

**§ 11.3****Preparing the Trial Notebook**

*Everything in its place for easy access*

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.

**Trial Notebook Sample Documents**

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

**GUIDELINES | 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.

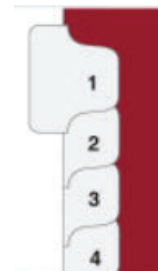


2. *A set of loose-leaf ring binder indexes divided into eight tabs.*  
The eight index tabs should be labeled as follows:

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



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 now ready to be created.



**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 tab of the *Trial Notebook* referred to in part 2 above.

**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.

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:

1	Name
2	Home address
3	Home telephone number
4	Work address
	Work telephone number
	Mobile telephone number(s)

This initial *Contact Information* page will act as a cover for material collected about the witness within the notebook. Any documentation 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 for each witness include:

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

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 of 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 in the future than to spend 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 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, 2020 X-ray of Plaintiff's bicuspid

*Purpose*

Establish Plaintiff's reason for seeking dental services

*Placed in Trial Notebook*

November 16, 2021

*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, 2021 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 Argument

The closing argument 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 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 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 mis-recollection 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 - that 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. Authority (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 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.*