

Trial notebook

“The Trial Note book”

The young lawyer was cross-examining his opponent's chief witness, and was about to impeach him with a prior inconsistent statement that went to the heart of the case.

The witness, Mr. Charles Malloy, testified on direct examination that both the plaintiff and defendant met him in his office and entered into a verbal modification of the contract that was the subject of the suit. In his extensive deposition, Mr. Malloy had testified that he had never been with the plaintiff and defendant in his office at one time.

The set-up for the confrontation with the witness's contrary statement in his deposition was a textbook example of the right way to do it. But then came the confrontation itself:

Q. This is not the first time you have given testimony in this case, is it, Mr. Malloy?

A. I'm afraid I don't understand. What do you mean?

Q. Well, you gave your deposition in this case, didn't *you*?

A. Yes.

Q. You raised your hand and swore to tell the truth?

A. Yes.

Q. And you did tell the truth, didn't you?

A. Certainly.

by James W MeElhaney

Associate Editor

Q. (Picking up the second volume of the 850-page deposition) Everything you said was transcribed by the court reporter?

A. Yes.

Q. And one of the questions I asked you then was (thumbing through the deposition) ... was ... just a moment ... (riffing through the entire volume) . . . was (picking up the first volume of the deposition) . . . ah . . . whether you and, ah, Mr. Wellemeyer and Harold Stevenson . . . uh . . . Your honor, may I have a moment, please?

The Court: You may.

[Thereupon there was a five minute recess]

Q. (Trying for a tone of confidence) All right, Mr. Malloy, we will return to the meeting in your office in a little while, but first, I want to ask you about your relationship with Harold Stevenson . . .

What happened? Disaster. Why? The lawyer had engaged in exhaustive discovery. He had deposed every witness, asked every interrogatory, studied every statement,

and made copious notes about everything. His files bulged with legal pads with his extensive analysis. He had a coherent theory of the case and was well versed in trial techniques.

The trouble was he used the legal pad, manila folder, brown accordion file system of trial preparation. John Alan Appleman was speaking about this method when he said, "[n]othing so undermines the

confidence of a court or jury in a lawyer as his constant groping and fumbling." J. APPLEMAN, ED., SUCCESSFUL JURY TRIALS 100 (1952).

For five years, *Trial Notebook* has been a series of essays on fundamental trial techniques and methods. **Now** it is time to show that the title is not only the name of a column, it is also a superior method of trial preparation.

Unlike many more formal legal terms, the trial notebook is just what the name implies. It is a system of trial preparation that actually uses a notebook to organize everything in the trial.

There are many rewards to using the trial notebook system. First, and probably most important is that it helps you find things during the trial, from particular passages in a deposition to the right response to your opponent's objections. As A. Leo Levin



and Harold Cramer said in TRIAL ADVOCACY-PROBLEMS AND MATERIALS 7 (1968), "The lawyer who has at his fingertips helpful authorities responsive to what may seem to others an unexpected objection on the part of his opponent, is a professional advocate. Neither luck nor a photographic memory accounts for most instances of such effective advocacy."

Second, if you are a junior in a firm, the trial notebook can help you in two ways: it can let a senior review your work in advance of trial, and it will impress your senior that you know what you are doing.

Third, if you prepare a good trial notebook, it is much easier for a colleague to take over if anything should keep you from trying the case.

So what goes in a trial notebook, and why? Before going into the list, please understand that one advantage of the notebook system is its flexibility. What goes into the trial notebook and how detailed you make it depends on you and on the case. If it is to be a successful system, it must be made to work for you and not the other way around.

© *The Notebook Itself.* Among those really dedicated to the system, the three-ring binder designed to hold 8 1/2 " by 11 " paper is standard. If you decide to put in legal size papers, they can be turned sideways and punched at the top or folded and put in pockets. Anyway, larger size binders are not readily available. It is useful to get tabbed separators just like you used to buy in junior high school-only this time you will actually use them.

No matter what kind of binder you choose, pick one that can be easily opened in trial. There are new binders on the market with plastic rings that have a silent slide fastener, although there are some lawyers who enjoy the authoritative snap produced by the old metal rings of the more traditional binders. The snap, they claim, eventually produces a fearful anticipation on the part of the opponent as surely as Pavlov's bell made his dogs expect that dinner would be served.

Of more practical moment are the pockets that are now available in stationery stores. Punched for standard three-ring binders, these pockets are designed to hold papers as large as

8 1/2" by 11", and are just the thing for keeping documents, pictures, and other exhibits (as well as copies for the judge, your opponent, and the jury) that you do not want to punch. So much for the cover. Now to the contents.

• *Table of Contents and Index.*

The table of contents comes at the beginning, but its final version is written last. A preliminary table of contents, however, should be one of the first items to go into the book, just to show what needs to be done as preparation progresses.

Usually the table of contents need not list page numbers, just the sections of the trial notebook in order. Since things will go into and come out of the trial notebook continually, anything close to accurate pagination is impossible.

No Index Usury

Ordinarily, an index is not used, although it can be helpful in protracted litigation. Instead of an ordinary index at the end of the trial notebook, a second table of contents, arranged alphabetically, will be more useful.

• *Analysis of the Case.* A coherent theory of the case is an essential ingredient to effective litigation. See *Trial Notebook, The Theory of the Case*, 6 LITIGATION No. 1, at 51 (Fall 1979). That unifying concept which you will use to persuade the judge and jury is just part of the analysis of the case. Here is the place for all sorts of notes, whether formal or informal, that go to make up your battle plan-from ideas about preliminary motions and jury selection to thoughts about final argument and requests for instructions.

• *Analysis of the Opponent's Case.*

If you have done your job well, you have also done some daydreaming about your opponent's case. The analysis of your opponent's case need not be a separate entry, but is important enough to warrant separate mention.

• *Proof Checklist.* A formal proof checklist is important for both plaintiffs and defendants. A good proof checklist has three levels: First, the

formal facts the law requires you to prove-the elements of your cause of action or defense. Second, the evidence that supports each element. Third, the source of the evidence. It may sound complex, but it is notespecially if you think of the three levels as simply *elements, evidence, and source.* A short example from a plaintiff's trial notebook will suffice:

Defendant's Negligence Excessive speed Limit
25-Officer Lintz Eyewitness bystander Karen
Maguire

No proper lookout
Did not apply brakes-
Admission in defendant's deposition
Did not apply brakes-
No skid marks, Officer Lintz

Writing the proof checklist is valuable for a number of reasons. First, it forces you to go over every facet of your case. If there are any gaps, they will show up on the proof checklist. Second, it helps you grasp the totality of the evidence that may refine your theory of the case. Third, going over your proof checklist immediately before trial will refresh your recollection about the case especially if you have a number of active files in your office-and make you a better advocate. Fourth, the proof checklist will help you put all evidence in perspective as the trial unfolds. It is like a running scorecard, since you check off evidence as the trial goes on. Looking at the proof checklist will help you decide whether you need to take some remedial action, such as calling a rebuttal witness. Finally, when your case is finished, you can review what you have done and rest your case in confidence, knowing that if your opponent makes a motion for a directed verdict, your proof checklist will aid you in making the proper argument.

• *Jury Selection.* Whether you have any real role injury selection depends, of course, on the court you are in. What you do during voir dire is a subject all to itself. See *Trial Notebook, Voir Dire*, 5 LITIGATION No. 3, at 37 (Spring 1979). But whether you get to ask the veniremen questions or it is all done by the judge, you cannot tell the

players without a scorecard. For this you need a chart, a group of squares assembled like a map of the way the panel of prospective jurors is arranged, in which to write their names and make some notes.

Psychological Point Count

If you are conducting jury voir dire, then the outline or list of questions **YOU** are going to ask the jurors belongs in this section. On the other hand, if the judge is going to conduct the questioning, then here is where you put the list of supplementary questions you are going to request the judge to ask.

If you use the psychological point count system of juror evaluation—the method that relies on various factors in a juror's background being given a number of points which are totaled up for purposes of juror comparison—then the point count forms that you and your clinical psychologist advisor work out together to fit this particular case also belong in this section.

• *Opening Statement.* Writing out your opening statement is usually not a good idea, because you may be tempted to read it at the start of trial. Reading is almost always a mistake, since even though it may be smoother and more 'polished' than an extemporaneous presentation, written language is different from spoken language. Moreover, no matter how hard you try, it is nearly impossible to duplicate exactly the progression of emotions you felt as you wrote your opening. The result is that if you read your opening statement, your feelings will not match the words and what you say will not sound quite sincere.

This does not mean you work without notes, however, and this is the place in the trial notebook to put those notes. For more detail on how to prepare the opening statement, see *Trial Notebook, Opening Statements*, 2 LITIGATION No. 4, at 45 (Summer 1976).

• *Stipulations and Pretrial Order.* Here is a good place for these things. Often stipulations are read to the jury immediately after opening. Moreover, if you need to refer to the pretrial order (if there is one), it is good to know where it is, near the beginning of the book. If there is some reason for

putting the pleadings into the trial notebook, they can go in here. On the other hand, if there is no need to refer to them during the course of the trial, the notebook need not be cluttered with them just because they look impressive.

• *Witnesses.* There are two main subdivisions to this section. The first is the list of your witnesses in the order in which you intend to call them. If this list is more than one page long, it may make sense to have a second list arranged in alphabetical order.

Do not just put the witnesses' names on this list. It should also have their addresses and telephone numbers—both home and work—as well as a notation indicating whether they have been subpoenaed. Then if one of your witnesses does not show up at the appointed time, it is much easier to locate him.

In addition to this information, it is often helpful to give a short characterization of the witness's relation to the case. There is a good reason for this. Witness order has an important bearing on persuasion, and should be carefully worked out to fit the theory of the case. A notation such as "investigating officer—strong witness" can be very helpful.

The second part of the witnesses subdivision is the more important of the two. Here is the group of outlines on the direct examination of all your witnesses and the cross-examination of all the opponent's witnesses. Indeed, in the appropriate-sized case, you may want to break these into two separate sections, one for direct, the other for cross-examination. When the witness takes the stand, you merely turn to the appropriate page in the trial notebook, and you are ready to begin your examination.

Here is where the trial notebook system truly starts to outstrip the legal pad, manila folder, accordion file system. At the beginning of each witness's subsection is a page with the witness's name, address, telephone numbers, employment and statement about his relationship to the case—just the way it was on the witness list. Following that should be a short paragraph (just one or two sentences) explaining why this witness is being called to testify; just what it is you

expect to prove with this person. Reading this introductory material and that paragraph of purpose just before the witness is called will

tend to keep you right on track during the examination of the witness.

Following this should be an outline of your examination. Whether this is direct or cross-examination, as Kenny Hegland suggests in *TRIAL AND PRACTICE SKILLS IN A NUTSHELL 142* (1978), write your outline on the *left hand side of the page*. You might even consider drawing a line down the middle of the page to force you to do this.

Why?

By leaving a wide right-hand margin, you have room for supplemental notes, and more importantly, a place to write particularly colorful language or important concessions from the witness you will later want to work into final argument. These are important notations you simply will not make unless you have a place to do it.

For most lawyers, writing out questions is not as successful as writing an outline. Written out questions do not leave as much flexibility as an outline does when the witness does not answer as anticipated. Furthermore, unless one reads superbly—like the old radio drama actors—reading the questions verbatim gives the examination of a witness a sense of being "canned," which is disastrous to the credibility of the witness (and the lawyer as well). See *Trial Notebook, The Credibility of the Lawyer*, 6 LITIGATION No. 3, at 53 (Spring 1980).

There are some questions, however, that should be written out and read verbatim. In rare instances it may be done with an ordinary witness. The more usual occasion for precisely worded questions is with expert witnesses, especially if they are asked hypothetical questions, a practice that has become optional under the Federal Rules of Evidence, Rules 703 and 705.

After the outline of the witness's examination is something nearly as important. It is a proof checklist. This is a short list of all the important bits of evidence you expect to elicit from the witness. When you have finished the examination of the witness, simply go down the checklist. Any gaps are obvious. If there are none, you can confidently say, "No further questions."

The time saved in witness examination will more than make up for the time spent preparing the trial notebook. Too many lawyers aimlessly flail around toward the end of both direct and cross-examination, hoping that they will somehow cover everything that way. The trial notebook system ends that, winning the gratitude of judges and juries alike.

And now to the point that got the young lawyer hopelessly snarled at the beginning, depositions and crossexamination.

It is not enough just to take a deposition and read it through before trial. One of the most important features of the trial notebook is the deposition index. With the deposition index comes one of the minor disputes about effective trial preparation: Is it something best done by the attorney trying the case, or can it be safely delegated to juniors or paralegals?

No matter how the question is answered, one thing is certain: the deposition index is not merely a formal matter. It can only be done by someone who understands the case thoroughly. For this reason, some lawyers who delegate many things to others actually dictate their own deposition indexes.

Complex Indexes

How complex the indexes need to be depends entirely on the case. Often a single page or two will do, listing topics and page numbers in the deposition. In complicated cases it may be more appropriate to prepare written summaries and cross-indexes, a system described in Paul Bergman's TRIAL ADVOCACY IN A NUTSHELL 375-76 (1979).

• *Documents and Exhibits.* Like witnesses, documents and exhibits are divided into two parts; first the list and then the things themselves.

If a document, picture, or other exhibit can be entirely authenticated and explained by one witness, you may wish to put it in a pocket as a part of the witness's file.

On the other hand, if there are a number of documents in the case, it is probably better to have them in a separate section or even separate book. Under some circumstances it may be a good idea to prepare a copy of the

entire document book (especially if the documents are pre-marked and admitted) for the court, each juror, and opposing counsel.

Before each document include a sheet with the requirements for the necessary foundation and the names of the witnesses who can do the job. If foundations are not your forte, see *Trial Notebook, Foundations*, 4 LITIGATION, No. 3 at 43 (Spring 1978). If you anticipate trouble from your adversary about the foundation, you can even include a case citation on your foundation notes.

• *Evidence and Procedure Memoranda.* Every case has the potential for some disputed areas of evidence or procedure. With a little thought, many can be identified in advance such as the effect of a presumption when there has been contrary evidence or whether a doctor consulted just for treatment can testify to the person's medical history.

The answers to questions like these often vary from state to state. While they can have an important effect on the conduct of the trial, if the judge makes a mistake in ruling on one of them, it is usually not reversible error. It is important to understand that point, because it means that generally your one chance for a proper ruling on the issue is the first time it occurs.

Many lawyers do the necessary research on such questions, but then through the quagmire caused by the legal pad, manila folder and brown accordion file system-either cannot find their research at the proper time, or fail to present their argument effectively.

Probably the best way to argue such an issue is both orally and in writing. The writing should be a miniature brief; no more than a few typewritten sentences in the middle of an otherwise clean paper. The effect of this sort of memoranda is startling, and it is worthwhile understanding why it works so well.

Watch what a judge does when a lawyer places a pile of books in front of him, and you will be cured of any temptation to do the same. The unspoken message of an opened book placed before the judge is, "I have not really finished my research. There may be contrary cases, and this may

not really be on point, but I think it supports me."

The unspoken message of the long brief is a little different, but not much more persuasive: "I have really done my homework. This is a long and difficult point which is distinctly arguable either way. You may not have time to read this, but I would appreciate it if you would reward my diligence, even if I am wrong." Long briefs are not usually read during the heat of trial.

Instant Understanding

The unspoken message of the miniature brief is different still: "Here it is, the answer is clear. I have done my homework, and am certain of the right answer. Read this and you will instantly understand the right way to rule. Ignore it at your peril." Very short memoranda do get read during trial. To keep on top of things, you should have three copies of each, one for you, one for the judge, and one for your opponent.

• *Final Argument.* Preparation for final argument really starts when the case comes in the door. Here is where all your notes will go. Their chance for actual retrieval is greatly enhanced because there is a place to put them.

• *Motions and Requests for Instructions.* In some jurisdictions requests for instructions are rather informal, and all that is needed is a few notes unless the case presents some novel points. Other states, however, follow a more elaborate procedure. In Texas practice, for example, each requested instruction must be on a separate piece of paper, together with a brief form for the judge to indicate whether the instruction is granted or denied. Whatever the practice, the tabbed pocket is perfect for keeping requests for instructions and briefs in support of supplementary motions.

Having come this far, you are now in position to see the most valuable aspect of the trial notebook system of trial preparation. Using this method makes thorough preparation easy. Just paging through the book is an instant status report on the case; it shows exactly what needs to be done.

Finally, it is a system worth using because it works and helps win cases.

