PREPARATION FOR TRIAL
NOTICES AND TIMELINES

January 23, 2009

Clerks OTLA Roundtable

Prepared by

Fiona Korolenchuk,

Law Clerk, Licensed Paralegal

Elkin Injury Law, Barristers, P.C.

PREPARATION FOR TRIAL - NOTICES AND TIMELINES

Every firm/lawyer/clerk/paralegal (I am going to call us "litigators" from now on) has a different way of preparing a file for Trial. As advocates and as litigators, we are, naturally, born ready. In my practice, I prepare every file, yes, every file, as if it is eventually going to go Trial. Trust me, if you manage your file this way, you will have a lot less work in the long run and you will be prepared! It only takes a couple of extra steps along the way and saves a lot of time later. This is even more important, given the changes to the Rules of Civil Procedure, that will be effective January 1, 2010.

Treating every file as it if is going to go to Trial does not mean that each file is approached in an adversarial way and that negotiations never take place, all it means is that the "trial prep" is done sooner rather than later.

Every litigator knows that the key to running a smooth trial is to be prepared. Every litigator knows that to be prepared for trial takes time. Every litigator knows that it takes *years* to get to Trial. Every Clerk/Paralegal knows that we are the ones getting it ready for Trial! So rather than wasting the years just "working" on a file, why not work on a file and prepare it for Trial at the same time? Makes sense right?

Preparing for Trial begins when you first meet your client. Often, the theory of the case is developed at this time. You will gather information along the way to support your theory and you may even obtain information that will change your theory and your theory will be re-worked and built upon as the claim progresses, however, the basic gist of the theory will remain the same. Even at the Adjuster level, a theory is developed. That theory is what you work on in your trial prep. Proving the theory involves asking the doctors the right questions, figuring out what kind of witnesses you need, whether they are lay witnesses (character, employment) or expert witnesses, such as engineers, vocational experts or forensic accountants.

By Discoveries, your theory (and theme that you want to present to the Jury) should be firmly established. I like to put a little note on the front left inside cover of the correspondence brad what the theory of the file is so that every member of our team will know what it is we are trying to achieve in this file. An example would be:

Facts: 31 year old Mary sustained a moderate brain injury in an MVA. She also sustained a fractured right (dominant) wrist and hand requiring surgery and resulting in reduced ability to use her right hand. She can no longer write with her right hand and must now compensate using her left hand. Mary was employed as a stats clerk at ABC Co.. Typing was an essential task of her employment. She typed pretty much all day. She liked her job but was not mentally challenged. At the time of the accident, she had applied for a position as a Manager at ABC Co.. She was still required to type, however as a Manager she would have been required to write more, and interact with people. Her injuries prevented her from doing so.

THEORY: - Our theory is that had the right hand/arm not been irreparably damaged, and had she not sustained the brain injury, Mary would have succeeded in obtaining the Managerial position and would have in fact, worked her way up the corporate ladder and would have earned a significantly increased salary had she not been involved in the accident.

Already you can see that Mary has a potential significant future lost income claim. Her claim is not just a lost income claim of $25,000.00 per year as a stats clerk, but has the potential to be a limits claim in addition to a fairly substantial general damages claim. Threshold is not an issue.

Using the above theory, we know that we will need employment information from Mary's employer. We will need to speak to Mary's colleagues, right away, to find out if she was even a possible candidate for the Managerial position. We need to establish that now. What were her chances of getting the promotion? How many candidates

were there for the position? Where did she rank in the selection process? Do they have a job description for the Managerial position? If we were to wait 4 years to develop this theory, many of Mary's colleagues may be gone from ABC Co. or perhaps, not even remember Mary let alone remember that Mary had applied for the Managerial position. We know we have to order the Employment file right away. Many companies do not keep employment files after two years if the employee is no longer employed due to storage issues. The company may even be dissolved by the time we get near Trial.

Using the same theory, we will need a vocational expert to tell us if Mary would have been a good candidate for the job – now – not in 4 years, because in 4 years it is obvious that she will not be a good candidate for the job. A point in time comparison is a "snapshot" that is that much harder to challenge. We also need a vocational expert to examine Mary's education, training and experience, to establish the corporate ladder climb. Gather up those character witnesses and those employment witnesses (even colleagues from her jobs prior to ABC co.).

Finally, the obvious, the medical experts. The very first narrative letter to the GP should ask him, straight out, whether or not Mary had the cognitive and functional ability to fulfill the position she aspired to. Send him a copy of the job description you got from the employer. Line up the medical experts you need, early, to say that Mary would have been an excellent candidate for the Managerial Position she aspired to and in fact, would have been able to excel in any type of Managerial role in similar employment.

Get the threshold out of the way immediately. Ask the question, "*Did Mary sustain a permanent, serious impairment that substantially interferes with ability to work?*"[1] **If you get the threshold issue out of way, early, and every time you get a report, defence counsel has a harder job to do.**

[1] Legislated definition of a permanent serious impairment, Bill 198, O. Reg. 381/03, s.1.

In every request for a medical report, ask for the practitioners CV. Most doctors just give you a rundown of their credentials in the first paragraph of the report. Follow up with the expert's Assistant for a copy of the CV. Make a copy and put it in your alphabetized folder of CV's that you have collected or that you are going to go back to the office after this round table to create!

Every report that you receive that expresses an *expert opinion* should be forwarded to defence counsel (and even the Adjuster if the feel of the file is not a positive one) with the following: "*Served upon you, pursuant to the Rules of Civil Procedure and the Evidence Act.*"

When preparing the client for Discovery, we are sure to tell our client our theory of her case. Although we have been advising Mary of the theory since the outset of the file, for Examinations for Discovery, we prep her on the theory. We explain to her how the theory was developed and how she, in her own evidence must be sure to give the right evidence to support the theory. Mary's claim (and all of our work to develop the theory) will go down the drain if following plays out:

Q. At the time of the accident, what was your job at ABC Co.?

A. I was a stats clerk.

Q. What was involved in that job, Mary?

A. Oh, not much, typing. That's about it.

Q. And did you like this job Mary?

A. Oh, yea, I loved it, I would have stayed in that job a long time, I didn't have to do much, and it wasn't a hard job.

With proper preparation, Mary would have answered the questions like this:

Q. At the time of the accident, what was your job at ABC Co.?

A. I was a stats clerk.

Q. What was involved in that job, Mary?

A. Oh, typing. All day.

Q. And did you like this job Mary?

A. Oh, yeah, I loved it, I didn't have to do much, but I was bored. It wasn't a hard job. It wasn't enough for me. I had applied for a Managerial position because I wanted to move up in the company.

If Mary knows the theory of the case, and she is prepared properly, her answers at discovery will be of significant assistance in advancing her claim and the Defence counsel will have a more difficult time challenging her evidence. This is all in preparation of Trial.

NOTICES AND TIME LINES

This paper is supposed to be about notices and time lines. Up to this point (Discovery) you have been giving notice, all kinds of notice of the theory of your case and the evidence you are going to lead. It is much better to have the client examined at Discovery on the theory of the case so they have an opportunity to provide evidence on the issues rather than scrambling at the last minute to gather up the evidence, and not be able to give their evidence about the information under oath. It also avoids a second Discovery.

Pre Trial

If you have worked your file up, since the beginning for Trial, the Pre Trial brief is a piece of cake. You can tell the court exactly what the theory of your case is, what the

evidence is in support of the theory and even enclose excerpts from your client's discovery transcript in the Brief. At this point, no Orders from the Pre Trial Judge will be needed because you have gathered most if not all of the information you need. At this point, you may want to inform the Court that you may be bringing a Motion, at the opening of the Trial, to call more than three experts to give evidence (per issue) pursuant to Section 12 of the *Ontario Evidence Act (OEA)*. Not only will this concern defence counsel, but it will also put him or her **on notice** of how serious you are about the theory of your client's claim. **This is becoming even more important given the recent amendments to Rule 53 of the *Rules of Civil Procedure* which are effective January 1, 2010 – so start getting ready now!**

I really go into "official" trial prep mode once the Pre- Trial is completed. Up to the date of Pre-Trial, I have been getting the claim ready so by the time the Pre-Trial arrives, I really only have to worry about "housekeeping" and not gathering substantive information such as experts and reports.

TRIAL PREPARATION – I CALL IT HOUSEKEEPING

Team Meeting

Important, important, important. Two heads are better than one, and three, four or even five heads are even better then two. The more people involved in the trial prep, the less labour intensive and time consuming the housekeeping is. Of course, this is all dependent upon the resources available to you and the makeup of your firm. At the team meeting, discuss the outcome of the Pre Trial, brainstorm around the issues, and discuss the potential landmines. Review the strategies which will be implemented in the months before Trial.

The day or two after the Pre Trial, meet with the client. Provide her with a copy of your brief and a copy of Defence counsel's brief. Report to her the Judge's opinion and get her thoughts. It is a good time to "re-group".

With the Judges' opinion in hand, and defence counsel's position fresh in your mind, start your "TO DO" list. Make note of the Judge's opinions on what further evidence you need and get to it. Immediately. Delegate if necessary.

The Trial Date is Set

Every jurisdiction seems to be different in the procedure to set a Trial date. In the Niagara Region (St. Catharines and Welland) the procedure is relatively easy, although I understand it is going to be undergoing some changes soon. Currently, in St. Catharines and Welland, the Pre Trial Judge sets the matter over to the Assignment Court following the Pre Trial. It is usually only a month or so away. The Assistant contacts defence counsel and the Trial Co-Coordinator and obtains convenient trial dates. Once a Trial date is selected, letters confirming the Trial date have gone out the TIMELINES begin.

First of all DIARIZE **6 months prior** to trial, **90 days** prior to Trial, **60 days** prior to Trial, **30 days** prior to TRIAL, **20 days** prior to trial and **10 days** prior to Trial. Write those dates in the front of the Trial Prep folder you will be creating. I will tell you what all these dates mean, further on in the paper.

Get all your documents into Binders. One binder for each "folder" ie medical, pleadings liability, lost income, transcripts etc. Create a medical binder that is a working copy that everyone is permitted to write on, highlight and make comments in. Make a copy of the Medical Brief for your client and provide it to her. It will require updating as time goes on.

Order your transcripts if you have not already done so. Copy your client's transcript and send it to him/her for their review. Tell them you will be going over it with them in the coming months.

At this point we begin an on-line Trial folder for each client. All trial prep information, letters, etc. go into the Trial folder for easy access. That way, anyone working on the file can see on the computer what has been done.

Create an on line Trial Checklist and as each assignment is completed check it off. You can keep a paper copy too; however that is twice the work.

Send your first trial prep letter to defence counsel. If defence counsel has not already provided the information, ask for their list of witnesses, a summary of each witness's evidence, an up to date Affidavit of Documents including information about experts, and particulars regarding surveillance and investigation of our clients. You may need to follow up with these requests several times before you get an answer. Eventually, you may need to bring a Motion to get the information. Remember that the first relief you must ask the Court for is permission to bring the Motion in the first place if you set the action down for Trial.[2]

The next step is to call the experts and advise them of the trial date. If it is an expert witness, speak to his or her Assistant or scheduling clerk and ask that the date be placed in the expert's calendar. Make sure you make a note of the date and time that you called this information in and the name of the person you spoke to. Then follow up with a letter to the expert advising them, again, in writing, of the Trial date.

6 months prior to Trial contact your witnesses and obtain all their available contact information. Telephone, address, email, alternate phone numbers, etc. This is assuming that you have served and filed your expert reports already and will not need to have the reports served and filed within the 90 day period under the OEA (discussed later).

---

[2] Rule 48.04 (1) Rules of Civil Procedure.

Contact your character or lay witnesses and remind them about who you are. Then send them a letter. **4 months** prior to trial update the witness on the status (ie going to settle, have an ADR scheduled or whatever) and then, **2 months prior to trial** get a hold of them again and arrange to meet with them to review their evidence. You will have to do this, again, about **30 days** prior to trial. Constant contact with the witnesses keeps them in loop and will ensure that they do not forget about the Trial, or think it "went away".

DOCUMENT NOTICES

There are two notices that have to be served prior to Trial. The **Request to Admit** and the **Notice of Intention.**

A **Request to Admit** allows you to ask another party to admit the truth of a fact or to admit the authenticity of a document. Rule 51 and Form 51A outline the timelines and how the Request should be drafted. Once you serve your Request to Admit the other party must respond within 20 days with a Response to Request to Admit. I will not discuss the Request to Admit, its purpose or its contents in this paper.

There is no timeline to serve the Request to Admit, however, you must leave sufficient time before Trial for defence counsel to respond with the Response to Request to admit. Strategically, if you wait to serve the Request to Admit until **30 days before** Trial, defence counsel will be scrambling, as they only have 20 days to respond. If no response is received, the opposing party is deemed to admit the facts set out therein.

The **Notice of Intention** is the document that provides the opposing party with your notice of whom you intend to call as an expert witness and which business records you will be relying on at Trial. A Notice of Intention is served in accordance with Rule 53.03 of the Rules of Civil Procedure and Section 52 & 35 of The *Ontario Evidence Act.* The

Notice of Intention advises the defence that you intend to introduce into evidence the evidence of those experts listed by either calling them as a witness or by filing their reports. You cannot do both. The first Notices of Intention must be served **no later than 90 days prior to Trial**. This can be tricky. If, all along, you have been serving reports and CNR "pursuant to the Rules of Civil Procedure and The Evidence Act" – there is no rush to do the Notice of Intention by the 90 day deadline. However, if you have sent all the documents, but *not "served pursuant to the Rules of Civil Procedure and The Evidence Act"* you MUST do the Notices of Intention. Sample attached.

As each additional report and document that is served upon defence counsel, a Notice of Intention should accompany that document. Prepare an Affidavit of Service and put it in the medical binder with the Notice of Intention and the CV.

Offers to Settle

Rule 49 of the Rules of Civil Procedure governs Offers to Settle. Offers to Settle are, in and of themselves, an entire paper. Suffice it to say that any Rule 49 Offers to Settle must be served no later than **10 days prior to Trial** to attract cost consequences. Any Offer to Settle served less than 7 days prior to Trial will not attract costs. [3]

RULE 53, RULES OF CIVIL PROCEDURE

To effectively prepare a file for Trial, you must know and understand Rule 53 of the Rules of Civil Procedure "Evidence At Trial". The Rule 53.03 (1) states that *"A party who intends to call an expert witness at trial shall, not less than **90 days** before the commencement of the trial, serve on every other party to the action a report, signed by the expert, setting out his or her name, address and qualifications and the substance of his or her proposed testimony."* If you are intending to introduce NEW evidence, that

[3] Rule 49.03 and 49.10

you have not already provided (ie another specialist) you must serve the report and CV **90 days** before trial. As of January 1, 2010 the rule will be revoked and changed, so that the new report must be served **90 days before the pre-trial conference**. [4]

If you are responding to an expert report filed by the defence, or if the defence is responding to your expert's report, Rule 53.03 (2) allows the report to be served **60 days** prior to Trial. As of January 1, 2010, the report must be served **60 days prior to the Pre-Trial.** In addition the amendment to the Rules of Civil procedure affective January 1, 2010, have broadened the contents of the responding experts report to state that the rebuttal report must contain:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
    i. a description of the factual assumptions on which the opinion is based,
    ii. a description of any research conducted by the expert that led him or her to form the opinion, and
    iii. a list of every document, if any, relied on by the expert in forming the opinion.

[4] O. Reg. 438/08, s. 48.

7. An acknowledgement of expert's duty (Form 53) signed by the expert. O. Reg. 438/08, s. 48.[5]

Finally the January 1, 2010 amendments to the Rules also state that **within 60 days after an action is set down for Trial, the parties shall agree to schedule a** setting out the dates of the service of the expert's reports in order to meet the requirements of the amendments. [6]

The *Ontario Evidence Act*

The Ontario Evidence Ac, sections 35 (business records) and 52 medical records, go hand in hand with Rule 53. Rule 53 supersedes the Evidence Act, in Rule 53 sets out the notice provision of 90 & 60 days and Section 35 of the OEA stipulates 7 days.

Business records

Where business records admissible

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. R.S.O. 1990, c. E.23, s. 35 (2).

Notice and production

(3) Subsection (2) does not apply unless the party tendering the writing or record has given at least **seven days** notice of the party's intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same. R.S.O. 1990, c. E.23, s. 35 (3).

Reports and evidence of practitioners

Definition

52. (2) A report obtained by or prepared for a party to an action and signed by a practitioner and any other report of the practitioner that relates to the action are, with leave of the court and after at **least ten days** notice has been given to all other parties, admissible in evidence in the action. R.S.O. 1990, c. E.23, s. 52 (2).

---

[5] O. Reg. 438/08, s. 48.

[6] See: O. Reg. 438/08, ss. 48, 68 (1).

SUMMONS TO WITNESS

The Rules of Civil Procedure do not stipulate a time frame within which a Summons to Witness must be served upon a witness. Suffice it to say, the more notice you give the witness the happier he is going to be with you and more agreeable to assist. I usually serve the Summons To Witness and Attendance Money about 30 days prior to Trial. Any earlier and the document could be misplaced and the Attendance Money long spent.

SUMMARY

Notices and time lines in preparing for trial is a very large topic. There is a lot to consider, and a lot to remember. CHECK LISTS are the best way to go. I have attached two different ones to this paper. Check lists should be individualized to meet the needs of each file.

I have attached, as an Appendix to the narrative portion of this paper, a Trial Checklist that provides what notice has to be given, when, and under what authority or rule. It is not necessarily a tried and true check list but more of a reference tool.

Given the recent amendment to the Rules of Civil Procedure, which will be effective January 1, 2010, the first few paragraphs of this paper suddenly makes sense. If a report has to be filed 90 days prior to the **pre trial** then you better be pretty sure who your experts are going to be **well in advance** because the amendments have now shortened the preparation for trial by a minimum of approximately 18 months (from 90 days before the Pre-Trial to 90 days before Trial).

A little word of warning: Be careful never to be lulled into complacency by settlement negotiations. Even if you are in negotiations and it looks the action may settle, do not be lulled into missing your check points. Keep the paper coming, Defence counsel will know that the claim is on your radar screen and that if the settlement negotiations do not prove productive, at least you are not scrambling to meet the deadlines.

Thank you for the opportunity of speaking to you today.

Fiona Korolenchuk