TRIAL PREPARATION:

PICK YOUR BATTLES

A paper by: **John Michael J. Bray and James M. Ross**
Orendorff & Associates
Sudbury's Personal Injury Lawyers
1533 Bellevue Avenue
Sudbury, ON P3B 3G4

Tel: 705-673-1200
Fax: 705-673-3050

Favourite Quote About the Law:

I was never ruined but twice: once when I lost a lawsuit, and once when I won one.

- Voltaire

Court's Renewed Emphasis on Trial Management:

Trial management is very topical, given the recent amendments to the *Rules of Civil Procedure*[1] that came into force on March 31st of this year.[2]

It is fair to say that these amendments were put in place, because the Court was displeased with how litigants and their counsel arrived unprepared for pre-trials and trials and the wasted judicial resources and court days that resulted from this approach.

We view these recent amendments as part of a continuing multi-year trend in civil litigation to find the right balance between disputes being fairly adjudicated on relevant evidence and the proportionality in the hearing of these disputes.[3]

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[1] *R.R.O. 1990 Reg. 194 [Rules].*

[2] *Ibid.*, at R. 48.03(2)(c), 48.05, 50.02, 50.03, 50.07(1)(a), 50.08(1), 50.12, 53.03(4), 53.08(1), and 76.10(5).

[3] *Hryniak v. Mauldin*, 2014 SCC 7, 2014 CarswellOnt 640 [*Hryniak*].

Our paper and presentation is primarily focused on spotting evidentiary issues that will pop up at your trial and simplifying these issues before you get there, so, that, your trial proceeds in an orderly fashion and you do not raise the ire of the presiding trial judge.

What Does the Trend (and the Recent Amendments) Mean for Trial Counsel:

Unfortunately, certain counsel were not making sufficient efforts to shift the culture and ensure timely and affordable justice and, in order to save the process, the Court believed it was required to take a more active role in trial management to deliver the service guarantee contained in R. 1.04(1) and (1.1).

While we, as counsel, should have been doing this anyways, given the culture shift and Rules Amendments, we need to refocus on:

1. **Complying with the Rules**: the Court does not seem inclined to grant any favours to those that do not abide by the time frames set out in the *Rules*[4];

[4] *Agha v. Munroe*, 2022 ONSC 2508, 2022 CarswellOnt 5615 at para. 19, 25-26, 30-32 [*Agha*].

2. **Be Ready**: Pre-Trials and Trials should always have been important dates to litigants and their counsel, but the *Rules* were amended, so, that all litigants and their counsel are ready for these dates and, if they are not, there are likely to be meaningful and undesired consequences[5];

3. **Be Reasonable**: A considerable amount of trial time can be spared by counsel making reasonable agreements beforehand (***the focus of this paper***). We should not need a judge to force agreements upon us (*e.g., where it is obvious that a fact is capable of proof or a document admissible*), but the *Rules* and the current judicial climate make it clear, if we do not make an agreement, the Court may make one for us[6] or at least punish an unreasonable party with cost consequences[7];

4. **Distill Down to its Purest Form**: Judges (and juries) do not want to hear our matter for longer than is absolutely necessary to fairly decide the dispute. Our job is not

[5] *Supra*, note 1 *Rules* at R. 50.07 and R. 50.12(2).

[6] *Ibid.*, at R. 50.07.

[7] *Ibid.*, at R. 57.01(e)-(g), and (i).

to throw witnesses and reams of paper at the trier-of-fact and hope they understand it, but to present a simple case on limited evidence in a persuasive way.[8]

How Do We Get to What the Court Wants:

We have to know and diarize the time lines provided for in the *Rules* and we need to comply with those time lines where at all possible. And, if compliance is not possible, we need to seek an indulgence from the Court, early (to minimize inconvenience to the opposing party and the Court) and have a good excuse for not complying with the *Rules* to justify the indulgence being granted.[9]

We also need to appropriately use the tools at our disposal to simplify the issues that will be tried and appropriate use the pre-trial (and, hopefully, any time that the trial judge grants us at or before the commencement of trial) to tie up any remaining loose ends, so, that, on the first day of trial the matter is truly ready to proceed.

[8] *Davies v. Clarington (Municipality),* 2016 ONSC 1079, 2016 CarswellOnt 2171 [Davies].

[9] *Supra*, note 4, *Agha*.

A Summary of the Important Dates:

Important dates that should be part of your file checklist include:

The Post-Discovery Time Lines			
Time	**Source**	**Section/Rule**	**What?**
Forthwith	*Rules*	30.07	Update your Affidavit of Documents as soon as a non-privileged or privileged document comes into your possession
Forthwith	*Rules*	31.09(1)	As soon as counsel becomes aware that an answer is no longer correct or is incomplete, they must provide a correction in writing
60 days after the examinations for discovery	*Rules*	31.07(2)	Provide undertakings and provide your position on any questions given under advisement
After the Action is Set Down			
Days before Pre-Trial	**Source**	**Section/Rule**	**What?**
90	*Rules*	53.03(1)	Serve any originating expert reports
60	*Rules*	53.03(2)	Serve any responding expert reports
30	*Rules*	50.03.1(1)	Certificate to be filed confirming what experts are to be called and whether their reports were served on time and, if not, the reason why not

Days after Pre-Trial	**Source**	**Section/Rule**	**What?**
30-120	*Rules*	R. 50.02(2.1)	Scheduled commencement of trial (conversely, your pre-trial is 30-120 days before your trial date) *For the reasons set out later herein, we favour a pre-trial closer to the trial.*
Days before Trial	**Source**	**Section/Rule**	**What?**
90	*Rules*	30.09	Waive any claims of privilege for substantive evidence (*e.g. surveillance)*
45	*Rules*	53.03(3)(b)	All supplementary expert reports must be served
20	*Rules*	51	A party has twenty days to respond to a request to admit
15	Rules	53.03(3)	Response to supplementary expert report must be served
10	*Evidence Act*	52(2)	Medical Report may be filed, with leave of the Court.
7	*Rules*	37.08(1) and 37.10(7)	While the trial judge may grant you leave, you should file any trial motions and factum / statement of law at least this early
7	*Rules*	49	Offer of Settlement to have enhanced costs impact.
7	*Evidence Act*	35(3)	Notice for business records to be admissible under *EA* must be served.

5	*Rules*	37.10.1	Confirm your trial motions
4	Rules	37.10(3) & (8)	Respond to any motions and file your factum

While the chart reflect the last possible day to do something, we implore you **NOT** to wait until the 11th hour and to get your ducks in a row early.

The Tools of Trial Preparation

These are our main tools:

1. Do the work early;
2. Have an early Client Trial Preparation Meeting;
3. Have an early Lawyers' Trial Meeting;
4. Send an early Request to Admit;
5. Send an early *Evidence Act* Notice under s. 52;
6. Send an early *Evidence Act* Notice under s. 35;
7. Appropriately use the Trial Management Portion of the Pre-Trial Conference to tie up loose ends; and
8. Inquire if the trial judge is available before the commencement of trial to deal with all preliminary matters not resolved between the parties.

1. Do the Work Early:

As Albert Einstein said, "if you can't explain it simply, you don't understand it well enough," or as set out in *Sopinka on the Trial of An Action*, "the difference between good counsel work and average work is precisely the extent to which the mass of information that can be brought to bear is organized, reduced to its essentials and presented in a concise and precise way."[10].

You cannot use any of the other trial tools available to you, if you do not know what you are asking for and why. That goes for asking the trier-of-fact to grant a Judgment in your favour, asking for counsel to consent on admissibility issues, using a Request to Admit, using s. 35 or 52 of the *EA* or the common law to introduce evidence in a less time consuming manner, seeking trial management orders from the pre-trial judge, or seeking trial orders in advance of trial from the trial judge.

Trial preparation is like Winston Churchill's famous quote on speech writing, "if you want me to speak for two minutes, it will take me three weeks of preparation. [...] if you want me

[10]J. Kenneth McEwan, Q.C., *Sopinka on the Trial of An Action*, 3rd ed. (LexisNexis Canada Inc. Toronto: 2016) at c. 3, p. 61-62 [*Sopinka's Trial of an Action*].

to speak for an hour I am ready now." If you want a short trial, you have to dedicate a great deal of time to achieve it and there is no other way to get there. If you do not prepare, the trial will become unmanageably long to the Court's, your client's, and your detriment.

It is true that, the moment a file darkens your office door, you should start preparing for trial. Your theory of the case informs the productions you seek, the questions you ask on discovery, the undertakings you obtain, and the experts you retain. A memorandum of proof can be a helpful tool in sorting through how all the evidence fits together both for your theory and against your theory and ensuring that your claim or defence have sufficient evidence to get to the jury.[11]

By the time you set the date for the trial and pre-trial, however, your focus should be entirely on how do you, with the least fuss possible (*see least amount of witnesses and documents*), put your best case before the trier-of-fact. As set out before, judges are not happy to sit through evidence that is unnecessary; juries, who have been ripped from their everyday lives and ill-compensated for their troubles, are even less enamoured with a long trial, especially where it appears that the length is caused by unprepared counsel.

[11] *Ibid.*, at p. 62-64.

Special Considerations:

a. Lay Witnesses:

The premise of our adversarial system is that your theory and your opponent's theory will be equally balanced on the expert front.[12] In this scenario, lay witnesses often offer a key to tipping the scale to one side or the other. ***Do not treat them as an afterthought***.

Lay witnesses' memories are not like fine wine. If their recollection of an event (*e.g., how a collision occurred*) is important, spend the time and money and have them provide a detailed statement early on (do not rely solely on a cursory statement given to a non-party). If you are going to call a lay witness at trial, advise them of the trial immediately after the date is set, provide them with their statement(s), and meet with them in advance of the trial to discuss their evidence with them and the questions you intend to pose and the questions you anticipate your opponent will ask them.[13]

Lay witnesses are unfamiliar with the trial process and it is your job to make them comfortable, so, that, they may deliver their evidence in a way that is easily understood

[12] *Igbokwe v. Price (2003)*, 36 C.P.C. (5th) 147, 2003 CarswellOnt 1990 (SCJ) [*Igbokwe*].

[13] *Supra,* note 10 *Sopinka's On Trial* at p. 72-75.

and received by the trier-of-fact.[14] Summonsing a lay witness and hoping for the best is not a recipe for success.

b. Opinion Evidence:

If you are intending to rely on a non-party expert or a participant expert to provide an opinion you have to ask:

1. *Is the opinion one that requires compliance with R. 53.03?*

The guideposts to answer that question are set out in:

1. *Westerhof v. Gee Estate*[15],
2. *Imeson v. Maryvale*[16] and
3. *St. Marthe v. O'Connor.*[17]

To proffer an opinion in examination-in-chief ***or in cross-examination***, the opinion must arise from, "the expert's observation of or participation in the relevant events"[18] and be

[14] *Ibid.*

[15] 2015 ONCA 206, 2015 CarswellOnt 3977 [*Westerhof*].

[16] 2018 ONCA 888, 2018 CarswellOnt 18565 [*Imeson*].

[17] 2021 ONCA 790, 2021 CarswellOnt 15743 [*St. Marthe*].

[18] *Supra*, note 15, *Westerhof* at para. 60.

"formed as part of the ordinary exercise of his or her skill, knowledge training and experience while observing or participating in such events."[19] The evidence must also meet the *Mohan*/*White Burgess* framework for admissibility.

The *Mohan* Test (adopted in *White Burgess*) is a two-step inquiry requiring you to show:

1. the opinion is:
    a. logically relevant,
    b. necessary to assist the trier-of-fact,
    c. not subject to an exclusionary rule, and
    d. proffered by an impartial qualified expert,
2. If the four criteria are otherwise met, the trial judge has to determine that the probative value of the admission of the evidence outweighs the prejudicial effect of the admission of the evidence (the cost-benefit analysis).[20]

You may want to turn your mind to these questions as it relates to whether the opinion evidence is admissible:

[19] *Ibid*.

[20] *Supra*, note 16, *Imeson* at para. 80-83.

1. Is the opinion contained in the clinical notes and records or report?[21] (If not, you likely cannot get the opinion in at trial, absent having the expert provide a R. 53.03 compliant report containing that opinion);

2. If the opinion is in the clinical notes and records or report, do you already have an expert in that expertise giving that opinion?[22] (If so, *is the opinion necessary*[23]);

3. If the opinion is in the clinical notes and records does it naturally arise from the course of treatment or the nature of the report authored? (If the opinion is formed after treatment or the initial report they have to comply with R. 53)[24] ; and

4. Finally, as counsel, if the evidence is otherwise admissible, do you believe the opinion is better coming out of the mouth of a participant expert or a non-party expert than an expert you retain?

[21] *Supra*, note 17 *St. Marthe* at para. 25, *see also*, *ibid*., *Imeson* at para. 61.

[22] *Supra*, note 12, *Igbokwe* at para. 4 & 8-9.

[23] *Supra*, note 8, *Davies* at para. 42.

[24] *Supra*, note 16, *Imeson* at para. 48 71, & 73.

c. Witnesses You May Need to Call At Trial But Cannot Speak to:

You cannot speak with:

a. an officer, director, or employee of a party adverse in interest to you; or

b. the Plaintiff's treating practitioner.

In relation to a., you can rely on R. 31.03(2) to secure the evidence of a key person controlled by an adverse party on discovery and, at trial, you can rely on R. 53.07(2) to compel their attendance (or receive an undertaking from the adverse party to call that person).

In relation to b., as a Defendant you can summons the treating practitioner to attend with their file at the trial (although be careful with the contents of your trial letter)[25], but, generally, you want to know their evidence beforehand. A Defendant can only obtain the clinical notes and records of the treatment provider (or speak to the treating practitioner about their evidence) one of two ways before trial: (1) consent of the Plaintiff; or (2) an Order of the Court.[26]

[25] *Smith v. Muir*, 2019 ONSC 2431, 2019 CarswellOnt 2431 at para. 30.

[26] *Ibid.*, at para. 26-27.

2. Client Trial Preparation Meeting:

When?

Shortly after the pre-trial and trial date are secured, you should be meeting with your client. We suggest immediately after completing your initial review of your file for the trial. We prefer an in-person meeting, because the discussions may be difficult.

What do you discuss?:

We use the first trial preparation meeting to discuss trial process and not as substantive preparation.

We discuss with our client:

1. our expectations of them if the matter is to proceed to trial;
2. our view of their case, both strengths and weaknesses;
3. the uncertainty of a trial, especially in front of a jury;
4. any outstanding offer to settle from the opposing party and any offer to settle we would recommend they make and how these offers may come into play at the conclusion of the trial; and
5. the time and cost of the trial (especially if we have an hourly rate retainer).

There are three best practices that we advocate should arise at this first trial preparation meeting:

a. Trial Retainers;

b. A Trial Direction / Letter; and

c. A "Best" Offer of Settlement.

a. Trial Retainers:

Once a pre-trial and trial date are set, you should bill for your work to date and seek a trial retainer, that is a reasonable estimate of your fees and the additional disbursements you will seek from your client at the conclusion of trial.

There is no party more reluctant or able to pay you for your work, than a party dissatisfied with a trial result and you do not want to do all the work of a trial without some guarantee that your time will be properly compensated.

b. Trial Direction / Letter:

As with the trial retainer, bad trial results may taint a client's recollection of what trial risks were discussed and what instructions were given. Mitigate this risk by discussing these risks at the first trial preparation meeting and commit these trial risk discussions to writing.

Our firm prefers receiving a signed trial direction acknowledging the trial risks and instructing us to go to trial despite these risks. A trial letter may serve the same purpose with more sophisticated litigants.

c. Offer of Settlement:

Open Offer from Adverse Party: Bring the offer to the attention of your client (if you have not already done so) or do so again (if you have done so), provide your opinion on whether it is reasonable, explain how the offer alters the costs consequences at trial, and get a written direction to accept or reject the offer. As a Plaintiff present the offer on net terms. As a Defendant present the offer and your costs and disbursements to date on gross terms. In this way, there is no confusion on what the offer means to the client.

Make an Offer: You have all of the information necessary to make your best offer at this point, your client is motivated to avoid a trial, and there no longer exists a reason to see if you can get a "better deal". ***The added bonus is the costs consequences that flow from the***

offer, which are good for a successful Plaintiff[27] ***and great for a successful Defendant.***[28]

Further, while complying with R. 49.10 is to be desired, a Court, especially in this climate, is going to be inclined to use R. 49.13, if it forms the opinion that the other party, given the trial result, was foolish to proceed to trial.[29]

While we are discussing simple two party litigation, there are strategies for all forms of settlement and you should, even in complex multi-party litigation, look to make a reasonable settlement offer before trial.[30]

[27] Under R. 49. 10, if the Plaintiff's trial judgment is as favourable or more favourable than their offer to settle than they are entitled to receive partial indemnity costs (60-66% of reasonable full indemnity costs) to the date of the offer and substantial (up to 90% of reasonable full indemnity costs) thereafter. I know of no clients who want to receive less of their judgment due to paying their lawyer.

[28] Absent R. 49.10 or special circumstances based on the amount of the recovery (see, R. 57.05 and 76.13), if the Plaintiff recovers a judgment, the Defendant bears their own costs and pays the partial indemnity costs of the Plaintiff throughout, what makes R. 49.10 better for a Defendant than a Plaintiff is that if R. 49.10 is engaged, the Defendant making an offer that is as or more favourable than the judgment, to the date of the offer the Defendant pays the Plaintiff's partial costs, but thereafter the Plaintiff pays the Defendant's partial indemnity costs.

[29] *Lawson v. Viersen*, 2012 ONCA 25, 2012 CarswellOnt 565 at para. 45-53 [Lawson].

[30] *See*, *supra*, Rules at R. 49.11 and 49.12, see also, an excellent paper on R. 49 is: Mary Simms, "There is no such uncertainty as a sure thing": The shifting focus of Rule 49 jurisprudence. While not dealt with in this paper, proportionate share settlement agreements (Pierringer Agreements / Mary Carter Agreements) offer methods to settle a case against some but not all parties.

3. Lawyers' Trial Meeting:

A lawyers' trial meeting can be very fruitful or a complete waste of time depending on you and opposing counsel.

The key to a successful meeting is:

1. both lawyers approaching the meeting reasonably; and
2. both lawyers being prepared for the meeting in advance.

We would suggest calling the opposing lawyer to see if they are willing to have a lawyers' trial meeting and, in that call, discussing the topics you want to deal with and, immediately after that call, sending follow-up correspondence to their attention confirming the contents of the call and, then closer to the date scheduled for the meeting sending a second piece of correspondence, setting out the trial issues you see in the file and your proposed solutions to those trial issues.

What do you want to discuss?:

1. Is it possible to have an agreed statement of facts?
2. Are there any admissions the parties are willing to make?
3. What evidence of the opposing party will you be reading in?

4. What demonstrative evidence do you propose to use?

5. Is it possible to have a joint document book?

6. If yes to 5, what is the document agreement?

7. Who is being called as a witness and how long will that party be examined and cross-examined?

8. What do you anticipate these witnesses to say?

9. Are there any preliminary motions that you are aware of and may these motions proceed on consent and, if not, how long will they take to argue and what should the time lines be for the exchange of materials?

Special Consideration: Joint Document Book & Document Agreements

a. What do you propose goes in?

The fundamental question in preparing a joint document book is, "what are the important records that are necessary to ensure a fair and just decision[?]"[31]

Do not propose that all of your documents should go in and do not accept this approach from opposing counsel. Firstly, it will anger the Court[32] and secondly, the Court is unlikely

[31] *Supra*, note 8, *Davies* at para. 48.

[32] *Ibid.*

to accept that counsel turned their mind to and agreed that all the contents of these thousands of pages would be admitted for the truth of their contents.[33]

In preparing the book, you should be focused on only those documents that you actually intend to rely upon at the trial. All the rest of the documents can, "stay where they are, in the possession of the doctor or record keeper, not in some cluttered court record."[34]

The documents are, by convention, generally arranged chronologically in the Joint Document Book.[35]

b. <u>The Document Agreement</u>:

Once you have gotten down to only those documents that either counsel are actually going to use, you have your joint document book, what you then need is to have a specific document agreement on the use of the documents in the book, which you will present to the trial judge with your joint document book and the trial judge will then determine whether they will accept the agreement arrived at by counsel and ensure that the nature

[33] *O'Brien v. Shantz* (1998), 167 D.L.R. (4th) 132 (CA) at para. 5 [*O'Brien*].

[34] *Supra*, note 8 *Davies*, at para. 48.

[35] *Supra*, note 10, *Sopinka's Trial of an Action*, c. 3, p. 67 and Appendix 1.

of the agreement is understood by all parties and the Court.[36] An ambiguous document agreement is of no assistance to anyone.[37]

Counsel should be able to review the documents to be included in the joint document book individually and determine the questions set out in *Girao v. Cunnigham*[38],

1. Is the authenticity of the document an issue? If not, admit the document is authentic.
2. Is the date that a letter is sent or received or transaction is said to have occurred in issue? If not, admit that the letter was sent, received, or the transaction occurred on or about the date set out therein, unless the contrary is proven in the evidence.
3. Are you admitting that the documents contents are true or not? ***This is generally the real issue in most document books (and is dealt with under the Evidence Act and Request to Admit sections)***. Again, if after a review of the evidence and proposed use, you believe the opposing party will be able to see the document admitted, you may admit it is admissible while reserving your right to challenge the contents with other evidence.

[36] *Bruno v. Dacosta*, 2020 ONCA 602, 2020 CarswellOnt 13621 at para. 53 [*Bruno*].

[37] *Ibid.* at para. 57.

[38] 2020 ONCA 260 at para. 33 [*Girao*].

4. Are the parties able to introduce into evidence additional documents not mentioned in the document book? For simplicity, it is better for all documents to be included in the joint document book, but we would suggest inserting a caveat for both counsel that with leave of the Court other documents may be admitted (*to cover a document being missed by inadvertence or the importance of a document arising only after certain evidence has been admitted*).

5. Are there any documents in the joint book that are to be treated differently? (*i.e., you can have separate agreements for each document, although, a general agreement with limited exceptions is the preferable approach*).

4. **Request to Admit**:

If you have a successful lawyers' trial meeting, likely you do not have to have recourse to any further trial preparation tools, but, if you do not, the Request to Admit is a powerful tool.

If not the Request to Admit procedure may offer a powerful tool to accomplish the same ends as your lawyers' trial meeting.[39]

[39] An excellent paper that we are indebted to in the completion of our paper and on this subject is by Steven Vitella, "Rules of Civil Procedure Chapters, Pre-Trial Procedures, Rule 51 - Admissions, 2nd ed. 2022 CanLIIDocs 1039 and we would recommend you review this paper in completing your Requests to Admit.

a. <u>Why?</u>

Rule 51 allows you to request that another party admit the truth of a fact or the authenticity of a document.[40]

You may wonder: *if the lawyers' trial meeting went nowhere, what is the point of sending the Request to Admit?*

Firstly, counsel can change their stripes the closer that trial gets and, if that occurs, the Response to Request to Admit saves you time proving routine documents or facts at trial.

Secondly, while counsel is free to deny even the most uncontroversial of facts or the most easily authenticated documents[41], part of trial preparation is building a written record, so, that, the Court will impose the orders you seek.[42]

[40] *Supra*, note 1 *Rules*, at R. 51.

[41] *Docouto v. Ontario* (2000), 44 C.P.C. (4th) 182, 2000 CarswellOnt 400 (Div. Ct.) at para. 5 [*Docouto*] a blanket denial is fine, however, the sufficiency of a refusal to admit with reasons is subject to court review for adequacy *see Glover (Litigation Guardian of) v. Gorski*, 2013 ONSC 6578, 2013 CarswellOnt 15561 [*Glover*].

[42] *Supra*, note 1 *Rules* at R. 50.07.

Thirdly, part of good trial preparation is building your costs argument regardless of the trial result and a Request to Admit and a "blanket denial" may accomplish that.[43]

b. When?

Technically, you can serve a Request to Admit at any time as long as the time for responding, 20 days, expires before the first day of trial[44], to get the full benefit of the *Rule* you should serve the Request to Admit early. No one wants to be reading a Response to a Request to Admit, the night before your trial, where the receipt of the Response may detract rather than aid in trial preparation. We have purposely placed the Request to Admit here, because we believe you should serve it, at the latest, shortly after a failed lawyers' trial meeting.

c. What Do You Want Admitted:

The easy answer is you want the other side to admit non-contentious facts, the authenticity of non-contentious documents, and the truth of the contents of these documents when that is not contentious.

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[43] *Supra*, note 1 *Rules* at R. 51.04 and R. 57.01(1)(g).

[44] *Orlan Karigan & Associates Ltd. v. Hoffman* (2000), 52 O.R. (3d) 235, 2000 CarswellOnt 4890 at para. 22 [*Orlan Karigan*].

You want the Requests to Admit to be neutral and simple one fact sentences, that can easily be admitted or denied.[45] Perhaps obviously, it is best to go from the least controversial fact to the most controversial fact that you are requesting to have admitted[46]

It should be noted that admitting authenticity or the truth of a fact does not make the document or fact admissible at trial, as the Request to Admit is unrelated to relevance.[47]

5. *Evidence Act* Notice under section 52:

The *Evidence Act* at section 52 provides counsel with the election to file a medical practitioner's report rather than have them attend at the trial to provide *viva voce* evidence as part of their case.[48]

As a starting point, you only need to use section 52 of the *EA*, if you want the trier-of-fact to be able to accept the opinion contained within the report for the truth of its contents. If the medical report is simply information on which your medical expert relied to come to

[45] *Caroll v. Stonhard Ltd.* (2001), 53 O.R. (3d) 175, [2001] O.J. 726 (SCJ) [*Caroll*].

[46] *Engels v. Richard Killen & Associates Ltd. (2002)*, 60 O.R. (3d) 572, [2002] O.J. No. 2877 at para. [*Engels*].

[47] *Canpotex Ltd. v. Graham (1985)*, 33 A.C.W.S. (2d) 141,1985 CarswellOnt 603 (H.C.J.) at para. 9 [*Canpotex*].

[48] *Evidence Act,* R.S.O. 1990 c. E.23 at s. 52 [*EA*].

their opinion or that you want to introduce to cast doubt upon the opinion reached by the opposing party's expert, you do not need to make use of s. 52.[49]

If it is an opinion you intend to rely upon, serving a section 52 notice prior to trial provides you with the election to either call the expert at trial or file their report[50], **PROVIDED THAT**

a. you seek and receive leave of the Court to file the report; and

b. you have given at least 10 days notice to opposing counsel.[51]

As leave is required of the Court[52] and the expert has to be available for cross-examination, if required by the opposing party[53], you still have to ensure that the expert is available (at your cost initially[54]) to appear in person, until you receive leave from the Court and the opposing party confirms that they do not require that medical practitioner to be cross-examined. Regardless of who serves the notice, any party may seek leave of the Court to

[49] *Reimer v. Thivierge*, 46 O.R. (3d) 309, 1999 CarsellOnt 3437 (CA) at para. 16 [*Reimer*].

[50] *Iannarella v. Corbett*, 2015 ONCA 110 at para. 131 [*Iannarella*].

[51] *Supra,* note 48 *EA at s. 52.*

[52] *Ibid.*

[53] *Ferraro v. Lee* (1974), 2 O.R. (2d) 417, 1974 CarswellOnt 881 (CA) at para. 9 at para. 9 [*Ferraro*].

[54] *Andreason v. Thunder Bay (City)*, 2014 ONSC 710, 2014 CarswellOnt 1014 at para. 10-13 [*Andreason*].

admit the evidence under s. 52 if the notice has been given, whereupon for all purposes the medical practitioner will be treated as the witness of the party who filed their report.[55]

a. To whom does the section apply?

Almost every possible treatment practitioner is covered by the section.[56]

b. What has the court considered the phrases, "obtained by or prepared for a party" and "signed by a practitioner" the to mean?

If a party to the litigation requests a document (*e.g., an X-Ray Report*) and receives the document, s. 52 applies to the report and the party need not to have retained the medical practitioner specifically for the litigation.[57]

Further, the Court accepts electronic signatures as having been signed by the practitioner.[58]

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[55] *Ibid.*, at para. 8-9.

[56] *See*, *Regulated Health Professions Act, 1991* S.O. 1991, c. 18 at Schedule 1 (e.g., dentist, chiropractor, massage therapist, physiotherapist, naturopath, doctor, nurse, optometrist, pharmacist, optometrist, psychiatrist, medical imaging technologist, etc.) [*RHPA*].

[57] *Campbell v. Roberts*, 2014 ONSC 1574, 2014 CarswellOnt 9156 (SCJ) at para. 23(a) [*Campbell*].

[58] *Ibid*.

6. *Evidence Act* Notice under s. 35[59]:

Section 35 of the *EA* is designed as an exception to the ordinary rules of evidence surrounding hearsay and to allow for routine business records to be admitted for the proof of acts, transactions, occurrences or events set out therein without calling the maker of the record, provided that the opposing party or a record keeper is able to satisfy the Court that s. 35 applies to the records sought to be admitted.[60] What is a business is liberally construed, such that, the ordinary records kept by any business, profession, or calling are potentially able to be admitted under s. 35, without the necessity of calling the record maker.[61]

If the parties admit or a record keeper is called and the Court accepts that the record meets the requirements of s. 35, the document is *prima facie* proof of the act, transaction,

[59]There are many excellent papers on s. 35 and we are indebted and would recommend for further reading Kristen Crain & Christine Kucey, I Noticed Your Evidence: A Practical Guide to ss. 35 and 52 of the *Evidence Act*, available on CanLii at: 2019 CanLIIDocs 3851, Richard Shekter, Key Evidentiary Challenges in Personal Injury (and Other) Trials), first presented at the Advocates Society Tricks of the Trade Conference on January 25, 2013, Patrick Poupore, Ensuring Admissibility of Fact and Documents Before the Trial Begins (presented at a past colloquium conference), Alan Bryant J., Sidney Lederman J and Mcihelle Fuerst J., Sopinka, Lederman & Bryant: the Law of Evidence in Canada 3rd ed. (LexisNexis Canada Inc. Toronto: 2009) at p. 283- , para. 6.185-6.255 [*Sopinka's Evidence*], and Michelle Fuerst J. Mary Anne Sanderson J. and Stephen Firestone J. Ontario Courtroom Procedure 5th ed. (LexisNexis Canada Inc.: Toronto: 2020) at Part 10, c. 43, sub. 4, p. 1050-1051 [*OCP*].

[60]*Setak Computer Services Corp. v. Burroughs Business Machines Ltd.*, 15 O.R (2d) 750, 1977 CarswellOnt 626 (Supr. Ct.) at para 27-35 [*Setak*].

[61]*Ibid.*, at para. 34.

occurrence, or event set out therein, but the opposing party is free to lead other evidence tending to show the record is incorrect or should be afforded little or no weight.[62]

In order to be admissible under s. 35, it has been held that records are required to meet the following criteria:

1. the record is made on some regular basis, routinely, systematically
2. the record is of an act, transaction, occurrence or event,
3. the record is not of opinion, diagnosis, impression, history, summary or recommendation,
4. the record is made in the usual and ordinary course of business,
5. it was in the usual and ordinary course of such business to make such record,
6. the record was made pursuant to a business duty,
7. the record was created at the time of the act, transaction, occurrence, or event or within a reasonable time, and
8. where the record contains hearsay, both the maker and the informant must be acting in the usual and ordinary course of business.[63]

[62] *Urso v. Greater Sudbury (City)*, 2017 ONSC 1746, 2017 CarswellOnt 5302 (Div. Ct. Single Judge) at para. 24 [*Urso*].

[63] *R. v. Felderhof*, 2005 ONCJ 406 (CanLII) at para. 27 [*Felderhof*].

The *EA* explicitly permits a record to be admitted for its truth even where the record taker, "lacks personal knowledge", but the lack of "personal knowledge" may impact the weight attributed to the statement.[64]

The (8th) requirement that both parties are acting in the ordinary course of business is a Court made rule to avoid all information that "lacks personal knowledge" being admitted as *prima facie* truth of its contents simply because the person receiving the information/statement was acting in the ordinary course of business and reflects the Court's concern about reliability, that is, if the party providing a statement is not acting under a business duty, the rationale for both the common law and statutory rule that the statement is "trustworthy" does not exist.[65] The judicial rule has seen self-serving statements on how an accident happened not be admitted for the truth of their contents[66] and for police statements taken from witnesses to not be admitted for the truth of their contents.[67] The Court does not, however, always insist on a record complying with this

[64] *Supra*, note 48, *EA* at s. 35.

[65] *Supra*, note 59 *Sopinka's Evidence* at p. 297-300, para. 6.224-6.231 & 6.235-6.239, see also, the better approach taken in the *Evidence Act*, R.S.C. 1985, c. C-5 at s. 30(1) which makes clear only evidence that would be admissible if oral testimony were given can be subject to the provision..

[66] *Adderley v. Bremner*, [1968] 1 O.R. 621, 1967 CarswellOnt 217 (HCJ) [*Adderley*], *but see*, *supra* note 59, *Sopinka's Evidence* at p. 302-303, para. 6.235-6.239.

[67] *Bruno v. Dacosta*, 2020 ONCA 602, 2020 CarswellOnt 13621 at para. 61 [*Bruno*].

Rule as a precondition for its admissibility for the truth of its contents.[68]

We share the view of *Sopinka's On Evidence*, motive to misrepresent and other issues that undermine the reliability of the document should go both to initial admissibility under s. 35 and to weight, if the document is admissible under the principled approach to hearsay exceptions.[69]

The risk of motive to misrepresent, however, does not exist where prior inconsistent statements are concerned.

a. <u>Prior Inconsistent Statement</u>[70]:

A party has always been able to bring to the attention of a witness an alleged prior inconsistent statement whether oral or written[71], where the issue is of a collateral nature and the witness does not admit the inconsistency the cross-examiner is stuck with the

[68] *Parliament v. Conley*, 2019 ONSC 2951, 2019 CarswellOnt 11523 at para. 29-40 [*Parliament*], *see also*, *supra*, note 58, *Sopinka's Evidence* at p. 297-300, para. 6.224-6.231.

[69] *Ibid.,* at p. 303, para. 6.239.

[70] There are many excellent papers on this subject, in preparing this paper we are indebted to and we would recommend if it comes up that you review Colin McKinnon J. Cross-Examination on Prior Inconsistent Statements, 2016 CanLIIDocs 4408, while it is not the focus of our paper it comes up often and is worth knowing the use to which a prior inconsistent statement may be put.

[71] *Supra*, note 48, *EA* at s. 20 and 21.

answer given by the witness and may not adduce contrary evidence, but where the contradictory evidence is relevant to the facts of the case, extrinsic evidence may be led to prove that the statement was made.[72]

Assuming the inconsistency is material, a party may not by use of s. 35 of the *EA* sidestep the requirements of s. 20 or 21 of *EA* or the common law rule in *Browne v. Dunn* and must put the inconsistency to the witness and provide the witness an opportunity to explain it.[73]

The protocol for seeking to have the witness adopt the statement and the cross-examination which follows, if they do not, is set out at length in *OCP* and should be kept in your back pocket for trial.[74] You are required to show the inconsistency between the testimony given and the prior statement and it is best practice to take the witness to the alleged statement, although, it is not strictly required.[75]

[72] *Supra*, note 58, *Sopinka's Evidence* at p. 1151, para. 16.156 [Sopinka's Evidence].

[73] *Alison Braks v. Dundeal Canada (GP) Inc.*, 2022 ONSC 4015, 2022 CarswellOnt 11351 at para. 47-77, *see also*, *supra*, note 33 *O'Brien* at para. 12.

[74] *Supra*, note 58 OCP at p. 896-904

[75] *Ibid.*, at p. 902-903.

If impeachment is the only purpose for which the statement is used it is generally not filed as an exhibit, although, that lies in the discretion of the trial judge.[76]

Where the alleged prior inconsistent statement is that of the adverse party in a civil action, and the statement is voluntary, the statement has always been admissible under the traditional exception to the hearsay rule related to admissions for the truth of its contents.[77] In relation to other witnesses or situations, the statement would only be admissible for the truth of its contents, if the exception created in *R. v. B.(K.G.)* is met to ensure necessity and reliability.[78]

While the issue remains unclear, in a civil proceeding, since the traditional hearsay exception exists and, in many cases, there is no reason to misrepresent on the record maker's part (e.g, admission records), we see no principled reason why, if it can be shown or is agreed that the evidence otherwise meets s. 35, that such records would not be admissible both to discredit the adverse party and to be used as some proof of their contents (that the event happened the way set out in the previous statement). Nor do we

[76] *Ibid., at p. 904-905.*

[77] *Supra* note 57 *Sopinka's Evidence* at p. 1151, para. 16.157.

[78] *Ibid.*

believe, that calling the record maker is likely to be anything other than a waste of the record maker's or the court's time and resources in most cases.[79]

b. <u>The Common Law</u>:

Business records that are not admissible under s. 35, may be admissible under the common law.

Under the common law, business records are admissible where:

1. the notes are made contemporaneously by a person having personal knowledge of the matters then being recorded; and
2. under a duty to make the entry or record.[80]

The common law is narrower, in that, the record has to be within the personal knowledge of the maker, but it is also wider, in that, it allows oral statements, observations of fact, and the opinions of the maker, so long as those opinions fall within the declarant's ordinary scope of duty.[81]

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[79] *Robitaille v. Anspor Constructiond Ltd.* (2002), 114 A.C.W.S. (3d) 971, 2002 CarswellOnt 1982 (CA) [*Robitaille*].

[80] *Ares v. Venner*, [1970] S.C.R. 608, 1970 CarswellAlta 80 [*Ares*].

[81] *Supra,* note 58 *Sopinka's Evidence* at p. 289, para. 6.199-6.201 & 6.233.

7. Trial Management Portion of Pre-Trial Conference:

Why did we put the trial management portion of the pre-trial conference in the penultimate position?

We believe that:

1. You should be setting the pre-trial as close to the trial as you may and still complete the steps that you need to do to get ready;
2. You should only seek the Court's assistance when all reasonable efforts to come to an agreement with opposing counsel have failed; and
3. if you have completed all the steps as set out above, you will know what remains outstanding and what relief you are seeking from the pre-trial judge, which makes preparing for the trial management portion of the pre-trial conference easy.

We have found that while a Court may not be able to force counsel to make reasonable concessions, at times, a judge has more sway on having opposing counsel come to the light.

Further, the purpose of the *Rules of Civil Procedure* amendments at R. 50.07 and 50.08 and, the fact, that a pre-trial judge may impose a timetable, is required to complete a pre-trial

conference report (which counsel are to certify), that you are to provide a list of your witnesses to the pre-trial judge, and the requirement that any order and the pre-trial conference report become part of the trial record, in our view, would tend to breed compliance by counsel (*no matter how previously unreasonable*) and, further, should there not be compliance by one counsel, sympathy for the other counsel in front of the trial judge.

8. <u>Seek to Have an Audience with the Trial Judge Early</u>:

Many issues are left to the discretion of the trial judge or, if an order is granted before the trial, the order is subject to the discretion of the trial judge. This is a sound practice as the trial judge should be the party acting as gatekeeper at the trial and is best placed to determine issues in relation to the fair hearing of the trial.

That said, reserving issues to the trial judge may lead to unnecessary delays at the trial of the matter, if you do not raise the issues at the outset.

For instance, while you may wait until you actually seek to call the 4th expert before you seek leave under s. 12 of the *EA*[82], we believe the better approach for you (because you will

[82] *Burgess (Litigation Guardian of) v. Wu*, 137 A.C.W.S. (3d) 962, 2005 CarswellOnt 927 at para. 32 [*Burgess*].

be better able to adjust if leave is not granted) and for the orderly progress of the trial is that, if you know you will need leave, that you move for leave at the outset of trial or sooner if you are aware who the presiding trial judge will be.[83]

In a judge-alone trial, the trial judge will appreciate dealing with the known preliminary matters at the outset rather than breaking up the factual evidence. In a judge-alone trial, presuming that these matters do not cause the trial to exceed the time estimated for the matter to be tried, we do not think, provided ample notice is given to opposing counsel and the Court as to the nature of the preliminary matters and the time that is estimated will be spent arguing these issues, that bringing the matters forward on the first day of trial poses any difficulty.

We take a very different view of a jury trial. In a jury trial, we believe good practice is at the trial management portion of the pre-trial conference to provide a fulsome list of preliminary matters that counsel have been unable to resolve and that impact the hearing of the trial and to seek from the pre-trial judge a timetable for the exchange of materials. Further, as this is one of the greatest sources of difficulty between counsel, counsel should commit in the timetable to the exchange of opening statements by a certain date and, if

[83] *Ibid.*, at para. 2 & 31.

there is an issue with the contents thereof, it may be addressed as a preliminary matter. If matters are to be argued, counsel should, on agreement, seek an indulgence from the appointed trial judge, likely on request to the trial co-ordinator, that the judge sit, hear, and decide these issues, prior to the jury being empaneled.

We believe it is incumbent upon all justice system participants to limit the inconvenience to members of the public asked to sit on a jury, by dealing with all known issues. Issues can and will arise during the trial that require a jury to be excused and a ruling from a trial judge, but we should not accept a practice where known issues are allowed to fester undealt with until the first day of trial, when the situation could and should have been avoided by properly prepared counsel.