WRITTEN ADVOCACY – MEDIATION AND PRE-TRIAL MEMORANDA

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"A good novel tells us the truth about its hero; but a bad novel tells us the truth about its author".

G.K. Chesterton,
English Author, 1874-1936

Not so long ago, oral advocacy was viewed as the most important of all litigation skills. Things have changed. Now, less time is allotted to oral submissions and more time is spent in written advocacy. As such, it is imperative that written materials that are submitted to the Court or Mediator are well-structured clear and credible.

Written submissions create the first impression of you, your firm and most importantly, your client and his or her case. Poorly written materials create problems for counsel when he/she appears before the Pre-Trial Judge or at Mediation. The reader may form a negative impression about your case from the outset that is almost impossible to correct. It is for this reason that before you set your fingers to the keyboard to dazzle the reader with the literary classic that you will write, make sure you are prepared, know your case and have everything you need to get started.

The Pre-trial Conference Memorandum

The Pre-trial Brief is a powerful tool at your disposal. It provides your first and best opportunity to persuade the Court of the merits of your client's case.

The Pre-trial Brief is written for one audience and one audience only the Pre-trial Judge. It is an opportunity for counsel to present the positions of their

respective clients to a Judge who has considered both sides of the case, in advance of the evidence being led. When the lawyer attends at the Pre-trial Conference the Judge has read both the Plaintiff's and the Defendant's briefs and has, in all likelihood, decided which one she accepts and which one she does not. It is for this reason that the Pre-trial Brief must contain all information pertinent to the case.

Pre-trial conferences are governed by Rule 50 of the *Rules of Civil Procedure.* Rule 50 sets out a very minimal framework, with little direction on how the pre-trial is to be conducted. As such, each Court office has adopted their own style or form for pre-trial scheduling, briefs and conferences. Make sure you know the form or procedure for the Court you are filing in. Especially check that Court offices Administrative Manual for the date for filing the Brief with the Court – some Courts require the Briefs to be filed a minimum of 7 days before the Conference and some 5 clear days. Know your Court, know your form!

Rule 50.01 sets out the scope of what may be considered at a pre-trial conference, as follows:

a) The possibility of settlement of any or all of the issues in the proceeding;
b) The simplification of the issues;
c) The possibility of obtaining admissions that may facilitate the hearing;
d) The question of liability;
e) The amount of damages, where damages are in issue;
f) The estimated duration of the hearing;
g) The advisability of having the court appoint an Expert;
h) The advisability of fixing a date for the hearing;
i) The advisability of directing a reference; and
j) Any other matter that may assist in the just, most expeditious and least expensive disposition at the trial.

Rule 50.03 provides that no communication shall be made to the Judge presiding at the Trial with respect to any statements made at the Pre-trial . The same Judge cannot preside at the Trial as the Pre-trial .

Rule 50 leaves the scope of the pre-trial conference to the discretion of the parties. There is plenty of leeway to engage in settlement negotiations. The pre-trial is an effective way to obtain the opinion of an impartial party as to the merits and theory of your case and that of the Defendants.

The Mediation Summary/ADR Brief

Mandatory Mediation is present in many jurisdictions in Ontario and is governed by Rule 24.1 of the *Rules of Civil Procedure.*

As of January 1, 2010, the Rule will be amended and will apply to the following actions:

1. Actions that were governed by this Rule immediately before January 1, 2010;
2. Actions that are commenced in Ottawa, Toronto or Essex after Janaury 1, 2010;
3. Actions governed by Rule 78 (Toronto Civil Case Management Pilot Project);
4. Actions governed by Rule 77 (Civil Case Management);
5. Actions governed by Rule 76 (Simplified Procedure) and assigned to mandatory mediation by the regional senior judge;
6. Actions in relation to a matter that was the subject of a mediation under section 258.6 of the *Insurance Act*, if the mediation was conducted less than a year before the delivery of the first defence in the action;

7. Actions placed on the Commercial List established by practice direction in the Toronto Region;
8. Actions under Rule 64 (Mortgage Actions);
9. Actions under the *Construction Lien Act*, except trust claims; and
10. Actions under the *Bankruptcy and Insolvency Act* (Canada).

Rule 24.1.05 gives the Court the authority to make an order on Motion to exempt an action from Mandatory Mediation.

Rule 24.10.09 sets out the time frame in which a Mandatory Mediation must take place, which is within 90 days after the first defence is filed, unless otherwise ordered by the Court. To permit parties to complete examinations for discovery, discovery of documents, inspection of property and medical examinations this time frame can be extended by the Court.

In the Niagara Region, where Elkin Injury Law is located and where I have practiced for 22 years, Mediation is not mandatory for most personal injury actions, as set out by the Rules. Mediation does, however, remain an effective tool to reach a resolution of claims, usually before pre-trial . For the purposes of this paper, "Mediation Memoranda" can be either ADR Mediation Briefs or Mediation Summaries required by the Court for the purposes of Rule 24.1.

If an Alternative Dispute Resolution Mediation "ADR" is to be held *after* the pre-trial, generally speaking we will file the Pre-trial Memoranda with the Mediator, with the necessary updates. If, however, the ADR Mediation is held *before* a pre-trial is held, the Mediation Summary that is filed is a short and snappy version of the Pre-trial Brief. The Pre-trial Brief will need to be modified to fit the appropriate Court's format.

The following are some tips to consider when putting pen to paper or fingers to keys in preparation of both a Pre-trial Brief and/or an ADR Mediation Summary with necessary modifications-

1. PREPARATION, PREPARATION, PREPARATION

Before you leave your house to go on vacation to the sunny Caribbean, you feel you are completely prepared. Weeks ago you printed your e-ticket and updated your passport. You packed your sunscreen, and favourite book, called your mother and stopped at the drug store for some Immodium. Did you forget anything? Nope, off you go on a weeklong vacation of rest and relaxation when suddenly, as you are boarding the plane, you realize that you forgot to pack your bathing suit! Thought you were prepared didn't you? Know that sinking feeling in your stomach when you realize you were not as prepared as you thought you were? We've all had that feeling and when preparing to take a case to Pre-trial or Mediation, we do not want to experience that gut wrenching reaction to being caught behind the eight ball! It is imperative that you and your file are PREPARED! Even if you think you are, think again. Conduct a careful and comprehensive review of all aspects of the file, well in advance of the date for filing the Brief. Unfortunately, this can be a time consuming task but there is no time like the present, given the close timing between the Pre-trial or ADR and the Trial and especially given the recent amendments to the Rules of Civil Procedure and the filing of expert evidence.

2. USE THE WHOLE FILE AND NOTHING BUT THE WHOLE FILE

In the day of electronic files or "paperless offices" it can sometimes happen that evidence or other vital information is missing from the on-line file. I

am of the old school and believe that the written word, on paper is the best way to go about making sure you have everything you need before you begin. Make sure you have all the necessary medical reports, economic loss information, investigation materials and witness statements spread out all over your desk before you begin. Dig into that dusty banker's box and drag out all of the original documents that haven't been physically touched in months because they were scanned into the on-line system. Use the original documents to prepare your Pre-trial Brief. You never know, you may find something you either didn't know you had, or forgot you had or touch wood, something that did not get scanned into your system.

3. FRESH OBSESSED!

Be very careful about using a precedent! If you want to use a precedent, use paragraphs from the precedent but don't open a Pre-trial or Mediation Summary from another file and begin to replace the information to suit the file you are working on. Start with a blank page! It may add to your already aching carpal tunnel, but type your Brief fresh! It can be very embarrassing and not to mention confusing, to put in your brief that your client, Brad Pitt, was driving her car on Hollywood Avenue when your client, Angelina Jolie, was a pedestrian walking his dog along Main Street.

4. I HAVE A THEORY!

I am sure you have heard this expression; numerous times in your practice. Each case usually has at least one theory. Depending on the facts of the case you are working on, there may be several different theories that occur throughout the life of the file. Many theories change as your case develops. Often, the initial theory of the case is not the same theory by the time it gets to Pre-trial or ADR. Sometimes, the theory of a case is obvious and glaring. Other

times it is not so obvious and you must strategize with your team to come up with a logical theory that is supported by the evidence.

A theory may play out in the liability of your case. You have evidence to suggest that the defendant was digging in his gym bag on the floor of the front passenger side of his car when he struck your client who was walking along a well lit country road that did not have sidewalks. We all know that the Defendant was inattentive, not keeping a proper look out and was basically, a very bad driver, but now you have a theory as to why he struck your client. The Defendant, on the other hand, denies this, and has a theory that your client ran into the road to save a stray kitten from being hit exactly at the same time that he was driving by. A theory is only that, a theory and after the examinations for discovery the whole theory of a case can be blown out the proverbial window! Make sure you have evidence to support your theory and that it makes its way into the Brief.

It goes without saying that you must know the theory or theories of the case – each aspect of the case can possibly have its own theory. There can be several different theories in each case, one for liability, one for general damages and one for economic losses. Once you and your team have established the theory or theories of your case, you must be in a position to present evidence that supports your theory arguments.

5. WHAT EXACTLY IS THIS ELUSIVE THING CALLED THEME?

Theme is different from theory. Theory is what you are setting out to prove, by telling the story, whereas theme is the setting for the story. In a personal injury practice, we sometimes refer to our files by events that trigger our memories about the facts of a case. An example may be the "25th anniversary accident" referring to the file where your client and her husband were on their

way home from a surprise 25th wedding anniversary held in their honour when they were struck head on by an impaired driver. This theme will, hopefully, elicit some sympathy from the reader of the Brief and will present a stable picture of your clients. Be careful though, you don't want to be overly emotional in setting out the theme, but presenting an emotional theme can be very effective when supported by appropriate and relevant facts and evidence.

From the first paragraph of the introduction to the facts, to the last paragraph in your summary, the Pre-trial Brief or Mediation Summary should have a theme and should refer to the theme in the story you are telling. A consistent theme in a written brief will continue to convey your client's story throughout the entire Brief, and should stand out in the body of the document and not be buried deep inside the depths of the brief. If your theme is to be an effective tool in convincing the reader of your client's case, it should be the first point you make.

6. TELL ME A STORY PLEASE

I have already suggested that the Pre-trial Brief or Mediation Summary, through the presentation of a theory and a theme is telling a story. You should be writing a short story and not a novel; so be careful about how you present your story. Keep it interesting, concise and to the point but still present your theme and your theory while keeping to the facts. Nobody likes to be bored when completing required reading so keep the reader engaged and believing in your clients and their case.

7. NEVER ASSUME BECAUSE YOU MAKE AN "#%&" OUT OF "U" & "ME"

When preparing the Pre-trial Brief, specifically, don't assume that the Judge knows anything about personal injury law. You may draw a Judge that does not have a lot of experience in personal injury or motor vehicle law.

Make sure that you set out the topic, i.e. motor vehicle accident, and the applicable insurance regime that applies. Do not assume that the Judge is familiar with the threshold definition or the applicable statutory deductible. Set it out in the Pre-trial Brief, at the outset, before you introduce your client.

In the case of an ADR Mediation Summary the parties have (hopefully) agreed upon a Mediator that is well versed in the area of law that you are litigating. In a motor vehicle accident case, you may want to just remind the Mediator which regime your client's accident falls under, ie: Bill 59 or Bill 198 and the applicable deductible, but setting out the criteria for the threshold is often not necessary in the situation of an ADR Mediation.

Do not assume that the Mediator or the Judge knows anything about your case. If you don't tell them specifically what you want them to know, they will not know. If there is something, specific, that you want to bring to the attention of the reader (ie a specific MRI) then mention that item explicitly in the body of the brief, do not assume that he or she will read the entire 25 document Medical Brief in advance of the Pre-trial or Mediation.

8. PLEASURE TO MEET YOU MRS. PLAINTIFF

The introductory paragraph should be the introduction of your character (your client); who she is, her name, her age, her date of birth. Tell the reader your client's marital status, country of origin, date of immigration, whatever is important for the reader to get to know your client. Give the client human qualities, such as mentioning the fact that your client is a Mother of three and Grandmother of one, that she owns a dog or a cat (which goes to housekeeping and home maintenance later too!).

9. PRESENTING THE EVIDENCE - FROM THE TIP OF YOUR TONGUE TO THE POINT OF YOUR FOOT

You have presented your evidence, now back it up. Footnote all your evidence, for ease of reference. Attach every document you refer to specifically or wish to rely on and bring to the direct attention of the reader.

a) Liability

The impact to your client's vehicle has been described as "low" by the Defendant. The damage, however, to your client's vehicle is in excess of $8,000.00. The photographs tell a different story and depict the entire trunk of your client's car in the back seat. Attach the photographs (photocopied in colour) and the collision documentation to the Brief as tabbed documents. Unless you refer specifically to a quotation from this document, you do not need to footnote it, simply refer the reader to the Tab that it can be found under in the Brief.

Attach witness statements if you are referring to them or quoting from them. If the statements themselves have not been deemed privileged documents; don't just summarize them for the reader, quote from them, footnote them and attach them as tabbed documents to the Brief.

b) **The Pre Accident Plaintiff – A picture paints a thousand words!**

Judges love pictures. Pictures tell so much about a person. To assist in developing your theme, you should include a pre-accident photograph of your client, doing something that she can no longer do, such as canoeing, camping, gardening, bike riding, etc. Attach it as a tabbed document.

c) The Post Accident Plaintiff and Medical Evidence - Past and Present

In the telling of your story, you anticipate that the Defence will lead evidence about the pre-existing medical condition of your client. In order to get around this, you have to mention that your client had an MRI of her lumbar spine only 1 month before the accident which did not reveal any defects in her spine. Her physician diagnosed a mild lumbar strain as a result of shoveling snow. You go on to tell the Judge/Mediator that the MRI taken 3 months *after* the accident revealed a large posterior disc bulge at L4-5 that was impinging on her spinal cord. Rather than burying the actual reports of the MRI's in the voluminous medical brief, footnote the reference to the MRI's and attach them as documents to the brief itself. This will aid the reader in accessing the evidence and will save you time and trouble in the long run when His Honour wishes to read the MRI reports but was unable to find them buried deep in the clinical notes and records of the Family Practitioner.

d) **Transcripts**

Excerpts from transcripts of the Examinations for Discovery are excellent tools to include in your client's Pre-trial or Mediation Brief.

At Examinations for Discovery, your client gave evidence that prior to the accident she was able to shovel snow and did so on a regular basis. She gave evidence at Examinations for Discovery that one day in the November before the accident; she lifted a shovel-full of very wet snow and hurt her back. She did not miss any time from work, but did mention it in passing the next time she saw her Family Practitioner for an unrelated reason. The Family Practitioner, because he is a very conscientious practitioner, ordered an MRI of the lumbar spine just to make sure she didn't do any serious damage, given that she is a surgical O.R. Nurse and is required to stand for lengthy periods of time. It is your client's evidence that she didn't complain of low back pain per se, but that her doctor ordered the MRI to be cautious. The Defendants, of course, are trying

to paint a picture of an already injured Plaintiff and have lead evidence that your client had a serious low back complaint that warranted an MRI Scan prior to the accident. Your client's sworn evidence should be set out clearly in the Pre-trial Brief in quotation form, marked with a foot note and the excerpt attached to the Pre-trial Brief as a tabbed document.

e) Chronology

In a particularly complicated case, where the client has an involved pre accident medical history, followed by an even more involved post accident medical picture which includes several surgeries, or a complicated work history, it is often helpful to include a Chronology of the Plaintiff's life. Attach this as a separate tab as well and include it in the index of the Brief.

f) **Case Law**

There is no harm in attaching relevant case law. You can footnote the references if you are quoting the case law to discuss a specific point of law or if you are referencing a quantum of damages, attach the case law to the Brief under a specific tab. In keeping with the above comments with respect to assumptions, don't assume (in the case of a Pre-trial Brief, specifically) that the reader is familiar with personal injury law. Judges today appreciate the assistance of seasoned and senior counsel in providing them with ranges of damages that are current to our time. You do not wish to have your client's claim undervalued and most Judges are grateful for the assistance.

10. WHOSE ON FIRST, WHATS ON SECOND….

This paragraph is, in all likelihood, out of order in this paper, but this is a do as I say not as I do kind of outline!

The order of the information/evidence you are presenting should flow. The story can be set up as follows, using headings and sub paragraphs:

1. Nature of action (i.e. MVA or S/F, T/F)
2. Applicable Legislation (i.e. Bill 59, Bill 198, or O.L.A.)
3. Presentation of theme and theory
4. Introduction of Plaintiff
5. Outline of liability with theory and evidence
6. Presentation of Pre-ccident Plaintiff (i.e. health, injuries, lifestyle, activities) with evidence in support (photos, medicals)
7. Presentation of accident related injuries, treatment and post-accident Plaintiff with evidence (medicals, photographs).
8. Concise statement about the threshold test being met and the deductible breeched
9. Presentation of Economic Loss evidence
10. Presentation of Family Law Act Claims if applicable and
11. Summary.

REFRESHER COURSE AT A GLANCE……

DO	DON'T
Be Prepared!!!	Type from a precedent – always start with a fresh page!
Take the whole file out of the box and work from the hard copy	Rely only on on-line or scanned files and documentation use the physical file!
Know the theory of your case & develop and set out the theme early	Don't Assume anything!
Use the right Court Form for the Court you are in	Avoid being too long winded and wordy.
Think before you write!	Avoid the cookie cutter approach to drafting.
Update your case law!	Don't put argument into evidence.
Do your research!	Don't get bogged down in information that means nothing in the end.
Do lots of drafts and get a fresh set of eyes to review	Don't leave it to the last minute to get started !
Attach evidence specifically referred to the brief and use footnotes	Don't recite every single medical you have – cut to the chase – highlight the meds that make your case!
HAVE FUN!	