Preparation for Trial and Procedural Tips

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Preparation for Trial and Procedural Tips

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A. Introduction

This paper seeks to provide practical tips on trial preparation beginning with developing a theory of the case, to the importance of generating a case-specific checklist, to interviewing and preparing witnesses, and understanding evidence.

B. Theory

1. Theory Derived from Facts

Theory identification occurs early in trial preparation. By the time pleadings are submitted, the theme and theory of the case should be identified. The "theory and theme, properly conceived, will give...a basis for structuring every phrase of the trial in a coherent and conceptually tight fashion".[1] Here, intimate knowledge of the facts of your case will help develop a persuasive theory[2] that provides the basis for the case.

A theory should be a succinct and persuasive statement of the facts and legal issues that militates towards a conclusion in favour of your client.[3] Ideally, a successful theory (1) is logical; (2) speaks to the legal elements of the case; (3) is simple; (4) and is believable.[4]

First, a theory is logical when it is based on either agreed-upon facts or facts that are provable and where the facts drive a conclusion. These facts must not contradict each other; rather they should work together to strengthen the argument and lead logically to each other towards a

[1] Edward Imwinkelried, "The Development of Professional Judgment in Law School Litigation Courses: The Concepts of Trial Theory and Theme" (1986) 39 Vand. L. Rev. 59.
[2] Steven Lubet, "The Trial as a Persuasive Story" (1990-1991) 14 Am. J. Trial Advoc. 77.
[3] *Ibid.* at 87.
[4] *Ibid.*

single conclusion.[5]

Second, a theory speaks to the legal elements of the case when it establishes that the law provides to your client an entitlement to relief. Identification, then, of the legal elements of the case becomes paramount, and the theory works to prove each legal element.[6]

Third, a theory is simple when it relies on undisputed facts rather than evidence that is difficult to prove or contentious.[7]

Finally, a theory is easy to believe when it accords with every day experience and avoids the need for harsh judgment. Increasing believability means removing from the theory arguments that depend upon personal attack or deception and focusing, instead, on the more plausible elements of the theory.[8]

2. Theory Directs Choices

The theory of your case, derived from the facts available, also animates the choices made in the course of the trial preparation. For instance, your theory will inform your need and choices of using witnesses, acquiring expert witnesses, interviewing your client, and investigating or fact-gathering.[9] Early development of your theory can also provide certain advantages in trial preparation. For example, with your theory in mind, you can word requests for admissions in a way that causes opposing counsel to "unwittingly stipulate facts beyond change that will greatly enhance the advocate's theory of the case".[10]

3. Development and Use of a Theory

I develop the theory of my case at an early stage. Once I have performed my intake interview

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[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*
[9] Binny Miller, "Teaching Case Theory" (2002-2003) 9 Clinical L. Rev. 293 at 297.
[10] Larry S Pozner and Roger J Dodd, *Cross Examination: Science and Techniques*, 2d ed (San Francisco: Lexis Nexis Matthew Bender, 2004) at 2.43.

with the client and am retained, I take the client's complaint and research all potential causes of action. Usually, the theory is discussed with the client during the first comprehensive meeting and only changed if the research does not support the theory, or the causes of action change from my initial analysis.

I draft my pleading with the theory of the case in mind. At this early stage, I have a preliminary idea of who will give evidence on what issues. Identifying who will provide evidence sets the basis for the recommendation to the client whether to proceed with litigation. For example, in a case where the witnesses would be hostile witnesses (i.e., an employment dispute on behalf of a terminated employee), understanding the theory will help illuminate the issues the client has to overcome.

Early development of the theory also assists with identifying relevant documents, which may be either supportive or detrimental to the theory of the case. The theme of a consistent theory is useful not only at examination for discovery, but also through trial.

Finally, a theory proves useful for all stages of the pre-trial process to the trial. It is important to remember that trial is far different from examination for discovery. Instead of one witness attesting to issues that are not within the scope of his or her personal knowledge, the trial requires a series of witnesses, each restricted to his or her personal knowledge, unless there is an exception to hearsay. A solid theory will ensure that when the case changes from pre-trial to trial, the witnesses all speak about some aspect of the evidence, however limited, that advances the theory of the case.

C. Checklist

1. Checklists in Aviation, Medicine, and Law

While some might reject the use of a checklist as being too limited or facile, the initial success of a viable checklist has led to its daily use in aviation to reduce pilot error. Its demonstrated

success has also led to its recent importation within the field of medicine,[11, 12] and its success there supports the continued and extensive use of checklists in trials.

The aviation industry's extensive experience with checklists is designed to limit pilot error at key points such as prior to takeoff and landing as well as in emergency situations by enabling flight crew to confirm key decision making or tasks that need to be accomplished at the appropriate time.[13]

These standardized checklists, more than identifying tasks at appropriate timing, permit modification based on feedback following implementation.[14] The checklists, once standardized, are further modified at a local level based on the needs of specific companies.[15] Of utmost importance in the checklist is to maintain the "focus, brevity, and action-oriented steps that make a checklist workable".[16]

Rather than a wholesale importation of the aviation checklist principles into medicine, relevant principles have been identified and refined to create checklists specific to the medical area in question.[17] For instance, checklists have been implemented on a large scale by the World Health Organization to improve surgical safety.[18] They have also been suggested in areas of internal medicine.[19]

Similarly, rather than a wholesale importation of checklists from other industries, devising a general checklist and modifying it for specific cases can simplify trial preparation. The ability of

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[11] A Gawande, *The Checklist Manifesto: How to Get Things Right*, (New York: Metropolitan Books, Holt and Company, 2009).
[12] Thomas G. Weiser, et. al., "Perspectives in quality: designing the WHO Surgical Safety Checklist" (August 2010) Int'l J Qual Health Care; 22:5 at 365.
[13] *Ibid.* at 367.
[14] *Ibid.*
[15] *Ibid.*
[16] T Turner, *Controlling Pilot Error: Checklists & Compliance* (New York: McGraw-Hill Professional, 2001).
[17] *Supra* note 11.
[18] *Ibid.*
[19] S Gorter, et al., "Developing case-specific checklists for standardized-patient-based assessments in internal medicine: A review of the literature" (November 2000) Acad Med; 75(11) at 1130.

checklists to distill complex and detailed information into simple manageable tasks places it in a central role for trial preparation. A checklist should be used not as an afterthought, but as a reference source to organize case management and to ensure that a large trial team works together as a cohesive unit. Some deadlines, if missed, can be fatal to easy litigation of a trial.

2. Sample Checklists

Appended to this paper is a sample checklist used in trial preparation. The checklist is a sample because different organization methods can be used to determine the next step in trial preparation. For instance, similar to an aviation checklist, the trial checklist can be written in a chronological fashion to identify in order which next step should be addressed.

However, these orderings can be grouped by subject for logical associations. In the attached sample in Appendix A, the subject headings identify specific tasks in relation the client, the pleading, the examination of discovery, the witnesses and other aspects of trial preparation.

Alternatively, the checklist can be modified with timelines that indicate when the task indicated should be completed. For instance, if you are following simplified procedure, you could indicate in your checklist that the affidavit of documents must be filed within ten days of receiving the statement of defence.

When working in a trial team, it is also useful to assign the person scheduled to the specific task to ensure accountability for that particular task. Checklists can help manage timelines and enable you to simplify a large amount of material. While general checklists can be obtained from handbooks and resources, the checklist must be modified for each particular case.

3. Modifying the Checklist

Unlike in aviation where each pre-flight check, though extensive, is completed within a short time-frame, and in medicine where the surgical checklist may be completed within 90 seconds

of ensuring the pre-surgery set-up is appropriately completed, the legal checklist has its own special needs. The checklist envisioned, and the samples attached, contemplate a timeline of weeks or months. Thus, the checklist drafted at the beginning of the trial preparation may not resemble the checklist used by the completion of the trial. The checklist, tailored to your specific case, will need to undergo modification as the preparation progresses. Constant updating of the checklist, however, will ensure the timelines and tasks are managed.

D. Witness Interviews and Preparation

1. Protecting Privilege

When you interview every potential witness that may assist your client, ensure that you record the witness's statements either in writing (by taking notes) or by recording the witness. It is trite but true that there is no ownership in a witness, and a witness who knows he or she is recorded can reveal this information to opposing counsel. However, your notes recording the witness's statements, if taken by a lawyer after litigation is commenced, can be treated as litigation privilege. Therefore, take care to ensure that witness statements retain the protection of litigation privilege.

In some cases, a witness statement is provided to the witness for signature. A signed witness statement increases the risk that the statement will be compelled for production to opposing counsel. However, this statement may be beneficial if you are more concerned that a witness will change his or her evidence. To protect solicitor-client privilege, I do not take witness statements of my client, nor of any representatives of my client.

2. Witness Statements

Signed witness statements may be used to refresh the memory of the potential witness when, or even if, the trial takes place, which could be months later. In my experience, these signed statements more often serve as excellent protection for trial counsel since witnesses' stories

change. Therefore, the requirement to change a strategy based upon a changed witness statement can be explained to a client when the witness changes his or her story.

Obtaining witness statements close to the event in question helps deflect criticism that the written statement is not an accurate reflection of the witness's memory given the lapse of time between the event and the statement.[20] In addition, ensure you do not act as a witness for these statements personally because if the potential witness changes her statement, you may find yourself a witness in your client's case.

3. Protecting Privilege for Examinations for Discovery

Take steps to preserve privilege during examinations for discovery. Rule 31.06(1) and (2) of the *Rules of Civil Procedure*[21], enacted to facilitate early disclosure, together function to encourage settlement and prevent surprises during trial. While Rule 31.06(2) explicitly requires the disclosure of the name and address of potential witnesses, Rule 31.06(1) has been interpreted to require a deponent to summarize her understanding of the substance of the potential witnesses' knowledge when asked.[22]

Although the deponent's expectation to summarize a potential witness's knowledge is limited to her own understanding of that knowledge, that obligation may expand to inform herself of that person's knowledge if that person is not equally accessible to the opposing party. Thus, when you are acting for the deponent, take steps to maintain privilege. This is done by ensuring your deponent is well-prepared by having the requisite knowledge and refraining from disclosing privileged information.[23] One way to prevent disclosure of privileged information is instructing your deponent not to bring any documents to the discovery other than those set out in Schedule

[20] Roger E. Salhany, *Preparation and Presentation of a Civil Action* (Toronto: Butterworths, 2009) at 5.
[21] R.R.O. 1990, Reg. 194.
[22] See *Dionisopolous v. Provias* (1990), 71 O.R. (2d) 547 (H.C.J.) (stating that a party may be required upon request to summarize the expected knowledge of certain persons).
[23] Heather C. Devine & Eric Rockefeller, "What Others Know About Your Client's Case: What You (Maybe) Have to Tell Opposing Counsel and How to Go About it" (2013) HLA 8th Annual Commercial Litigation Seminar*, publication pending.*

"A" to the deponent's Affidavit of Documents. In particular, ensure your deponent does not bring to the discovery any documents designated as "Privileged".[24]

Another way to prevent your deponent from disclosing privileged information is to limit her knowledge of privileged information and to bring as much information as possible under privilege. This can be done by you conducting witness interviews in the absence of your deponent and controlling your deponent's contact with others having knowledge of the matters in action.[25] However, if your deponent is obligated to inform herself prior to her examination and you are unable to personally conduct an interview, provide to your deponent specific and directed questions that attempt to prevent your deponent from learning irrelevant information.[26] This way, relevant information can be appropriately revealed without destroying privilege.

Continue to protect privilege during examination by guarding against opposing counsel's overreaching questions. Although your deponent may be required to provide a full summary, your deponent need not make assumptions about the information to which the opposing party is entitled nor should your deponent speculate about the knowledge of the person in question. Thus, if opposing counsel fails to narrow her questioning, consider refusing such questions where appropriate.[27] Finally, if the merits of your case justify full and voluntary disclosure of your deponent's summary before the expenses of discoveries is incurred, consider speaking with your deponent in detail, obtaining a full account of her first-hand knowledge only, and present it opposing counsel in a persuasive way either prior to examination or in the discovery plan.[28]

[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*
[27] However, be aware that improper refusal may result in opposing counsel seeking an order requiring a written summary with costs of obtaining same awarded against your client. *Ibid.*
[28] *Ibid.*

4. Expert Witness

If an expert witness is needed, you may obtain references for such experts from colleagues or senior members of the bar.[29] Alternatively, if the litigation concerns a specialized field, your client may know experts in the field who offer the appropriate expertise. In any case, it is your responsibility to ensure the expert can be qualified by you as an expert at trial and you must anticipate that opposing counsel will seek to limit or disqualify his or her expertise.

When choosing an expert witness, inquire whether the expert witness has testified in court before and inquire appropriately regarding the general impression of the judiciary with that expert witness. It is imperative that if the expert has provided testimony in a case, you find and read the case.

The reasoning in the judgment could provide guidance on the court's opinion of the expert witness such as the witness's credibility, impartiality, or reliability.[30] If the judgment provides an unfavourable comment regarding the expert, avoid the expert or ask the expert to distinguish the comment in his or her report. You cannot hope that the other side will not find the unfavourable comment; instead, anticipate the other side will find the comment, and provide your expert with the grounds to defend his or her position in the report.

The role of the expert witness is to assist the court, not to appear as an advocate. Thus, take care in using expert witnesses who routinely and solely provide evidence for the defence or plaintiff.[31]

Finally, ensure the expert witness will present well in court. An expert may, indeed, be an expert in the relevant field but may lack the necessary skills to communicate answers clearly or

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[29] *Supra* note 20 at 7.
[30] *Ibid*.
[31] *Ibid*.

in plain language.[32] Make sure you take the time to prepare your expert and role play both examination-in-chief and cross-examination.

5. Witness Preparation

Not every witness interviewed should be used as a witness in trial.[33] Rather, focus on finding a witness who is helpful to your client's case and not one who fails under the pressure of cross-examination. This process can be started early at the interview stage where you record your opinion of what type of impression the witness may make during trial.[34] I always communicate this information to the client to enable the client to assess whether to proceed with a trial or to encourage settlement.

Even a witness who presents well will benefit from preparation for a courtroom setting. Meet with your witness individually and review the evidence. Prepare the witness for not only the examination-in-chief, but the cross-examination. Emphasize the importance of answering only the question asked and not over-explaining. To ensure the question asked is the one answered, remind the witness to wait until the complete question is asked before answering. Finally, remind your witnesses to be respectful.[35]

It is useful to video record a witness in both examination-in-chief and cross-examination and to subsequently review the video with the witness. Often, advice given before the video is not followed; however, when the witness watches the effect of fidgeting, head bobbing or argument, it becomes clear to the witness that this behaviour is unfavourable.

These same preparation tips apply for expert witnesses. Clear communication unobstructed by technical language can help translate an expert's point. In preparing the witness to provide

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[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*
[35] See generally *Ibid.* at 84.

such expertise, ensure that you also understand what the expert is saying. Finally, help the expert help you. Ask the expert to provide you with potential issues with her testimony so you can address them during the preparation phase rather than when faced with them for the first time during cross-examination.[36]

E. Evidence

This issue will only be briefly addressed since it is being discussed in detail in a later session on this same date. In calling witnesses to testify, do not call multiple witnesses to make the same point. Rather, choose one effective witness.[37]

In preparing that witness prior to trial, review with the witness the evidence in detail. Conduct a practice of the examination that will take place in court, asking the witness every question and have the witness respond. In addition, subject the witness to a practice cross-examination to ensure the witness is prepared for potential questions. However, in doing so, do not provide to the witness the answer that should be given.[38]

The purpose of preparing the witness is to ensure the witness provides a clear and full answer to the question posed, and the answer is, indeed, the witness's answer.[39] At all times, emphasize to the witness the importance of telling the truth. Lack of memory can be corrected, but correcting evidence that is inaccurate (perhaps speculative) or untrue is very difficult and may very well affect the trial result.

F. Courtroom Procedure

Courtroom procedure comprises not only what is prescribed on occasion in statute, but also

[36] *Ibid.* at 85.
[37] *Ibid.* at 82.
[38] *Ibid.* at 83.
[39] *Ibid.*

embodies the unwritten rules and traditions that have evolved.[40]

1. Registrar

At the opening of the trial, introduce yourself to the court staff and treat them with respect at all times.[41] When in court, do not approach the bench. Anything that must be handed to the judge must be done so through the registrar.[42] You may inquire with the registrar about the judge's preferences. For instance, if material has to be prepared for an in-court motion, find out whether the judge prefers to have your authorities brief highlighted or whether the judge prefers computers not be used in the courtroom. Take care not to inquire about anything the registrar is not at liberty to say such as the view of the judge on any particular case.[43]

2. Self-Represented Litigants

Minimize your oral communication with self-represented litigants in the courtroom in favour of written communication. In fact, if you must communicate with self-represented litigants ensure you know the Rules of Professional Conduct which have specific obligations for an officer of the court communicating with an unrepresented person. Where oral communication is necessary, have a witness present. You may also ask the court to clarify in open court any issue relating to the self-represented person's views or position.[44]

3. Cell Phone

Be very careful to turn off your cell phone in the courtroom while court is in session and warn the witnesses and your client about this requirement.

G. Top 10 Practical Tips

1. Organization*:* Make sure the counsel's table is organized and tidy. The judge will see

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[40] Donald S Ferguson, "Ontario Courtroom Procedure" (Markham: LexisNexis Canada Inc., 2007) at 21.
[41] *Ibid.* at 219.
[42] *Ibid.* at 65.
[43] *Ibid.* at 220.
[44] *Ibid.* at 228.

your organization, and you will increase your chance of being able to find the right brief at the right time.

2. Label: Label all materials clearly. Consider using colour-coded dots if you have several briefs, and make sure everyone on the trial team understands the system.

3. Extra Copies: Bring an extra copy of all key material. If the judge does not have a copy in the court file, you can continue with your submissions easily.

4. Space: Use the space behind the counsel table by arranging boxes as temporary shelves for transcript briefs. Then, all one has to do is turn around in the swivel chair and access the relevant transcript.

5. Stand: When the Judge addresses you by looking at you directly, stand and address the court and err on the side of respect rather than sitting and trying to determine if it is your turn to stand.

6. Housekeeping: At the beginning of your address to the court, make sure you take the time to do what many call "housekeeping", which is to review with the judge what materials he or she should have available. Often materials properly filed with the court are not in the court file.

7. Object: If you wish to object to an issue when opposing counsel is on her feet, stand to catch the judge's attention.

   He or she will often say: "I see Ms. Devine is on her feet."

   You answer: "Your Honour, I object..."

   The other counsel should fall silent and let you address the court.

8. Managing Interruptions: If opposing counsel is rude and seeks to interrupt you when you are on your feet, catch the judge's eye and ensure the judge, not opposing counsel, has control of the courtroom. Do not let opposing counsel catch your eye. The judge rules the courtroom, and eventually opposing counsel will be forced to end her tirade.

9. PowerPoint: Try to use presentation software when making submissions, and ensure the evidence referenced within a slide corresponds to the evidence in the materials filed with the court.

10. Courteous: Be polite and courteous to everyone in the court at all times. You are a member of a wonderful, time-honored profession and no matter what is happening in the court and no matter how you are being treated, you are an officer of the court, and you control your own behaviour.

Appendix A

Trial Preparation Checklist

Subject	Task
Client	( ) Develop a case theory ( ) Instructions from client to proceed to trial ( ) Notify client of trial date

Pleading	( ) Pleadings reviewed
	( ) Required amendment
	( ) Consent to amendments
	( ) Confirmed by letter
	( ) Motions for amendments
	    ( ) Prior to trial
	    ( ) At trial
	( ) Order obtained

Examination of Discovery	( ) Original transcripts located and set aside for trial
	( ) Undertakings fulfilled
	    ( ) Client
	    ( ) Opposing party
	( ) Updated investigations carried out
	( ) Interview with investigator
	    ( ) Necessary
	    ( ) Completed

Records	( ) All parties records reviewed ( ) Contacted opposing counsel to get list of their records to be admitted at trial ( ) Prepared agreed exhibits list
Fact	( ) Summary of facts prepared ( ) Notice to admit facts ( ) Agreed statement of facts

Law	( ) Legal materials reviewed and updated
	( ) Memo of fact and law
	    ( ) Required
	    ( ) Completed
	( ) Case book completed
	( ) Exchanged cases if appropriate
	( ) Consent on legal issues obtained

Witnesses	( ) Witness list
	    ( ) Prepared
	    ( ) Reviewed and updated
	    ( ) Witness notified

	( ) Notices to attend/summonses served and filed
	( ) Witness Statement
	        ( ) Required
	        ( ) Obtained
	        ( ) Reviewed
	( ) Expert report
	        ( ) Required
	        ( ) Reviewed
	( ) Notices served
	        ( ) Received Adversary expert report
	        ( ) Notice to Admit Expert Report Served
	        ( ) Replied to opposition's Notices to Admit Expert Reports
	( ) Out of province witness?
	        ( ) Required
	        ( ) Arrangements made
	        ( ) Interprovincial subpoena
	( ) Final interview with witnesses
	        ( ) Scheduled
	        ( ) Completed
	        ( ) Hotel and flight arrangements

Demonstrative Evidence	( ) Demonstrative evidence
	        ( ) Required
	        ( ) Obtained
	        ( ) Reviewed
	( ) Copies for court and other counsel (if applicable)
	( ) Consent of opposing counsel to introduce demonstrative evidence
	( ) Proof of demonstrative evidence arranged
	( ) Court staff contacted and arrangements made

Damages	( ) Legal research on law of damages completed
	( ) Statement of damages
	( ) Proof of damages
	        ( ) Required
	        ( ) Arranged
	( ) Consent as to proof of damages

Trial Outline	( ) Trial outline prepared ( ) Direct of witnesses ( ) Cross-exam of witnesses ( ) Possible motions during trial – materials prepared
Trial Brief	( ) Trial brief prepared?