Trial Preparation
By Marjorie Anne McDiarmid
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Ninety/ninety-five percent of trial is preparation; that much is a cliche. But what is this preparation anyway? I would suggest that successful preparation is essentially pre-visualization: a term which I use in the same sense as do sports psychologists. Let me explain.

What I am proposing is that you must, in the process of preparation, play through mentally, in detail, the questions you will ask, the objections you will make and the arguments which both you and the other side will pose during the trial. If you are going to introduce an exhibit, you should imagine yourself walking to wherever the exhibit is located, retrieving it, doing the ritual dance in which you mark, show and lay the foundation for the exhibit, make the offer and your argument and plan your publication to the jury.

I can hear at least three complaints arising already: "I don't have time!", "That's just wishful thinking!" and "How can I tell what is going to happen in that kind of detail?". Let me take these one at a time.

First, it is surely true that you don't have the time to previsualize every step in every case. Let me suggest one necessary compromise and one benefit of experience. Experience first. Trial work, like any human activity, has its scripts which become second nature with practice. Those of us who have driven a stick-shift car for many years, no longer need to think, as we once did, how
to mesh the shift of the gear lever with the pressure on the clutch. Similarly an experienced trial lawyer can do the ritual dance of the exhibits set forth above in his or her sleep. Once a piece of the trial has reached that level of reflex action, one need devote no further time to it during the pre-visualization process.

If, after eliminating the things you can do well by rote, you still lack sufficient time to pre-visualize the entire trial process spend what time you have bolstering your strengths. Virtually each case that goes to trial has problems. If it were clear that the evidence favored one party overwhelmingly, barring a break down in negotiation, you would not be standing in court at all. This being the case, spend your limited time figuring out how to tell your story in the most compelling way. You cannot afford to totally disregard real damage that the other side can do you. Your theory of the case must accommodate the irrebuttable evidence which they can adduce. But, our most recent information indicates that if you can sell the fact finder on your 'story' of the events, that fact finder will minimize for you the contradictory evidence.

So you have the time to do at least some pre-visualization and I have suggested where you should spend it. How do you prevent the time from being frittered away in wishful thinking? First, let me say a word in defense of wishful thinking. One of the chief troubles with human

strategic thinking is the tendency toward tunnel vision. High priced consultants are hired by large companies every day to help move their executives away from old ideas through the use of various brain storming or problem solving techniques. Wishful thinking, properly used, is our built in device the accomplish the same thing. If you can avoid censoring your ideas, but rather play them out and see where they take you, you will mine the occasional nugget of a truly new idea.

Sooner or later though, you have got to come back to the earnest business of making your plans concrete. My preferred method here is the most concrete of all: pen or pencil marks on a clear sheet of paper. There are two written devices which I use to both provoke and capture the type of thinking I am discussing here. The first of these devices appears in the literature under a variety of names: proof sheet, evidence list, etc. The name I prefer, because it is most descriptive of what I do, is an elements matrix.

Elements	***Witnesses***		
Murder 1	Mary Wilson	Helen Wilson	Corenor's Report
After Deliberation	**O'Neill asked when Helen due back** *told O'Neill didn't know when Helen due*		
With Intent to Cause Death	**Aimed gun**		
Person Other than self	**Aimed gun**		
Causes Death	**Doctor pronounced dead**		**Death by Gunshot**
Within Statute of Limitations	**Occurred 9/10/Yr-**		
Within Jurisdiction	**home in Nita**		
Defendant Guilty	*disliked D* **saw D's car before marriage broke up** **arguments with Helen & Mary** **threats & temper** **has id's D before in**	**"Oh, no Joe!"** **"Did he have a gun?"** **Threats** *went out walking at night alone* *refused police help*	**no powder burns** **bullet ejected from body**

	dark & rain **"pay for this"** **"make you regret"** **"know what's good for you"** **id D as shooter** *saw couple of seconds* *in shock* *shooting at 10:00 pm* *told D Helen going to Palace* *jacket wet the first visit* *judge had enemies* *revenge threat* *lost family* *out on parole*	*when offered by Denise*

Figure 1

Take a look at figure 1. It is from a mock case which we use periodically for teaching. For each witness or piece of tangible evidence, I note its potential contribution to proof of the elements of the case. This matrix is prepared at the time of pleading and refined through discovery. In my preparation for trial itself, I use it to plan lines of questioning and foresee evidentiary problems which I and hopefully my opponent will have in presenting our cases.

The second device is my list of questions. Two points. First, yes, after a little over twenty years of litigation, I still write out my questions. Second, I use the question list to perform a number of functions which other commentators suggest you address separately. Look at figure 2 from the same mock case.

Questions

	Exhibits mark, show, offer
31. Your honor, at this point we would offer a certified copy of the judgment of convictions of John Bierman, signed by Judge Wilson.	***Anticipate Objections*** not hearsay, 803(8) & (22) authentic 902(4) best evidence 1005
32. Bierman threatened revenge, didn't he?	Obj: hearsay Ans: Is the State contending that the Judge was lying? Offer more foundation
33. Your husband told you about the statements made by Bierman, didn't he?	***References*** P 34, L 28-29
34. And at the time that he told you, he was	P 34, L 28

concerned about those statements, wasn't he?

35. He talked about them for some time, didn't he?	P 34, L 29
36. The nature of those statements was threatening, wasn't it?	P 34, L 28

Figure 2

It is possible, as writers on trial notebooks frequently suggest to have a page tracking the progress of exhibits, a cross tabbed copy of the prior statements for impeachment and refreshment purposes and separate sheets covering each of your evidentiary arguments, but I don't like flipping pages (I'm afraid I'll forget) and I've never seen the need to complicate a process which should be simple. So in my world, it's all on one page.

No, I do not read the questions at trial. This is a previsualization device remember. Finally you say, "How can I tell what is going to happen so that I can think about it in detail, much less write it down?" The first answer is that between your investigation of your own case and your discovery of your opponent's, at least 85-95% of the facts ought to be available to you before you begin the process. Next, you have a fair degree of control over how those facts will emerge. Think of yourself as a movie director which an admittedly fractious cast. You have means--impeachment, form of the question, pace and timing, use of exhibits, etc--to control your actors. What's more, you have your opening statement and your closing argument to set the context for your film. Provided you make no large mistakes--the one question too many, etc--and provided that your client's claim is just, it will be a rare case in which surprise overtakes you. Only in Perry Mason does the witness seated in the last row confess. The rest of us, by and large, play a fairly straight forward game at the front of the courtroom.

I hope these suggestions will help you play yours will more confidence.