

# The Electronic Trial Notebook

**Ronald C. Morton**

Morton Law Firm, PLLC  
Clinton, Mississippi

## The Traditional Trial Notebook

The primary task of every lawyer engaged in litigation of any type, whether it be primarily chancery matters or federal jury trials, is (a) to learn his client's story, and (2) to convey that story to the jury. We learn our client's story through complex and often tedious discovery mechanisms, such as Requests for Production of Documents, Interrogatories, and Depositions, all of which result in the creation of mounds of paper, folders, if not boxes, of documents, volumes of deposition testimony, all inevitably to be stored in multiple brown and manila folders bulging with case law, yellow legal pads scribbled with notes, piles of pleadings accoed together, and outlines for everything from order of proof to witness exams. The lawyer's first priority is to manage this often unwieldy mass of information in a manner which permits him to discover what happened, and how.

Once the trial attorney has learned his client's story, his primary function is to convey that story to the trier of fact, and to refute the inevitably different story being offered by his opponent. Lawyers do this primarily through the solicitation of testimony through questioning witnesses, and the introducing exhibits. Inevitably, this means presentation of a culled down subset of the aforementioned mass of information and testimony, reduced only to the most relevant and pertinent facts. Both of these primary tasks are performed best if the attorney has some mechanism of segregating and organizing the information produced in pre-trial preparation, so that he may exercise an orderly command over that information when at trial. It is imperative that this presentation be organized and complete.

There is no single, or best, method of organizing this trial information. Indeed, the "best" system is the one that works for the user. However, it is clear that the "wrong" approach to this task is to have no system at all. In the absence of some system to organize documents and testimony, a lawyer must sift through "everything" in order to find "anything", every time something is needed from the file. Such a non-system at best, wastes the lawyer's time and energy, as well as that of his staff, and at worst, can result in embarrassing, if not catastrophic, results through a disorganized and ill-prepared trial presentation. "Nothing so undermines the confidence of a court or jury in a lawyer as his constant groping and fondling." J. Appleman, ed. Successful Jury Trials, 100 (1952).

The solution to the foregoing dilemma is frequently some form of trial notebook. Professor James W. McElhaney has written and lectured extensively on the subject of trial notebooks, and has written an excellent book on the

subject published by the ABA. *McElhaney's Trial Notebook*, (ABA 3<sup>rd</sup> ed., 1994). Trial notebooks take many different forms, ranging from simple, thin three ring binders divided by subject, to elaborate legal size, self-easeled, pre-divided, five hole punched binders designed specifically for trials. Frequently the trial notebook is divided into sections with labeled tabs or dividers, some more elaborate than others. Common section headings include: case analysis; proof checklists; voir dire; opening statement; pretrial order; stipulations; witnesses; deposition index; document index; memoranda; closing argument; and jury instructions. Regardless of the specific form that the notebook takes, the essence of the trial notebook is always an approach to organizing and reducing the mass of information produced in pretrial, into only the most relevant and information necessary for trial, in a form that can be easily and quickly retrieved at the appropriate time.

### **The Case for the Electronic Trial Notebook**

While the tried and true three ring binder or folder method for trial notebooks works well, this paper and its accompanying presentation offer its audience an electronic alternative for the digital age which affords the user several advantages over the traditional "paper" notebook. For lack of a better word, I will refer to this "virtual" notebook as an Electronic Trial Notebook. The concept and goal of the Electronic Trial Notebook is to achieve the same organizational results provided by a traditional trial notebook, but to do so in a manner that takes advantage of the inherent efficiencies of modern computer technology. In essence, the Electronic Trial Notebook provides its user with the same organizational capabilities as the more traditional trial notebook, but will also provide greater flexibility, greater accessibility, increased organizational capabilities, and will do so without size or transport constraints inherent in paper records. The Electronic Trial Notebook is inherently flexible, and is easily capable of expanding as factual developments of each case require. The addition of a witness to the notebook is as simple as double clicking and inserting the witnesses name, followed by the series of topics about which to inquire. Addressing the development of a complicated legal issue is as simple as adding a new subject heading and importing the legal authority or brief related to that topic. Searching for information within the notebook can be as simple as using the "find" (usually "Ctl-F") command.

A traditional notebook may require multiple volumes, or can otherwise become unwieldy as the case develops, limiting the lawyer's ability to easily carry the notebook home or elsewhere as he travels. The Electronic Trial Notebook has no such size constraints, as it resides on a hard drive, and therefore can be everywhere that the lawyer carries his laptop.

As with the traditional trial notebook, there is no singular, or "right" way to design an Electronic Trial Notebook. This paper will explore three different options for creating the Electronic Trial Notebook, with the greatest emphasis and instruction placed on the use of NoteMap 2 software, published by CaseSoft.

However, there are numerous other options available to the practitioner not addressed in this paper, including some creative uses of database software, document management software like Worldox, or hyper-linking within Word or Wordperfect. The practitioner is only limited by his own imagination, technical skill, and budget. It is this author's position that the Electronic Trial Notebook's primary function is organization of trial information, with presentation features as a secondary function. Accordingly, this paper will focus primarily on software designed to organize thoughts and information, and only secondarily will address presentation. Software primarily designed for presentation, such as Sanction II or TrialDirector, will not be explored in any great length, although either of these programs can serve as a stand alone trial notebooks once the user has sufficient command over the operation of these very powerful, and complex, programs.

### **The Beginner's Electronic Trial Notebook**

For the most basic of Electronic Trial Notebooks, a lawyer can utilize the very popular software program, PaperPort. This software comes bundled with many scanners, including the popular Visioneer line of scanners, and is extremely intuitive. Essentially, once the software is loaded, all images scanned into the computer will, by default, be loaded into the PaperPort software. The latest version, PaperPort v. 10.0 Pro, has the added capability of receiving the document as a PDF file, which can be viewed using the now ubiquitous Adobe Acrobat Reader software, as an easy and universal file format for sharing documents with co- or opposing counsel. The software utilizes the familiar folder directory system, and can easily mimic a traditional paper file through the creation of separate file "folders" for each category, such as "vor dire", "motions in limine", etc. Once the appropriate folders are created, relevant images can be scanned, or if already scanned, can be dragged, into the appropriate folder and copied to as many corresponding folders as necessary. The sub folders of three witnesses who will testify about the same document, for example, can each contain their own copy of that document. All applicable image files will then reside within each appropriate subcategory folder, and can either be displayed as a thumbnail image to be easily recognized, or as the more traditional "small icon/file name" format utilized by Microsoft Windows. Witness questions, talking points, or elements of proof and the like, can all be generated using any word processor, and then saved into the appropriate PaperPort folder for later recall. Additionally, images which the lawyer desires to be published to the jury can easily be displayed in full screen mode to be sent to the projector or juror displays if available, by simply double clicking on the icon or thumbnail of the image. Those images can also be annotated on screen during witness questioning, or before. However, the program is primarily an image management software, and not a presentation software, and as such its presentation options are limited.

Using PaperPort for one's Electronic Trial Notebook is simple. It is intuitive. And it is cheap. The PaperPort software frequency comes bundled with

scanners that cost in the \$100 - \$250 range, and can be purchased for around \$100 online, with the Pro version costing \$200. However, the software has at least two significant shortcomings when used in the Electronic Trial Notebook context. First, the folder system, by default, organizes folders alphabetically. While this shortcoming can be overcome through creative folder naming, such as "01 Opening Statement" instead of "Opening Statement", in order to force a non-alphabetized placement, the insertion of additional topics or folders may require file renumbering. It is certainly not as simple as merely dragging the heading to the appropriate location, as is available in better suited software discussed later.

A second shortcoming of PaperPort for this purpose is the inability to modify, on the fly, witness questions or talking points. PaperPort merely displays images, and is not a word processor. Accordingly, any outlines saved to PaperPort are really displayed as images, and have a fixed form. Changes to images would have to be completed within their native word processing software, and then be re-saved, overriding the original outline. Such steps simply are not practical in the heat of trial, and even outside the courtroom are awkward, at best. Additionally, while the software can produce images for display and limited annotation at trial, it cannot reliably search documents or transcripts, as it is managing images rather than text files. Finally, the software is not capable of displaying moving video clips.

These shortcomings notwithstanding, for the beginner, and for trials in which the number of documents is limited and advanced text searches unnecessary, this basic approach at electronic organization can serve as an effective method of creating an Electronic Trial Notebook, which can be designed and used effectively by even the most novice of computer users. The software tends to be very reliable, and is so intuitive it does not require a manual or training. It is just like handling virtual paper.

## **The Ultimate Trial Notebook**

At the other end of the spectrum, Summation iBlaze v. 2.5, provides a full featured integrated trial notebook. Summation is the undisputed leader in the field of litigation support software. The program is primarily a database repository for (1) scanned document images, which can be coded for later searches and recall, and (2) deposition and trial transcripts, which are retained in ASCII format and can be fully searched and retrieved using Boolean searches. The search and retrieval functions of this software go far beyond the scope of this paper, and will not be addressed in any detail herein. Suffice it to say that the software is feature rich, extremely complex, and provides the user with many tools for culling evidence in a user friendly format. The software has been the leader in this very narrow niche market for 10 years. The software is also very expensive, ranging from \$1,000 for the entry level LG software, to approximately \$2,500 for the iBlaze version.

Each version of this software adds new and better features. One of its

most recent improvements is the “Case Organizer”. This feature is, in essence, the incorporation of an Electronic Trial Notebook into the program. Rather than using folders as was done in the previous example, the Case Organizer utilizes separate “tabs”, which can be supplemented, and customized, up to a maximum of 100 tabs per case. The user simply adds each of the desired notebook section topics as a new tab by right clicking on any available tab and selecting “Add New Tab”. Thereafter, the user simply goes to the tab to which he desires to added content, and using the “Add Item” button, adds the content he desires. For example, under a “Witnesses” tab, the user would add items for “John Doe”, “Jane Doe”, and every other witness anticipated to testify. Thereafter, talking points or questions can be added under that witness using the “Add Item” button, followed by a “tab” to nest the question or topic beneath the witness. Specific deposition transcript testimony can be added beneath that witness on the same tab, in outline form, by merely running searches within the program’s transcripts database, selecting the appropriate text, and then selecting the “Copy to Case Organizer” icon next to the text. Likewise, images of documents can also be added to that witness by searching the documents database, selecting those relevant documents, and then selecting the “Copy to Case Organizer” option.

Once copied into the Case Organizer, the documents and transcript testimony can be moved by tapping once and releasing the left mouse button, followed by tapping and holding the left mouse button over the selection, and then dragging the testimony or exhibit to the desired location within the outline. Similarly, exhibits or testimony located within the outline can be copied using the “Ctl-C” and “Ctl-V” commands, both to copy within the same tab, or to copy from one tab to another. All of the documents referenced within the case organizer outline are thereafter fully available for display by simply pressing the icon in the far left margin of the outline. Upon pressing this icon, a full page image of the transcript or document will appear on screen. This provides the lawyer with a powerful tool to quickly organize testimony, and access documents and testimony needed to impeach a witness, or otherwise to be published to a jury, without fumbling through file folders, or constantly flipping back and forth within a paper notebook. The information is there, and readily accessible with the mere click of a button. Additionally, creation of the Electronic Trial Notebook in this format requires very little physical effort. The lawyer merely selects the pertinent exhibits and deposition testimony, which he would have to do regardless of his organizing method, and with the click of the button, electronically places them inside his virtual notebook – no photo-copying or hole punching required. New documents can be easily be added to the notebook on the fly by simply switching to the transcript or exhibit modules of the program, running a search, and pressing an icon.

For an additional \$600, one of the two leading trial presentation software packages, Sanction II or Trial Director, can be linked to Summation, the combination of which will enable the practitioner to not only quickly retrieve documents and testimony relevant to a particular point at trial, but will also

enable allow the to publish the selected the documents in an extremely attractive format, and utilize extensive editing and annotation tools, realtime, such as highlighting, tear away, zoom, and side-by-side compare, as well as moving video. Both of these products are mature, feature rich, presentation software programs, which are extremely complex, and well beyond the scope of this paper. However, the combination of either of these presentation packages with Summation provides the end user with state of the art in trial presentation capability, giving the lawyer the power to quickly and efficiently locate relevant documents and text, outline and organize those documents and text for presentation at trial, and presentation of those documents and text in an attractive and impressive format, quickly, efficiently, and reliably. That having been said, the costs of these programs is considerable, and in many ways difficult to justify. In addition to the upfront costs of between \$1,600 and \$3,100 for the combined software, annual maintenance and support costs are approximately \$550, and training, which is essentially mandatory due to the complexity of these programs, costs approximately\$1,500, not including lawyer time.

### **The Intermediate Electronic Trial Notebook**

An interesting compromise solution between the two spectrums presented above is the use of NoteMap 2, published by CaseSoft, as part of their CaseMap Suite. This program, at its very core, is a very sophisticated outliner, however what lends this program so well to use as an Electronic Trial Notebook, in addition to its intuitive ease of use, are its two unique features: (1) hoisting, and (2) linking. This software, which sells direct from CaseSoft for approximately \$150, combined with an image viewer such as PaperPort or Acrobat Reader, and a transcript manager, such as TextMap, another CaseSoft product, will give its user much of the capability discussed above using Summation, at a fraction of the cost, and with a minimal learning curve.

When a new file is created in NoteMap, the program permits the user to enter an outline topic. Pressing the return key moves the cursor down to the next outline level and automatically numbers the next line accordingly.

I.

II.

III.

Pressing the tab key will move that line of text as a sub part of the preceding topic, and renumber the line accordingly.

I.

A.

B.

i.

ii.

A topic which needs to be moved up or down within the outline can easily be moved by clicking the appropriate directional arrows on the tool bar.

These features, by themselves, are very similar to the outlining features built into Microsoft Word or Corel WordPerfect. But what sets NoteMap apart from these general-purpose wordprocessing programs is its ability to “hoist” relevant outlining sections, and “link” to external documents by retrieval within their native programs. Hoisting is the ability to focus on a single topic or sub-topic, and all subparts thereunder, of the outline, temporarily removing all other unrelated text. For example, an outline containing a topic of “Witnesses”, with subtopics for "John Doe" and "Jane Doe", and relevant questions or sub-topics under each, could be “hoisted”, using Ctl-T, so that only "John Doe" and the questions and topics related to him, appeared on screen. Thereafter, the outline can be de-hoisted to again appear in full, using Shift-Ctl-T, so that the next witness can be selected. This feature is extremely useful when using the outline as an Electronic Trial Notebook, in that it gives the practitioner quick and easy access to each witness or topic within the outline, without the distraction or clutter of unrelated text.

Similarly, the “linking” function is an extremely powerful tool for the lawyer seeking to organize for trial. Any line item on an outline can be linked to a file or image simply by right clicking in the left margin of the desired line and selecting “insert linked file”, then pointing and clicking to the desired file. An icon of a paperclip will then appear on the outline. Clicking on the paperclip icon will then open the file for viewing or presentation in its native software format. A linked PDF file will launch Adobe Acrobat and bring up the PDF document selected. A .WPD file will launch the document in WordPerfect. This functionality gives the user the ability to organize documents or testimony at the pertinent part of the outline, where it is expected to be needed, for ready accessibility, and provides an easy way of recalling those documents or that testimony at the appropriate time.

When linking documents to an outline, the lawyer must be cognizant of the fact that the document’s path must ultimately reside on his local machine, and not the firm's network, in order to utilize this feature at trial or anywhere else outside the office. Accordingly, a couple of solutions are probably worth considering. One method is to select and copy all of the documents that you intend to link to the case from your network drive into a folder specifically designated for Electronic Trial Notebook images. Thereafter, the user should only link images from this folder located on his local “C:” drive. A second option is to burn the images to his CD, and thereafter link the documents from the CD drive. A final solution worth exploring is the use of specialty software designed specifically to synchronize designated folders between laptop's and network drives, such as Network Unplugged, from Mobiliti.com. This software essentially allows the user to designate network folders for local laptop synchronization. While unplugged, links directed to the network drive of such a designated folder would be automatically redirected to the virtual local folder bearing the same drive letter and path, which was automatically synchronized by the software when last connected to the network.

Using the foregoing method of trial organization, a lawyer, for less than \$500, and minimal training, can effectively create and use an Electronic Trial Notebook. This author recommends that the user, once comfortable with outlining, begin each case with a trial notebook template, and fill-in the details as the case develops throughout discovery and pretrial. A sample of such a template is located in the appendix hereto. This allows the lawyer to see, at a glance, the status of his case, identify what areas need attention, and permits the easy addition of relevant information as the case develops, or even better, whenever the lawyer happens to think of something relevant or important. By the time trial arrives, the outline will have been mostly completed, and will require only minor polishing to be ready to use "live".

It is highly recommended that immediately prior to trial, the lawyer print out a hard copy of the entire outline and re-create his Electronic Trial Notebook in printed form as a backup. While this software is very stable, and modern computers are now very dependable, technical failures still occur, and every practitioner should be prepared for such a contingency. Paper and toner are cheap compared to the prospect of a computer failure mid-way through examination of a witness with no backup plan. Another backup method is carrying a duplicate file on a separate laptop computer. Several years ago this would have been an excessive luxury, but now with laptop computer prices so cheap, it is difficult to justify not having a backup computer if the computer is critical to your trial presentation.

## **Hardware**

The obvious piece of hardware necessary for the Electronic Trial Notebook is a notebook computer. Prices of these computers have fallen dramatically in recent years, as their popularity and speeds have soared, and their features dramatically increased. At a minimum, this author would recommend the use of a 500MHz Pentium III or equivalent, with a 2 Ghz Pentium IV or higher preferred. Likewise, a minimum of 327 MHz of RAM, with a preference for as much as the motherboard will allow, is recommended. Some of the software packages mentioned herein use a considerable amount of RAM, and the chances of crashing or locking up are significantly diminished when higher levels of RAM are used. Another significant consideration is battery life. It will be imperative in all but the shortest of trials to have a power outlet available for the computer at counsel table. Even so, if the lawyer is trying the case totally paperless, it will likely be necessary for the lawyer to unplug when questioning a witness from the podium, and sufficient battery life is critical under those circumstances. This author would recommend looking for a rated battery life of four hours or longer. Computers seldom achieve their battery life ratings under real life conditions, so four probably only means three; the longer the rated life, the better. Likewise, in this author's experience, a 30 Gig hard drive will fill up quickly with images and software programs, and is a minimum standard with higher storage capacities recommended, if available. If the reader intends to



store images on CD-ROM for linking and extraction, a CD-ROM reader will be a necessary accessory, and now come standard on most notebook computers. Be aware that CD-ROM's are a considerable power drain, making the rated battery life even more critical. Finally, in addition to having a paper backup, this author recommends having an electronic form of back up, and frequently uses a USB memory stick for such purposes. Burning the files to a CD is another alternative. An archive copy of the presentation or outline can be stored on either such a device, and retrieved on a spare or backup computer should that later become necessary.

In addition to a computer, a scanner will be necessary in order to convert paper documents into electronic images. Single sheet fed scanners, such as the Visioneer Strobe line, provide limited speed, but offer a small footprint and low price of approximately \$250. For larger scanning volumes, a scanner with an automatic document feeder is a necessity. The Visioneer 9650 is a flatbed with a 12 page per minute ADF, and is very reliable. Additionally, Fujitsu makes a full line of intermediate ADF scanners, ranging from 12 ppm to 30 ppm. Prices for these type scanners range from \$600 to \$2,500.

## **Final Considerations**

Before using an Electronic Trial Notebook at trial, it is imperative that the lawyer practice, disconnected from the network, and under similar conditions as he will be exposed to in the courtroom. This is necessary both (a) to ensure the user's comfort level with the computer, its software, and the other equipment, and (b) as a practical matter, to make certain that the software will really work under trial conditions and that all the links remain valid. Additionally, inquiry should probably be made prior to beginning trial as to any local rules or customs that may require conformity, such as questioning the witnesses from the lectern versus remaining at counsel table, and whether the computer can accommodate those constraints. As previously mentioned, power is always a major concern, and in addition to a long life battery, the practitioner should not assume that outlets are at or near counsel table, or if they are present, that they actually work. Check before your trial date, and be prepared to bring power to the counsel table with long extension cords if necessary. As a final note, it will be important if counsel intends to publish electronic documents to the jury, court, or witnesses, that he show only the document, and not his Electronic Trial Notebook or other work product. This can be tricky using a single computer. Accordingly, and especially in light of the relative low cost of many suitable notebook computers today, some consideration should be given to having two trial computers – one for the lawyer's Electronic Trial Notebook, and a second dedicated to presentation of evidence. Likewise, consideration should be given to the use of dual monitor settings in the courtroom, if the operating system and applicable software support dual monitor use.

