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## The essential trial binder

A PRIMER ON HOW TO PREPARE YOUR TRIAL BINDER TO ALLOW YOU TO BE AT YOUR MOST EFFICIENT AND NIMBLE IN TRIAL. IT WILL ALSO ASSIST YOU IN PREPARING YOUR CASE FOR TRIAL

Preparing your trial binder may feel like an arduous task but having a system of organization that allows you to easily access information during the heat of trial is indispensable. Additionally, the mere act of preparing your trial binder at the outset of your case can also be tremendously beneficial in planning your presentation for trial.

If you start the process early and incorporate the habit of adding relevant documents to the trial binder file starting at case intake, the task of preparing your trial binder becomes far less laborious and stressful and will help you focus and organize your case.

While some jurisdictions have specific requirements you must adhere to for purposes of submitting the court's required trial binder, this article centers on the attorney trial binder (or multiple binders) that you will utilize in trial to stay as organized and equipped as possible for trial. Whether you have one or several trial binders will depend on the complexity of your case; nevertheless, it is fundamental to ensure that your notebook is nimble enough and can be easily utilized not just at counsel table but also at the podium, traveling to and from the witness stand and, if necessary, as a visual in front of the jury box. Whereas this article focuses by example on the general personal injury/auto accident trial, the specific examples can be broadened to almost any kind of trial.

Creating built-in efficiencies like having a trial binder that has nearly everything you could need to access at almost any point in trial is essential to showing the jury and judge that you are conscientious and truly value their time. Showing the jury, in particular, that you went through the extra time and effort to ensure you have everything you need at your fingertips, instead of wasting their time looking for things in your computer, iPad, or trial software, or leafing through files and boxes, unsure of where the item is you are attempting to locate, is one of the easiest and most effective ways to garner their favor. Since a trial is about credibility, performing in front of the jury in a manner that displays you are carefully organized can demonstrate that you are more prepared and more credible than your opponent.

Speaking of an iPad and trial software, there truly is no substitute for having a paper copy of all necessary documents in trial; never rely on technology to be foolproof. Further, the act of physically putting together the trial binder will help you commit much of the information to memory more effectively than saving and uploading the documents to any kind of trial software or other form of technology. Ideally, you will combine the efficiencies of both electronic and physical document management and monitoring in trial, however this article focuses exclusively on the physical, classic three-ring style trial binder(s).



There should be 15 essential items in your trial binder: 1) Property damage, site or other liability photos; 2) Before and after visuals of the client; 3) Medical summary/timeline/chronology; 4) Medical, employment, liability or other relevant hot docs; 5) Damaging hot docs; 6) Client's human story; 7) Mini opening; 8) Voir dire topics and cause challenge law cheat sheet; 9) Opening statement; 10) Witness outline and witnesses-by-witness tabs; 11) Closing checklist; 12) Damages road map; 13) Demonstrative exhibits; 14) Pocket briefs; and 15) Miscellaneous.

### 1. Property damage, site or other liability photos

Include photos from the scene of the incident and any later inspections in this tab. If you have an incident report of some kind, consider including it here even

if it is not admissible if it has a quick reference to information that is helpful to you.

## 2. Before-and-after damages visuals (photos, videos, other visual evidence) of the client

Before and after photos, videos, and visual evidence of the impact of the incident on the client and their family are often the most effective way to tell the story of how this incident has changed the life of this human. Persuasive photos can include images of the injuries and body parts, photographs of the front offices of hospitals and medical offices to put into context for use at trial to show elements of the non-economic damages story of what your client went through, and, of course, personal and family photos of the client and his or her life from before and after to show the changes as a result of this incident. In many cases, the best way to obtain such photos and videos is to ask the client if you can look at their phone and scroll through their photos and videos to see what treasures you can find that the client may not even remember or think to tell you about; it also helps you get to know your client and their story better.

Compelling videos can include pre- and post-videos of activities that are now challenging or impossible for the client; home exercises, physical therapy and rehabilitation; and surgery and/or injections, such as videos of the epidural injection process. These videos bring to life for the jury what the client has had to go through just to try to get back to baseline in many cases. It also makes the story of the wrongdoing and the effect of that wrongdoing on the life of this human much more real for the jury.

## 3. Medical summary/timeline/chronology

You can include a full medical summary or chronology if you have had one prepared, but often a list of key treatment dates and providers that only takes one to two pages is your best bet for a quick reference point. For example, a one-page sheet that tells you the dates of

any key imaging, surgery recommendations, or surgeries.

## 4. Medical, employment, liability or other relevant hot docs

Insert in this tab specific pages of any important medical, employment, liability or other important records, including those for each good and bad fact important to your damages, highlighted. Tend toward over-inclusivity at first, then ultimately end up with approximately 8-15 pages depending on the complexity of your case.

## 5. Damaging hot docs

Assemble every document that is bad for your case or that the defense will use. This may involve prior medical records with prior and/or related injuries, the client's social media or sub rosa that may need to be put into context, or any other document that you must cover first before the defense mischaracterizes it. Compile all documents that the defense will try to misrepresent so that *you* can introduce them if necessary and leave the defense with nothing left to say about them.

## 6. The human story

Obtaining the client's human story is an essential part of preparing for trial and an integral part of the trial binder on any case. Learning about the client's life, family, upbringing, traumatic events, character, notable accomplishments and highlights will help you discover the story of your client and how they got to this crossroads in their life. This is an indispensable part of trying their case.

You should obtain five or six stories that really capture the jury's imagination of who this person is, bringing them to life for the jury. Such stories can also show by analogy the narrative of the defendant(s) as the villain and their wrongdoing, deceit, betrayal, or similar theme. Be sure to frame your case to incorporate any potential problem areas such as legal issues, credibility challenges, and social media that may falsely show your client in a better light and play down their true suffering.

## 7. Mini opening

A carefully crafted mini opening is a vital part of your trial preparation and trial binder. The mini opening is not the time to argue or "win" your case; in fact, the opposite is true. The goal of the mini opening is to highlight the problem areas and danger points of your case in one form or another to be addressed in voir dire, saving your best facts for opening, direct and cross-examinations. Consequently, it is essential not to oversell your case in your mini. Arguably, you will not be able to have the robust discussion and get the voir dire you need without being able to highlight and underscore those issues in your case in the mini opening, including an introduction of the specific dollar amount of damages you intend to seek, unless prohibited by the court (and then an introduction of whatever range or barometer the court will allow *must* be introduced).

A useful exercise is to also write out and anticipate the defense's mini opening and take notes during trial of what the defense states and "promises" in their mini opening so that those items can be addressed and incorporated in your opening at trial.

## 8. Voir dire topics and cause-challenge law cheat sheet

The first page of this section of your trial binder should include the list of topics and questions to be addressed in voir dire in the order you plan to address them. Frequent topics to consider including will be: non-economic damages/assets; the exact dollar amount/range you intend to tell the jury is the reasonable amount for what was taken from the plaintiff(s) because of loss of quality of life and each of the non-economic harms; burden of proof; invisible injuries; pre-existing injuries; any difficult causation or liability issues; individual defendant; and plaintiff's absence at trial, if appropriate, to help the jury understand that it is not healthy for the client to sit through and/or hear about the evidence given their medical/mental/physical condition.

The second page or tab should be your cause challenge language and strategy, including your cheat sheet of the relevant caselaw and statutes to cite to the judge when necessary to argue your cause challenges. Also be sure to include any specific jury instructions you would like to use during voir dire.

### 9. Opening statement

While most attorneys use PowerPoint or Keynote presentations during their opening statements now, you should always be prepared with a pre-printed version of your slides or electronic presentation in the event the court technology is not functioning, or some other technological misfortune occurs. A paper copy can be used page by page or select pages and images on the ELMO or similar document camera projection system. If you do not, or cannot, utilize a slide presentation during opening, be sure to have at least an outline of the main topics, evidence and themes you intend to cover so you can cross-reference it quickly before concluding your opening; you want to be certain to have hit on each of the critical items.

You should include here any demonstratives and jury instructions you intend to utilize during opening, and incorporate.

### 10. Witness list and witness-by-witness tabs

In addition to the witness list, prepare a separate tab file for each witness (plaintiff and defense) with a quick one-sentence synopsis of who they are and listing the facts to which you anticipate they will testify (either on direct or cross-examination). Each witness sheet should list:

- Name of the witness (and photo)
- Brief description of who they are (e.g., John Doe, Plaintiff's husband; Dr. Humphrey, Emergency Room doctor who read the CT scan)
- Whether a subpoena has been issued and served on this witness, if necessary

- Short list of facts you need from that witness
- Exhibits relevant to that witness
- Copy of each page of any exhibit you intend to use/introduce with that witness, and
- List of trouble spots for cross-examination.

### 11. Closing checklist

The closing checklist must include all facts you need in evidence and every element you need to prove or disprove to make your case. Put a check box next to each entry so that when your witness gives you the fact/element you can check it off. You should include at least the basic architecture of your closing KeyNote/PowerPoint, any important jury instructions and additional law, and the verdict form mapped out (preferably pre-negotiated with defense counsel).

Also, maintain a chart of all exhibits that were introduced and admitted (with check boxes next to each item so that you can check when each item is admitted, as well as columns for whether it was admitted by the plaintiff or defendant(s) and on what date). This should be prepared far in advance of trial and act like a roadmap to help you write the examinations and develop the lists of facts/exhibits for each witness. By end of trial there should be a checkmark next to each fact you proved, and each exhibit you or the defense admitted.

### 12. Damages roadmap

"The law and the evidence in this case will support a verdict of \$\_\_\_\_." Create your own worksheet and write out a number of different ways you can get to that number, then choose the one that sits closest to the truth and what you *know* the verdict number should be and how you will get there.

### 13. Demonstrative exhibits

Items to include here are any demonstrative timelines and chronologies, copies of videos and electronic exhibits (such as videos of the client, surgery demonstratives, etc.), imaging films, notes for your blow-up

posters and exhibits, etc.) and any notes to help you crystalize your thinking; for example, a plan to have your expert physically write specific items on butcher or parchment paper on an easel.

### 14. Pocket briefs

The speed with which you can move through trial can determine the outcome of the verdict. As such, being prepared with any pocket trial briefs you may need before and after trial to expeditiously and effectively resolve issues that will arise is crucial. Ideas of pocket briefs you may need consist of: specific numbers, dollar figures or sums of money in mini opening, voir dire and opening; use of PowerPoint/Keynote in opening; unrestricted time for voir dire; judge required to allow a mini opening if requested by either party in California; specific cause challenges anticipated; expert witness issues such as *Kennemur* objections, scope of expert testimony, issues related to retained vs. non-retained experts, standards of certainty, any issues related to specific jury instructions; character evidence; specific hearsay/*Sanchez* issues; the use of deposition clips during opening; and any specific evidentiary issues.

### 15. Miscellaneous

This remaining catch-all tab(s) should incorporate any additional factual or other timelines/chronologies, summary charts, cast of characters, mind-maps, focus group reports and/or analytics, pre-trial/trial orders that must be observed, and trial to-do notes.

Ultimately, any documents that become Bates stamped for trial should replace the non-Bates stamped documents in the trial binder once all trial and exhibit binders for the court are complete.

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