

## HANDLING A TRIAL EFFICIENTLY\*

By Mary Teal

*“Just as bad advocacy is a time waster, good advocacy is a time saver. Good advocates can strike to the heart of an issue in an interesting and compelling way. They can reduce complexity to riveting clarity and simplicity.”<sup>1</sup>*

Good advocates convert the complexity of their client’s case to riveting clarity by first developing a theory of the case which guides their preparation. They spend the time and effort to prepare well in advance of the trial date. Effective and efficient trial advocacy requires preparation, preparation, and preparation, at the earliest stages. Finally, they cooperate with their opponent wherever possible to avoid unnecessary costs.

It is essential that you formulate a theory of your client’s case from the beginning. The theory will provide you with a framework for efficiently preparing the case. You will be in a position to focus on the essential facts. The theory will give you an idea of which legal

principles apply to the case. The theory will govern all that you do, from the drafting of pleadings to the preparation of affidavits of documents to the approach that you take at the examinations for discovery. As you acquire more information, you may have to fine tune your theory.

While it may seem incongruous, many litigators feel that the first thing to do, as the trial date approaches, is to prepare your closing argument. Your closing argument is your last chance to persuade the trier of fact of your theory of the case. By knowing what you want to say in closing, you will know what evidence you need to call. In your closing argument, you will set out the facts that need to be proved and any legal positions that need to be taken.

In the remainder of this paper we will consider other tools to enable a trial to be conducted efficiently and effectively.

### *Request to Admit*

The Request to Admit, in conjunction with your first draft of

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<sup>1</sup> Robert F. Reid and Richard E. Holland, *Advocacy: Views from the Bench* (Aurora, Ontario: Canada Law Book, 1984), p. 4.

\* This is an abridged version of a paper presented by Mary Teal at a recent OBA seminar.

## Noteworthy

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your closing argument, provide an excellent framework for the efficient conduct of the trial. Preparation of a Request to Admit will help you organize the evidence that you must introduce at trial to prove your theory of the case.

A Request to Admit may elicit an admission with respect to non-controversial facts and the authenticity of some of the documents upon which you intend to rely. These admissions will save you time because you will not have to prove the fact or document. Even if a Request to Admit does not elicit admissions from your opponent, if you have made a concerted effort to identify the facts and the documents that you must prove at trial, you will have succeeded in streamlining your case. A Court may also take into account a denial or refusal to admit in exercising its discretion with respect to costs.<sup>2</sup>

### *Notice of Intention*

If you have prepared a Request to Admit, you will have requested that your opponent admit the authenticity of the documents listed. You should only have listed those documents upon which you intend to rely in advancing your theory of the case. You will also want to serve a Notice of Intention pursuant to R. 53.03 of the Rules of Civil Procedure

and ss. 34 and 35 (business records) and 52 (health practitioner's reports) of the *Ontario Evidence Act* ("OEA") at least ten days before trial. The notice under s. 52 of the OEA advises opposing counsel that you intend to introduce health reports into evidence by filing them, without calling the practitioner. If there are health records that can realistically be filed, without calling the practitioner, advise your opponent. Your opponent risks cost consequences if he nevertheless requires that you call the practitioner.

The legislature created a specific exception to the hearsay rule for medical reports by enacting s. 52 of the OEA. Any report by a medical practitioner is admissible into evidence for the truth of its contents, so long as the report has been delivered to the parties to the action at least 10 days before the commencement of the trial, and the party submitting the report makes the expert available at trial for cross examination.

Business records are admissible as proof that the acts referred to therein took place, but not as to the truth of their contents.

### *Witnesses*

The most obvious method for proving facts at trial is to call witnesses. In order to ensure that the trial proceeds effi-

ciently, consider calling only those witnesses who are necessary to prove your theory of the case. You should carefully consider why you are calling each witness to ensure that you call only those persons that are necessary to deliver the facts required to prove your case. Do not call any extraneous witnesses.

When preparing cross examination of a witness, you must be governed by the theory of your client's case and what you wish to extract from the witness. Prepare the cross examination with a view to achieving your objectives, and no more. You should be aware of the Rule in *Browne v. Dunn*<sup>3</sup> when preparing for cross examination. If you intend to impeach the credibility of the witness with independent evidence, the witness must be confronted with the evidence while still in the witness box.

There are tactics employed in the order in which you call your witnesses. Map out your strategy ahead of trial to exploit any advantages in the order witnesses are called. During the course of trial, you should be aware of certain timing issues. If your client takes the stand late on a Friday afternoon, and you wish to spend some additional time over the weekend to prepare for cross examination, do try to extend

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<sup>2</sup> Rule 51.04, Rules of Civil Procedure.

<sup>3</sup> *Browne v. Dunn* (1893) 6 R. 67 (H.L.).

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the time you spend on your examination in chief. Between the completion of your examination in chief and your opponent's cross examination, you may not discuss your client's testimony with him.

You may wish to move at the commencement of trial for an Order excluding witnesses pursuant to Rule 52.02 of the Rules of Civil Procedure. If the Order is made, you cannot discuss testimony given in the witness' absence until after he or she has testified. If you require the assistance of a witness during the trial e.g. an expert, ensure that you request an exception to the exclusionary order.

#### *Demonstrative Evidence*

As you are preparing for trial, consider any difficulties you may encounter relating to the admissibility of evidence and in particular, the introduction of demonstrative evidence or demonstrative aids. If you plan to rely on demonstrative evidence, notify opposing counsel well in advance of the trial. If opposing counsel does not consent to the admissibility of the evidence, seek leave to admit the demonstrative evi-

dence before the trial and before your opening if you intend to rely on the aid in your opening. You should have your legal briefs prepared regarding the admissibility of the demonstrative evidence before the trial begins.

#### *Discovery Evidence*

You may prove a fact efficiently by reference to an admission by a party at an examination for discovery. If it is your intention to read in excerpts from your opponent's Examination for Discovery as part of your case, have a Brief of the excerpts prepared for the Judge and opposing counsel, as well as a Court copy of the entire transcript. If you fumble through the transcript looking for the excerpt, it causes delay and detracts from the impression you wish to make.

#### *Opening Statement*

Your opening statement should also be prepared well in advance of the trial. It provides an overview of the case, defines the issues and highlights evidence. It echoes the theme or theory of your case. It must not be argumentative, but can be persuasive. The opening relates to the final argument in

much the same way as an overture relates to the finale in a symphony. The themes are repeated to drive your point home.

You should be familiar with what is or is not permissible in an opening statement. Listen carefully to your opponent to ensure that he or she does not overstep the bounds of what is permissible. If you are familiar with the requirements of the opening address, you will be prepared to object, if it is warranted. You should exercise caution in raising an objection in a jury trial. The objection will usually be raised after your opponent's opening is completed and in the absence of the jury, unless it is an extreme case.

#### *Conclusion*

Efficient trial preparation is a function of the early development of a theory of your case, marshalling and organizing the evidence in accordance with your theory, and cooperating with opposing counsel to minimize your client's costs.

### **FIRM NEWS**

On November 13, 2006 Pam Stevens will be the co-chair of an OBA program entitled Hot Topics in Motor Vehicle Insurance 2006. Bruce Cook will be speaking at this seminar on Top AB Cases from 2006.

## **Creation of The ARC Group Canada Inc.**

Hughes Amys is proud to announce that it, and firms from seven other Provinces, have formed a national affiliation of defence counsel called The ARC Group Canada Inc. The ARC Group is a network of independent law firms from across Canada, focusing on insurance and risk management. We are dedicated to providing Canada's insurance and risk management communities with vigorous, seamless and unmatched service, of the highest quality. We provide these services to insurers, self-insured companies and other entities requiring assistance with insurance and risk-related legal matters involving coverage and defence, such as directors and officers and errors and omissions liability; professional lines; transportation, environmental and energy related risks; boiler and machinery exposures; accident, health, life and disability risks; and fire, property and casualty claims, among others.

The ARC Group members are: Alexander Holburn Beaudin & Lang LLP, British Columbia; McLennan Ross LLP, Alberta; Campbell Marr LLP, Manitoba; Hughes Amys LLP, Ontario; Gasco Goodhue LLP, Quebec; Barry Spalding, New Brunswick; Burchell Hayman Parish, Nova Scotia and Martin Whalen Hennebury Stamp, Newfoundland.

On October 26th, The ARC Group held its inaugural seminar here in Toronto, featuring a number of speakers, one of whom was our own Mario Pietrangeli, speaking on When and Why You Need an Expert. The keynote speaker was Ali Reza of Exponent Inc. Mr. Reza's company used computer technology to create different hypothetical loss scenarios to help resolve a legal question involving insurance coverage for the collapse of the World Trade Center in the 9/11 attacks. He was a fascinating speaker on an even more fascinating topic and drew considerable attention to our event. The event was followed by a reception. ARC's guests included leaders of the insurance and risk management community.

If you wish to know more about the ARC Group, or our involvement in it, please call Michael Teitelbaum or Jamie Trimble, or visit the ARC Group's website located at [www.thearcgroup.ca](http://www.thearcgroup.ca).