

PRE-TRIAL AND TRIAL PREPARATION

INTRODUCTION

This checklist on trial and pre-trial preparation has a general litigation focus and is not intended to address the unique considerations of specialized litigation such as matrimonial, personal injury, builders' lien, expropriation and other specialized proceedings where specific rules or practices have developed. Regardless of the nature of the case, do not treat the checklist as an absolute - add, subtract and modify depending upon the nature of the particular case.

LIST OF AUTHORITIES

See the following sources for more detailed treatment of trial preparation:

Huberman and Foti, *Civil Actions*, (Toronto: Carswell, 1995).

Manes & Edwards, *Organized Advocacy – A Manual for Practitioners*, (Toronto: Carswell, 1983).

McElhoney, *Winning Before Trial – Effective Pre-Trial Practice* (December 1989), Continuing Legal Education of Saskatchewan.

McKeague & Vorony, *The Queen's Bench Rules of Saskatchewan: Annotated* (out of print), (Regina: Law Society of Saskatchewan, 1998).

The Queen's Bench Rules of Saskatchewan, URL:

http://www.sasklawcourts.ca/default.asp?pg=qb_rules (accessed February 2007).

Salhany, *Preparation and Presentation of a Civil Action*, (Toronto: LexisNexis, 2000).

Smith, *Professional Conduct for Canadian Lawyers*, (Toronto: Butterworths, 1989)

- especially Chapters 6 and 7.

Sopinka, Houston & Sopinka, *The Trial of An Action*, 2nd Edition (Toronto: LexisNexis, 1998).

CONTENTS

A.	Post-Discovery Steps	L-2-2
B.	Re-Assessment After Discovery	L-2-2
C.	Building The Trial Brief	L-2-3
D.	Ordinary Witnesses	L-2-4
E.	Expert Witnesses.....	L-2-5
F.	Documents	L-2-7
G.	Damages.....	L-2-8
H.	Re-Assessment.....	L-2-8
I.	Pre-Trial	L-2-9
J.	Final Preparation.....	L-2-10

Notes:

CHECKLIST**A. POST-DISCOVERY STEPS**

1. Review responses to undertakings to ensure they are responsive and complete.
2. Review refusals and assess whether necessary to pursue.
3. Consider whether order for inspection, detention or preservation of property or materials is appropriate: Rule 390.
4. Consider whether there is a need to make application for production of third party documents: Rule 236.
5. Consider whether it is necessary to examine for discovery third party: Rule 222A.

B. RE-ASSESSMENT AFTER DISCOVERY

1. Review pleadings to determine whether they are appropriate to deal with any new factual or legal issues identified during discoveries.
2. Consider whether amendment to pleadings is necessary to permit investigation of new issues identified during discovery.
3. Re-assess with client the issues, objectives, problems, potential outcome and cost/benefit of litigation in light of what was learned during discovery.
4. Assist client with making decision of whether to proceed with litigation or to seek alternatives.
5. Consider alternative approaches such as:
 - 5.1 Negotiated settlement.
 - 5.2 Summary judgment.
 - 5.3 Application to determine point of law: Rule 188.
 - 5.4 Submission of stated case.
6. Initiate settlement discussions or prepare and serve offer to settle.

Notes:

C. BUILDING THE TRIAL BRIEF

1. Reduce to writing a conceptual over-view or trial plan which identifies:
 - 1.1 Legal issues to be addressed.
 - 1.2 Essential facts to be proven.
 - 1.3 Significant factual positions of opponent to be countered.
 - 1.4 Evidence/witnesses to prove your affirmatives.
 - 1.5 Potential rebuttal evidence or witnesses.
 - 1.6 Damage issues and proof.
2. If not already done, prepare memorandum of law on each legal issue identified.
3. Review discovery of opposing party with combined objectives of:
 - 3.1 Indexing by topic.
 - 3.2 Identifying favourable admissions.
 - 3.3 Identifying evidence to be rebutted at trial.
 - 3.4 Summarizing the evidence. If litigation software is used, consider reproducing significant evidence on selected topics.
4. Review discoveries of your client with combined objectives of:
 - 4.1 Summarizing the evidence your client can give.
 - 4.2 Identifying admissions favourable to other side and impact.
 - 4.3 Identifying areas where evidence from others will be necessary to buttress your client's evidence.
5. Prepare or update a master brief (utilizing paras. C.3 and C.4 above) which states facts in detail utilizing:
 - 5.1 Chronological format, unless there are overriding reasons to depart from it.
 - 5.2 References to relevant documents at each stage.
6. When discovery reviews and master brief are completed, revisit and amend or expand trial plan.

Notes:

7. Reconsider whether it is necessary or appropriate to:
 - 7.1 Make application for production of documents in possession of third party.
 - 7.2 Seek leave to examine non-party: Rule 222.
8. Consider whether it is necessary or appropriate to obtain order of court:
 - 8.1 To take evidence of person within jurisdiction to perpetuate it.
 - 8.2 To take, by way of affidavit, deposition or interrogatories (Rules 284 and 289), the evidence of persons whose attendance at trial cannot be enforced.

D. ORDINARY WITNESSES

1. Identify all intended or potential witnesses.
2. Prepare or extract from master brief or discoveries, a summary of known facts or evidence relevant to each witness.
3. Prepare set of documents which may be relevant to each witness.
4. Consider who will interview, or attempt to interview, prospective witnesses bearing in mind that if you interview alone and witness changes the story at trial, you will have no way of cross-examining on this. Consider having investigator or paralegal conduct interview if appropriate.
5. Contact potential witnesses to arrange interviews. If refusal, consider sending written request noting refusal and, where appropriate, consider resort to Rule 222A.
6. Prepare for interview:
 - 6.1 Review pleadings and issues.
 - 6.2 Review paragraphs D. 2 and D. 3 above together with any previous statements made by witness.
 - 6.3 Prepare outline of topics to cover.
 - 6.4 If not conducting interview yourself, brief interviewer.
7. Interview or examine witnesses. Interview/examiner should:
 - 7.1 Review known facts or evidence with witness.
 - 7.2 Review relevant documents with witness.
 - 7.3 Get witness's version or interpretations with respect to 7.1 and 7.2.

Notes:

- 7.4 Obtain witness's briefing on any new or related evidence.
- 7.5 Find out if witness has made any previous statements and attempt to obtain copy.
- 7.6 Try to identify other potential witnesses.
- 8. After each witness interview prepare:
 - 8.1 Typewritten statement or witness brief.
 - 8.2 Record assessment of person's strength and weaknesses as a witness.
 - 8.3 Consider sending brief or statement to witness to review, confirm, correct and sign.
- 9. Consider interviewing anticipated witnesses for opposing party. Note you cannot speak to opposing party without counsel's permission and you should not contact opposing parties' experts without giving notice to opposing party's solicitor so that solicitor may advise his or her experts on matters which are covered by legal privilege which expert may not disclose.
- 10. Prepare witness contact sheet with names, addresses, telephone numbers and fax numbers of all witnesses and potential witnesses for easy reference in your trial book.

E. EXPERT WITNESSES

- 1. Consider, if you have not already done so, the need for expert witness:
 - 1.1 Identify appropriate experts.
 - 1.2 Discuss expert's fees with client, including who is responsible for expert's account.
- 2. Select and conduct initial interviews with experts in which you:
 - 2.1 Discuss expert's qualifications, publications and court experience.
 - 2.2 Discuss case and issues.
 - 2.3 Define issues on which opinion is required.
 - 2.4 State for expert those facts which will be proven at trial (or assumptions to be made) and upon which his or her opinion will be sought.

Notes:

- 2.5 Attempt to obtain preliminary expression of opinion before actually engaging expert to conduct investigation and prepare report.
- 2.6 Get estimate of fees and set clear parameters as to what can be charged. Make arrangements regarding payment, including who will be responsible for expert's account (you or your client).
3. When expert is selected:
 - 3.1 Discuss expert's role in the case. Ensure expert understands he or she is not advocate nor finder of fact but is to provide independent and objective expert evidence in respect of particular fact situation.
 - 3.2 Make sure expert knows he or she will be cross-examined and may be compelled to produce his or her entire file. Carefully consider what should be in expert's file. Inform of possibility of being served with subpoena and discuss privilege. Advise expert that opposing counsel should not contact him or her without giving you notice so that you may advise expert which matters are covered by privilege.
 - 3.3 Ensure expert has all relevant facts, documents and report.
 - 3.4 Obtain suggestions for reading which will improve your knowledge of area.
 - 3.5 Determine whether other experts will be needed.
 - 3.6 Assess expert's strengths and weaknesses as witness.
 - 3.7 If it is intended to use report, discuss form and content of report.
4. Obtain report and review it with expert in detail, considering how it will affect your case. Cross-examine on it.
5. Remember draft reports in expert's file may end up being produced. Therefore, ensure expert has facts and assumptions straight to start with. Preferably have expert discuss his or her report and opinions with you before reducing to writing.
6. Obtain expert's curriculum vitae.
7. Add expert's address, telephone and fax numbers to witness contact sheet.

Notes:

F. DOCUMENTS

1. Public documents: consider what public documents will be necessary to be filed as proof or evidence and:
 - 1.1 Obtain certified or other verified forms of:
 - 1.1.1 Land Titles documents.
 - 1.1.2 Personal Property Registry searches.
 - 1.1.3 Court documents.
 - 1.1.4 Other public documents.
 - 1.2 Ensure that each can be used as proof without more pursuant to ss. 4 - 26 of Saskatchewan Evidence Act or equivalent of Canada Evidence Act.
 - 1.3 Place in specific file so they are available when needed.
2. Private documents: in respect of documents produced by party or third parties:
 - 2.1 Ensure that exhibit numbers on documents are transposed into party's statement as to documents and that statement as to documents numbers are transposed into witness list so that documents can be quickly identified in either direction.
 - 2.2 Organize all documents produced and classify them into three categories consisting of:
 - 2.2.1 Documents that will likely be exhibited at trial - have your assistant extract original or exhibited copy into separate file/binder (leaving photocopy behind in the original set) sorted in chronological order or by topic.
 - 2.2.2 Documents that potentially may be of significance - index as to facts or issue.
 - 2.2.3 Documents that will likely be of no significance.
3. Proof of documents.
 - 3.1 In respect of public documents, determine whether they can be proven as public, official or court documents (See *Saskatchewan Evidence Act*) or whether witness is required.

Notes:

- 3.2 In respect of private documents, determine whether document can be proven:
 - 3.2.1 By admissions from discovery.
 - 3.2.2 By evidence of your client or third party witness.
 - 3.2.3 As business record (*Saskatchewan Evidence Act*, s. 31).
4. Prepare list of those specific documents that are not susceptible to proof in routine manner as per para. F.3 above and decide what steps will be taken for proof.

G. DAMAGES

1. Consider approaches to proof of damage including:
 - 1.1 Have your client or appropriate witness prepare up-to-date calculation of damages. When defending claim for damages, do your own assessment of damages based upon evidence at discovery.
 - 1.2 Restate client's calculations into heads of damage consistent with law regarding damages.
 - 1.3 Identify witness/evidence by which each damage element will be proven.
 - 1.4 Consider basis upon which to attack each head or particular of damage you face.
 - 1.5 Incorporate damage issues into your trial plan.

H. RE-ASSESSMENT

1. Once again, re-assess prospects for case with your client.
2. If you have not already done so, consider preparing and serving Part XIV Offer of Settlement well before moving to pre-trial.
3. In Offer to Settle, ensure that:
 - 3.1 It addresses issue of costs.
 - 3.2 It specifies that it is open for acceptance until judgment is delivered unless first withdrawn.

Notes:

I. PRE-TRIAL

1. When all of the above are complete, call for pre-trial conference in accordance with Rule 191.
2. If you cannot obtain joint request for pre-trial conference, proceed to have date fixed pursuant to Rule 191(9A).
3. Serve and file pre-trial brief at least ten days before assigned date in format contemplated by Rule 191(3).
4. To this end, use materials assembled in your trial book to:
 - 4.1 Prepare summary of relevant facts.
 - 4.2 Identify issues and applicable law.
 - 4.3 Assemble documents for pre-trial judge.
5. Ensure client is advised in advance of:
 - 5.1 Pre-trial date.
 - 5.2 Necessity for his or her attendance.
 - 5.3 Pre-trial conference process, its objectives, opportunities it presents and strategies that will be adopted.
6. In respect of appraisal and medical reports:
 - 6.1 File and serve copy of any appraisal, medical, dental or chiropractic report that you intend to rely on at trial together with qualifications of expert at least ten days prior to pre-trial.
 - 6.2 Pursuant to Rule 284C, such a report is admissible in evidence at trial without more unless other party gives notice of need to call that expert not less than ten days prior to commencement date of trial. Attempt to determine at pre-trial whether you will be required to call that expert at trial.
 - 6.3 In respect of medical, dental or chiropractic report, consider whether it would be appropriate to ask at pre-trial for order that subject submit to examination by independent party.
7. In respect of other expert witnesses:
 - 7.1 Serve and file, not less than ten days before pre-trial, a report setting out name, address and qualifications of expert, substance of proposed testimony and copy of any written report intended to used at evidence: Rule 284D.

Notes:

- 7.2 When served with such expert report, attempt to get other party to indicate at pre-trial whether they will be calling rebuttal expert: see Rule 284D(3).
- 7.3 With respect to actuarial evidence, note Rule 284B.
- 8. At and after pre-trial:
 - 8.1 Re-assess with your clients your prospects in light of what you have learned.
 - 8.2 Modify your offer to settle, if appropriate.
 - 8.3 Follow-up with Registrar to fix trial date.
 - 8.4 Consider whether to give a demand for jury trial. Under Rule 196, this is to be made before Registrar has assigned a date.
 - 8.5 As soon as trial date is fixed, advise, in writing, of trial dates:
 - 8.5.1 Your client.
 - 8.5.2 Potential witnesses.
 - 8.5.3 Experts.
- 9. Consider whether appointment of assessor to assist trial judge would be appropriate.

J. FINAL PREPARATION

- 1. Update all aspects of trial book including:
 - 1.1 Master brief.
 - 1.2 Witnesses briefs.
 - 1.3 Documents to prove.
 - 1.4 Briefs of law.
- 2. Prepare briefs on any anticipated evidentiary issues.
- 3. Attempt to reach agreement with opposing counsel regarding documents (e.g. for purposes of trial, it will be deemed that documents were sent and received by persons named therein, that those persons had authority to send and receive, business records were prepared in normal course of business, that copies may be used, etc.).
- 4. Attempt to agree on joint book of documents.

Notes:

5. Pursue agreed statements of fact.
6. Notice to Admit: If unable to reach agreement, prepare and have available to serve, various notices including:
 - 6.1 Notice to Admit Documents: Rule 242. Do this in respect of all documents which opposing party has declined to admit on discovery or by agreement. Prepare and serve at least ten days before trial.
 - 6.2 If served with Notice to Admit Documents, remember that unless notice to challenge authenticity is served within six days, you are prima facie deemed to have admitted it.
 - 6.3 Notice to Admit Facts (Rule 244) in respect of any specific facts which you assess as being capable of proof but which other party has failed to agree to. In this respect:
 - 6.3.1 You must serve Notice at least ten days prior to trial.
 - 6.3.2 If served with Notice to Admit Facts, give admission of those facts which you expect to be proven within six days prior to date of trial or you may have to bear cost of the proof in any event of the cause.
 - 6.4 Notice to Produce Documents (Rule 248) in respect of any specific documents from opposing side that you may require which are not subject to agreement.
 - 6.5 Notice and Report in respect of any rebuttal expert you intend to call pursuant to Rule 284D(3).
7. Documents:
 - 7.1 Ensure that any late discovered documents are produced to other side. Failure to give notice later than ten days before trial may result in inability to use or cost penalty under Rule 218.
 - 7.2 Serve a subpoena duces tecum with conduct money in respect of documents that need to be obtained from third parties.
8. Serve subpoenas *ad testificandum* together with appropriate conduct money on all witnesses, whether friendly or not. If they are to testify in respect of documents in their possession, serve a subpoena *duces tecum*: Rule 233.

Notes:

9. In event that you intend to present evidence taken in another cause or matter, give two days' notice to other party of your intention to read such evidence: Rule 285.
10. Make appropriate arrangements for:
 - 10.1 Presentation of telephone or audio-visual evidence: Rule 284A.
 - 10.2 Court reporter at trial, if required.
 - 10.3 Interpreter, if required. (This is responsibility of examining party: Rule 293).
 - 10.4 View. Advise court and opposing counsel in advance and attempt to work out arrangements.
11. Factual witnesses:
 - 11.1 In respect of those persons who will be witnesses:
 - 11.1.1 Review with them your witness brief.
 - 11.1.2 Advise them of areas you intend to examine on and go over some sample questions of examination and cross-examination.
 - 11.1.3 Discuss court room procedure, how to dress, how to answer questions - consider providing them with brief written review for ease of reference.
 - 11.1.4 Attempt to schedule specific time and make arrangements to contact on short notice to facilitate their schedule.
 - 11.1.5 Ensure that your witness information re: telephone numbers and other means of contact are current.
12. Expert witnesses:
 - 12.1 In respect of expert witnesses:
 - 12.1.1 Review their report and ensure that it is still current in light of all knowledge obtained.
 - 12.1.2 Share any rebuttal report obtained and ask expert to brief you on that including assessment of points made.
 - 12.1.3 Advise of manner on which you intend to present evidence and go over examination questions and sample cross-examination questions.

Notes:

- 12.1.4 If expert is inexperienced as witness, discuss court room procedure, how to dress, how to answer questions and consider providing appropriate written guide.
 - 12.1.5 Ensure that timing, travel and other arrangements are made.
 - 12.1.6 Ensure that your contact addresses and telephone numbers are current.
13. Finalize trial book including:
- 13.1 Reviewing and ensuring completeness of your trial brief.
 - 13.2 Ensure proof of each document to be exhibited is available by agreement, admission or witness and appropriate copies are available for judge, witness and opposing counsel.
 - 13.3 Prepare list of questions from examination for discovery to be read into record with copies for judge and opposing counsel. Consider actually printing out those extracts utilizing litigation support software to make judge's job easier.
 - 13.4 Prepare list of witnesses in order you intend to call them.
 - 13.5 Prepare layperson's glossary of any technical terms that will be used and have copies available.
 - 13.6 Prepare outline of examinations-in-chief.
 - 13.7 Prepare concepts and assemble necessary references for anticipated cross-examinations.
 - 13.8 Ensure you have briefs of law on anticipated evidentiary issues.
 - 13.9 Update legal authorities referred to in your pre-trial brief and modify legal argument from pre-trial brief into legal argument for trial.
 - 13.10 Prepare opening address and consider closing address if appropriate.

Notes:

Notes: