

Tips for putting together the all-important trial notebook

By: F. Dennis Saylor IV and Daniel I. Small ○ February 4, 2016

It almost goes without saying that a successful trial lawyer needs to be thoroughly prepared. But hard work alone is not enough, and even the most prodigious memory will carry you only so far.

A successful trial lawyer also needs to be carefully organized. In particular, you need a system of organization that permits you to access information — in the courtroom, in the heat of battle — and to convey it to the jury and judge in a coherent and persuasive way.

The basic organizational tool for trial lawyers is a trial notebook. This is a three-ring binder (or multiple binders) that contains the information you will need during the trial.

At a minimum, the notebook should include witness outlines (or scripts), exhibit lists and key exhibits. In a complex case, you also may want a chronology, summary charts and a cast of characters.

Dan Small likes to include a case summary and a pleadings index in his trial notebook; Judge Saylor liked to include selected legal and evidentiary materials.

Whether you have one or more notebooks may depend on the complexity of the case. Dan recommends separate notebooks for each witness. However you assemble it, make sure that any one notebook is not too fat or cumbersome. You will want your notebook with you at the podium, not just at the counsel table, and you want to be able to flip through the pages easily.

It is critically important that you be able to see what is written in your notebook and understand it when examining a witness, or at other times during the trial. It won't do you any good if the information you need is buried in an ocean of small print.

Experiment with layout and typeface to make your notebook readable and understandable. Use a larger-than-normal font. Use lots of white space. Use colors: yellow highlights, red notations, whatever. Include cross-references to transcripts and exhibits.

Again, you want as much information as possible at your fingertips, and you want to be able to refer to it as quickly as possible.

The mere act of preparing the notebook will help focus and organize your presentation. It will help you think through your case, your theories and your vulnerabilities. Also, it inevitably will commit much of the information to your memory, minimizing your need to refer to it.

We both are firm believers in old-fashioned, low-tech three-ring binders. It's possible that this can be done electronically with a laptop or tablet, but not likely to be as useful or effective.

You may want to develop and monitor the documents electronically, but then print to a three-ring binder, unless you are absolutely sure that a laptop will work just as well. Remember: Three-ring binders never run out of power, never go blank, and nothing bad happens if you touch it in the wrong place.

Several of these documents deserve a longer discussion, which we will defer to another day. For now, we'll just touch on each one briefly.

1. Witness outlines or scripts

These are the most important items in your notebook. Judge Saylor believes that lawyers should develop a script for each witness, while Dan uses a broader outline format. What we both agree on, though, is the extraordinary importance of a carefully crafted document that guides your examination of the witnesses.

This is not the time for random notes or “winging it.” We’ll save the rest for a future column.

2. Exhibit list and key exhibits

Any case with more than a handful of documents requires methodical organization. At a bare minimum, you want to have a list of the exhibits in your notebook. If nothing else, you need to keep track of which documents have been admitted in evidence and which have not.

You also will want copies of key exhibits, such as a controlling contract, or perhaps selections from those exhibits to reduce bulk.

3. Chronologies and summaries

A thorough chronology can be a highly useful document. It should cover all significant events in the case, with the date, description, and citation or source included. It is a good way to bring together the evidence to review what happened, and how it can be proved.

Similarly, it may be useful to include summary charts covering any topic that lends itself to such a display — wiretapped conversations, for example, or bank deposits or medical treatments. One or more maps also might be helpful.

4. Cast of characters

In a complex case, a cast of characters, arranged alphabetically and with a brief description of that person’s position and role in the case, may be desirable. It also may include key contact information and identify that person’s counsel, if any. An organizational chart for a corporation or other entity is another potentially useful document.

5. Case summary

Dan likes to prepare a brief summary of the case and a list of key issues and include that in the notebook. It forces you to focus on what the case is about, in a way that trial lawyers often do not do until much later in the process; it creates a document that will be an easy reference for you, or anyone who examines the file at a later time; and it encourages the process of rethinking and rewriting the key issues and themes as the case moves along.

6. Pleadings index

Dan also includes a pleadings index. That is simply a chronological list of what has been filed in the case, with date filed and description, which is usually the caption or some abbreviated version of it. The simplest way to prepare it is simply to print out the court docket.

7. Other items

You may want to include items such as the relevant statute or regulations, the elements of the claim or criminal charge, and key prior rulings by the court (for example, denying summary judgment).

Judge Saylor (when he was trying cases) usually included outlines of anticipated points for evidentiary objections likely to be raised at trial, with citations as appropriate. He also included some odds and ends, such as the multiple-question litany for admitting a business record (to make sure he got it right if he needed it).

Dan recommends that you begin to prepare the trial notebook right at the beginning of the case. It’s never too soon to be properly organized, and that work will pay dividends throughout the litigation. Judge Saylor agrees, but with a note of caution: Cases rarely unfold exactly as you think they will and make sure you are not (psychologically, if nothing else) locking yourself into a version of the facts that may not prove to be correct.

However you prepare your notebook, the goals are the same. You want to present your case clearly and persuasively, from the beginning of the trial to the end; to have your exhibits admitted in evidence; to avoid sustained objections; to include every item of evidence you need, while minimizing unnecessary words and exhibits; and to respond effectively to your opponent’s evidence, objections and arguments.

Properly prepared, a trial notebook will help you both plan and present your case and respond to any unforeseen turns that it may take.

Previous installments of Tried & True can be found at masslawyersweekly.com. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. He teaches trial advocacy at Boston University School of Law. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country. He can be contacted at dan.small@hklaw.com.

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