



# The Anatomy of Trial Preparation

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What is the difference between “getting ready” for trial and “preparing for trial”? To me, the difference is in evaluating and planning strategy for all of the eventualities that could come up. This is playing the chess board in advance of trial. I love the show *Queen's Gambit*. Remember how she played through the games on the ceiling while she laid in bed? This is the kind of preparation that I'm talking about.

## Outline of Proof

The first step in preparation is to prepare an outline of the issues and method of proof involved in the case. While this step may start early on during the case, usually it is not super effective until much of the discovery has been conducted. I do this outline on a white board and begin by listing the claim – affirmative and defensive – that are on the table. Then, list the elements of proof of each claim. Add under each claim the witnesses and exhibits that are relevant to proving those claims. From here, evaluate what production you have or need to meet the proof on each element. If you know there is a conflict of opinion on the law, identify where those are during this process.

After going through this full analysis, then reverse the analysis into the roadmap for trial, listing the witnesses you're going to call, the issues you need to address with that witness, and the exhibits you will use with each.

Sometimes there are specific legal issues or skirmishes that you expect to have during the trial. When you can anticipate a particular objection being contested, then write out the objection and the statutory or case law authority on the point so you don't have to think about it in the heat of the battle; you can just turn to that page in your notebook and read it into the record. You can also prepare trial briefs on particular legal issues to bench file when the issue arises to provide the judge with the legal authority in a short, bite-size document.

From this process, you can begin to prepare your pretrial designations of fact and expert witnesses as well as the list of exhibits.

## Notebooks for Trial

I am a big notebook lawyer. When I'm in trial, I like my presentation to be “buttoned-up”, neat and tidy. I detest the pile of paper that ends up being a mess on many lawyers' trial tables. I also don't like large notebooks as they are bulky and difficult to maneuver in court. Smaller notebooks are easier to handle and can be put away when you are done with that part of the trial.

### Master Notebook

The Master Notebook will contain information that will be needed throughout the trial and usually is less substantive than the rest of the notebooks. Here's some items that may be in this notebook:

- Players list with contact information for witnesses, parties, or court officials.
- Travel information



- Outline of Proof (above)
- Master witness chart – I do a spreadsheet of all of the fact and expert witnesses listed by any party and where the reference to that witness is.
- Master exhibit list
- Discovery index listing each party's produced documents
- Timeline of events, if needed
- Current printed docket sheet
- Pretrial Disclosure list with fact/expert witnesses and exhibit lists for both parties

### Pleadings Notebook

The main Pleadings notebook will contain generally the important pleadings and orders in the case. I always include every petition/counterpetition, even if amended out. All of the temporary orders throughout the case will be included. Any scheduling orders, major discovery rulings, and partial summary judgment orders should also be in this notebook.

You might also have a separate notebook that contains transcripts from various important hearings for reference.

### Discovery Notebook

The discovery notebook should contain the pleading portion of all of the live discovery responses. So, if something has been amended, then I'd leave out the prior version, but keep everything that can be relied upon. So, responses to all written discovery as well as document production indexes (repeated from the master notebook). I keep a copy of the master fact and expert lists and pretrial disclosures in this notebook too (also repeated from the master notebook). You might want a master list of audio and video produced for reference.

As to the full document production, you will want to have access to this, just in case you need something that isn't planned in the exhibit lists. Anymore, having this electronically is probably the best option instead of printing to paper, especially if you have a staff member in trial with you who can quickly access items when needed. Keep in mind that internet at the courthouse is spotty, so have this on thumb drive where you can access it. Also have a Plan B and Plan C for how you will use this information.

You might also want one place where you have all of the deposition transcripts taken in the case for reference.

### Outstanding Motions Notebook

If there are pending motions that need to be heard at the beginning of trial and ruled on, I keep those in a separate notebook. At final trial *all* issues that aren't ruled upon are set. Most of the pending motions at final trial will relate to evidence that each side wants to keep in or keep out of the trial. Include either side's motion and all responses, supporting affidavits and declarations. This is also a good place to keep any trial briefs or specific legal arguments that will be made during the trial. If you cite a lot of case law authority, you might have a separate notebook that just contains the case law.



## Argument Notebook

I like to have my notes for opening statement and closing argument in one notebook, separate from the rest of the preparation so that it is easily used and put away when not needed. I also like to have a place to keep notes in that notebook for thoughts about things that need to be argued in closing.

If it's a jury trial, this notebook will house my voir dire outline, notes about perfect juror qualities, a jury seating chart (created in consultation with court staff about how the venire is laid out), motion for jury shuffle, and notes about challenges for cause if I need them.

Also in a jury trial, this will be a good place to keep the proposed jury charge of both sides as well as your tender submission at the ready. Note, in formatting your proposed charge, I always start with a cover sheet that references the proposed charge. Then on each page of the proposed charge I include reference to the PJC or case law authority that supports the wording of definition or question as well as a place where the judge may indicate whether the submission is approve, denied, or modified. You can also use these individual pages as your official tender during the formal charge conference on the record. When the final charge is prepared, hopefully using your version, the processor can simply remove the additional language after the court's ruling is received.

## Witness Notebooks

My preference is to have a separate notebook for each witness that contains everything about that person in one comprehensive place. Some witnesses may be short and can be combined into one notebook with other short witnesses.

I like to have everything about a witness in one place, so I don't have to fumble around with papers. Each witness should have the outline of questions, executed and filed subpoena, highlighted and tabbed deposition, records or documents relevant to that witness, and discovery designations.

If you are calling a witness by deposition, you will need to decide if you are going to read the testimony into evidence or if you will use clips from a video of the deposition. Either way, have the page and line references for the court reporter and opposing counsel with a highlighted copy of the deposition transcript. If you plan to use video clips, have multiple copies of the clips on thumb drive to give the court reporter and opposing counsel.

If you are asking for attorney's fees, remember to prepare a notebook for yourself as a witness with all of your relevant exhibits (contract, cv, and billing statements).

Regarding exhibits, in a short hearing, I will keep the exhibits to be used with a witness in that witness notebook. My copy of the exhibits will be under tab and extra copies will be in a folder for use in the hearing (or in the electronic folder if a remote hearing). However, in a final trial, I usually gather all of the exhibits into a master notebook which can be more easily reproduced for the judge/jury, court reporter, and opposing counsel. In that event, I will have a list of exhibits that I plan to introduce with that witness contained in the witness notebook with reference to the master exhibit notebook tabs.



Don't forget to plan for the other side's witnesses. You may have to do some educated guesswork about who they plan to call.

### Exhibit Notebook

As stated above, in a temporary or interim hearing I like to have the pre-marked and numbered exhibits with the witnesses notebooks or tabs and extra copies in a folder with that notebook so everything is contained in one place. In a final bench or jury trial, I like to have master exhibit notebooks where each exhibit is under a tab and corresponds to the number. With the Exhibit Notebook I like to have a master list of exhibits (repeated in the Master Notebook) and a column to note admission of the exhibit as well. Having another copy of the pretrial disclosures of either party would be helpful here also.

If using audio or video exhibits, you will want to have a list of the minute references for those exhibits and have a method of using these types of evidence that isn't dependent on the internet.

If you have exhibits that are important originals (like certified copies of records or other documents) you might keep a folder for these documents if you need to reference the original copy for some reason.

### Final Thoughts

Finally, during trial, I like to use a new yellow pad each day for notes during trial. I also like to have a separate yellow pad for closing argument notes. Or, you can have a section in the Argument Notebook to keep these notes so you have it all in one place when it is time for the final argument to take place.