegal often works with the client to provide responses. The attorney should review all work before sending it back to the opposing counsel.

Investigation
Discovery generally involves obtaining information from the other party. Obtaining relevant facts and information from other sources involves law office investigation.

Draft Memoranda
After conducting research, a paralegal may create an interoffice memorandum that informs the attorney of how cases and statutes apply to the matter being litigated.

Set Hearing Dates
A paralegal may need to contact the court to set a date for a hearing, during which the court can rule on motions filed by either of the parties. A hearing differs from a trial because a hearing deals with a specific step of litigation, such as a *motion to suppress evidence*.

Set Trial Dates
A paralegal is often the person who contacts the court and the other parties involved in the litigation to set a date for trial. The most frustrating part of setting dates may be finding a day that is clear on the calendars of the court and all parties.

Draft Motions
Paralegals often create motions for the attorney. A motion asks the court to rule on a procedural matter, and is often accompanied by a trial brief (sometimes called "memorandum of law"). The motion makes the request, while the brief (or memo) presents a legal argument citing authority to attempt to convince the court to rule in that party's favor.

Draft Trial Brief
A trial brief argues a legal point to the court. It usually attempts to convince the court to rule in favor of a motion that has been filed with the brief.

Correspondence
A paralegal often writes letters to the client, witnesses, and even to opposing counsel. Such correspondence should only be created under the direction of your supervising attorney.

Obtain Records
Paralegals may gather relevant documents from companies and agencies. These can include such items as hospital records, criminal records, and employment records. Get into the habit of having a client sign several general, as well as specific, release forms at the start of litigation authorizing your firm to obtain records on his or her behalf.

Trial Notebook Preparation
A paralegal may collect and organize all the pleadings, discovery requests, discovery responses, exhibits, witness lists, witness questions and other material that an attorney may need to access at trial. This collection is called a trial notebook. A notebook may also be prepared for a hearing and is called a hearing notebook.

Arrange for Service of Process
Process is the summons and complaint. A paralegal may arrange for a non-interested party (usually a process server or county sheriff) to serve the documents on the defendant. This constitutes service of process.

Set Deposition
Setting a deposition means contacting the witness who is to be deposed, arranging a time for the deposition, and giving notice to all parties when and where the deposition will take place. This is accomplished by sending out a notice of deposition. All parties have the right to attend and to ask questions at a deposition.

Draft Deposition Questions
While a paralegal is not authorized to ask questions at a deposition, it is not uncommon for a paralegal to draft deposition questions for the attorney's use. Start preparing such questions with the information you have from any previous interviews conducted with the witness. In addition to researching form books in the law library for discovery questions, you can modify interrogatory questions to make them deposition questions.

Legal Research
Legal research is the act of finding law relevant to the matter being litigated or locating materials that will assist the attorney in preparing for trial.

Digest Depositions
Depositions can be hundreds of pages long. A paralegal may summarize each page to make the relevant information easier to access.

File Maintenance
A paralegal should keep the client file very organized. Good organization will be noticed and appreciated by the attorney. A paralegal should form the habit of spending 20 minutes each day organizing files that were accessed earlier in the day. Also, get in the habit of replacing any documents removed from the file as soon as possible.

Data Retrieval
Data retrieval is closely related to file management. Whether documents are in the file, separate folders, or elsewhere, they need to be easily accessed.

Expert Bona Fides
Expert *bona fides* means proof of a witness's expertise. If an expert witness is called to testify at trial, the requesting attorney may want the paralegal to obtain the expert's resume and *Curriculum Vitae* (a listing of any honors or publications associated with the expert).

Arrange Subpoenas
A witness called at trial or for a deposition, should be subpoenaed. Include a check to cover witness fee payments and mileage compensation. Witness fees change from county to county. Check your local court rules for witness fees in your jurisdiction.

Skip Trace
If a witness or a client is missing, the paralegal may be asked to try to locate the person.

File Court Documents
The paralegal may file pleadings or motions with the court or arrange for documents to be filed. The paralegal should make sure the court gets the original and all parties receive a copy stamped by the court. If the document is a complaint, include a check for any filing fees. Some courts require cover sheets to accompany complaint filings.

Calendar Control
A paralegal may log appointments, hearings, and trials in the attorney's calendar. Be very accurate. An important tip: When you log a new meeting in the calendar, place a sticky note on that page alerting the attorney to the new entry. If the attorney uses a computerized calendar, place a sticky note on the attorney's computer screen with the new appointment information. This may prevent confusion later.

Client Communication
Don't underestimate the importance of this task. Attorneys are notoriously bad at client communication and the paralegal can be of significant assistance in assuring positive client relations.

Settlement Support
If the case settles prior to going to trial, some of the provisions of the settlements may need monitoring. For example, if the settlement involves periodic payments, a paralegal should calendar the payment dates and communicate with the party to confirm that payment has been sent or, in some circumstances, received.

The Trial Stage of Litigation
The trial stage starts at the opening statement, and ends with the verdict by the jury.

Client Support
As the trial begins, the client will likely be nervous. It will help to ease a client's concerns if he has an open channel of communications to the attorney. A paralegal can help by answering questions and/or getting answers from the attorney.

Draft Motions
While most motions are drafted and filed during the pretrial stage, it is possible that additional motions will be made during the trial.

Arrange Subpoenas
Most witnesses will be identified and subpoenaed during the pretrial stage. Sometimes a rebuttal witness who was not on the original witness list will need to be subpoenaed during the trial, but this situation is the exception rather than the rule.

Legal Research
During the trial, an attorney may need a legal matter or procedural issue researched. When this occurs, it is a priority. Be thorough and prompt.

Coordinate Witnesses
Make sure that all of the witnesses have been subpoenaed and call each witness the day before their anticipated testimony. Make sure that the attorney has witness questions in the trial notebook.

Prepare Evidence and Exhibits
If evidence is to be presented as an exhibit at trial, copies must be made and each copy and original appropriately labeled.

Maintain Client File
Especially during the trial, keep the client's file in order.

The Post-trial Stage of Litigation

The post-trial stage begins after the verdict is returned. This stage includes the appellate process.

Interview Client
Some attorneys want the client interviewed after the trial to determine his or her level of satisfaction with the attorney's representation. The interview is a good time to arrange the return of client documents and evidence.

Interview Jurors
It is becoming more common for attorneys to want jurors interviewed after a trial. The attorney wants to know the most and least effective presentations for each side and general attitudes about the trial presentation. A paralegal is often asked to conduct these interviews.

Draft Notices
If a party intends to appeal, a *Notice of Appeal* must be filed within a specific period of time (usually thirty days) and sent to both the court and all parties. A paralegal may prepare a *Notice of Appeal* for review by the attorney.

Draft Briefs
If the client or either party chooses to appeal, appellate briefs will be filed. A paralegal may be expected to prepare drafts of these briefs.

Transmit Record
If your client appeals, your firm will have a limited amount of time (usually 30 days) to transmit the trial court record to the appellate court. A paralegal is often responsible for this very important task.

Legal Research
A paralegal may conduct research related to issues on appeal.

Draft Oral Presentation
An attorney may make an oral argument before the court of appeals. The paralegal may help in the research and writing of this presentation.

Maintain Client File
After the trial, the attorney may want the file sanitized, or purged of any notes or work product, prior to being archived. Most states have a minimum amount of time that a file must be retained (usually five to seven years). Also, as mentioned above, any original documents or exhibits should be returned to the owners.

Calendar Control
Dates related to an appeal should be carefully calendared.

§ 11.3 PREPARING THE TRIAL NOTEBOOK

A trial notebook is a collection of all the materials the attorney may need at trial. Most law firms create the trial notebook the few weeks before a trial begins. There is nothing wrong with this, but an "ad hoc" trial notebook, created as the pretrial commences alongside the regular client file, may be more thorough.

When creating a trial notebook, the system has two fundamental goals:

Efficiently simple
The process for creating the trial notebook should be simple, and by that simplicity, efficiency should result. Part of this efficiency is the avoidance of duplication of efforts in creating the notebook.

Quality Results
The result should be a file that is prepared to be taken to trial with a minimum amount of last minute preparation.

Guidelines § 11.3 | Preparation of the Binder

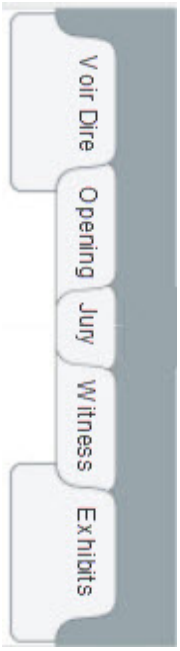
The following supplies will be needed:

1. *A loose-leaf binder with a label holder on the spine.*

The notebook should be 2, 3, or 4 inches, depending on the anticipated complexity of the trial. The binder should be labeled "Trial Notebook" on the spine along with the case name.

2. *A set of loose-leaf ring binder indexes divided into eight tabs.*

The eight index tabs should be labeled as follows:

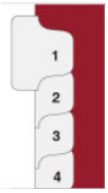


1. Voir Dire
2. Opening Statement
3. Witnesses
4. Exhibits
5. Closing
6. Jury Instructions
7. Law
8. Miscellaneous

Trial Notebook Sample Documents

Appendix A includes examples of several documents found in the typical *Trial Notebook*.

3. *Two sets of numerical 1-25 (or higher, depending on case complexity) letter size index tabs for the loose-leaf notebook.*



4. *A numbered expandable file, and a legal size storage box in which to keep the expandable file (for exhibits to be presented at trial) and items which may not fit in the file.*

One set of the numerical indexes should be placed in the *Witnesses* section of the notebook (binder) and one should be placed in the *Exhibits* section. The notebook is ready to use.

The Ad Hoc Trial Notebook System

Now that the binder has been set up, the paralegal is ready to create an ad hoc *Trial Notebook*. This means it is a notebook created using the binder "along the way" as the litigation progresses. Following are instructions for how to maintain each section of the *Trial Notebook*.

1. *Voir Dire*

The attorney will want either a standard set of questions for prospective jurors, or questions specifically created for this litigation, included in the *Trial Notebook*. Following is a partial basic set of *Voir Dire* questions.

VOIR DIRE QUESTIONS

1. Full name?
2. City in which juror lives.
3. How long in present residence? In county? In state?
4. Marital status?
5. Occupation and employer?
6. Length of present employment?
7. Prior employment?
8. Spouse's occupation?
9. Number and ages of children?
10. Children's' occupations, if applicable?
11. Prior jury service?
12. Civil or criminal case?
13. Has juror or any member of family been party to any lawsuit? When? Where?
14. What type of lawsuit?
15. Is juror close friend or relative of a law enforcement officer?
16. Does juror know any parties to or attorneys in this case?
17. Has claim for personal injuries been made against juror or any of juror's family?
18. Has juror or any member of family ever made claim for personal injuries?

2. *Opening Statement*

The opening statement is usually not a scripted statement, but is instead an outline that the attorney uses to lay out the basic elements of what he or she will present at trial. While the attorney is not allowed to *argue* in the opening statement, the elements of a prima facie case must be included (or at least alluded to) within the statement.

OPENING STATEMENT OUTLINE

1. Nature of case

a. Medical malpractice case

b. Brought by plaintiff against doctor who treated her after surgery

c. Claim: doctor failed to use proper standard of care in treating plaintiff after surgery

d. Plaintiff will prove that if doctor had used proper standard of care, plaintiff would have been given proper medicine after surgery to fight postoperative infection that caused neurological damage to plaintiff

2. Proof

a. Hospital records and testimony of admitting doctor that plaintiff had no infection on admission to hospital

b. Testimony of surgeon that plaintiff was free of infection during surgery but that infection may be byproduct of surgery if proper medication is not used to fight off infection

c. Testimony of doctor, who is expert in field, that antibiotics must be given to postoperative patient under normal standard of care

d. Hospital records and testimony of nurses who cared for plaintiff, demonstrating that antibiotics were not prescribed for plaintiff after surgery

e. Hospital records and testimony of expert that plaintiff developed postoperative infection two days after surgery and that infection caused neurological damage from which plaintiff has not yet fully recovered

3. Relief sought

a. Plaintiff seeks damages for medical expenses, lost wages, and pain and suffering as result of substandard medical care

3. Witnesses

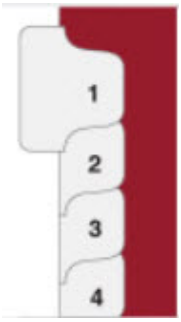
The *Witnesses* and *Exhibits* portions are the heart of the *Trial Notebook*. If these sections are thoroughly collected, arranged, and indexed, the trial will likely run much more smoothly. A well designed notebook also fosters improved discovery and a reduction in duplication of effort, making the process more cost-efficient.

The *Witness* section is divided by numerical tabs. A cover sheet should be prepared as the first page in the *Witness* section. On the cover sheet entitled, "Witness List," every witness and potential witness should be listed as their name surfaces during the pretrial stage. Simply list each additional witness consecutively beginning with the number "1." The witness' full name should be listed and his identity/role provided in parenthesis. The list will act as an index to potential witnesses at trial. Resist the temptation to organize alphabetically or by party at this point. Remember, the list will grow as the litigation progresses toward the trial. Be disciplined. Add any potential witness to the list. It is easier to remove a potential witness than to add him or her after-the-fact.

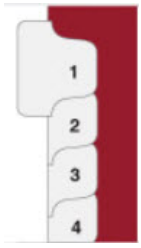
Following is an example of the *Witness List*.

WITNESS LIST

1. *Terry Peters (plaintiff)*
2. *Carla Razzelle (defendant)*
3. *Jessa Peters (plaintiff's wife)*
4. *Dr. Mary Bennett (primary physician)*
5. *Kerri Lakewood (eyewitness)*
6.
7.
8.
9.
10.



The above list will correspond with the numbered dividers found following the list. It is possible that you will need to contact or subpoena any of the witnesses on the list. Thus, as soon as a name is added to the *Witness List* above, go to the corresponding numbered divider and prepare a single page that includes:



Name
Home address
Home telephone number
Work address
Work telephone number
Cellular telephone number(s)

This initial *Contact Information* page will act as a cover for material collected about the witness within the notebook. Any documentation or information about that witness now has a home. If a statement or deposition has not been taken (and is needed), arrange to do so as soon as feasible.

Examples of material to be collected include:

- *a copy of any statements the witness has made*
- *a copy of any deposition summaries regarding the witness' testimony*
- *additional documentation relating to a witness testimony (such as Web site comments, published Tweets, etc.*
- *Once an outline of direct or cross examination has been created, that should be placed in this tab as well*

When preparing questions for the witness on the stand, it is advisable to also draft expected responses to those questions. If possible, a Quick Reference Note to relevant material (statements; depositions; etc.) would be valuable. This way if the witness strays from expected testimony the attorney will have very quick access to that previous testimony or documentation.

Example § 11.3(a) | Quick Reference Note

The dentist was not aware that the patient was allergic to the local anesthetic Procaine. (Dentist's deposition; page 34.) The dentist should have known that the patient was allergic to Procaine based upon the office's standard Intake Form. (*Exhibit 3 – Intake Form: Warm Springs Dental Clinic*.)

As trial approaches you should create an ***Alternate Index***, with the witnesses listed in anticipated order at trial (as opposed to the previous numerical order), including an obvious reference to the *Witness List* number.

4. Exhibits

By organizing exhibits, or potential exhibits, as the pretrial stage of litigation progresses, the likelihood of later duplicating efforts is minimized, thus acting as a cost saving measure. Also, it helps to ensure that physical items that may later be used as exhibits are well organized and easily accessed throughout the litigation process.

As with the *Witness* section, the first page of the *Exhibit* section should be titled "Exhibit List." That list will act as an index to the potential exhibits contained within that section. When a document is identified by the attorney as a potential exhibit, make two copies. (Note: If there is a question as to whether a document or tangible item is going to be an exhibit, include it. It is much easier to *remove* it later than to expend time *locating it* at a later point.)

Assign the document a number, placing it in the section under the corresponding numbered tab. Place the other copy in the expandable file or legal size storage box. If the one of the documents is an original document, that should go in the box, not the file. *Never alter an original exhibit in any way, including folding, punching holes, writing on, or stapling the document.*

The Expandable File

The numbered expandable file will contain all of the trial exhibits which will later be labeled. Again, if original documents are available, they should be placed in the expandable file, *not the binder*. If an item does not fit in the file, it should be placed within the box alongside the expandable file. Use a non-permanent sticky note to number the item for reference, and place a note in the corresponding numbered section informing the file that the item is separate. (Again, the exhibit numbers should match the *Exhibit List* and the *exhibit tabs* in the *Trial Notebook*.

While an original document should not be altered, there are times when an exhibit needs to be prepared. For example, if a letter refers to an insurance policy the plaintiff's attorney may want to hide that reference. In such a case, the original should be placed in the expandable file, but an additional copy should be made as well. The copy should be prepared to be an exhibit by blacking out references to the insurance policy.

To avoid potential confusion, place a sticky note with the message "Original: Not to be produced as an Exhibit" on the original letter. Now when trial comes, the attorney will have a prepared exhibit as well as the original letter at her fingertips (in case of any dispute about the validity of the exhibit).

Now that you have listed the item in the *Exhibit List*, placed a copy in the corresponding *Trial Notebook* tab, and placed either the original item, a copy of the original item, or both in the numbered expandable file, there is only one thing left to do. But it is important.

Create a very short memorandum that provides a brief outline of the exhibit. A copy of this memorandum should be placed alongside the exhibit copy in the *Trial Notebook* and the expandable file.

This memo takes about five minutes to create, but can save large amounts of time and possible confusion later. By creating this memo and including it in both the *Trial Notebook* and the expandable file, during depositions or pretrial hearings, the attorney will have ready access not only to copies of the exhibit, but also to a quick reference regarding the value and purpose of the item.

EXHIBIT MEMO
Peters v. Razelle

Exhibit 4

Item
January 6, 2010 X-ray of Plaintiff's bicuspid

Purpose
Establish Plaintiff's reason for seeking dental services

Placed in Trial Notebook
November 16, 2011

Comments
X-ray was provided to the Plaintiff by the dental assistant working in the office, Kathy Smith, after Plaintiff requested it.

Also see *Reply to Motion in Limine and Brief in Support*, March 4, 2011 which attempted to exclude the X-ray from trial.

The attorney will eventually make additional notes regarding exhibits. These notes will be more detailed and will likely include strategy for admission, specific strategy for presentation of the evidence, and even possible questions to ask witnesses about the evidence. Any such notes should be copied and placed in the *Trial Notebook* and expandable file.

Also, if there are legal research memos or motions and briefs regarding an exhibit, it is a good idea to include a reference to those documents alongside the exhibit copies in the *Trial Notebook*.

Again, the *Witness* and *Exhibit* sections are the most important parts of a *Trial Notebook*. As a paralegal, you can serve an important role in the attorney's preparation for trial.

5. Closing

The closing statement wraps up the attorney's arguments on behalf of the client, allowing the attorney to summarize evidence that has been presented at trial and emphasize important points the jury may have missed or forgotten. Attorneys may use a somewhat more scripted approach than in the *Opening Statement*, but not always. Whatever style the attorney uses, a copy should be placed in this section of the *Trial Notebook*.

Common elements of a closing argument include:

- *Summaries of testimonies, highlighting what each witness established or, in some cases, what witnesses on the other side failed to establish.*
- *Summary of any relevant enacted law (statutes and regulations) and how they apply (or do not apply).*
- *Summary of Case Law and how it applies.*
- *Final reiteration of how the jury will be ensuring that justice is done if they return a favorable verdict.*

6. Jury Instructions.

Also called a Charge to the Jury, jury instructions are the legal rules that jurors are told to follow as they deliberate on a case. What evidence they may consider, what law applies and how, and so forth.

Some attorneys use a standard set of instructions, depending on the kind of case being tried, and then modify them as necessary. At some point, usually during the trial, the attorneys for both sides and the judge will have to agree on the instructions provided to the jury. Typically the plaintiff's attorney will send a set to the defense attorney. The defense attorney will then make recommended changes. After much negotiation between the sides, the instructions will be provided to the judge for approval or to settle any remaining disputes about the rules the jury will be told to follow.

Example § 11.3(b) | Partial Set of Jury Instructions

JURY INSTRUCTION NO. 1
In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

JURY INSTRUCTION NO. 2
I have mentioned the word "evidence." The "evidence" in this case consists of the testimony of witnesses, the documents and other things received as exhibits, and the facts that have been stipulated - this is, formally agreed to by the parties.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case. Certain things are not evidence. I shall list those things again for you now:

1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.

2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and just not try to guess what the answer might have been.

3. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.

4. Anything you saw or heard about this case outside the courtroom is not evidence.

Finally, if you were instructed that some evidence was received for a limited purpose only, you must follow that instruction.

JURY INSTRUCTION NO . 3
There is no burden upon a defendant to prove that he is innocent. Accordingly, the fact that a defendant did not testify must not be considered by you in any way, or even discussed, in arriving at your verdict.

7. Law

If there are pretrial disputes that argued points of law, make sure to have copies of the laws and any memos, briefs, motions, or court orders relating to those arguments. If there is a law that has not been disputed prior to trial, but which your attorney anticipates may become a point of issue at trial, prepare a memorandum regarding the law and how it affects the case at hand. This will help the attorney to better be able to handle any sudden arguments during the course of the trial.

8. Miscellaneous

This section is for material that does not fit logically into any other section of the *Trial Notebook*. It should have an index with thorough descriptions of the content of this section.

Conclusion

A properly prepared *Trial Notebook* will allow the attorney to better navigate through litigation. If prepared as the litigation proceeds, as opposed to the more typical method of rushing to create the notebook just before trial, the result will be not only a better *Trial Notebook*, but a more prepared and informed paralegal and attorney.

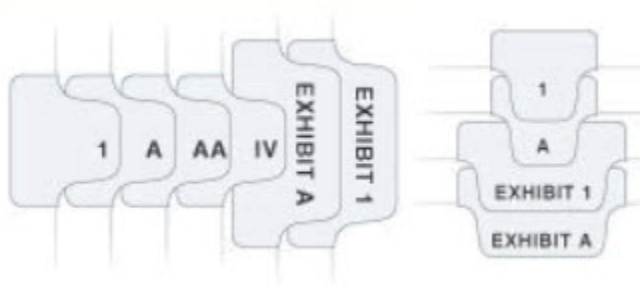
See Appendix A for a few samples of the contents of a Trial Notebook.

§ 11.4 PREPARING EXHIBITS FOR TRIAL

An exhibit is a physical item that will be presented as evidence at trial. Exhibits may include:

- *contracts*
- *maps*
- *photographs*
- *charts*
- *documents*
- *computer-generated graphics*
- *other demonstrative items relevant to the case*

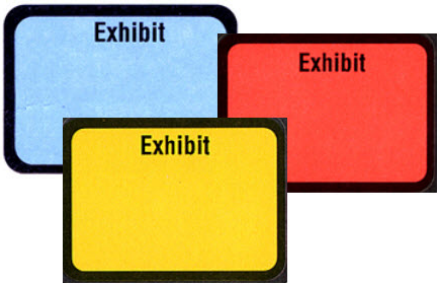
A party must ask the court to "admit" an exhibit as evidence. If the opposing party does not object, the court will admit the exhibit into evidence for the jury's consideration. If the opposing party objects, the attorney asking that the item be admitted must establish the admissibility of the exhibit. If the exhibit is admitted, it will be assigned either a letter or number and a label identifying the party who submitted it.



There are two typical methods for identifying exhibits: Exhibit *labels,* or exhibit *tabs* (shown here). They serve exactly the same function, except that *labels* have a light adhesive and are placed on the surface face of the item, while *tabs* are attached to the edge. The decision to use labels or tabs is usually left to the preference of the attorney.

When preparing the exhibits, the paralegal will need to ask the attorney whether they will be numbered or lettered. (i.e., Exhibit A, B, C, or Exhibit 1, 2, 3.) Some courts have specific rules requiring that the Plaintiff use lettered exhibits and Defendants use numbered exhibits.

The paralegal must make copies of the exhibit for each party in the litigation, and the original document will be provided to the court as the official exhibit. Labels are especially handy for exhibits because the paralegal may color code the items. For instance, all blue-labeled exhibits are the original exhibit to be submitted to the court, all yellow-labeled exhibits are the Plaintiff's copies, and all red-labeled exhibits are copies for the Defendant.



For instance, if a contract is introduced by the plaintiff as an exhibit:

- *The original document prepared for the court may be identified by a blue label titled Exhibit D.*
- *A copy of the document is prepared for the plaintiff and is identified by a corresponding yellow label as Exhibit D.*
- *A copy of the document is prepared for the defendant and is identified by a corresponding gray label as Exhibit D.*

Of course, the colors may change from case to case and depending on the label provider, but they colors must remain consistent within a single litigation.

Note that the adhesive on the exhibit labels is not permanent, but instead is similar to the adhesive used on sticky notes. This is important because the original evidence is not to be altered in any way, including the use of staples, writing, folding, or other disfiguring.

Once properly labeled, the paralegal should collect each exhibit, along with the copies of that exhibit, in order. This means that Exhibit A, and the Plaintiff and Defendant copies of Exhibit A should be together, Exhibit B, and copies, should be together, and so forth. All exhibits should then be placed in an expandable file, preferably with dividers to make access easier.

Ask your firm's office manager for the appropriate labels or contact a legal supply store for assistance. You may also check the *Rules of Evidence* for your jurisdiction for the appropriate titles of exhibits.

§ 11.5 ALTERNATIVE TO TRIAL: ARBITRATION

Arbitration is a form of alternative dispute resolution. In arbitration, the parties prepare much the same as they would for trial. The case is heard by a person who is not a judge (in most cases) in a somewhat simplified and more informal hearing.

Many states use arbitration to relieve the courts of some of the burden of the recent increase in civil litigation. It is an attempt to foster a settlement prior to trial. While an individual cannot be forced to give up his right to a trial, he or she may be forced to go through the arbitration process, but that process will not be binding.

In arbitration, the losing party has the right to ask for a trial (by filing a motion for trial de novo), but there may be penalties, if the party loses again at trial. On these pages we have presented an outline of a typical arbitration process. The specific elements of arbitration in your jurisdiction may vary.

Requirements for a Case to Go to Arbitration

Cases filed in the state trial court will generally be arbitrated if the damages requested do not exceed an amount set by statute. The maximum requested damages will vary, but a typical amount is $40,000. Most arbitration cases involve automobile accidents and neighbor disputes, but other litigation matters are also eligible.

How Is an Arbitrator Assigned to a Case?

In most states, there is a discovery commissioner or master to oversee the process of arbitration. This official, whose title varies from state to state, assigns arbitrators to specific cases. In a typical system, the commissioner proposes five arbitrators to both parties. Each party may strike two names from the list, leaving at least one accepted arbitrator. The commissioner then assigns the arbitrator. In some jurisdictions, the court performs the duties of the discovery commissioner, assigning arbitrators and settling procedural disputes.

What Does the Arbitrator Do?

The arbitrator acts as a quasi-judge and is usually paid by the parties. While the rules of discovery are generally still in effect during the arbitration stage, the arbitrator may limit discovery at his or her discretion. An arbitrator, for example, may limit interrogatories to 20 questions instead of the usual 40. In some states, only attorneys are allowed to act as arbitrators. However, in other states non-attorneys, including paralegals, may fill this role.

What Happens at an Arbitration Hearing?

The arbitrator sets a hearing date. During the hearing, both parties have a chance to present arguments, present evidence, and call witnesses to testify. The examination during the hearing is similar to examination during a deposition with the rules generally more lax than in-court examination. Subpoenas for witnesses are permitted, but not generally required.

Can a Party Appeal an Arbitrator's Decision?

The mechanism for "appeal" of an arbitrator's decision is usually a *motion for trial de novo*, a request for a court trial. In many states, however, if a party files a *motion for trial de novo* to reverse the arbitrator's decision and loses, the court may order the losing part to pay court costs and the opposing party's attorney's fees.

To determine the details of arbitration in your state, check your court rules, including any arbitration rules. You may also call the court clerk at the court in which the action is being litigated.

§ 11.6 THE PARALEGAL AS ADVOCATE

In legal terms, advocacy is usually thought of as a part of the role of an attorney. The attorney argues for, or advocates on behalf of, his or her client. This is especially important in litigation. However, today advocacy is not simply argument on behalf of a client. It is any attempt to convince someone to do something even when that person may not have any motivation to do so. This can be in court in front of a judge, or it can be at a hospital trying to convince a doctor to release patient documents. In many cases, the paralegal becomes an extension of the attorney during the litigation process by obtaining information relevant to representation.

When a consumer talks a store clerk into taking an item back without a receipt, he is being an advocate. When a woman talks her way out of a traffic ticket, she is being an advocate. When a paralegal convinces a hospital records clerk to let him view the unsanitized notes in a patient's file, he is being an advocate for his client.

The difference between a good paralegal and a great paralegal is very often a matter of advocacy. When paralegals understand their advocacy roles, their drive, focus and persistence of representation improve. Furthermore, developing good advocacy skills is often a matter of attitude.

Attitude

You may like your client. You may thoroughly dislike your client. You may think he is being abused. You may think he is being abusive. When you leave that office to interview a witness, visit the law library, or perform any other task on behalf of a client, you must leave your feelings about the client behind. You are not only representing your client, but also his right to effective representation and a fair trial. Your attitude needs to be:

> *No one will stand in the way of information to which my client has a legal right.*

In fact, a paralegal should be self-righteous about the client's rights. Attempting to keep a paralegal from obtaining information abuses the client's constitutional rights. This may sound extreme, but it is the reality.

Example § 11.6 | Paralegal Advocacy

At a court file clerk's office in Jefferson County, Colorado, a handwritten sign was tacked up stating that only attorneys were allowed to view files. A paralegal was asked one day if he was a lawyer and responded that he was not. The clerk advised him of the rule and refused to allow him to view the file. The paralegal politely objected, pointing out that unless otherwise ordered by the court, all files were public record. Making no progress with the clerk, the paralegal asked to speak to a supervisor. After the paralegal stated his position, the supervisor simply pointed to the sign and asked, "Can't you read that sign?" The paralegal, who had anticipated the problem, removed a folded copy of the statute regarding public records from his briefcase, and asked: "Can't you read this statute?" After a few moments, the supervisor instructed the clerk to allow the paralegal to see the file in question. The sign was gone a week later. This is advocacy. No one should stand in the way of the client's rights. And you may have noticed another benefit: Advocacy can be fun! It can make a paralegal's job more interesting. On any given day, a paralegal may perform an act of advocacy that makes a difference for a client.

Advocacy is a very individual thing. What works for one paralegal may not work for another. The opinions on the following pages should be considered discussion points. You may agree with the comments. You may disagree. But think about them. They may help you become a more effective advocate.

Not Everyone Gets the Idea of Advocacy

J.W. was a legal secretary when she enrolled in the paralegal program. During the research part of the course, she asked to research an actual legal matter in which her firm was involved. The firm's client was an 18-year-old girl. She had worked between the ages of 12 and 16 in her father's store. The money she made was kept in an account for her college education. When she was 16, her parents divorced, forcing the young woman to choose where to live. When she chose her mother, the father emptied the account and refused to give the money to his daughter.

The senior partner on the case assigned one of the firm's associates to assist in representation. The critical hearing date approached and the associate was pessimistic about the client's chances. J.W. researched in several sources, but it wasn't until she searched in *Am. Jur. Proof of Facts* that she hit the jackpot. The "proof" stated that once a minor reaches majority, any property or monies belonging to him or her must be provided and that to fail to do so would constitute theft. J.W. prepared a memorandum, including case law, for the attorneys.

However, when she presented the memo to the associate, he brushed it aside saying, "This is criminal, and our case is civil. It doesn't apply." J.W. was very disappointed, not understanding why the authority she found couldn't be used. If nothing else, she thought, it could be used as a "hammer," an inducement to the father. ("If the money isn't returned, we may have to ask the district attorney to look into this.")

J.W. took a chance and presented the memo to the senior partner. He read the memo, then asked, "Where did you get this?" J.W. told him *Proof of Facts*. He responded, "Proof of what?" Then he demanded that J.W. go to the law library with him and show him the books.

On the way back to the office, the partner told J.W. that as soon as they got back, she was to order a set of Proof of Facts, that the associate was off the case, and that she was being promoted to be the firm's first paralegal.

The Price of Advocacy

Some paralegal students use their skills to help themselves. N.F., a paralegal, was involved in a child-support matter. Her ex-husband had never paid a cent in child support for their five-year-old son. The attorney she hired was very expensive and N.F. was fairly unimpressed with his work. About a week before the definitive hearing on the matter, the associate who was assisting on the case, met with N.F. and told her the firm had received a brief from the opposing counsel and the cases they cited appeared to work against N.F.'s efforts to collect support at this late date. N.F. was furious. These lawyers had worked for almost a year on the case and the best they can tell her now is "it doesn't look good." This was unacceptable.

Launching her own research, she discovered that the two cases the opposing counsel relied on in the brief were quoted out of context. Both cases actually worked for her! Her attorneys must not have even read the cases. N.F. prepared a memorandum, met with her lawyers, and told them what to do. At the hearing, it was with mixed emotions that N.F. heard her lawyer argue the exact points she had prepared herself, as though they were the product of his own work. The judge ruled she was owed $25,000 in back support.

It was a hollow victory, however. N.F. should never have been forced to go to court, but the judge inexplicably would not grant her attorney's fees. When the attorney's bill arrived a month later, she was stunned - his fee for "representation" was $21,000.

Seeing the Big Picture, Literally

Construction defect paralegals often assist in site inspections. They visit the site in dispute and, along with experts from both sides, examine the alleged defects. Sometimes they simply view the structure. Sometimes they observe "destructive testing," which involves an expert punching holes in walls, ceilings, and floors to determine construction techniques.

M.R., a paralegal, was attending the site inspection of a home involved in litigation. The claim was that the largest room in the house, the dining area, was inadequately ventilated. The area had vaulted ceilings and the expert for the plaintiff rambled on about the inadequacy of a design that left such a large area unvented. In the midst of the experts, attorneys, and clients present, M.R. raised a simple question. Admitting she was not an expert, she asked if the area might possibly get better ventilation if a large framed picture, which happened to cover a vent, could be moved.

The expert was dismissive, arguing that there couldn't possibly be a vent there. After scrambling around for a ladder and carefully removing the large and expensive picture, the expert was forced to declare that there was, indeed, a vent behind the picture. The case was over, settled by a paralegal.

Advocating for a Paralegal

P.A. was very well-liked and respected by the staff and most of the attorneys at her firm. Unfortunately, the attorney to whom she was assigned had taken a dislike to her. One day, P.A. did something she had never done before: She forgot to calendar a hearing date for a client, an omission that resulted in an arrest warrant being issued. The client called and was furious.

P.A. spoke with the client because the attorney she worked for had left for the day. P.A. felt terrible. She was advised to prepare a motion to quash the warrant for filing the next morning. P.A. spent a sleepless night anticipating what the attorney would do when she found out. Naturally, the attorney was very upset. She sent P.A. to court with the motion, a fairly routine request, which was granted. P.A. didn't see the lawyer again that morning.

After lunch, the managing partner summoned P.A. to his office. He closed the door and informed her that what he was about to tell her had nothing to do with her mistake. He wanted to let her know that her attorney had stormed into his office and demanded that P.A. be fired immediately.

The managing partner was dumbfounded. He had not worked much with P.A., but had always had a positive impression of her. He told the attorney he would get back to her about it after lunch. In the meantime, he started asking questions. He talked to attorneys, paralegals, secretaries, and even the receptionist. Everyone seemed to know two things. P.A. was a hardworking paralegal, and her attorney was regularly abusive to her.

The managing attorney apologized to P.A., told her that the attorney no longer worked at the firm, and informed her that she would become his paralegal, at a higher rate of pay.

Advocacy's Reward

A paralegal may be involved in almost every aspect of the litigation process: research, investigation, interviewing, preparing documents, setting up depositions, and many other tasks. Your work will almost certainly have an effect on the outcome of the litigation process.

D.R. worked for a litigation law firm. One case involved a 70-year-old man whose wife was killed in a car accident by a teenager traveling 70 mph in a 35 mph zone. When the case began, the only witnesses (besides the defendant himself) were the defendant's two buddies, who had been riding in his car. They were not expected to be particularly helpful.

During the pretrial stage, D.R. identified and interviewed more than 70 potential witnesses. They ranged from a minister, who had been frightened to see the teenager driving on the same road, to students and teachers, who would testify about the dangerous driving habits of the defendant. Great witnesses for the plaintiff's case.

In researching the case, D.R. also discovered an exception to the general rule that plaintiffs in wrongful death cases cannot be compensated for "loss of consortium." D.R. discovered case law establishing that if the death occurs a significant amount of time after the accident, compensation is allowed.

At the settlement conference, the attorney walked in with statements and depositions from the 70-plus witnesses, informed the opposing counsel that loss of consortium was "back on the table," and said that the client would settle for nothing less than the maximum amount under the defendant's insurance policy. The two attorneys representing the defendant left the room to discuss the matter. After about five minutes they returned, agreeing to "settle" for the full amount if the loss of consortium issue was dropped.

As the attorney and D.R. walked out of the settlement conference, the attorney patted D.R. on the back, paused for a moment, and said, "This is was as much your case as anyone's. I want you to call the client."

That is the kind of difference a paralegal can make. With the right skills, and the right attitude, it is the kind of advocacy you, as a paralegal, can be a part of.

CHAPTER 11 WRAP-UP

WHAT YOU SHOULD KNOW…

After reading this chapter you should know the following:

- ☐ The purpose of a Trial Notebook and how to prepare one
- ☐ How to prepare exhibits for trial
- ☐ The fundamentals of arbitration
- ☐ What it means to be an advocate

ASSIGNMENTS

There are no assignments for this chapter.