Preparing For Trial

Stephen G. Ross
Rogers Partners LLP

Publication Note:

This presentation was done in 2008

ROGERS PARTNERS LLP

Overview

- Preparing for trial is about identifying, expanding, and then narrowing the *world of available evidence,* and then merging this world with one's *theory of the case*.
- During this presentation, trial preparation will be discussed in three distinct phases:
    - File Opening to Examinations for Discovery
    - Examinations for Discovery to Mediation
    - Mediation to Trial

When to start preparing?

- Trial preparation begins the day a file lands on your desk
- With few exceptions, every file should be treated as though it will proceed to trial
- An initial strategy or "game plan" is formulated from Day One
- Development of the Theory of the Defence at trial will often begin at this time as well

Developing Your Theory of the Case

- This is the lawyer's most important task prior to trial – it provides a framework to begin and continue collecting all available evidence and narrowing the facts down to what is important
- Your Theory should be:
    - consistent with the law
    - consistent with the facts
    - consistent with **common sense**
- Your Theory will be the dominant position you intend to assert at trial – it should be consistent with what you intend to prove and will ask the Judge or jury to accept

Thinking in phases…

- A good approach to preparing for trial is to think in phases:

    1. File Opening to Examinations for Discovery

    2. Examinations for Discovery to Mediation

    3. Mediation to Trial

- Preparing for each helps to prepare for trial.
- Compartments are not water tight

Phase 1- File Opening to Examinations for Discovery

- Upon receipt of the file, all current productions are reviewed and all available evidence is analyzed.
- An initial opinion on liability and damages is then formed.

Phase 1 - File Opening to Examinations for Discovery

- The Affidavit of Documents is prepared and represents a list of currently available evidence.

- Ensure all available evidence has been produced. Arrange at early stage to have affidavit sworn.

ROGERS PARTNERS LLP

Phase 1- File Opening to Examinations for Discovery

- The Affidavit of Documents should be sworn at an early stage to preserve the right to examine plaintiff for discovery first

ROGERS PARTNERS LLP

Phase 1- File Opening to Examinations for Discovery

- The Affidavit of Documents also helps to determine what further productions are required to prepare for examinations for discovery
- A letter to the plaintiff's solicitor may be written to request further documentation (evidence)

ROGERS PARTNERS LLP

Phase 1- File Opening to Examinations for Discovery

- Standard Loss Control Measures are considered, such as obtaining: police reconstruction reports, weather reports, driver abstracts, fire department records, collision summaries, ploughing schedules, etc.
- From the outset to the point of Final Stages of Trial Preparation (where issues are narrowed) **the World of Available Evidence grows and grows**

ROGERS PARTNERS LLP

Phase 1- File Opening to Examinations for Discovery

The preservation of evidence not in our possession is also addressed – “black boxes”, available on some vehicles, provide data as to the actions of the vehicles in the seconds before the accident. In these cases, we write to plaintiff counsel requesting them to secure this evidence

Traffic Cameras/News Outlets
Photos/Videos

ROGERS PARTNERS LLP

Phase 1- File Opening to Examinations for Discovery

- Review of evidence collected from plaintiff, insured and other sources and consider whether and **expert should be retained to assist** with examinations:

  For example, retain Forensic Engineer:

  - Complicated product liability
  - Complicated MVAs involving road authority and/or controversial liability issues

ROGERS PARTNERS LLP

Phase 1- File Opening to Examinations for Discovery

Pre-discovery retention of an engineer can, for example, aid in preparing the nature and actual questions counsel will pose to the other parties at examinations for discovery

ROGERS PARTNERS LLP

Phase 1- File Opening to Examinations for Discovery

- Another example may be a **psychologist** or **psychiatrist** who can assist with the nature and actual questions to ask a plaintiff at examinations who alleges to be suffering from a profound psychological/psychiatric problem (e.g. PTSD)
- At the pre-discovery stage, assistance from the expert with respect to questions to pose to the parties being examined can be very useful but it should be emphasized that in most cases no written reports are to be prepared:
  - not asking for findings opinions or conclusions (written or oral), rather assistance at the evidence collection phase.

ROGERS PARTNERS LLP

Phase 1- File Opening to Examinations for Discovery

- At this stage plaintiffs are also often searched via Google™ , My Space™, Facebook , etc.
- References to plaintiff's social activities and interests can be found.
- Social media searches can be very revealing

ROGERS PARTNERS LLP

Phase 1- File Opening to Examinations for Discovery

At this point, you should have:

- Most of the known evidence available from the insured, adjusters and any retained investigators
- The other parties' productions in the forms of their Affidavits of Documents
- Experts' questions (list of undertakings to request) to assist at examinations
- Various relevant government and other non-party documentation available via a *Freedom of Information Act* request
- Evidence from other sources like the internet

ON TO DISCOVERIES…

ROGERS PARTNERS LLP

Examination for Discovery

Examinations are used to develop your case for trial:

- Enables you to gain an understanding of the **likeability** of the plaintiff and the plaintiff's family (*FLA* Claimants)
- Obtaining clear **impeachments** for use at trial/mediation (plaintiff denies what is on surveillance, Facebook, medicals)
- Enables you to gain **admissions** which can be elicited again at trial or read into evidence (from transcripts) at trial
- The Transcript itself can be used at trial for impeachment purposes if the plaintiff states something materially different at trial than at exams

ROGERS PARTNERS LLP

Phase 2- Examinations for Discovery to Mediation

- Examinations for Discovery have been completed. This is an excellent time to re-assess your trial needs and preparation
- At this point you have a detailed understanding of the file, you have met the plaintiff, and have dealt with opposing counsel – there is a developing sense of the dynamics of your theory in comparison to the others being put forth
- This is when you should begin seriously refining your *theory of the case* and what things you will need to prove and how you are going to prove them

Phase 2- Examinations for Discovery to Mediation

- You should now create and review your list of undertakings, and consider whether there is information or documentation now known to be outside of the power, possession and control of a party to the litigation, such that either **an examination of a non-party or a 30.10 motion** (production from non party) may be required

Phase 2- Examinations for Discovery to Mediation

- After discovery you will want to **consider retaining experts** to address the various heads of damages and injury claims, or to confirm or rebut the findings of treating or medical legal experts

Phase 2- Examinations for Discovery to Mediation

- The important experts likely to be retained concern **causation, future care costs** and **income loss**

- If it appears likely that an expert will be required at some point, send out an initial retainer letter securing your expert

- When and whom to retain are questions for each specific case depending on complexity and quantum

Phase 2- Examinations for Discovery to Mediation

- Prior to mediation, you will need to **identify any legal issues** which may separate the parties, which must be addressed and/or researched before resolution is possible e.g., limitation period arguments and **deductibility of certain collateral benefits**
- Heading into mediation, you have determined your strategy, begun paring down from the World of Available Evidence and put forth a convincing brief /powerpoint of the key issues and evidence the plaintiff will face at trial
- Strategy and evidence may be a bit different at mediation than trial

Phase 3 – Mediation to Trial

The "World
of Available Evidence" is
at its largest at this point in the case,
and now is the time to
start narrowing it
again

Phase 3 – Mediation to Trial

- If mediation fails, trial preparation should begin in earnest
- Again, reassess your theory of the case:
    - should become tighter and focused the closer the trial becomes
    - Focus on the narrowest possible number of issues
    - Drop any argument not consistent with your theory and that is unlikely to relay a simple, clear message to the jury
    - Determine if more evidence may be needed to counter new arguments and evidence presented for first time by plaintiffs at mediation

6 months and Counting…

- While preparation begins the day a file lands on your desk, the real push begins at the 6 month point
- What you should be thinking about completing if not already done:
    - All **undertakings** have been answered by your client and the other side (challenge refusals, or leave as is)
    - **Affidavits of documents** have been exchanged and updated and production is complete: **Privilege Waived where appropriate (90 days)**
    - Order and summarize all **discovery transcripts** as you may need or want to read into evidence portions of the evidence given on the examination for discovery of an adverse party (**send transcripts** to your clients/insureds)
    - Review **pleadings** to see if **amendments** are required

6 months and Counting…

Attendance of Witnesses

- At this point, **summons to opposing parties** need to be discussed and decided – issuing these summons preserves the right of cross-examination and establishment of evidence through adverse witnesses as a substantive part of your case (Rule 53.07 (2) and (3).

- Witnessess are contacted and contact information obtained and summons sent where appropriate

6 months and Counting…

Consider Motions in Advance of or at the Start of Trial

- Some potential issues which may require a motion prior to trial:

1. For additional discoveries (non parties or FLA Claimants)

2. For a further and better affidavit of documents

3. Request to inspect original documents

4. Motion: Production from Non Parties

6 months out…

- Some Motions to Consider for Start or At Trial

5. *Voir dire* at Trial re: Demonstrative Evidence during Opening and/or Surveillance

6. Leave to call more than three (3) experts

7. Exclusion of witnesses

8. Threshold

9. Admissibility of Contentious Evidence

… among others

6 months out…

Serving Expert Reports

- Rule 53.03 requires that unless leave is obtained from the trial judge, expert reports must be served at least 90 days before the start of trial
- If responding to the report of another party, that report must be served at least 60 days before trial
- Expert reports properly served within the above noted periods can be supplemented by a supplementary report so long as they are served 30 days before trial
- Reports must be signed by the expert (not their firm) and served along with the name and address of the expert and a copy of their *curriculum vitae*

6 months and Counting…

MEDICAL REPORTS

- Section 52 of the *Evidence Act* requires that at least **10 days notice** be given to all other parties in order to introduce medical reports, which includes reports prepared by treating physicians

- The opposing party retains the right to cross-examination of the expert even if just filing report

- Consider which experts wish to call and which to just file reports from.

6 months and Counting…

Business Records

- Section 35(2) of the *Evidence Act* provides that business records are admissible as evidence if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.
- If a document properly constitutes a business record, it is admissible only if at **least 7 days notice** of an intention to tender the record as evidence is given to all other parties.
- Any party is entitled to obtain production of such a record for inspection within 5 days after giving notice to produce the same.

Admissions

- **Request to Admit**
  - A Request to Admit together with a copy of any document mentioned in the request to admit (unless the document is already in the other party's possession) may be served at any time.
  - The party on whom a request to admit is served **must respond within 20 days** after service of a request to admit, otherwise the party is deemed to have admitted the truth of the facts or the authenticity of the documents: Rule 51.03(1) and (2).
  - The response must specifically deny the truth of a fact or the authenticity of the document referenced in the request or refuse to admit the same and set out the reason for the refusal, otherwise admission will also be deemed: Rule 51.03(3).

Notices of Intention

- The Notice of Intention is to be served **10 days before trial**
- A complete review of the documentary evidence – contracts, hospital records, doctor's reports, employment records, tax returns, etc., should be completed to determine what should and should not be included in your Notice of Intention
- One purpose of a Notice of Intention is to **avoid** the expense and trouble of **producing original documents at trial** and to avoid, where possible, the necessity of calling the actual authors of documents to prove the document's authenticity
- Deals with Notice requirements of business records, medical reports under *Evidence Act*

ROGERS PARTNERS LLP

Notices of Intention

- Defence counsel should be aware of an Ontario C.A. decision in *Reimer v. Thivierge*, where the Court held that, by including a plaintiff's pre-accident doctor's report in a Notice of Intention, coupled with counsel's aggressive use of the report in cross-examination and his trying to introduce the Report as an exhibit, counsel made the author of the Report a defence witness that should be available for cross-examination by the plaintiff
- These reports should still be listed in your Notice of Intention if you **may** wish to file the report/record as an exhibit as substantive part of defence case,
  but be careful of use in light of *Reimer*

ROGERS PARTNERS LLP

Settlement Offers

- If a defendant does not accept a plaintiff's offer to settle and the plaintiff obtains a judgment that is as or more favourable than the offer, the plaintiff is entitled to partial indemnity costs to the date of the offer and substantial indemnity costs from the date of the offer: Rule 49.10(1).
- If a plaintiff does not accept a defendant's offer to settle and receives a judgment as or less favourable than the offer, the plaintiff is only entitled to partial indemnity costs to the date of the offer and thereafter.
- These costs consequences only apply if an offer to settle is served **at least 7 days before the start of trial** and must remain open until the start of trial: Rule 49.03

Before Trial

- Obtain Jury Panel
- Draft Questions for Jury
- Draft your Closing Argument before trial:
  - you will provide yourself a focus for the evidence
  - You will ensure that you know what must be in evidence to say what you want to say to the jury at the end of the trial

Demonstrative Evidence at Trial

- Plaintiffs have commonly made use of Demonstrative Evidence ("DE") at trial. More and more, we see increasingly sophisticated evidence distilled into a form that speaks instantly, impressively and most important, memorably
- Defence counsel has also realized the value of DE – its use is limited only by the creativity of counsel

Demonstrative Evidence at Trial

- Officially, the definition of Demonstrative Evidence encompasses any non-testimonial evidence where the Court uses its own senses to make observations and draw conclusions, rather than to rely on the testimony of a witness
- The reason DE works is while individuals retain only 10% of the information they read, they will retain

85% of the information they see

Time for Trial…a review

- By the time you enter the courtroom, the world of available evidence ought to have expanded and shrunk, until all you have left are the most important factual elements that are necessary to prove your theory of the case.
- Thinking in phases helps to focus your attention on what you need to prove and when, and what evidence is required to prove your theory or enable you to present your theory to the Jury during your closing.