

TRIAL NOTEBOOK

By D. Richard Jones, III

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I. Purpose

A. Communicate well: Tell an honest story

1. Organization through preparation. An ill prepared lawyer is quite visible and undermines the court's and jury's confidence in your case and your client and ultimately undercuts your own confidence.
2. Honesty before the jury. You must earn your credibility.

B. A Trial Notebook:

1. Enhances your Credibility with Judge, jury and defense counsel. You've sent a strong message; I am prepared.
2. Allows expression of your courage, your conviction, your confidence and your belief in your client and case.
3. Removes stress at trial; allows you to listen and listen well to the witnesses, the defense lawyer and the quiet voice within you. I'm not talking about the voices of reason, logic or intellect. We all are quite well trained in using our minds for logic and reason. I'm not

talking about your emotions either. At trial, lack of preparation leads to emotions running amuck, sudden unprovoked outbursts of anger. I am talking about the quiet voice within you. Some people call it your gut instinct. Some call it your soul.

- a. Develops gut instinct of trial lawyer.
- b. With thorough preparation, you are not deafened by stress. You may hear the quiet, still voice within. The voice that speaks in your gut. Listen to your gut instinct. It is a quiet voice, easily overwhelmed by the cocophony of trial, the ceaseless attacks of defense lawyer, a hard judge who appears solely interested in interrupting your presentation or hastening it along, or poor witnesses.
- C. A Trial Notebook is not a:
 1. Pleading notebook, correspondence file, medical records file, medical bills file, research file (by topic), evidence files by subject, photograph file (who, what, where, & when for each photograph), expert witness files, document files including document index, file index, deposition files (each witness); settlement file (wrong mind

set)

- D. A trial notebook is a process, never final or complete until after your trial.
- E. It is the battle plan. General Schwartzkoff had a notebook of his battle plan, Desert Storm. For all battles, that is all cases, before they are filed and certainly after filing, a trial notebook is essential.
- F. Degree of completion of trial notebook generally enhances likelihood of success of your case. Work on it, think on it; doesn't take too much at any one time, but the trial notebook does need periodic (monthly) review.

II. Three Ring Binder

Use Three hole paper

Always write it down, regardless of where you are;

write it down: I forget!

Divide into sections

Do what comes naturally: prepare and prepare

thoroughly

III. Contents: (my order of preparation)

- A. To do list
- B. Thoughts: Cerebrate: theme, theory, story!

- C. Jury charges: theory of recovery plus theme
theory of damages plus theme
- D. Your witnesses plus defense witnesses you may call
- E. Witness List
- F. Exhibit List
- G. Motion(s) at trial
- H. Post Trial
- I. Closing Arguments
- J. Cross examination of defense witnesses
- K. Rebuttal
- L. Opening Statement
- M. Voir Dire
- N. Pre-Trial Order
- O. Discard

Contents: (In order of my trial notebook)

- A. To do list
- B. Thoughts: Cerebrate: Theme, theory, story!
- C. Pre-Trial Order
- D. Witness List (Order of)
- E. Exhibit List
- F. Voir Dire
- G. Opening Statement

- H. Witnesses
- I. Cross examination of defense witnesses
- J. Rebuttal
- K. Motion(s) at trial
- L. Jury Charges
- M. Closing Arguments
- N. Post-Trial
- O. Discard
- IV.
- A. To do list
 - 1. Photocopy lists from your practice forms or seminar materials!
 - 2. Your handwritten notes, list witnesses, evidence, documents, folks to interview; list discovery you should make
 - 3. Get to know your client well, at their home. Learn who she is, what makes that person tick. Build the story of your case.
- B. Thoughts: celebrate:
 - 1. Theme, theory, story for both liability and damages:
 - a. Tie all three into one sentence:

- i. Johnny Cochrane: If the glove doesn't fit, you must acquit.
- ii. Gerry Spence: If the lion escapes, then the owner is liable: Why? Because the lion is dangerous. If the lion, these 40 pounds of plutonium, escapes, then the owner, Kerr-McGee, is liable for the death of Karen Silkwood.
- b. Global application of theme
- c. Best if it anticipates, encompasses and answers defense theme.
2. Outline strong points
 - . Outline weak points: How do you address them before defense does?
3. What is defense theme? What is their proof?
4. What exhibits will I use?
- C. Jury charges: theory of recovery plus theme. Theory of damages plus theme. This is the final way you may impact jury; your charges should not be an after thought, but a forethought. When jury hears the judge's charges, the words should evoke the story of your case, your theme, your theory. If your closing argument is the sermon, the jury charges are the chorus.

1. Best to prepare core liability and damage charges early.
 2. As you do more trials, you may have fewer charges to write; but research particulars of case and develop those charges applicable to your case.
 3. Write your own charges, if not found in Suggested Pattern Jury Instructions, Eleventh Circuit Judges Association Pattern Jury Instructions or Devitt & Blackman's Federal Jury Practice and Instructions.
- D. Witness list: arrange and rearrange during discovery and before trial to tell the story; what is the story line? (Highlight in one sentence purpose of witness and make a story board. Where does witness fit in telling of the story? Try different order of witnesses. Plaintiff usually is not the first witness. Build credibility around him.)
- E. Opening
1. Write your opening: Follow an organizational structure
 2. The details make the story

3. Practice it, does it sound right? revise it and then make outline of your opening and use the outline at trial. Draw visual aids on easel. (Practice drawing!).
4. Make notes of defense opening
- F. Voir Dire
 - . Jury profile - who you want and who you do not want
 - . Questions to ask
 - . Examine jury panels from your prior trials in that county and/or other counties.
- G. Anticipated motion(s) at trial:
 1. Motions in Limine
 - a. Insurance - Plaintiff and Defendant
 - b. Plaintiff's or Defendant's unrelated conduct
 2. Admissibility of Evidence or Documents
 3. Directed Verdict
- H. Closing Argument
 1. Notes
 2. Organizational structure
 - . Do's and Don't's
 3. Usual arguments
- I. Your witnesses plus defense witnesses you may call

1. One section for each witness; after deposition, include summary of deposition testimony (also in deposition file)
2. Outline questions to ask each witness:
 - . Cross reference to exhibit list.
 - . What testimony of this witness will you highlight on easel.
3. Keep deposition in deposition file but have that file handy on counsel table.
- J. Exhibit list - number, who identifies? Admitted
- K. Cross examination of defense witnesses: attack the idea, not the person, unless the person is truly a scoundrel & you can prove it and proving he's a scoundrel is essential to your case.
 - . Cross-reference to deposition responses.
 - . Have deposition file easily available; lay on counsel table
- L. Rebuttal
- M. Post Trial
 1. Unliquidated Damages Interest Demand
- N. Pre-Trial Order
- O. Discard

As you prepare your notebook, some ideas may not work; some leads may be worthless. After you have prepared a section, place the unneeded parts, not in the trash, but in the discard section. (You may find it invaluable later on!)

V. Trust your trial notebook

- A. Carry it with you during trial preparation, to depositions, to settlement conferences and to any meetings with the Judge.
- B. Helps prepare for the unexpected, which will come.
- C. Write out your worries, before trial and especially during trial.
- D. Develops courage of your convictions.

Fully believe in your case.

We all have butterflies during trial. Those fears are natural. Trust yourself. You are prepared. If you cannot answer real fears you have with your case during trial, fears that the jury see or feel, and you cannot prove facts to counter that fear or successfully argue around it, let your client know. Perhaps consider dismissing without prejudice prior to resting or, if afterwards, settling the case.

VI. After the case is over:

- A. Debrief the trial with your partner, associate, fellow lawyer: where can I improve? What went well? What did not? Learn from my mistakes.
- B. Copy your voir dire, opening, witness examination, cross examination, closing, charges, and place in separate notebooks for each, for future use in later cases.

For instance, when you have an opening to prepare, look in the notebook for your prior opening statements, select appropriate parts of prior openings and incorporate into the new one.

APPENDIX A - RESOURCE MATERIALS ON TRIAL NOTEBOOKS

1. Chapter Two of *GTLA Trial Practice Manual* by Manley F. Brown.
2. *Fundamentals of Trial Techniques*, Thomas A. Mauet, pp. 2-8.
3. *McElhaney's Trial Notebook*, Third Edition, by James W. McElhaney, pp. 3-13.

APPENDIX B - READING AND VIEWING MATERIALS

Many, if not most, of the ideas in this presentation originate from great trial lawyers in Georgia and elsewhere. If I have seen clearly the trial process, it is because I have stood on the shoulders of these giants, some of whom I have listed below:

1. Gerry Spence, *How to Win in Voir Dire*
2. Gerry Spence, *How to Win in Opening Statements*
3. Gerry Spence, *How to Win in Cross Examination*
4. Gerry Spence, *How to Argue and Win Every Time* (St. Martin's Press)
5. T. Malone, *How to Maximize Damages in Voir Dire and Closing Argument* (Harrison Publishing)
6. Wellman, *The Art of Cross-Examination* (Collier Books)
7. Adela Rogers St. Johns, *Final Verdict* (Signet Books)
8. Louis Nizer, *The Jury Returns* (Pocket Books)
9. Stryker, *The Art of Advocacy* (Zenger)
10. Cohn & Chisolm, *Take the Witness* (Garden City Publishing Co.)
11. Peter Perlman, *Opening Statements* (ATLA Press)

12. Phillip Carboy, *Final Arguments* (ATLA Press)
13. Cicero, *Murder Trials* (Penguin Books)