

Litigator's Bookshelf

Trial Tactics

by Stephen Saltzburg

(American Bar Association, Criminal Justice Section, 2007)

Reviewed by Paul Mark Sandler

As a professional race car driver well knows, success does not hinge on observing what lies directly in front, but rather, what dangers and obstacles lurk ahead in the distance. Stephen Saltzburg, professor at the George Washington University Law School, chair of the ABA Criminal Justice Section, and author of numerous books and articles on evidence, procedure, and litigation, well knows that winning at trial requires a race car driver's far-ahead look. Saltzburg's book, *Trial Tactics*, examines precise problems and issues that most trial lawyers experience on the battlefield of trial, but should be prepared to address well before the trial commences. The great lesson to learn from this book is not just to think ahead, but to plan ahead effectively. The analysis, conclusions, and clear prose offered by Saltzburg are always helpful. In fact, you will likely find yourself thinking, as I did, "Why did I not know this?" or

Paul Mark Sandler is with Shapiro Sher Guinot & Sandler, in Baltimore, Maryland. He is the author of the book Anatomy of a Trial: A Primer for Young Lawyers.

"I have made this mistake before and never realized it."

Trial Tactics is truly a road map for the discovery of the many pitfalls and obstacles that must be avoided to achieve ultimate success at trial. Samples of the content from some of these sections will entice you not just to read *Trial Tactics*, but to study it. To aid the reader, Saltzburg frequently illustrates his points by presenting the actual witness examination from the case in point, and then he provides a detailed analysis of the legal principals involved.

The book consists of prior articles the professor has written in a column on trial tactics for *Criminal Justice Magazine*, and the book is divided into seven sections: basic principles; examination of witnesses; lay and expert opinions; hearsay, confrontation, and compulsory process; character evidence; summaries and exhibits; and opening and closing arguments.

Trial Tactics begins with a top ten list of rules of evidence that every trial lawyer should commit to memory. Then Saltzburg focuses on the three

most basic principles of evidence law. He explains the basic principles surrounding evidentiary objections and the approach a trial lawyer should employ to obtain a favorable ruling.

In detailing the need to appreciate the proper way to offer proof of facts, Saltzburg highlights four alternative approaches: question-and-answer mode, representations by counsel, written presentations, and informal offers.

While earlier chapters of the book provide basic instruction on common problems experienced at trial, subsequent chapters are more sophisticated. For example, Part Two of Chapter 15 discusses proper and improper corroboration of witnesses. Here, Saltzburg presents the problem, illustrates the problem by discussing a particular case, and analyzes particular testimony:

Q: Now, you've had the occasion to work with Mr. Carboni not only on this case but on some other cases?

A: Yes, ma'am.

Q: Approximately how many?

A: Seven other cases.

Q: And what did you find about the information he had provided to you?

A: That the information he's provided has always been credible, it's been accurate and truthful.

While this questioning may not have been improper from the court's point of view, Saltzburg explains that such questions, even though approved by a court, may be in violation of Federal Rule of Evidence 608, which relates to evidence of character and conduct of witnesses. Saltzburg then draws the lessons to be learned in presenting testimony to corroborate and bolster a witness's testimony during trial, and the interrelationship between such testimony, applicable court opinions, and the rules of evidence.

In subsequent chapters, Saltzburg becomes even more particular and analytical. For example, in Chapter 47, he not only discusses 404(b), the most highly discussed federal rule of evidence, but also explains reverse Rule 404(b) evidence. What is this "reverse rule," you ask? Saltzburg explains that defendants have the same right to offer Rule 404(b) evidence as prosecutors, and they are not required to give pretrial notice under the Federal Rules of Evidence. This chapter analyzes the principles underlying 404(b), discusses significant cases such as *United States v. Montelongo*, and presents examples of when and under what circumstances reverse 404(b) evidence is admissible.

In one of his concluding chapters, Saltzburg discusses two types of document summaries often used during trial. The "pedagogical" summary involves organization of other evidence that has been or will be admitted in the case. Consider this testimony that Saltzburg

highlights from the case *United States v. Johnson*, 54 F.3d 1150 (4th Cir. 1995):

Q: Now, there is also an orange, arched arrow with a head on both ends going between Steve Lewis and Kent Johnson. What does that arrow represent and what is that based on in the evidence?

A: That arrow is indicative of cocaine base or crack cocaine passing from Steven Lewis to Kent Johnson, and also on a separate occasion from Kent Johnson to Steven Lewis on a number of times [sic]. The evidence has been from Kent Johnson's testimony that he sold or fronted Steve Lewis crack cocaine and also that he obtained crack cocaine from Steve Lewis. That's why it's a two-headed arrow because the flow of crack in this specific instance goes both ways although it is a separate transaction.

Although the trial judge admitted both the chart and the testimony, treating it as "expert testimony," the court of appeals disagreed, finding error. The court reasoned that an expert, while having the right to express opinion on earlier testimony at trial, must still relate that testimony to some "specialized knowledge." Nevertheless, the court ultimately upheld the use of the chart and testimony under Federal Rule of Evidence 611(a) rather than Federal Rule of Evidence 1006. Saltzburg lists the factors that the *Johnson* court suggested trial judges should consider when summary charts are offered, including the length of trial; its complexity; accompanying

confusion, if any, presented by a large number of witnesses; the prejudicial effect of a chart, and whether it outweighs probative value; and finally, safeguards that might minimize that prejudice, such as ensuring that the person who prepared the chart is available for cross-examination, and properly instructing the jury as to the way it is to use a summary chart.

Saltzburg then gives attention to the introduction of "summary testimony." He concludes that evidence rules regarding summaries of documents in testimony apply to defense counsel as well as prosecutors. He suggests that prosecutors use summary charts and testimony more often than defense counsel, perhaps because the prosecutors' burden of proof and access to resources make it easier for them to use such evidence. He wisely suggests that defense counsel might as well do the same.

The book concludes with analysis and strategy relating to motions in limine, opening statements, and closing arguments. Particularly instructive are Saltzburg's lessons relating to what can be said and cannot be said during closing arguments. As most trial lawyers know, it is not rare for a trial judge to intervene sua sponte if he or she believes that improper argument is occurring. Saltzburg agrees that there is merit to judicial intervention because it avoids the need for rebuttal of improper argument. He points out that if the trial judge does not respond sua sponte to improper argument, it might be appropriate for counsel to seek such intervention.

If you are serious about trying cases, and want sophisticated analysis of the problems that arise in trial, and how to overcome them, I recommend reading this book. □