CIVIL LITIGATION PRACTICE BASICS 2016

Chairs: Erica Baron  
*McCarthy Tétrault LLP*

Samaneh Hosseini  
*Stikeman Elliott LLP*

October 5, 2016  
9:00 a.m. to 12:30 p.m.

Total CPD Hours = 2 h 30 m Substantive + 1 h Professionalism

Donald Lamont Learning Centre  
The Law Society of Upper Canada  
130 Queen Street West  
Toronto, ON

SKU CLE16-01001

Agenda

9:00 a.m. – 9:05 a.m.  
**Welcome and Opening Remarks**

Erica Baron, *McCarthy Tétrault LLP*

Samaneh Hosseini, *Stikeman Elliott LLP*

9:05 a.m. – 9:40 a.m.  
**The Initial Client Meeting and Starting and Defending the Case (20 minutes)**

Andrew Kalamut, *McCarthy Tétrault LLP*
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<tr>
<td>9:40 a.m. – 10:10 a.m.</td>
<td>Preparing for and Conducting Effective Examinations for Discovery (5 minutes)</td>
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<td>Mark Walli, Stikeman Elliott LLP</td>
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<td>10:10 a.m. – 10:25 a.m.</td>
<td>Demonstration of an Examination for Discovery: Video and Discussion</td>
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<td>Jonathan Levy, Torkin Manes LLP</td>
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<td>10:25 a.m. – 10:40 a.m.</td>
<td>Coffee and Networking Break</td>
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<td>10:40 a.m. – 11:05 a.m.</td>
<td>Bringing Common and Uncommon Motions (5 minutes)</td>
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<td>11:05 a.m. – 11:30 a.m.</td>
<td>Pre-trials and Settlements (15 minutes)</td>
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<td>11:25 a.m. – 11:50 a.m.</td>
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<td>Ellen Snow, Clyde &amp; Co. Canada LLP</td>
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<td>11:50 a.m. – 12:20 p.m.</td>
<td>Preparing for Trial and Post-trial Issues (10 minutes)</td>
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<td>12:20 p.m. – 12:30 p.m.</td>
<td>Question and Answer</td>
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**SKU CLE16-01001**

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TAB 5  Preparing for Trial and Post-Trial Issues

Dena Varah, Lenczner Slaght Royce Smith Griffin LLP

TAB 6  Expert Reports

Ellen Snow, Clyde & Co. Canada LLP
Civil Litigation Practice Basics 2016

The Initial Client Meeting and Starting and Defending the Case

Andrew Kalamut, McCarthy Tétrault LLP

October 5, 2016
The Initial Client Meeting and Starting and Defending the Case

The Initial Client Meeting

A. General
B. Client identification
C. Conflicts
D. Solicitor-Client Privilege
E. Conducting the interview
F. Investigating the facts
G. Limitation periods
H. Determining which clients to take on
I. Retainers

Starting and Defending the Case

J. Looking ahead to trial when drafting pleadings
K. Rules and Statutes
L. Actions vs Applications
M. Common Pitfalls
The Initial Client Meeting

A. General

The initial client meeting will likely be your first formal in-person contact with a potential client. This is an opportunity for you as a lawyer to:

- ensure that you are abiding by the necessary Know Your Client rules imposed by the Rules of Professional Conduct;
- ensure there are no legal/business conflicts;
- obtain as many of the relevant facts as possible that are needed to move the matter forward through the litigation process; and
- confirm the scope of your retainer and how you are going to be compensated for your services.
B. Client Identification

The first information that you will need to obtain is the potential client’s information. By-Law 7.1 of the Rules of Professional Conduct sets out the Know Your Client requirements:

- the client’s legal status, i.e., an individual, corporation, estate, a bankrupt, etc.
- if the client is an individual:
  - full name, home address, telephone number, occupation, as well as that individual’s business address and telephone number (if applicable);
  - it’s a good idea to make a photocopy of any identification for your records;
- if the client is a corporation:
  - full business name, business address and telephone number, the nature of the business, as well as the name and contact information of the person instructing you
C. Conflict Check

A conflict exists where the potential duties owed to multiple clients, or the lawyer’s own interests, would be adverse or otherwise run into each other. Rule 3.4-1 of the Rules of Professional Conduct provide that:

A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.

Before you provide any services, you must first determine whether there exists a legal conflict between you (or your firm) and the client, i.e., whether you represent, or have represented, a client that is adverse in interest to the potential client.

If there is a conflict, it is possible that certain steps can be implemented so that you and your firm can still act for the potential client:

- waiver and consents;
- joint retainers; or
- setting of conflict screens at your firm.
D. Solicitor-Client Privilege

Assuming that you have cleared conflicts, the next step is discussing the relationship between counsel and client. This is a good opportunity to discuss the law surrounding solicitor-client privilege. This is a well-understood concept to lawyers, but may be foreign to a lay-person.

- Solicitor-client privilege is the client’s privilege.

- It is the client’s right to refuse to disclose, and to prevent others (including you) from disclosing confidential communications made with you for the purposes of obtaining legal advice.

  ▪ Anything the client discloses to you confidentially, does not need to be shared with any other parties.

  ▪ Your client should be made to understand that he/she should be sharing all the facts of the case with you, both good and bad;

- The key to that is “confidential” communications.

- Advise the client not to discuss the details of the case with others.

It is worthwhile discussing litigation privilege as well, which is the privilege that attaches to work-product that is produced (by counsel and others) for the purpose of litigation.
E. Conducting the Interview

As this is your first interaction with the client, it is important to take the time and use it as an opportunity to develop a relationship with the client:

- Introduce the client to any individuals who will be in contact with the client going forward, i.e., other lawyers, clerks, assistants, etc.

- Discuss the litigation process as a whole, which is going to be foreign to most clients:
  
  - What to expect in the coming months/years;
  
  - The stages of litigation (pleadings, discoveries, trial);
  
  - The slow speed in which litigation proceeds, i.e., manage the client’s expectations for when a resolution may occur.
F. Investigating the Facts

After obtaining the Know Your Client information and clearing conflicts, it is time to delve into the substantive issues.

What type of information are you looking for as counsel during this initial meeting?

The short answer: as much information as possible!

- What is the issue?
- Why does this person want or need a lawyer?
- The particulars of the case. Really try to drill down on the issues:
- Ask the client to provide you with documents now.
  - For example, if it is a contractual dispute, you should have the contract early so you can start your legal analysis of the issues.
  - If it is a personal injury claim, you will want the hospital records and doctors’ records early on as well.
- Is there a special relationship between your client and the other parties that you need to be aware of?
  - Does that give rise to certain special duties?
- In addition to questions about liability, you will want to discuss damages.
  - What is the end result that your client is seeking?
  - What is the relief/what will make your client whole again?
- Are there other parties that may be necessary and proper parties to the action?
  - If your client is the plaintiff, who should the defendants be, or who do the defendants need to be?
  - If your client is the defendant, is it appropriate to bring a crossclaim or counterclaim?
  - Should your client commence a third party claim if a proper party is not named as a defendant?
• There may also be other individuals, who may not be proper or necessary parties to the action, but may have relevant evidence.
  
  o Obtain those individuals’ contact information to act as potential witnesses.
  
  o If your client is a corporation, send out a litigation hold memorandum to make sure that documents and other records are maintained through the course of litigation.
    ▪ Many companies have record retention policies that result in the destruction of records or data. Have an early conversation with your client. Identify the custodians of relevant records, and provide those custodians with a litigation hold letter to ensure that the documents are preserved.

• If your client is a defendant that is insured, you may want to place the client’s insurer on notice.
  
  o There are typically fairly strict reporting requirements for claims or potential claims.
  
  o If your client wants the benefit of insurance, make sure that the insurer is given the proper notice.

• Always reconsider potential conflicts once you get the full picture.
  
  o For example, is there a conflict with any additional parties being added to the litigation?

• Ask your client to prepare a narrative setting out their story/side of the case.
  
  o It is a helpful way for the client to sit down and work through the issues of the case and will help point to the evidence necessary to make out the claim/defence.
  
  o Receiving the narrative usually leads to additional questions, and starts bringing documents to light.
  
  o The narrative is subject to privilege, so the client does not have to worry about the other side getting a hold of it.

• At this early meeting, you will want to take the time to start thinking about experts that you will need to make your case.
  
  o If the issue is a sub-special or a highly specialized/technical field, and there may not be many experts in the field, you may want to retain one of these experts
early so you have the pick of the bunch, before the other parties have a chance to do so.

- Your client may have some ideas as to who would be a suitable expert in their case.

- It is never too early to start thinking about and developing your theory of the case.
  - The initial client interview is no exception.
G. Limitation Periods

Once you have the requisite facts and understanding of the issues of the case, consider what limitation periods apply in order to determine the timeline for either commencing a proceeding or responding to a proceeding.

- On the plaintiff side:
  - What limitation period governs the plaintiff’s cause of action?
  - Did your client retain you two years less a day? Move quickly!
  - Consider other potential time-restrictions, like length of warranties in contracts, or time limits established by agreements, or other things of those nature.

- On the defendant side, consider how long the client has to respond to the proceeding (i.e., ensure the client is not noted in default)
H. Determining Which Clients to Take On

An additional area of risk management that is necessary to consider is the issue of competency. This refers to whether you are the appropriate professional to act for that client. Do you have the right skill set to act for this potential client?

If a potential client seeks to retain your services, and you may not have the requisite skill set or expertise to properly serve this individual’s interest, consider referring the individual to another lawyer or law firm.
I. The Retainer

The Retainer or Engagement Letter with your client formalizes the solicitor-client relationship and establishes the scope of the services that you will be providing.

A Retainer or Engagement Letter should include the following:

- List the parties for whom you act;
- If you are acting for a corporation, you may want to list who you are obtaining instructions from within the corporation;
- List the lawyers or other professionals who will be acting for the client;
- Set out the scope of legal services that you will be providing;
- Outline the fee arrangement, i.e., your rates or the fee arrangement that you intend to have in place;
- How and when the retainer is terminated, i.e., at the conclusion or disposition of a matter, by written notice, etc.;
- Identify any conflicts and the manner in which the conflict is resolved, i.e., the client consents to continue to act where a conflict may exist; and

Any other information necessary to make the arrangement work for your client, i.e., if you have a joint retainer, maybe you would work out how the fees are arranged.
Starting and Defending the Case

J. Looking ahead to trial when drafting pleadings

Once you have the facts that are necessary to commence or defend a proceeding, it is important to treat the matter on the assumption that it will proceed to trial. Consider what issues must be raised, either claims or defences, at the pleading stage to ensure that the outcome sought by your client can be obtained, at trial.

Remember, the only thing that a trial judge reads before the start of trial are the pleadings. Tell a compelling story in a clear and concise manner!

- Consider conducting legal research to determine what causes of action are available to you as a plaintiff.

- The same goes for what defences are available to your client as a defendant.
  
  - Additionally, consider whether it is appropriate to counterclaim against the plaintiff, crossclaim against a co-defendant, or commence a Third Party Claim against a non-party.

- What underlying facts are necessary to be pleaded to support the cause of action or defence?
  
  - Remember that any facts as pleaded in the Statement of Defence are considered admissions for the purposes of trial, and are not easily withdrawn by amendment.

- If time is of the essence, and your client requires more time, considering serving either Notice of Action (Form 14C) or a Notice of Intent to Defend (Form 18B). This will extend the time to serve a Statement of Claim or Statement of Defence.

- Practical tips if you are the plaintiff or applicant:
  
  - Determine the legal title of the defendant or responding party by conducting corporate or legal name searches.
    
    - If it is not possible to determine the legal name of the individual, commence the proceeding using a placeholder name, such as John or Jane Doe.
  
  - Determine the addresses of the parties that you intend to serve personally.
  
  - Determine whether a jury trial is appropriate in the circumstances.
Determine where the proceeding will be commenced.

Use clear unambiguous language when drafting the pleading, along with plenty of headings and sub-headings. Be sure to include the following as the plaintiff:

- The precise nature and amount of relief sought based on the various heads of damages, along with claims for pre and/or post-judgment interest under the *Courts of Justice Act*.
- The names of the parties, their capacities, their business and residence, along with the facts and circumstances leading up to the dispute.
- The material facts that gave rise to the cause of action.
- The place of trial proposed by the plaintiff.

Be sure to include the following as a defendant:

- The allegations that the defendant admits, denies, and that the defendant has no knowledge of.
- The material facts relied on for the basis of any defence.
K. Rules and Statutes

There are multiple Rules and Statutes that govern pleadings, addressing such things as what parties must be named in certain actions, the timing of limitation periods, the form of the pleading, the manner of service, and everything in-between.

It is imperative to carefully review the Rules of Civil Procedure and any other relevant legislation relating to your pleading to ensure that it is in conformity with the governing requirements.

• The first stop should always be the Rules of Civil Procedure. Specifically, consider the following Rules:
  
  o Rule 7 – Parties under disability (naming litigation guardians)
  o Rule 8 – Partnerships (commencing actions against partnerships)
  o Rule 9 – Estates and Trusts (commencing actions against an Estate or Trust)
  o Rule 13 – Place of commencement and hearing or trial
  o Rule 14 – Originating process (action or application)
  o Rule 16 – Service of documents
  o Rule 17 – Service of documents outside of Ontario
  o Rule 18 – Delivery of Statement of Defence
  o Rule 25 – Rule governing pleadings in an action
  o Rule 26 – Amendment of Pleadings
  o Rule 27 – Counterclaim
  o Rule 28 – Crossclaim
  o Rule 29 – Third-Party Claim
  o Rule 64 – Mortgage actions
  o Rule 74-75 – Estates Matters
  o Rule 76 – Simplified Procedure

• In addition to the Rules, consider whether any limitation periods apply. Review the Limitations Act, 2002, and any other relevant statutes.

• Depending on the claim commenced or defence raised, have a mind to that statute, and plead accordingly. The statute will likely set out the necessary elements of the cause of action, for example, the Negligence Act or the Ontario Business Corporations Act.
L. Actions vs. Applications

There are two ways to commence a proceeding in Ontario – either by Action or Application. Determining whether to proceed by Action versus Application requires consideration of the issues that gave rise to the proceeding as well as the relief sought by the initiating party.

- An Action is commenced by a plaintiff who is seeking relief in which there are facts in dispute. An Action is disposed of by trial, in which the parties lead evidence by oral testimony before the judge or jury.

- Rule 14.05 specifically governs when an Application is to be commenced as opposed to an Action. Evidence for Applications proceed by affidavit evidence, typically without court cross-examinations. The hearing of the Application will be before a judge on a written record, meaning that there is no live evidence given.
  - Applications are sometimes mandated by statute (Rule 14.05(2))
  - Applications are also appropriately brought where the party is seeking a declaration of rights by the Court under a contract, will, or agreement.
    - There is a list of circumstances in which an Application is appropriate as set out at Rule 14.05(3).
M. Common Pitfalls when Drafting Pleadings

- Failing to plead the necessary underlying facts to support a cause of action.
  - This can be fatal to a claim and result in a motion to strike the action.

- Failing to plead adequate specificity for certain causes of action.
  - The Rules mandate that certain causes of action relating to fraud, misrepresentation, breach of trust or malice or intent, require that the pleading shall contain full particulars (Rule 25.06(8)).

- Pleading evidence instead of facts.
  - A party is required to plead the material facts, and not the means by which those facts will be proven (X ran a red light, as opposed to Y saw X run a red light).

- Failing to ensure that the client carefully reviews the pleadings so there are no surprises going forward. Remember, as a defendant, anything pleaded is considered an admission!

- Failing to start an action under the proper monetary jurisdiction, such as commencing an action under the standard rules when the action ought to have been brought under the Simplified Procedure (less than $100,000) or in Small Claims Court (less than $25,000).
  - There are significant cost consequences to a plaintiff that improperly commences an action in the incorrect monetary jurisdiction. Do not claim $1M in damages when the loss is only $10,000.
Notes on Conducting Examinations for Discovery

Mark Walli, Stikeman Elliott LLP

October 5, 2016
Notes on Conducting Examinations for Discovery

Some Basic Parameters Under the Rules

- Examinations for discovery can be done by way of oral or written questions, but (presumptively) not both
  - Oral examinations for discovery are by far the more common method
- A party has the right to examine for discovery any other party adverse in interest, once
  - Leave of the court is required to examine a party more than once
- Where the adverse party is a corporation, then the examining party may choose to examine any officer, director, or employee of the corporation as its discovery representative
  - The corporation may bring a motion for an order to substitute another officer, director or employee as its discovery representative
- Generally, examinations for discovery may be conducted only after pleadings have been exchanged and affidavits of documents served
- A party presumptively is entitled to only seven hours total time for examinations for discovery (regardless of the number of adverse parties)
  - In practice, longer amounts of time for examinations are routinely agreed to between/among counsel for the parties
- An examination for discovery is initiated by way of Notice of Examination served on the adverse party’s counsel
  - Under the Rules, the party which serves its Notice of Examination first presumptively is entitled to conduct its examination for discovery first
  - In practice, scheduling discussions will occur between counsel as to mutually convenient dates for counsel and the witness(es) before Notices of Examination are served

Scope of Examinations for Discovery (Rule 31.06)

- The Rules create a broad scope for examinations for discovery, requiring the person to answer “any proper question relevant to any matter in issue” or to specific matters made discoverable by Rule 31.06
Courts interpreted the former Rule 31.06, which required answers to proper questions “relating to any matter in issue” as creating a “semblance of relevance” test under which a “wide latitude” was permitted. See Kay v. Posluns, 1989 CanLii 4297 (ON SC)

The amendment to Rule 31.06 which changed “relating” to “relevant” has been held to have made a “modest narrowing of the scope of examinations for discovery” (see Ontario v. Rothmans Inc., 2011 ONSC 2504 (CanLii)), but the ambit of permissible questions remains wide.

- Rule 31.06 specifically makes the following subject matters fair game for questioning on discovery:
  - the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in the action (unless the court orders otherwise)
  - the findings, opinions, and conclusions of an expert engaged by or on behalf of the party being examined (that are relevant to a matter in issue)
    - however, the party being examined need not disclose an expert’s findings, opinions, or conclusions if they were made solely in preparation for contemplated or pending litigation and the party undertakes not to call the expert as a witness at trial
  - the existence and contents of any insurance policy which may respond to a judgment in the action, the amount of money available under that policy, and any conditions affecting the availability of the money

- Rule 31.06 also states that the witness being examined for discovery must answer to “the best of his or her knowledge, information and belief”
  - This broadens the scope of examination from matters of personal knowledge to include hearsay testimony
  - The scope of the rule also creates requirements with respect to the preparation of witnesses for examinations for discovery, particularly for representatives of corporate parties, such as review of relevant production documents and potentially speaking to others with personal involvement in the events/occurrences/transactions at issue
    - It has been held that “[a]ny person who is to be examined for discovery has an obligation to prepare himself or herself to answer questions that could reasonably be expected to be asked” and that “[a]n unexplained lack of preparation by a representative of a corporation amounts to a constructive refusal to participate in the discovery process as required by the Rules of Civil Procedure”
Moreover, “the practice of the profession, the rules and the case law about the practice and procedure envision that when the person being examined does not personally have knowledge of a matter in issue, then that person must undertake to provide the information by making inquiries of the persons with the knowledge.” See Fischer v. IG Investment Management Ltd., 2016 ONSC 4405 (CanLii), at paras 26-27

- Rule 31.06 also expressly prohibits certain types of objections to questions posed on discovery:
  - It is not permissible to object to a discovery question on the grounds that the question seeks “evidence”
  - It is not permissible to object to a discovery question on the grounds that it constitutes “cross-examination” UNLESS the question goes solely to the credibility of the witness
  - It is not permissible to object to a question on the grounds that it constitutes cross-examination on an affidavit of documents

**Failure to Answer Questions on Discovery**

- Rule 31.07(2) provides that, where a party fails to answer a question on discovery, the party may not introduce at the trial the information that was not provided, except with leave of the trial judge

- For purposes of Rule 31.07(2), “failure to answer” a question means:
  - Refusing to answer the question, whether on grounds of privilege or otherwise
  - Taking a question under advisement, but not providing an answer within 60 days
  - Undertaking to answer a question, but not providing an answer within 60 days

- Rule 53.08 governs requests for leave to introduce information at trial that was not provided on discovery. It provides that leave “shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice for the opposite party or will cause undue delay in the conduct of the trial

- In addition to engaging Rule 31.07(2), failure to answer a question on examination for discovery may engage sanctions under Rule 34.15 (see below)
Duty to Correct Answers Given on Discovery

- Rule 31.09 requires that when a party discovers that an answer given on discovery was incorrect or incomplete when made or is no longer correct and complete, the party must provide the corrected/complete information in writing to every other party forthwith.

- A party that fails to comply with this duty may not introduce subsequently discovered evidence that is favourable to its case at trial, except with leave of the trial judge (to be determined in accordance with Rule 53.08).

Use of Examination for Discovery at Trial

- At trial, a party, as part of its own case, may read into evidence any part of the evidence given on the examination for discovery of any adverse party (provided the evidence is otherwise admissible):

  - The discovery evidence may be read in whether or not the adverse party has already given evidence.

- Evidence given on an examination for discovery may also be used at trial to impeach the witness, on the basis of prior inconsistent statements.

- Generally speaking, a party may not introduce into evidence at trial, as part of its own case, evidence given by that party or its representative on an examination for discovery:

  - The basic principle is that the party’s own evidence is to be given in person, orally in court.

- Rule 31.11 does provide for certain circumstances in which a party may introduce (parts of) the evidence given on its examination for discovery:

  - If an adverse party reads into evidence at trial parts of the party’s examination for discovery, the party may request that the trial judge “direct the introduction of any other part of” the discovery evidence that “qualifies or explains the part first introduced”.

  - Where a person examined for discovery has died or is unable to testify at trial because of infirmity or illness, or cannot be compelled to attend at the trial, any party may seek leave of the trial judge to read in that person’s evidence on examination for discovery (to the extent it would be admissible if the person were testifying in court).
Purposes of Conducting an Examination for Discovery

- The courts have recognized that there are three main purposes of an examination for discovery of an adverse party:
  - To enable the examining party to know the case it has to meet
  - To enable the examining party to procure admissions which will dispense with other formal proof of the party’s own case
  - To procure admissions which will destroy the adverse party’s case (See McLeod v. Canadian Newspapers Co. Ltd., 1987 CanLii 4275(ON SC))

Role of Counsel for the Party being Examined

- Every party being examined for discovery is entitled to have their counsel present at the examination
- The role of counsel for the party being examined is, however limited:
  - “There is no doubt that a party is entitled to have a lawyer present on discovery to give legal assistance to the party being examined. But that assistance is to consist of the lawyer listening to the particular question and deciding whether the question is proper, or improper because it is irrelevant, or invades solicitor-client privilege, or is confusing or incomprehensible, or is otherwise improper, and if so, taking an objection to the question on the record in the manner contemplated” by the Rules. Kay v. Posluns, supra; see also Iroquois Falls Power Corp. v. Jacobs Canada Inc., 2006 CanLii 35612 (ON SC)
- Examples of improper questions are those which:
  - are based on a factual premise that has not been adopted by the witness
  - misstate the evidence
  - do not relate to the pleadings
  - have already been answered (See Schindler Elevator Co. v. 1147335 Ont. Inc., 2010 CanLii 41136 (ON SC))

Some “Do’s and Don’ts” in the Conduct of Examinations

- In the Iroquois Falls case, supra, Master McLeod set out a number of principles concerning the conduct of examination for discovery based on the case law and the Rules:
Counsel representing a party being examined is entitled to interrupt the examining party for the purpose of objecting to an improper question, placing the objection on the record and either directing the witness to answer under protest or not to answer.

Counsel may also interrupt the examiner if necessary to ensure the witness and counsel both understand the question.

Counsel must not interrupt/interfere with the examination any more than is necessary in order to perform their proper function.

As a practical matter, counsel may sometimes wish to answer a question or to correct an answer, but if the examining counsel objects, then neither is permitted.

Counsel may choose to re-examine his/her own client in order to correct an answer or to clarify or explain an apparent admission or inconsistency. Alternatively, he or she may provide the correction or clarification subsequently in writing. But in either case, the examining party is entitled to the evidence of the witness, not counsel.

Because examinations for discovery include an element of cross-examination, counsel should not discuss evidence with the witness during a break.

In a lengthy discovery or series of discoveries, counsel may consider it necessary to discuss evidence with the witness. The intention to do so should be disclosed to opposing counsel, and if there is an objection, leave of the court may need to be sought.

If there is a break between rounds of discovery, counsel is free to meet with the client to prepare for the upcoming discovery; it may be necessary to discuss evidence already given to obtain instructions regarding discovery motions, to address the duty to correct answers, and to answer undertakings.

Counsel ought not to unnecessarily oppose reasonable discussions between counsel and client provided they are disclosed. It is legitimate to ask the witness under oath on resumption of discovery whether he or she was coached as to what answers to give.

Sanctions for Improper Conduct of Examinations (Rules 34.14 and 34.15)

- Rule 34.14 provides that an examination for discovery may be adjourned and a motion for directions brought to the court where:
  - The right to examine is being abused by asking an excess or improper questions
• The examination is being interfered with by an excess of interruptions or objections

• The examination is being conducted in bad faith to annoy, embarrass, or oppress the person being examined

• The answers to questions are evasive, unresponsive, or unduly lengthy

• The has been a neglect or improper refusal to produce a relevant document on the examination

• On a motion for directions, if the court finds that a person’s improper conduct necessitated the adjournment, or that an examination was improperly adjourned, it may make an order that the person pay costs of the motion, any costs thrown away, and costs of any continued examination, personally

  o Motions for directions should only be necessary when counsel (or the witness) has refused all requests to conduct him or herself in accordance with the rules and the situation is “so extreme as to render the discovery futile” (see Iroquois Falls, supra)

• Rule 34.15 provides that upon the failure to attend a scheduled examination, to take an oath or affirmation, to answer a proper question, or to produce a document that is required to be produced, the court may:

  o Order the person to reattend to answer the question(s) improperly objected to, and any proper questions arising from them

  o Dismiss the party’s case or strike out its defence

  o Strike out all or part of the person’s evidence, including any affidavit made by the person

  o Make such other order as is just

• Courts have held that on a discovery counsel “must conduct themselves as officers of the court and with mutual respect” and that “counsel doing the examination must co-operate with the other counsel present so that they (as well as the party being examined) can understand the questions. See Kay v. Posluns, supra; Iroquois Falls, supra; and Schindler Elevator, supra

  o For example, in Schindler Elevator, supra, the court expressly quoted from passages in the discovery transcript where “counsels’ conduct was less than civil” and found that “there is no place for sarcasm in an examination”

  o In McLeod, supra, the court noted that “[i]n an extreme case” of misconduct on examination, the party risks an order for a second discovery or the dismissal
of his claim or defence, and the lawyer risks disciplinary proceedings before the Law Society.”
CONSIDERATIONS FOR DISCOVERY PLANS IN ONTARIO

Highlights of Rule 29.1 of the Rules of Civil Procedure:

- Mandates a discovery plan in all actions where a party intends to engage in documentary discovery, oral or written examinations for discovery, inspection of property and/or medical examinations

- Discovery plan is to be agreed within 60 days of the close of the pleadings, or attempting to obtain the evidence, whichever is earlier

- The discovery plan must be in writing and must (at least) include:
  - Intended scope of documentary discovery
  - Dates for the service of each party’s affidavits of documents
  - Information on the timing, costs and manner of production of documents
  - Names of the persons to be examined for discovery and the timing and length of such examinations

- In preparing the discovery plan, the parties “must consult and have regard to” the Sedona Canada Principles on the discovery/production of electronically stored information (see below)

- The parties must ensure that discovery plan is updated as necessary throughout the progress of the action

- The Court may refuse to grant relief on any discovery-related motion under Rules 30 to 35 if the parties have failed to agree on or update a discovery plan

Basic Points about Discovery Planning:

- A Rule 29.1 discovery plan IS NOT just a timeline of pre-trial steps that are to be completed before an action is set down for trial.
  - The rule requires substantive discussions/agreement about the scope of discovery (particularly document discovery) in the action and must at least cover the matters set out in Rule 29.1.03(3)

  See Palmerston Grain v. Royal Bank of Canada, 2014 ONSC 5134 (CanLii) and Starwood Acquisitions Inc. v. 267 O’Connor Limited, 2016 ONSC 4771 (CanLii) (finding that a “traditional timeline” was not “even a limited discovery plan”)


The parties, through counsel, must engage in good faith discussions/negotiations in attempting to reach a discovery plan. Rule 29.1 contemplates more a collaborative process than an adversarial discovery planning process.

- See Shaver v. Great Canadian Meat Company, 2016 ONSC 4059 (CanLii) and Lecompte Electric Inc. v. Doran (Residential) Contractors Ltd., 2010 ONSC 6290 (CanLii) (Discovery planning is intended to allow the parties to “map out the most efficient and effective way to organize the production and discovery needs of the particular action having regard to the complexity of the records, the issues in dispute and the amounts at stake”; it “is intended to be a collaborative rather than adversarial exercise.”)

- Where the parties cannot agree on a discovery plan, a court may order one, BUT:

  - Rule 29.1 places the onus on the parties to agree to the plan. See Dewan v. Burdet, 2012 ONSC 4465 (CanLii) (“The ability of a party to bring a motion every time a disagreement arises in the creation of a discovery plan undermines the obligation of the parties under this rule. Except in exceptional circumstances, that obligation should remain on the parties and result in the dismissal of such a motion.”)

  - The parties should be pragmatic if there are disagreements and attempt to agree to as much of the discovery plan as possible. See Teti v. Mueller Water Products Inc., 2015 ONSC 2289 (CanLii) (“It is unclear why the parties cannot consent to a discovery plan that sets out at least those matters that can be agreed upon and reference unresolved matters as ‘to be determined by further negotiations or by court order’ possibly with a deadline.”)

  - Where there have been insufficient efforts to attempt to agree to a plan, the court may properly decline to impose one. See In-Store Products Limited v. Zuker, 2013 ONSC 7091 (CanLii) (“...where the parties cannot agree on a discovery plan, a master has the jurisdiction to exercise their discretion to determine the most appropriate course of action to take. The jurisprudence does not, as suggested by the appellant, require that a master exercise their discretion to impose a discovery plan.”)

- In preparing the discovery plan, “[p]arties are required to comply with the Sedona Principles and failing to do so is a breach of the rules.” See Palmerston Grain, supra (citing Harris v. ATC Aviation Technical Consultants, 2014 CarswellOnt 4709 (SCJ))

### Highlights of the Sedona Canada Principles

- There are 12 Sedona Canada Principles, available online from The Sedona Conference® at thesedonaconference.org
• The most fundamental principle is that electronically stored information ("ESI") is discoverable.

• Other key aspects of the Sedona Canada Principles that should inform the discovery planning process are:

  o The parties should ensure that steps taken in the discovery process are proportionate, having regard to: the nature and scope of the litigation, the complexity of the issues and amounts at stake; the relevance and importance of ESI to the adjudication of the case; and the costs, burden and delay that may be associated with producing ESI.

  o Counsel and parties should meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, review and production of ESI.

  o A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual ESI.

  o Parties should agree on the format in which ESI is to be produced and/or listed in affidavits of documents

  o Sanctions should be considered by the court where a party will be materially prejudiced by another party’s failure to meet any obligation to preserve, collect, review or produce ESI.

  o The reasonable costs of preserving, collecting and reviewing ESI will generally be borne by the party producing it.

**Note on Proportionality**

• The Sedona Canada Principles expressly refer to the importance of proportionality in relation to the identification, collection and production of ESI.

• Rule 29.2 codifies the principle of proportionality in discovery generally in Ontario. It provides that, when determining whether a party or other person must answer a question on discovery or produce a document, the court shall consider:

  o Whether the time required to comply would be unreasonable

  o The expense associated with compliance

  o Whether complying would cause undue prejudice

  o Whether complying would unduly interfere with the orderly progress of the action
- Whether the information/document could be provided by another source
- Whether compliance would result in an excessive volume of documents being produced

- In *Siemens Canada Limited v. Sapient Canada Inc.*, 2014 ONSC 2314 (CanLii) the court adopted an eight-factor “test” for the consideration of proportionality in the context of electronic discovery:
  - The specificity of the information at issue
  - The likelihood of discovering critical information
  - The availability of such information from other sources
  - The purposes for which the responding party maintains the requested data
  - The relative benefit to the parties of obtaining the information
  - The total costs associated with production
  - The relative ability of each party to control costs and its incentive to do so
  - The resources available to each party

**Checklist for a Discovery Plan**

- Given the importance of the principle of proportionality in discovery in Ontario, there is no “one size fits all” discovery plan.

- A critical variable in the discovery planning process is the scope of e-discovery that will be undertaken by the parties, having regard to the nature and complexity of the issues, the relevance of ESI to the issues, the parties’ resources, and the amounts at stake in the proceeding.

- In cases where e-discovery is going to be a significant part of the discovery process, an effective discovery plan needs to be more robust than in a paper document case. In all likelihood, counsel will need the assistance of IT personnel and/or e-discovery specialists, *with respect to the negotiation of a discovery plan* as well as its implementation.

- Subject to the first bullet point above, the discovery planning process and resultant discovery plan should address the following:
o The preservation of ESI by the parties, including steps such as suspension of any automatic file deletion or record destruction policy and sending preservation memos to document custodians

o The steps to be taken to identify relevant and collect ESI, including identifying: the geographic locations and data storage systems to be searched, the custodians of the ESI, the file types to be searched, and the date range and search terms to be used

o Provision for the return/deletion of any inadvertently produced ESI that is privileged (and stipulation of non-waiver of privilege through inadvertent production)

o Deadline(s) for the service/exchange of affidavits of documents, and for production of paper documents and ESI

o Format and coding for the production of ESI (for example, what “fields” of information – such as author/date/recipient- will be provided with the ESI)

o The names of the persons to be produced for oral examinations for discovery

o The schedule and duration of the examinations for discovery

o How costs of complying with the agreement are to be allocated/shared/borne by the parties
Civil Litigation Practice Basics 2016

Bringing Common and Uncommon Motions

Michael Fenrick, Paliare Roland Rosenberg Rothstein LLP
Tina Lie, Paliare Roland Rosenberg Rothstein LLP

October 5, 2016
Motions Checklist

Whether/when to bring a motion

- Necessary
- Will materially advance your client’s case
- Reasonable prospect of success
- Benefits outweigh the costs

Starting your motion

- Jurisdiction – Master vs. Judge (see Rule 37.02)
  - Motion “shall” be made to the court if within jurisdiction of Master (see Rule 37.04)
- Schedule motion
  - Motion Scheduling Court for certain motions before a judge (long, urgent, summary judgment)
    - See Practice Direction for Civil Applications, Motions and other Matters in the Toronto Region
  - 9:30 Appointment for matters on the Commercial List
    - See Commercial List, Toronto Practice Direction
- Set a timetable
- For discovery-related motions, discovery plan in place? (see Rule 29.1.05)
Preparing your materials

- Notice of Motion (see Rule 37.06)
  - Relief sought
  - Grounds for motion
  - Statutory provisions and applicable rules
  - Documentary evidence
- Evidence to support grounds for motion
  - Affidavits
    - Whose?
    - On information and belief? (see Rule 39.01(4))
    - “Full and fair disclosure of all material facts” on ex parte motion (see Rule 39.01(6))
- Cross-examinations
  - Necessary?
  - Timing – delivered all affidavits, including reply affidavits? (see Rule 39.02(2))
  - Transcripts filed? (see Rule 37.10(5))
- Examination of witness (see Rule 39.03)
- Discovery transcript (see Rule 39.04)
  - Adverse party’s discovery transcript may be used
  - Own discovery transcript may not be used without consent (but can be attached to affidavit)
- Factum required? (see rule under which relief is sought)
  - Length – need leave?
    - See Practice Direction for Civil Applications, Motions and other Matters in the Toronto Region
- Other materials
  - Refusals and undertakings chart (see rule 37.10(10))
  - Pleadings?
At the motion

☐ Motion confirmation form before motion (see Rule 37.10.1)
☐ Draft order
☐ Bill of costs or costs outline (see Rule 57.01(5) and (6))
Examples of Types of Motions

Substantive motions

- **Summary judgment – Rule 20**
  - “No genuine issue requiring a trial” (see Rule 20.04(2))
  - Evolution of summary judgment “from highly restricted tools used to weed out clearly unmeritorious claims or defences to ... a legitimate alternative means for adjudicating and resolving legal disputes”
  - Appropriate where the process (including the new fact finding powers in Rule 20):
    1. allows the judge to make the necessary findings of fact;
    2. allows the judge to apply the law to the facts; and
    3. is a proportionate, more expeditious and less expensive means to achieve a just result.

- **Determination of question of law / strike out a pleading – Rule 21**
  - Strike out a pleading
    - No reasonable cause of action or defence (see Rule 21.01(1)(b))
    - Prejudice or delay; scandalous, frivolous or vexatious; abuse of process (see Rule 25.11)
  - No evidence admissible (see Rule 21.01(2))
    - Available where question does not turn on facts
  - Motion must be made “promptly” (see Rule 21.02)

- **Special case – Rule 22**
  - Parties concur on question of law (see Rule 22.01(1))

Early motions – for plaintiff

- **Norwich order**
  - To obtain pre-action discovery against third party – primary purposes:
    - Obtain identity of a potential defendant
- Evaluate whether cause of action exists
- Trace assets
- Preserve evidence or property

  o Five-part test (see *Isofoton S.A.*, 85 OR (3d) 780 (ON SC))
    1. Valid, bona fide or reasonable claim
    2. Involvement of third party in alleged wrongdoing
    3. Third party is the only practical source of information
    4. Indemnification of third party for costs associated with disclosure
    5. Interests of justice

- **Motion to strike out pleading** – Rule 21
  o See above

- **Interlocutory injunction** – Rule 40
  o Three-part test (see *RJR Macdonald*, [1994] 1 SCR 311)
    1. Serious issue to be tried
    2. Irreparable harm
    3. Balance of convenience
  o Undertaking as to damages (see Rule 40.03)
  o **Mareva injunction**
    - *Ex parte* motion to preserve evidence or assets
    - Need grounds for believing that defendant has evidence or assets in Ontario and risk that they will be removed
    - Maximum duration of 10 days, subject to extension (see Rule 40.02)
    - Need “full and fair disclosure of all material facts” (see Rule 39.01(6))

- **Anton Piller order** – Rule 45
  o *Ex parte* “civil search warrant”
  o Four-part test (*Celanese*, 2006 SCC 36)
    1. Strong *prima facie* case
    2. Very serious damage
3. Convincing evidence that defendant has incriminating documents or things
4. Real possibility that defendant may destroy material before discovery process
   o Need “full and fair disclosure of all material facts” (see Rule 39.01(6))

- **Other interim relief**
  o Appointment of receiver (Rule 41)
  o Certificate of pending litigation (Rule 42)
  o Interim recovery of personal property (Rule 44)

**Early motions – for defendant**
- **Jurisdiction / forum non conveniens – Rule 17.06**
  o Available to out-of-province defendant
  o “Real and substantial connection” test for jurisdiction (see Van Breda, 2012 SCC 17)
  o Various factors for forum non conveniens
  o Motion must be made before defending

- **Motion to strike out pleading – Rule 21**
  o See above

- **Motion for particulars – Rule 25.10**
  o Particulars sought are not within the knowledge of the party seeking them
  o Particulars are necessary to enable party to plead

- **Security for costs – Rule 56**
  o Available to defendant in certain circumstances (see Rule 56.01(1)) – some examples:
    - Out-of-province plaintiff
    - Plaintiff is corporation and there is good reason to believe it has insufficient assets in Ontario to pay costs
Action is frivolous and vexatious and there is good reason to believe plaintiff has insufficient assets in Ontario to pay costs

Procedural motions

- **Amendment of pleadings – Rule 26**
  - Court “shall” grant amendment unless there is prejudice that cannot be compensated for by costs or an adjournment (see Rule 26.01)
  - Limitation period?

- **Discovery-related motions – Rule 30-31**
  - Discovery plan in place? (see Rule 29.1.05)
  - Refusals and undertakings chart (see rule 37.10(10))
NOTICE OF MOTION

The Defendant, Innocent Canada Limited, will make a motion to the court on <date>, 2014 at 10:00 a.m., or as soon after that time as the motion can be heard, at 393 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An order compelling Insolvent Co. to pay into court $200,000.00 as security for costs of this action;
2. In the alternative, an order compelling Insolvent Co. to pay into court such amount or amounts and in the form determined by the court as security for costs of this action; and
3. Costs of this motion fixed and payable forthwith, inclusive of disbursements and H.S.T.

THE GROUNDS FOR THE MOTION ARE:

1. The Plaintiff is a corporation incorporated under the laws of Ontario;
2. The Plaintiff no longer carries on business in Ontario;
3. The Plaintiff has insufficient assets in Ontario to pay any adverse cost award made against it in this action;
4. The Defendant’s estimated party and party costs to defend this action are approximately $200,000.00;
5. Rules 56.01(1)(d) and 56.04 of the Rules of Civil Procedure; and
6. Such further and other grounds as counsel may advise and the court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Affidavit of Denis Innocent sworn September 2, 2014;
2. Affidavit of Gordon Knight sworn September 2, 2014;
3. Such further and other material as counsel advise and this Honourable Court permits.

September 2, 2014

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Plaintiff Defendant

ONTARIO SUPERIOR COURT OF JUSTICE

NOTICE OF MOTION

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Lawyers for the Defendant
AFFIDAVIT OF DENIS INNOCENT

I, DENIS INNOCENT, of the City of Toronto, in the Province of Ontario, President and CEO of Innocent Canada Limited, MAKE OATH AND AFFIRM:

1. I am the President and CEO of the Defendant, and as such I have knowledge of the matters to which I hereinafter depose, except where such knowledge is stated to be based on information and belief, in which case I have set out the source of my information, and I believe such information to be true.

The Action

2. This action centers on a dispute over the scope of and the termination of a consulting services agreement (the “Agreement”) that the parties entered into on October 1, 2005. Innocent Canada Limited (“Innocentco”) terminated the Agreement for cause on April 28, 2011.

   A copy of the Agreement is attached to this affidavit as Exhibit “A”.
3. During the term of the Agreement, on October 29, 2010, the Plaintiff issued a Notice of Action against Innocentco. The Statement of Claim was subsequently filed on November 26, 2010. Innocentco was unaware that the claim had been issued until April 2011.

4. In the Statement of Claim, the Plaintiff (sometimes referred to herein as “Insolventco”) claims damages in the amount of $5,000,000, as well as an accounting and disgorgement of all revenue and profits generated by Innocentco from November 1, 2008 to the date of trial relating to the sale of products by Innocentco to the purchasers listed on Schedule A to the Agreement.

5. There are 250 purchasers listed on Schedule A. These purchasers bought dozens of different types of products from Innocentco, the vast majority of which were not relevant to or included under the terms of the Agreement.

6. The Defendant was served with the Statement of Claim on April 27, 2011. It retained White Knight LLP shortly thereafter.

7. I am advised by Gordon Knight (“Knight”), a lawyer with White Knight LLP, that shortly following its retainer, Sangit Wacker (“Wacker”) of Fancy Pants LLP (“Fancy Pants”), lawyers for the Plaintiff, telephoned him and explained that the Plaintiff was facing dismissal of its action for delay because no statement of defence had been filed within 6 months of the issuance of the claim. Therefore, a defence needed to be filed immediately to avoid administrative dismissal.

8. The parties agreed the Defendant would file a broadly worded defence
promptly to save the Plaintiff’s claim from an administrative dismissal, and that it
would thereafter deliver a more comprehensive amended statement of defence in
due course.

9. In accordance with the parties’ agreement, the Defendant delivered its
Statement of Defence on May 1, 2011.

10. The Plaintiff served its affidavit of documents almost a year later, on April
15, 2012. The affidavit listed only a few hundred documents, despite the fact that
the claim challenges the entire contractual history of the Plaintiff and Defendant
spanning five and half years, and involving hundreds of underlying transactions.

A copy of the Plaintiff’s affidavit of documents is attached to this affidavit as
Exhibit “B”.

11. In June 2013, the parties received a Status Notice from this court dated
June 13, 2013 advising of a possible dismissal of the action for delay (again).

A copy of the Status Notice is attached to this affidavit as Exhibit “C”.

12. The Defendant delivered its Amended Statement of Defence on July 30,
2013.

13. After a lengthy collection and review process which was very disruptive and
time consuming, the Defendant served its affidavit of documents and copies of its
productions on July 30, 2013. The Defendant has identified approximately 10,000
relevant documents given the very broad scope of the allegations raised in the
Statement of Claim.

A copy of the Defendant’s affidavit of documents is attached to this affidavit
14. In August 2013, the parties agreed to a timetable for the action which the Plaintiff was to file with the court to avoid the second potential administrative dismissal of its action. The timetable required the parties to complete examinations for discovery by January 31, 2014, and that the Plaintiff set the action down for trial by October 15, 2014.

A copy of the parties’ agreed timetable is attached to this affidavit as Exhibit “E”.

15. After filing the timetable with the court in August 2013, the Plaintiff took no other steps up to January 2014 to advance its action.

16. I am informed by Knight that Wacker contacted him in late January 2014 to discuss scheduling the examinations for discovery. Knight requested that Wacker send him a proposal in writing, which was never forthcoming.

17. I am informed by Knight that he spoke with Wacker on February 28, 2014. The conversation is set out in Knight’s affidavit sworn in support of this motion, sworn September 2, 2014, which I have read. I understand that the gist of the conversation was the Knight had learned that the principal of the Plaintiff, Ded Beet (“Beet”), had commenced an action against Fancy Pants with respect to a different retainer. Wacker was not aware that the action had been brought.

18. On March 13, 2014, White Knight received a notice of change of lawyers indicating that Black, Hatt LLP (Black Hatt) were now the lawyers for the Plaintiff.

A copy of the Notice of Change of Lawyers is attached to this affidavit as as
Exhibit “F”.

19. White Knight has received no further communication from Black Hatt, even though under the timetable the Plaintiff is required to set this action down for trial by by October 15, 2014.

The Plaintiff is no longer in business and appears to have no assets in Ontario

20. The Plaintiff is a corporation incorporated under the laws of Ontario. It has not filed an annual return since 2012. The Plaintiff’s registered office is a post office box located inside a shopping mall.

   A copy of the corporate profile report for the Plaintiff is attached to this affidavit as Exhibit “G”.

21. According to a July 2014 Superior Court of Justice family law judgment (the Trial Decision) involving Beet, Beet is the sole shareholder of the Plaintiff, and the Plaintiff has not be actively carrying on business since April 2011.

   A copy of the Trial Decision is attached to this affidavit as Exhibit “H”.

22. Beet maintains a profile on Linkedin. His current position is listed as the president at “Ded Beet Consulting”. His profile lists his role as president of the Plaintiff as having ended in April 2011. In his profile, Beet states that he is “looking for business opportunities”.

   A copy of Beet’s Linkedin profile, printed on August 28, 2014 is attached to this affidavit as Exhibit “I”.

23. The Plaintiff had maintained an internet web page at www.nodough.com from 2008 until at least April 2011. A screen capture of the current home page of
www.nodough.com shows that it is now “under construction”. To the best of my knowledge, the Plaintiff has no presence on the internet to suggest that it has engaged in any business since the termination of the Agreement in April 2011.

Copies of the current screen capture for the Plaintiff’s website taken on August 30, 2014, and the archived screen capture from April 2011 are attached to this affidavit as Exhibit “J”.


A copy of the www.canada411.ca and www.411.ca search results are attached to this affidavit as Exhibit “K”.

25. The Plaintiff does not appear to own any real property in Ontario. A paralegal at White Knight, Virginia Clerk (“Clerk”), conducted a search of the Plaintiff through Teranet and the results were negative.

A copy of the search results dated August 30, 2014 are attached to this affidavit as Exhibit “L”.

**Beet's Matrimonial Proceedings**

26. Beet’s divorce and division of family assets are the subject of the Trial Decision, referenced above. I am advised by Clerk that she conducted a search of the Court of Appeal records, and no appeal was filed from the Trial Decision.

27. In the Trial Decision, the trial judge cites evidence led by Beet with respect to his business assets. Specifically, the judge found:

(a) Beet had continuously worked in, controlled and operated Insolventco from 1994 to April 2011.
(b) Insolventco is owned by Beet.

(c) Beet had complete control over Insolventco.

(d) Beet gave evidence at the trial that Insolventco required $500,000 to "stay afloat" and that receiving such funds was "vital to the viability of the company" because Insolventco had "lost its only consulting contract in 2011." I take that finding to be a reference to the termination of the Agreement in April 2011.

(e) Beet gave no evidence of any efforts he was making to secure another consulting contract for Insolventco or to pursue other new business for the Plaintiff or himself.

(f) The Court fixed the value of Insolventco at $1,000,000 as of the valuation date of June 2012, based upon its retained earnings at that time.

(g) Beet claimed that after Insolventco lost its major contract he "was in financial difficulties."

(h) After the Plaintiff's "main contract was cancelled", Beet "did not make an effort to regain his previous level of earnings and, as such, was under-employed."

(i) Beet was ordered to pay to his ex-wife:

   (i) $100,000 in spousal support arrears from 2012 to the date of judgment;

   (ii) $200,000 in retroactive child support;

   (iii) $5,000 per month per child in child support going forward; and
(iv) $50,000 in retroactive education costs; and,
(v) $700,000 for an equalization payment.

28. In a separate decision, the Court awarded a total of $500,000 in costs against Beet in respect of the matrimonial proceeding (the “Costs Award”).

A copy of the Costs Award is attached to this Affidavit as Exhibit “M”.

**Beet and the Plaintiff do not appear to have sufficient assets to satisfy all of their obligations and there is an Unpaid Judgment against the Plaintiff**

29. Based on the information in the Trial Decision and admissions in the Statement of Claim it is apparent that the only available source of funds Beet had to pay the amounts in the Trial Decision and Costs Award would be from the retained earnings in Insolventco.

30. Clerk conducted writ searches against both Beet and Insolventco. The search came back with no results against Beet, which in my mind, confirms my belief that Beet paid his matrimonial obligations from the retained earnings of Insolventco.

A copy of the writ search results dated August 30, 2014 are attached to this affidavit as Exhibit “N”.

31. This belief is bolstered by the fact that the writ search for Insolventco identified that it has an unpaid judgment in the amount of $50,000 owing to a leasing company dating from June 2, 2014. If there were still funds in Insolventco, I believe that the creditor would have arranged for the sheriff to seize these funds from Insolventco.

32. To my knowledge, there is no evidence that the Plaintiff is still a going
concern, that it generates any revenue, that it owns any property, or that it has any other assets.

33. In the Statement of Claim at paragraph 12 & 14, the Plaintiff admits that it has ceased carrying on business, and has wound up all of its business activities. This is consistent with the Trial Decision.

34. Based on all of the forgoing, it appears the Plaintiff has insufficient assets in Ontario to satisfy any adverse cost award that may be made in this litigation.

The Defendant's Costs will be Substantial

35. The action is a complicated commercial dispute. To date, the Defendant has been required to defend the action and review thousands of documents in order to produce its affidavit of documents.

36. The collection and review of relevant documents required to produce an affidavit of documents was particularly time consuming and expensive. The initial universe of potentially relevant documents totalled approximately 200,000. While this number was reduced using key word searches, approximately 50,000 documents were reviewed for relevance and privilege. The final Affidavit of Documents listed approximately 10,000 documents in Schedule A.

   A chart detailing the legal fees the Defendant has incurred to date is attached to this Affidavit as Exhibit “O”.

37. The parties have yet to agree upon a discovery plan and schedule oral discoveries. I am informed by Knight that oral discoveries would likely require
three or more days per party given the number of documents involved and the
general complexity of the issues in dispute.

38. The discoveries will require a significant amount of preparation in light of
the complexity of the liability and damages issues in play between the parties.
Specifically, disproving the Plaintiff’s claim will require a review of the business
activities of both the Plaintiff and the Defendant over the three year term of the
Agreement. Given the nature of the Agreement, these issues will need to be
explored in respect of all the purchasers’ accounts and several hundred product
types for each sale to these purchasers.

39. I anticipate that the trial of this matter would take at least 15 days. The
resolution of this case will require evidence of:

(a) the discussion of the parties during the negotiation of the Agreement
    (in advance of its execution);

(b) factual matrix/commercial context evidence regarding the workings
    of the Defendant which inform the intentions of the parties in
    negotiating the Agreement;

(c) negotiation and attempts at resolution throughout the term of the
    Agreement; and

(d) forensic analysis of the accounts and products included within the
    terms of the Agreement, and the commissions paid to the Plaintiff.
    The Agreement excludes many products Innocentco sells to the
    purchasers. The Plaintiff is claiming disgorgement and unjust
    enrichment. There will be a significant dispute on the contract
interpretation of what accounts and products were included or excluded from the scope of the Agreement. There will also be a significant dispute as to the damages that flow from any finding on the scope of the Agreement. The parties will have to call evidence on a granular level (per client, per account, per sale) regarding damages.

40. Knight has prepared a draft costs outline estimating the legal fees the Defendant will likely incur from now until the completion of trial on a party and party basis. The costs outline is an exhibit to the affidavit of Gordon Knight sworn September 2, 2014, which I have reviewed. These partial indemnity costs are significant – totalling approximately $200,000 up to the date of trial, and more thereafter. I understand that the actual costs that the Defendant will incur in continuing to defend this action will greatly exceed these party and party costs.

A copy of the Costs Outline containing an estimate of these costs is attached to this Affidavit as Exhibit “P”.

Affirmed before me at the City of
City of Toronto, in the Province of
Ontario, this 2nd day of
September, 2014

_____________________________________
DENIS INNOCENT
Commissioner for Taking Affidavits
INSOLVENT CO. -and- INNOCENT CANADA LIMITED

Plaintiff

Defendant

ONTARIO SUPERIOR COURT OF JUSTICE

AFFIDAVIT OF DENIS INNOCENT

WHITE KNIGHT LLP
Barristers
155 Wellington Street West
Toronto ON M5V 3H1

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Lawyers for the Defendant
BETWEEN:

INSOLVENT CO.  
Plaintiff  

- and -  

INNOCENT CANADA LIMITED  
Defendant  

ORDER

THIS MOTION, made by the Defendant for an order for security for costs was heard this day, at 393 University Avenue, Toronto, Ontario.

ON READING the affidavit of Denis Innocent, Gordon Knight, and Ded Beat, and on hearing the submissions of the lawyers for the parties,

1. THIS COURT ORDERS that the Plaintiff, Insolvent Co., pay into court $200,000.00 as security for costs of this action within 30 days of the date of this order.

2. THIS COURT ORDERS that the costs of this motion are fixed in the amount of $X, payable by the Plaintiff to the Defendant within 30 days of the date of this order.
THIS ORDER BEARS INTEREST at the rate of 3% per year commencing on October 15, 2014.

Master Shorthaman
Pre-Trial Conferences and Settlements: The Basics

Andrew Winton, Lax O'Sullivan Lisus Gottlieb LLP

October 5, 2016
Pre-Trial Conferences and Settlements: The Basics
Andrew Winton, Lax O’Sullivan Lisus Gottlieb LLP

The pre-trial conference is one-part mediation session and one-part trial preparation conference. A good advocate will be prepared to navigate both elements of the pre-trial conference in order to successfully represent her client.

If the mediation portion of the pre-trial conference results in a resolution of the action, then the next step is to “sew up” the settlement. The second half of this paper will briefly discuss the practical considerations that constitute an effective settlement process.

Preparing for a Pre-Trial Conference

Preparation for the pre-trial conference begins when you are scheduling the conference with opposing counsel. Rule 50.05 requires the parties to participate in the pre-trial conference by personal attendance (Rule 50.05(a)) or by telephone or video conference if personal attendance would require undue travel or expense (Rule 50.05(b)).

Personal attendance is strongly advised whenever possible. Some regions may require leave from the Court if a party will not attend in person. In other situations, even if the party is from out of town, the pre-trial judge may frown on the party’s failure to attend in person and may order the party to personally attend an adjourned pre-trial conference the next day.¹

Thus, in order to ensure your client complies with Rule 50.05, make sure she books off the entire day of the pre-trial conference before you confirm the date with the Court and

¹ This happened in a case involving a colleague at Lax O’Sullivan Lisus Gottlieb – to the adverse party. The pre-trial judge called the non-attending party (who resided out of town) from the conference and ordered him to attend personally the next day. He did, and the case settled.
periodically remind her that she should attend in person. You should warn your client to book off the entire day even if the pre-trial is only schedule for one hour in the morning just in case the conference runs long. This is especially applicable in the Toronto region, where pre-trials have been known to start late and/or to last several hours.

Immediately after you have confirmed the date for the pre-trial conference, you should place reminders in your calendar for the deadline for delivery of experts reports and the pre-trial conference memo.

**Expert Reports**

Rule 53.03(1) requires a party who intends to call an expert witness at trial to serve an expert report on every other party at least 90 days before the pre-trial conference. While it is possible to extend this deadline at the pre-trial conference (Rule 53.03(4)), one should not assume an extension will be granted.

Even if an extension is possible, it is usually not in your client’s best interests to delay delivery of an expert’s report. If the action is one where an exchange of experts’ reports is expected on a key issue such as damages, the delay may frustrate the parties’ ability to settle the case at an earlier stage and may lead to unnecessary additional legal expense.

In addition, you should consider how the pre-trial judge will react to the late delivery of your expert’s report. Asking for an extension may give the impression you are unprepared for trial and may affect your ability to influence the trial preparation timetable.

It is best to comply with Rule 53.03(1) if possible and to build time into your calendar to ensure your expert’s report is progressing at a pace that will enable you to serve it 90 days before the pre-trial.
Pre-Trial Conference Memo

Many counsel try to save their clients’ money by not putting much effort into the drafting of the pre-trial conference memo. This is “penny-wise and pound-foolish”. The pre-trial conference memo is your opportunity to convince the pre-trial judge and the other parties of the strength of your case. “Phoning it in” (e.g., re-writing your pleading) gives the impression that: 1) you have not yet figured out how to present your case to the Court; 2) your client has lost interest in paying for the litigation; and/or 3) your client is not going to attend the pre-trial with a serious intention to attempt to settle.

The Toronto and Central East Regions (and possibly others) have prescribed formats for the pre-trial conference memo. You can never go wrong following those formats; however, as with a mediation brief or factum, in some cases you may want to go beyond the four corners of the prescribed formats to better present your case. If you decide to take a more “creative” approach to the pre-trial memo, make sure you include the essential elements that must be present in every pre-conference trial memo:

1. A summary of the issues in dispute;

2. Your client’s position on those issues;

3. The names of the witnesses your client is likely to call at trial and the length of the time estimated that the examination in chief of each witness will take; and

4. The steps that need to be completed before the action is ready for trial and the length of time that it is estimated that completion of those steps will take.\(^2\)

\(^2\) Rule 53.04.
The summary of the issues in dispute and your client’s position on the issues can take many forms. As with a mediation brief, you should summarize the relevant facts fairly, but with an emphasis on the facts that support your client’s position. Do not ignore bad facts, but when you acknowledge them, you should briefly explain why they are not damaging to your case.

When summarizing your position on legal issues, **do not write a factum.** If there is a well-known case that is relevant to your position, refer to it, but do not cite every authority or argue in detail your legal position. Do not attach any case law unless you have found a case that is 100% on point with all aspects of your case.³

When summarizing the facts, use footnotes to refer to key documents or essential discovery evidence which supports those facts. Attach the pleadings, the key documents and excerpts from the discovery transcripts referenced in your memo. Depending on how the pre-trial judge approaches the mediation portion of the conference, you may want to show them those documents when you explain the merits of your position.

The trial readiness portion of your memo should follow the prescribed format. Even if the region where the conference is being held does not require it, consider whether to include a brief summary of the evidence your witnesses will give at trial. Do not draft a full “will-say”, but consider setting out the issues the evidence will address and/or the key evidence you know you’ll obtain from the witness.

The pre-trial memo should convince the pre-trial judge that you are confident of your chances of success at trial and that you are ready to go to trial. These messages will not be lost on the opposing parties and will play an important role during settlement discussions.

³ If you can’t resist, consider bringing a thin brief of relevant authorities with you to the pre-trial conference which you can distribute to the pre-trial judge and opposing counsel if appropriate.
Rule 50.04 requires pre-trial briefs to be filed no less than five days before the pre-trial. Under Rule 3.01(1)(a), that means **five business days**.

**What to Expect at the Pre-Trial Conference**

Each judge has her or his own way of running a pre-trial conference. Some will begin with a basic trial preparation discussion. Others jump right into a settlement negotiation with little reference to the merits of the parties’ positions.

However the pre-trial conference begins, you can expect at least two basic topics to be discussed at every pre-trial conference: whether it is possible to settle the case at the pre-trial conference and what it will take to prepare for trial.

**Settlement**

The settlement portion of the pre-trial conference will likely involve some combination of discussions with counsel only, discussions with only one party and her counsel, and plenary sessions. The pre-trial judge may call on you, as counsel, to explain the weaknesses of your case to your client in the break-out session, or alone but to opposing counsel, or even in the plenary session. Be prepared to defend the weaknesses in your case and to clearly articulate the strengths of your case in any environment.

You can choose not to answer a question, but that may be worse than answering. If the pre-trial judge asks you in front of everyone, or opposing counsel, or your client, “How do you respond to x?” (where “x” is a weakness in your case), and your answer is “I prefer not to answer in front of opposing counsel/my client” your non-answer suggests you have no answer to “x”, which is probably worse for you in the long run than if you had answered the question. The question should not take you by surprise – a thoughtful answer, prepared in advance, will demonstrate that you are ready to deal with “x” at trial.
Before the pre-trial conference begins, you should discuss your settlement strategy with your client. Be prepared to make at least one offer to settle, with the recognition that whatever you offer will most likely be the best you can hope to recover/pay later on if you don’t settle at the pre-trial.

Depending on the client, you should also prepare them to hear the weaknesses of her case. You want to avoid a situation where your client is hearing about the weaknesses of her case for the first time from the pre-trial judge. This is a sure-fire way to lose your client’s confidence in you. You will presumably have a reply to each weakness, and you should also communicate those replies to your client in advance.

**Trial Readiness**

In a two-hour pre-trial, the trial readiness portion of a pre-trial conference may last anywhere from zero minutes (if your case settles) to a half-hour or more. It depends on how prepared counsel are for trial – if everything is ship-shape, the trial readiness portion will last no longer than it takes for the pre-trial judge to record the details of the trial (how many witnesses, how long per side, etc.) in her pre-trial report.

If you are not yet ready for trial, you should arrive at the pre-trial with a plan that sets out what steps still need to be completed and when you intend to complete those steps. Try to consult with opposing counsel beforehand on these issues so you can present a trial-readiness schedule which both parties consent to or at least which narrows the areas of disagreement.

Do not attend the pre-trial conference without having given some thought to these issues. If you are the plaintiff’s counsel, the pre-trial judge can adjourn your trial date if you appear not to be ready. If you are the defendant’s counsel, you could be subjected to an onerous timetable for the completion of the remaining steps.
Conclusion re. Pre-Trial Conferences

It cannot be said that cases are won or lost at the pre-trial conference, but even if the case does not settle that day, your performance at the conference will influence what happens in the weeks leading up to trial. Your strong advocacy during the settlement portion of the conference may lead to a better settlement offer from the other side before trial. Even if settlement is not possible, your careful preparation for the trial readiness portion of the conference will increase your chances of obtaining a pre-trial timetable that works in your favour.

Settlements

Lawyers have a professional obligation to advise and encourage their clients to compromise or settle a dispute whenever it is possible to do so on a reasonable basis. In order to comply with this obligation, and to efficiently advise your client, you should consider whether it is possible to settle a case not just at a mediation or pre-trial conference, but also before you undertake any step in the litigation that is going to cost your client a lot of money (e.g., a summary judgment motion or e-discovery).

Depending on the nature of the dispute, there may be many elements to a settlement – it is not always just about the money. In addition to dollars and cents, you may need to consider the following as part of a settlement:

- Confidentiality – do not assume your client wants a confidentiality clause;
- Tax planning;
- Legal costs;
- Interest; and

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4 Rules of Professional Conduct, Rule 2.02(2).
- 8 -

- Release(s).

There may be other elements to the settlement, especially in complex commercial disputes. Make sure you have a checklist of the issues your client needs addressed in any settlement and ensure the minutes of settlement address all of those issues.

“Sewing Up”: Be Precise, but Don’t Argue About the Colour of the Thread

There are often three main documents that are integral to any settlement of a dispute: the minutes of settlement, the release and the dismissal motion record.

Negotiation of the minutes of settlement should be approached in the same manner that you negotiate any contract – what is written is important, and what is orally promised is not worth the paper its written on. Use templates with extreme caution – some elements of a settlement may appear to be boilerplate, but you should always be alert to the unique needs of a particular case and ensure the minutes address those needs.

For example: if it is your standard practice to insert a boilerplate confidentiality clause in your clients’ minutes of settlement, consider whether you want a limited “carve-out” from the clause to allow your client to say that the matter has been settled to their satisfaction. Or, if you represent the defendant and the matter is being dismissed with no payment of funds to the plaintiff, your client may not want to agree to a confidentiality clause, and they may not know to tell you that. Do not follow a template blindly.

Just like any other contract, once you have signed minutes of settlement, you have a deal.\(^5\) If the other party does not comply with the minutes, you can bring a motion under Rule

\[^5\text{Sometimes you have a deal before minutes are signed – see e.g., Hartslief v. Terra Nova Royalty, 2013 BCCA 417. But that is beyond the scope of this paper.}\]
49.09 for judgment on the terms of the offer or continue the proceeding as if there had been no accepted offer. Be careful! Your client’s response to non-compliance will be considered an irrevocable election in response to an alleged repudiation of a contract.⁶ If your client takes a step that is inconsistent with affirming the settlement, she will not be able to seek to affirm the settlement later if that is what she wished she had done.

Releases are often treated as boiler-plate. This is a common mistake. As counsel, your job is to make sure the release meets your clients’ needs in a particular dispute. Beware boilerplate releases that are either overly broad or too narrow.

If your client is the plaintiff and the defendant has made allegations of misconduct as part of her defence of the action or has pleaded a defence of set-off, you should insist on a mutual release.

For both releases and minutes of settlement, try to include clauses that allow for execution in counterparts and which specify that electronic copies are as enforceable as originals. This will allow you to distribute copies by PDF and avoids the need for original signatures on several copies of a document.

**Parties Under Disability**

If one of the parties to the settlement is under disability, the settlement will not be binding on that party without the approval of a judge.⁷ This rule applies whether or not a proceeding has been commenced in respect of the claim.

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⁶ See *Charter Building Company v. 1540957 Ontario Inc. (Mademoiselle Women’s Fitness & Day Spa)*, 2011 ONCA 487.

⁷ Rule 7.08(1) of the *Rules of Civil Procedure*.
Approval should be sought by way of a motion if it is being sought in a proceeding and by way of an application if no proceeding has been commenced in respect of the claim being settled.\textsuperscript{8} The motion or application materials must contain:

(a) a copy of the proposed minutes of settlement;

(b) an affidavit of the litigation guardian setting out the material facts and reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement;

(c) an affidavit of the lawyer acting for the litigation guardian setting out the lawyer’s position in respect of the proposed settlement; and

(d) the person under disability’s consent in writing if they are a minor over the age of 16 years, unless a judge orders otherwise.\textsuperscript{9}

\textbf{Conclusion re. Settlements}

It is said that over 95\% of civil litigation cases settle. Mastering the ability to effectively and efficiently “sew up” a case after the parties have agreed to terms is an important but sometimes undervalued talent. When the focus is on completing a settlement, counsel must be careful not to lost sight of the fact that they are still advocating for their client – the goal should always be to settle the case as efficiently and effectively as possible.

\textsuperscript{8} Rule 7.08(3).
\textsuperscript{9} Rule 7.08(4).
Pre-Trial Checklist

- Explain the pre-trial conference process to the client:
  - Part settlement conference, part trial preparation conference
  - Might involve lots of “down time” for the client
- Confirm client’s ability to attend before scheduling the date
  - Ensure the client/attending representative has full settlement authority or that someone with full authority is available by phone for the entire day
- Serve expert report(s) 90 days in advance, unless a different date is ordered by the Court
- Serve responding expert report(s) 60 days in advance, unless a different date is ordered by the Court
- Assemble the key documents and transcript excerpts you intend to include in your pre-trial memorandum brief
- Confirm your anticipated witnesses are available for trial
- Deliver the pre-trial memorandum brief 5 business days before the pre-trial conference
- Review the opposing party’s pre-trial memorandum with your client before the conference
- Review the pre-trial process with the client
- Discuss settlement strategies before the conference begins
- Discuss trial logistics with the client
- Pack snacks for you and your client in your court bag
- **NB:** “Before the conference” does **not** mean that morning. Use the morning of the conference for review, not to present information for the first time!
“Sewing Up” Checklist

- Minutes of Settlement signed by all parties
  - Specify if settlement funds include costs, interest, HST, other taxes or remittances (e.g. employment)
  - You might want to apportion funds for tax reasons
    - Costs vs. damages
    - Loss of goodwill (b/c capital, not income)
    - Retirement allowance (no source deductions)
- Release in a form agreed to by counsel, acting reasonably
  - Should you get/give a mutual release?
  - Non-disparagement clause?
- Confidentiality clause?
  - Not always – e.g. if action dismissed without costs
- Can be signed in counterparts? Electronic copies okay?
  - If it’s important, put it in writing!
- Finalize the release – review carefully!
- Direction re. funds – to your firm in trust or to someone other than the party to the proceeding?
- Hold your client’s signed release in escrow pending:
  - Payment of settlement funds (if to your client)
  - Written consent to dismissal (if your client is paying)
- If drafting the dismissal motion materials, ask counsel to:
  - Authorize you to consent on their client’s behalf
  - Authorize you to admit service on their behalf
- Send settlement docs to your client for their records, but keep a copy in your file in a separate folder
- Take opposing counsel out for lunch or coffee when it’s over
Civil Litigation Practice Basics 2016

Preparing for Trial and Post-Trial Issues

Dena Varah, Lenczner Slaght Royce Smith Griffin LLP

October 5, 2016
# Preparing for Trial and Post-Trial Issues

Dena Varah, Lenczner Slaght LLP

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Preparing for Trial and Post-Trial Issues
Dena Varah, Lenczner Slaght LLP

I. INTRODUCTION

The definition of litigation is to “engage in legal proceedings”. The ultimate stage of those proceedings is the trial, which all litigators must be prepared to participate in and excel at. The trial may be vanishing, but it is not yet vanished, and litigators who possess the skill, experience and fearlessness to be trial counsel are rare and valuable commodities.

This paper will address certain topics to assist you in preparing for trial. It is a practical guide to pre-trial steps and post-trial issues, but is by no means exhaustive. I hope that having a sense of these steps will provide some confidence when a trial approaches. Although strategic considerations are obviously crucial, procedural steps are tricky and uncertainty around them can cause significant stress.

II. DOCUMENTS

(a) Notices

There are two broad types of notices served prior to trial: requests to admit pursuant to the \textit{Rules of Civil Procedure} and notices pursuant to the \textit{Evidence Act}, R.S.O. 1990, c. E. 23.

(i) Requests to Admit

Rule 51.02 of the \textit{Rules of Civil Procedure} provides:

(1) A party may at any time, by serving a request to admit (Form 51A), request any other party to admit, for the purposes of the proceeding only, the truth of a fact or the authenticity of a document.

(2) A copy of any document mentioned in the request to admit shall, where practicable, be served with the request, unless a copy is already in the possession of the other party.

Rule 51 outlines the procedure for a party, at least 20 days before trial, to serve a request that any other party admit “the truth of a fact or the authenticity of a document”. According to the \textit{Rules}, its purpose is to limit the issues at a hearing by obtaining admissions on certain facts and documents. Counsel should keep this purpose in mind in serving and responding to requests to admit.
Requests for parties to admit facts should be tailored to obtain reasonable admissions that shorten the length of trial. Requests to admit should therefore not be an attempt to admit controversial facts through the inadvertence of opposing counsel. It is, unfortunately, not uncommon for counsel to serve 20 page requests to admit with controversial facts buried in subparagraphs. Facts that are central to the defence or prosecution of the matter will rarely be purposely admitted prior to trial.

A document that is admitted as authentic is not necessarily admissible. Authenticity means that a document has not been fraudulently altered or created. Admissibility will be determined at trial.1

Rule 51.03(1) provides that responses to requests to admit must be provided within 20 days. Where there is no response within 20 days, the request to admit is deemed to be admitted in its entirety.2

A party should carefully consider its response to a request to admit. Blanket denials of all facts and documents can result in adverse costs consequences. One of the criteria for fixing costs pursuant to Rule 58.06(1) is “a party’s denial of or refusal to admit anything that should have been admitted”. A denial does not require a reason, but a refusal to admit a fact or document does require explanation.3

(ii) Evidence Act Notices

Every litigator in Ontario should be intimately familiar with the Evidence Act and should understand the applicability of its notice rules. Sections 35 and 53 are applicable to a broad range of litigation.

Section 35

Section 35 outlines the procedure for tendering business records at trial. A party must provide at least seven days notice of its intention to tender business records. Business records are the exception to the rule of evidence that all documents must be proven in order to be admissible. Section 35 provides:

35. (1) In this section,

“business” includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise; (“entreprise”)

“record” includes any information that is recorded or stored by means of any device. (“document”) R.S.O. 1990, c. E.23, s. 35 (1).

1 Canpotex Ltd. v. Graham, (1985), 5 C.P.C. (2d) 233 (Ont. H.C.)
2 Rule 51.03(2). A party may bring a motion to withdraw an admission pursuant to Rule 51.05
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).

For a document to qualify under this section as an admissible business record, it must be a writing or record made of an “act, transaction, occurrence or event” that is “made in the usual and ordinary course of any business” where it is “usual and ordinary” for the business to make such a writing or record. There are therefore three essential criteria for a business record to become an admissible business record pursuant to section 35. There are several examples of business records that usually meet these three criteria, including accounting ledgers, banking records, board minutes and resolutions, nursing notes and financial statements.

A party must be vigilant both in preparing section 35 notices and in reviewing those notices received. A section 35 notice should never include all documents produced in the litigation. Although there is no formal mechanism to respond to section 35 notices, a party who disputes that the criteria for admissible business records have been met should voice its objection by letter prior to trial.

Section 52

Section 52 outlines the procedure for introducing the evidence of practitioners. This section is relevant in medical or personal injury case where the plaintiff has seen physicians who generate reports for trial, but calling each physician would be both expensive and unnecessary. A section 52 report generally contains a summary of the treating practitioner’s clinical notes and may also contain the practitioner’s opinion of the future care needs of the plaintiff. The provision does not permit the filing of reports on standard of care or causation.

Section 52 provides:

52. (1) In this section, “practitioner” means,

(a) a member of a College as defined in subsection 1 (1) of the Regulated Health Professions Act, 1991,

(b) a drugless practitioner registered under the Drugless Practitioners Act,

4 I am loathe to use the word never in a paper about civil trials, the very model of unpredictability, but I cannot conceive of modern day litigation where productions would not include emails, letters, consult notes or other documents that do not qualify as admissible business records pursuant to section 35.
(c) a person licensed or registered to practise in another part of Canada under an Act that is similar to an Act referred to in clause (a) or (b). R.S.O. 1990, c. E.23, s. 52 (1); 1998, c. 18, Sched. G, s. 50.

Medical reports

(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).

The procedural requirements to file the report are twofold: the party must serve notice of its intention to file the report and leave of the court must be granted. A party elects to either file the report or call the practitioner as a witness, but not both. As a matter of discretion, a court can grant leave to both file the report and call the practitioner, but this is the exception rather than the rule.

The courts have consistently ruled that the practitioner must be available for cross-examination but for exceptional circumstances that prevent the practitioner’s attendance.⁵

(b) Joint Document Books

It is often possible to short-circuit evidentiary issues by reaching an agreement on a joint document brief. The widespread use of the joint document brief should not be an excuse to ignore the rules listed above. Litigators need to understand the above rules, not only because there will be cases where a joint document brief is not possible, but also because the rules of evidence are crucial to determining the admissibility of documents contained in a joint document brief.

When parties compile a joint document brief, the parties must agree on the documents contained therein and the use the trial judge can make of those documents. Consider these questions:

(1) Are all the documents in the joint document brief both authentic and admissible or just the former?

(2) Are there any documents that are not admissible for the truth of their contents unless a witness is called to identify it?

(3) Are there any parts of documents that should not be admitted for the truth of their contents such as physician consult notes that contain statements that address standard of care or causation?

⁵ In addition to the practitioner being unavailable, the court must rule that the report contains information that is not otherwise available and that the timing of the preparation of the report is crucial to the court’s understanding of the case. Grammatico v. Medeiros Estates, [2012] O.J. No. 4361 (S.C.J.).
There questions should be considered by and discussed between counsel long before trial as lack of agreement may result in motions at the outset of trial or require the inclusion of witnesses who would not otherwise be called. Counsel must be clear on all areas of disagreement as the trial judge must understand at the outset of trial the use he or she can make of the documents.

III. TOPICS IN TRIAL PREPARATION

(a) Witnesses

The preparation of witnesses is a topic that warrants its own paper. It is a crucial and underdeveloped skill for trial counsel especially considering the consequences of the ill-prepared witness. It is not the law that will surprise at the trial, it is the witness who forgets the crucial meeting, readily admits his malevolence or revels in displaying his temper during cross-examination. These witnesses make even the most enthusiastic trial counsel dream of the quiet predictability of real estate law.\(^6\)

Counsel should try to meet with important witnesses well in advance of trial. Not only will this early meeting help re-immers the witness in the relevant events and documents, but it will assist counsel in determining areas of factual weaknesses and whether additional witnesses are necessary. It will also give witnesses a better sense of the trial process well in advance of the court date. Counsel must be mindful that most fact witnesses and even some experts are unfamiliar with the court process, the unpredictability of trial timing or even the setup of a courtroom. These procedural explanations will help ease (although rarely eliminate) the anxiety of inexperienced witnesses.

There are various ways to prepare witnesses. Although most trial counsel adopt a general practice for preparing witnesses, that practice will have to incorporate enough flexibility to account for the temperament of the witness, the testimony he or she is required to deliver and the complexity of the proceedings. There are several broad rules that are applicable to preparation of witnesses for all proceedings:

(a) Provide witnesses with all documentation that they will be required to review in their testimony. Include documentation that is likely to arise in cross-examination;

(b) Any witnesses examined for discovery must be instructed to carefully review their discovery evidence;

(c) Examination in Chief questions should be reviewed with the witness more than once and amended as a result of witness responses; and

(d) Witnesses should be prepared for potential cross examination topics.

\(^6\) I mean no offence to real estate lawyers, and I acknowledge there are times real estate law is neither quiet nor predictable. This was the best example I could find to illustrate my point.
If a witness is not a party or an expert, there are limitations imposed by an order excluding witnesses. Counsel cannot reveal testimony that has already been given during the course of trial to those witnesses.

**(b) Demonstrative Evidence**

Demonstrative evidence can be helpful in providing a visual explanation of complex matters. In medical or other science heavy cases, demonstrative is often critical in simplifying complicated expert evidence.

If counsel is considering introducing demonstrative evidence, it is of assistance to confer with opposing counsel to determine if there are any objections to the demonstrative aid your witness or expert will be producing. Objections can usually be dealt with prior to trial by adding simple words such as “diagram not drawn to scale.” It is always preferable to use a demonstrative aid that is uncontroversial so that the trier of fact can feel comfortable relying on it as authoritative.

**(c) Literature**

Literature can be used to buttress your experts’ opinion or to undermine the opinion of your opponent’s experts. Prior to trial, it is of assistance to have your expert perform literature searches to help find relevant articles or text books. Literature should be from authoritative sources, which include accepted medical textbooks or peer reviewed journals. If you are using literature to support your experts’ opinion, it should generally be included in his or her expert report.

Literature used on cross-examination need not be provided to opposing counsel before the cross-examination nor should it be. The use of literature in cross-examination is one of the few areas of civil litigation in which counsel can still rely on the element of surprise. The first requirement in cross-examining with literature is that an expert must acknowledge that the literature is from an authoritative source. If the expert will not acknowledge its authority, he or she cannot be cross-examined on that literature. If literature is taken from the sources described above, experts will not be able to credibly deny that it is authoritative.

**IV. POST TRIAL ISSUES**

**(a) Preparation of Formal Orders**

It is generally the party who has succeeded who will prepare the formal judgment. If a party is unsuccessful, and it is considering an appeal, it must be vigilant in ensuring that the formal judgment is taken out. An appeal cannot be perfected without a formal judgment.

The party preparing the formal judgment, should consider whether it is worthwhile to delay the judgment until the costs award can be included. This is practical if cost submissions and the decision on costs are expected on a relatively short time frame. If not, and an appeal is to be taken,
it may not be practical to delay formal judgment. The party preparing the formal judgment should obtain approval as to form and content from the opposing counsel.

(b) Preserving Appeal Rights

Trials are a zero sum game\(^7\). There is a winner and there is a loser, but the one who wins last, wins. As a result, trial counsel must embrace the role of appellate counsel or at least know to whom to refer their appeal cases. Preparation of appeal documents is a topic for another paper, but all trial counsel must understand how to preserve their client’s appeal rights.

The first question is whether your client wishes to appeal. Questions of appeal are often difficult ones that require careful analysis of the legal issues and the chances of success on appeal. Although counsel often does not want to carefully read unfavourable decisions, they must do so in order to provide advice to their clients relatively quickly.

Assuming your client does want to appeal, there is an appeal as a right from the final order of the Court. Parties have 30 days to appeal from the time the decision is released, even if the judgment is not issued or entered\(^8\). Leave is required for appeal of costs orders. Leave to appeal motions must be filed within 15 days after making of the order or decision\(^9\).

While matters are being appealed, monetary judgments are stayed, but judgment for non-monetary relief are not automatically stayed. To the extent that a stay is not automatic, parties may seek a stay from either the court appealed from or the court appealed to.

V. CONCLUSION

I hope that having a better grasp of the procedural steps and considerations will prepare you to tackle the engaging, unpredictable and always instructive civil trial.

\(^7\) Usually.
\(^8\) Rule 61.04 (1)
\(^9\) Rule 61.03.1
Expert Reports

Ellen Snow, Clyde & Co. Canada LLP

October 5, 2016
Expert Reports:
Civil Litigation Practice Basics 2016

Ellen M. Snow
Clyde & Co Canada LLP

Expert Evidence: An Overview

- Expert evidence is becoming increasingly more common place in actions, applications and on motions
Expert Evidence: An Overview

• Litigation has become more complex and can engage a myriad of issues from different disciplines

• Includes scientific and technological matters, accounting and valuation principles, foreign law issues and other specialized fields.

Expert Evidence: An Overview

• Experts are often necessary to assist triers of fact in understanding how to make sense of these kinds of issues to the extent that they touch on the matters they are required to adjudicate
Expert Evidence is Exceptional

• Opinion evidence is normally excluded and the ability to draw inferences is the sole province of the trier of fact


Expert Evidence is Exceptional

• Expert evidence may be adduced where: (i) specialized knowledge is needed to determine the implications from the bare facts; and (ii) where the trier of fact is not able to draw the necessary inferences unaided.
Expert Evidence is Exceptional

• Evidence has engendered a fair degree of controversy
• Typical concerns include:
  o Usurping the role of the trier of fact/Lack of necessity;
  o Increasing litigation costs;
  o The rise of the “witness for hire” phenomenon; and
  o Lack of independence from the retaining party.

When to Engage an Expert?

• Framework for determining whether to admit expert evidence set out in Mohan
  • The evidence must be relevant;
  • The evidence must be necessary to assist the trier of fact;
  • No exclusionary rule engaged; and
  • The evidence must come from a properly qualified expert.
When to Engage an Expert?

- Obviously case specific and no hard and fast rules for when experts are necessary.

- Expert evidence is necessary where the subject matter is such that ordinary people are unlikely to form a correct judgment about it without guidance from an expert.


When to Engage an Expert?

- Some examples where expert evidence has been tendered:
  - Medical malpractice/personal injury cases
  - Valuation of a business
  - Jurisdictional/forum challenges
  - Property damage cases
Selecting an Expert

• Potential resources to aid in identification:
  o Colleagues
  o Peers
  o Existing case law
  o Literature review or industry publications
  o Noted academics
  o Clients (with caution!)

Selecting an Expert

• Seasoned versus Novice Witness
  o Pros and cons of prior testimony
  o Different roles for counsel
Retaining an Expert

• Explaining the duties and obligations of an expert witness
• Key Point: The Expert is NOT an Advocate

Retaining an Expert

RULE 4.1 DUTY OF EXPERT

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert’s area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.
Retaining an Expert

Form 53 acknowledges this duty
1. My name is ______. I live in the City of _____, in the Province of _____.
2. I have been engaged by to provide evidence in relation to the above-noted court proceeding.
3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
   (a) to provide opinion evidence that is fair, objective and non-partisan;
   (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and
   (c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.
4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Retaining an Expert

• Other duties/obligations:
  o Potential disclosure of file
  o Non-destruction of documents
  o Confidentiality of documents and information received by mandate
Retaining an Expert

- Written Retainer Agreement
  - Facts and Assumptions on which the opinion is to be based
  - Question(s) for consideration clearly and neutrally framed
  - Summary of an expert's duties and a copy or summary of Form 53
  - Fee and billing considerations

Retaining an Expert

- Remember the retainer agreement is producible and subject to cross-examination!
  - Is there anything in it that could undermine the objectivity and independence of your expert?
  - If yes, redraft before you send!
Communication with Experts

• What is the appropriate scope of communication between counsel and a proposed expert?

Communication with Experts

• Thorny issue that courts have grappled with:
  o Can counsel have undocumented conversations with witnesses?
  o Are communications between the expert and counsel protected by privilege?
  o To what extent can or should counsel be involved in the preparation of the expert's report?
  o Are draft expert reports producible in the action?
Communications with Experts

• Clarification of these issues in Moore v. Getahun
  o Decision at first instance 2014 ONSC 237 (S.C.J.)
    o Medical malpractice case
    o Trial Judge found that communication between defence expert and counsel was improper
    o Counsel should have no role in the preparation of the expert’s report
    o Causes a stir in the legal community

Communications with Experts

• Moore v. Getahun 2015 ONCA 55
  o Court of Appeal disagrees with the Trial Judge on the scope of communication between experts and counsel
  o Collective sigh of relief from lawyers in Ontario
Communications with Experts

• Take away points from the Court of Appeal decision:
  o It is not improper for counsel and experts communicate prior to the delivery of the expert’s report
  o Consultation and collaboration is “essential” to ensure that expert witness understands their duties

Communications with Experts

• Counsel can appropriately review draft reports and have an obligation to:
  – Ensure the report complies with the Rules
  – Addresses and is restricted to relevant issues
  – Is written in a manner and style that is comprehensible including:
    • Clarification of facts and assumptions
    • Confining the report to the area of expertise
Communications with Experts

• Ethical and professional standards of the legal profession forbid counsel from engaging in practices that would interfere with the independence and objectivity of the expert
  o Endorsement of the Advocate’s Society’s *Principles Governing Communications with Testifying Experts* (Toronto: Advocates’ Society, 2014)
  o Nine Principles

Communications with Experts

• Draft reports and preparatory discussions are not presumptively producible in a proceeding
• Litigation privilege
• Open-ended inquiry into drafts increases cost and delay
Communications with Experts

• Litigation privilege is **qualified** and cannot be used to shield improper conduct

• Production will be ordered where party seeking it can show **reasonable grounds** to suspect that counsel communicated with an expert in a manner “**likely to interfere with the expert witness’ duties of independence and objectivity**”

Communications with Experts

• Production must be based on a factual foundation. Examples:
  – Where an expert admits that he did not draft the opinion and has an ongoing commercial relationship with the plaintiff
  – Where the witness has admitted to always being advocate for the client
  – Where the expert has tailored evidence to the client’s theory of the case
The Expert Report

• Prior to 2010, there was little guidance in the Rules of Civil Procedure as to when expert reports should be exchanged and/or what form they should take

• Amendments changed this

The Expert Report

• Timing of Delivery (Generally)
• Rule 53.03 now stipulates that:
  – A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference serve on every other party to the action a report
  – A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report
The Expert Report

Rule 53.03(2.1) stipulates that the 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.
The Expert Report

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.

7. An acknowledgement of expert’s duty (Form 53) signed by the expert.

The Expert Report

• Counsel’s level of involvement in the report:
  o Varies based on the specific facts
  o Scenarios where a more “hands on” role is appropriate
  o At minimum reviewing for compliance with Rules, rules of evidence, comprehension, clarity, etc.
The Expert Report

• Use of literature in the report
  o Entitled to rely on works of a general nature within their field of expertise to support his/her opinion
  o Technically hearsay; allowed to show the basis of the opinion, not the truth of the information
  o Deficiencies with the evidence will go to weight rather than admissibility

The Expert Report

• Caution when using and relying on literature:
  o must be disclosed to opposing parties per Rule 53.03
  o Ensure that any literature relied on is authoritative within the field
  o Thorough review and aware of any passages that undermine or contradict the expert’s evidence
Conclusion

• Organizing and overriding principle is that expert evidence is **not** to devolve into advocacy

• Principle should guide all interactions between counsel and experts

• Questions/Comments?