TRIAL TACTICS AND TECHNIQUES

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INTRODUCTION

You can get mixed messages reading too many advocacy manuals and texts[1]. For example, some will advise you when opening at trial to be thorough and heavy on the documents, and others will advise you to be short and sweet. In closing some will advise you to make limited written submissions in a fashion akin to bullet points and others will advise you to file a detailed written statement both at the beginning and end of trial.

Some people recommend that you make detailed oral and written submissions covering every material point. Others will recommend that your submissions should be limited in scope so as to allow the judges to develop the argument for themselves: on the psychological basis that a judge's own thoughts are more likely than your submissions to be incorporated in the judgment.

The plethora of advocacy-related education courses and programs would suggest that advocacy skills can be learned. I believe this is true to a certain extent or this paper would not be useful. Nonetheless, the lifeblood of advocacy is experience. And a lot of experience is a prerequisite to being a successful advocate.

EXPERIENCE

Most of the advice given by experienced advocates is well-founded and appropriate *in the right case*. It is experience which will allow you to judge the appropriate tactics for your particular case. One size does not fit all.

In 1936, a New York litigator, Francis L. Wellman, in a well-known book, *The Art of Cross Examination*[2] scoffed at merchants who preferred to compromise their difficulties or write off their losses rather than to litigate in the courts[3] but he understood that delays of up to three years made litigation undesirable in commercial cases. Wellman believed the delays were not attributable to too few judges or to judges who did not work hard enough. Instead, Wellman attributed the blame to inexperienced trial lawyers.

> "The conduct of a case in court is a peculiar art for which many men, however learned in the law, are not fitted; and where a lawyer has but one or even a dozen

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[1] For a helpful list of texts and papers from 2004 see schedule "A".

[2] Fourth Edition, 1936.

[3] *Ibid.* pp. 23-23.

> experiences in court in each year, he can never become a competent trial lawyer. I am not addressing myself to clients, who often assume that, because we are duly qualified as lawyers, we are therefore competent to try their cases; I am speaking in behalf of our courts, against the congestion of the calendars, and the consequent crowding out of weighty commercial litigations.
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> One *experienced* in the trial of causes will not require, at the utmost, more than a quarter of the time taken by the most learned inexperienced lawyer in developing his facts. His case will be thoroughly prepared and understood before the trial begins. His points of law and issues of fact will be clearly defined and presented to the court and jury in the fewest possible words. He will in this way avoid many of the erroneous rulings on questions of law and evidence which are now upsetting so many verdicts on appeal. He will not only complete his trial in shorter time, but he will be likely to bring about an equitable verdict in the case which may not be appealed from at all, or, if, appealed, will be sustained by a higher court, instead of being sent back for a retrial and the consequent consumption of the time of another judge and jury in doing the work all over again."[4]

Thus, Wellman was of the view that trial lawyers should not only specialize in the courtroom but that a competent trial lawyer should conduct trials at least a dozen times a year.

This is not going to happen in Canada for any commercial litigator, nor even for most personal injury litigators. It would appear, therefore, the only real trial lawyers on Wellman's standards will be the criminal lawyers. And it is true that for young trial lawyers, two or three years in the criminal trenches—combined with hard work and discipline—will make them eminently better barristers.

As Wellman states:

> "There is no short cut, no royal road to proficiency, in the art of advocacy. It is experience, and one might almost say experience alone, that brings success. I am not speaking of that small minority of men in all walks of life who have been touched by the magic wand and genius, but of men of average endowments and even special aptitude for the calling of advocacy; with them it is a race of experience."[5]

It is important to take all such advice with a grain of salt. It is difficult to accept all of Wellman's critique of "office lawyers" who, from his perspective, were the cause of all the delays in the legal system in his era. I set out another of Wellman's points for your consideration:

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[4] *Ibid.* pp. 23-24.

[5] *Ibid.* pp. 24-25.

> "When the public realizes that a good trial lawyer is the outcome, one might say, of generations of witnesses, when clients fully appreciate the dangers they run in intrusting their litigation to so-called 'office lawyers' with little or no experience in court, they will insist upon their briefs being intrusted to those who make a speciality of court practice, advised and assisted, if you will, by their own private attorneys. One of the chief disadvantages of our present system will be suddenly swept away; the court calendars will be cleared by speedily conducted trials; issues will be tried within a reasonable time after they are framed; the commercial cases, now disadvantageously settled out of court or abandoned altogether, will return to our courts to the satisfaction both of the legal profession and of the business community at large; causes will be more skilfully tried—the art of cross-examination more thoroughly understood."[6]

Apart from actually conducting trials, as a general proposition, a young advocate wanting to be a successful advocate should read widely among the many texts in the area of advocacy; better still he or she should attend as often as possible to witness trials for themselves. But ultimately, while one should certainly participate in some trial advocacy programs (although, in my view, these are overrated and bear little similarity to the real thing) it is vastly more important to take on as many trials in your younger years as your firm will permit. These may be *pro bono* criminal defence, *pro bono* civil matters, minor personal injury matters (although the latter are less likely due to the threshold and the deductible).

STYLE

You should not slavishly copy senior counsel that you work with or observe in court. Everyone has their own style. It is even a peculiarity of the law that eloquence is not a prerequisite to greatness: although it helps. I have attached as schedule "B" Wellman's description of six of the well-known barristers in the American courts at the turn of the 20th century (yes, I do mean the early 1900s). While these are trial lawyers who appeared regularly before juries, it is interesting to note that each are described as different characters with very different styles. Indeed Wellman clearly thought little of some of them. Thus, Edward C. James is described as "ponderous and indefatigable. His cross-examinations were laboured in the extreme." Wellman says that James:

> ". . . would pound at you incessantly, but seldom reached the mark. He literally wore out his opponent and could never realize that he was on the wrong side of the case until the foreman of the jury told him so. Even then he would want the jury polled to see if there was not some mistake. James never smiled except in triumph and when his opponent frowned. . . he owed his success to his industriousness and indefatigable qualities as a fighter; not I think to his art."[7]

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[6] *Ibid.* pp. 25-26.

[7] *Ibid.* p. 231.

Wellman described William A. Beach, who was known as "the Hamlet of the American Bar" as a "poor cross-examiner"[8].

And so I conclude this introduction by recommending to you industry and indefatigability. Genius is rare; hard work and discipline are the keys to success for the vast majority. I also urge you not to take it too seriously when some of your colleagues bad mouth other barristers whom you think to be excellent or very experienced. Wellman was not very complimentary of many of the best barristers at the American Bar at the turn of the century. What would he have said about the average barrister?

The great advantage of hard work and more hard work is well-illustrated by Wellman's description of a formerly well-known barrister, Rosco Conkling, who, in the course of defending a murder trial, in anticipation of cross-examining the pathologist, himself procured a body and had it dissected so that his cross-examination would be well-informed. As Wellman reports:

> "As the result of [the pathologist's] cross-examination at the trial, the presiding judge felt compelled to declare the evidence so entirely untrustworthy that he would decline to submit it to the jury and directed that the prisoner be set at liberty."[9]

As will be seen below, Justice Goudge (the Goudge Inquiry into Pediatric Forensic Pathology in Ontario) would approve.

While technology changes over time, whether it be the introduction of the telex, photocopier, fax, computer, e-documents, the fact is that basic litigation skills remain essentially the same today as they have done for decades. Diligence, shrewdness, precision, confidence, and, most importantly, experience, make the good advocate great.

TACTICS TIMING: WHEN TO PUSH; WHEN TO SLOW

Given the delays already inherent in the court system, plaintiffs generally want to have a trial as soon as possible. Justice delayed is indeed justice denied. Furthermore, it is usually less expensive to get to trial in a short period of time and avoid the expensive, repeated re-education by counsel as they pick up and set down the file over a period of years.

There are exceptional circumstances which may militate against the plaintiff desiring an early trial. In personal injury cases one may need to have the injury "mature" so that the extent of the damages is known and more readily demonstrated to the jury. Experts may need time to conduct tests. You may want to await the outcome of an analogous case elsewhere.

Defendants rarely want to go to trial. Defendants generally believe that justice delayed is a very good thing. Even defendants who are confident they will prevail rarely are in a rush to "put their

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[8] *Ibid.* p. 232.

[9] *Ibid.* p. 233.

money where the mouth is". This can be in part due to the excessively high cost of a modern trial. Trials today take far more time than in Wellman's day, for reasons which will not be debated here. Of course, defendants can also drag their feet because of a nagging doubt about their prospects (who did you say the trial judge was going to be?).

On the other hand, there can be circumstances where even the defendant will wish to have an early trial. For example, there may be a concern about whether defence witnesses will be available or able to testify after some years, perhaps because of infirmity or old age. The defendant may also have a concern about the impact of the pending claim on their marketplace or their shareholders. Some people just do not like the stress and uncertainty associated with litigation and want it over with. Not just experience but proper diligence will allow you to advise your client how to proceed; whether quickly or slowly.

The following examples of actual cases illustrate some of the conflicting considerations. No two cases are the same.

For example, we acted for the plaintiffs in a class action alleging the insurers were inadequately compensating insureds for car repairs based on the value of inferior car parts. The equivalent U.S. class action had resulted in a $1,000,000,000.00 judgment for the plaintiff class and the U.S. decision was under appeal. We commenced the action in Canada and offered to have the outcome of the U.S. proceeding determine the outcome of the Canadian class action. The offer was rejected. Presumably the insurer wanted the opportunity to defend in Canada, no matter the outcome in the U.S. We pushed the case hard in Canada and engaged in a myriad of expensive motions over a period of years.

Ultimately, the U.S. judgment was set aside on appeal and we were left to litigate the claim (unsuccessfully) in Ontario. In hindsight we should not have been in such a big rush. We should have simply awaited the outcome of the U.S. case.

We also act in two large class actions against "big pharma". Thus, we continue to litigate against Eli Lilly (in respect of the drug Zyprexa) and Merck (in respect of the drug Vioxx). Both companies have settled in the U.S. but they continue to fight in Canada. There is no advantage to delay on the part of the plaintiffs. There is no advantage to the defendants to get the matter resolved. Vioxx, in particular, amounts to all out warfare.

Sometimes contrary considerations unexpectedly occur. In one of our "big pharma" class actions the defendant likely settled in part due to pending merger considerations.

One final example does not involve our firm and I can only surmise as to the tactics and strategy. When David Kassie and other investment bankers left CIBC in 2004 to form a new investment brokerage, Genuity, it led to immediate litigation alleging improper competition, solicitation, and the revelation that many brokers "pin" messages via BlackBerry so that no records are kept. It is entirely possible that the plaintiff, CIBC, in that case was in no rush with the litigation. The threat of pending litigation may have been better than actual litigation because the impending lawsuit might adversely affect Genuity's customers or Genuity's future investment plans. If that indeed was a thought in the mind of CIBC's lawyers it proved valueless when Genuity prospered and recently merged to form Genuity Canaccord.

SOME PRACTICAL CONSIDERATIONS WHEN EXPEDITING A TRIAL

1. Make sure you complete your witness interviews as soon as possible and certainly well in advance of trial.

2. Take into account the age or infirmity of the witnesses and consider whether a rule 36 examination is available or necessary.

3. Retain all necessary experts as soon as possible, taking into account the anticipated delay in getting to trial and ensure that the relevant experts are going to be around to testify in a few years time.

4. Do not leave interprovincial summonses (rule 53.05 and the *Interprovincial Summonses Act*) to the last minute. You need a court order and this may not necessarily be readily available just before trial.

5. Make sure all notices are served on a timely basis. See, for example, the 15 day notice requirement of the notice of constitutional question under s. 109 of the *Courts of Justice Act*, as well as the more common seven days under s. 35 of the *Evidence Act* (business records), 10 days under s. 55 of the *Evidence Act* (copies of letters, etc.) and 20 days for a request to admit (rule 51.02).

OBJECTIONS: JUST BECAUSE YOU CAN, DOES NOT MEAN YOU SHOULD

The reality is that every judge wants to expedite and shorten the trial. Objections are less likely to be sustained today than 20 or more years ago. Important rules of evidence, such as the rule against hearsay, are no longer sacrosanct (*Ares v. Venner*[10]; *R. v. Khan*[11]). In a civil trial without a jury the judge is much more likely to allow evidence to be admitted "subject to the weight to be given to it" or allow the evidence to be admitted subject to a ruling to be given when the testimony has been completed, than to exclude the evidence. Every judge believes they can identify and disregard unduly prejudicial evidence and that they will not be adversely affected by hearing it.

Nonetheless, where there is a truly important issue (or perhaps where you are desperate) a timely objection must be made. If you do not object you will not be able to do so on appeal[12]. In general you should not object unless:

(a) you are strongly of the view that the evidence will be unduly prejudicial; or

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

[11] *R. v. Khan*, [1990] 2 S.C.R. 531.

[12] *Country Style Food Services Inc. v. 1304271 Ontario Limited*, [2005] O.J. No. 2730, paras. 88-91 (O.C.A., June 30, 2005).

(b) you are getting desperate and you need to change the direction of the trial (very unusual circumstances) or need to establish a better record for appeal.

You should generally avoid objections in respect of unimportant issues because:

(a) you will divert the judge from the truly important issues on which you do want an exclusionary ruling;

(b) you may well deliver the message to the judge that you are desperate and your case is a losing proposition;

(c) you may lose the objection and focus the judge on the otherwise unimportant issue; and

(d) you may lose the judge's goodwill by causing unnecessary delay and interruption.

COMMON AREAS FOR OBJECTIONS

(a) **Hearsay:**

While the rule against hearsay still has life, the "offensiveness" of the evidence must be fairly clear to warrant an objection. First, if the evidence is relatively innocuous why object and risk alienating the judge? Secondly, if the evidence can be introduced properly by another witness relatively easily—and the evidence is not central to the case—why require the additional witness to be called, thereby cementing the point in the judge's mind? Nonetheless, in the case of obvious hearsay on a central point you should certainly object. You will then be met, assuming the related witness is unavailable, with an argument that the evidence is reliable and necessary. But at least you may win that point. If you lose it you have one ground for appeal.[13]

(b) **Failure to strictly prove the authenticity of documents:**

In advance of trial you will have served the appropriate notices under ss. 35 (business records) and 55 (copies of letters, etc.) of the *Evidence Act*. You will also have relied on a request to admit (rule 51.02—at least 20 days prior to trial) or, more likely, an admission at discovery. Note that a positive response to a request to admit the truth of the fact or authenticity of the document does not necessarily mean it is admissible or relevant at trial.[14]

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[13] In *Wiebe v. Jenkins Indoor Plant Services Inc.*, 2008 CarswellOnt 8359 (SCJ), a mistrial was granted in a jury case where the defendant did not call a witness to confirm prior hearsay. See also R. Anand, *Hearsay does not Matter*; and B. Legate, *Hearsay Evidence: Does it Matter? It's in the Eye of the Beholder*, both at 2006 Advocates' Society Spring Symposium, tab 2.

[14] *Canpotex Ltd. v. Graham*, [1985] 5 C.P.C. (2nd) 233 (Ont.H.C.).

There is also fertile ground for objections in respect of proper proof of emails, proper proof of website content, and, as a further example, proper proof of Royal Commission reports[15].

(c) **Contravention of the rule in *Browne v. Dunn*, i.e., failure to afford a witness an opportunity to address an issue upon which the cross-examiner intends later to impeach the witness**:

In this famous English case from 1893, plaintiffs' counsel did not cross-examine defence witnesses, but later alleged that they were not telling the truth. The House of Lords said this was unfair. It is not the rule, however, that the witness has to be cross-examined[16]. What is required is that the witness be given sufficient notice that their credibility is in issue and an opportunity to explain themselves.

Note, however, that contravention of the rule in *Browne v. Dunn*,[17] again, will likely simply be more relevant to the weight to be given to the evidence by the trial judge rather than result. See schedule "C" for further elaboration of the rule.

(d) **Challenges to an expert, the relevance of their evidence and related matters**:

The new rules with respect to experts (see especially rule 53.03) are intended to increase the objectivity and lack of bias on the part of experts and to focus the scope of the dispute by encouraging them to "meet and confer"[18]. The Civil Justice Reform Project[19] was concerned about the proliferation of experts testifying at trials as well as the perception that experts were no longer objective advisors, as opposed to advocates for their clients. While courts have always thrown out biased reports which were more in the nature of advocacy (and any such an objection should be voiced clearly as soon as possible at trial) this will be particularly true of any experts who cross that line in future.

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[15] See *Robb Estate v. St. Joseph's Healthcare Centre*, [1998] 31 C.P.C. (4th) 99 (Ont. Gen. Div.) rejecting the Krever Report as proof of its contents.

[16] See, for example, *Hurd v. Hewitt* (1994), 20 O.R. (3d) 639, and *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24 per MacDonald J. at paras. 368-371. See also s. 20 of the *Ontario Evidence Act* re proving contradictory written statements when examining a witness, s. 21 re proving contradictory oral statements, and s. 23 re discrediting your own witness. The rule in *Browne v. Dunn* is intended to ensure there is no ambush of a witness. If the witness knows the issues and that he will be impeached there is no need to cross-examine him on the point: *R. v. MLW*, [1995] 82 O.A.C. 397.

[17] (1893) 6 R. 67, H.L.

[18] See Colin Stevenson, *Duty Calls: The New Rules of Experts in the Ontario Civil Justice System*, OBA Conference February 8, 2010 (www.stevensonlaw.net).

[19] Justice Osborne's report presented November 2007 is found at http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf.

The Goudge Report (2008)[20] on flaws in Ontario's forensic pathology system had much broader implications for civil and criminal justice in Ontario. It sets out fertile ground for objections to expert evidence. In the context of criticizing the pathologist, Dr. Smith, the Inquiry identified 10 criticisms, all of which can be relevant in any case:

(i) he failed to understand his role was not to support the crown (or party retaining him) (this goes to bias and may affect both weight and admissibility);

(ii) he failed to adequately prepare for court (this would be relevant to the weight of his evidence);

(iii) he overstated his knowledge in a particular area (this may be relevant to his qualification as an expert or to weight);

(iv) he gave anecdotal evidence which was inappropriately unscientific (this goes primarily to the weight of his evidence);

(v) he failed to give a balanced view of the evidence and was dogmatic and was unduly certain (this again goes more to weight);

(vi) he was unprofessional and gave unwarranted criticism of other professionals (this again goes more to weight);

(vii) he testified on matters outside his area of expertise (this should be the subject of an immediate objection);

(viii) he gave opinions which were speculative, unsubstantiated and not based on (pathology) findings (this goes to weight);

(ix) he used loose and unscientific language (again, this goes to weight); and

(x) he lacked candour and honesty (again, this goes to weight).

The Goudge Inquiry established that the complexities of forensic pathology often led to ineffective cross-examination. You must be thoroughly prepared in the particular area of expertise to perform a competent cross-examination. Remember Wellman's example of Rosco Conkling who arranged for and attended a dissection prior to trial to ensure he was properly prepared.

One must always recognize, of course, that broad cross-examination on the area of witnesses' expertise is often inadvisable as you can seldom match the depth of

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[20] *Inquiry into Pediatric Forensic Pathology in Ontario*, The Honourable Stephen T. Goudge, Commissioner, released on October 1, 2008, may be found at http://www.goudgeinquiry.ca/.

knowledge of a true expert. The cross-examination must be focussed and thoroughly prepared in advance.

The Goudge report will be very useful in support of your legal arguments challenging experts on the various issues summarized above. A copy of relevant sections of the Goudge report is attached as schedule "D".

There can be no doubt that if you have any reasonable chance of having an expert's evidence declared inadmissible because they are not properly qualified, such an objection should be made[21]. On a related but different point, one regularly sees expert opinions with respect to legal issues. Expert opinions are admissible, for example, with respect to ethical standards. Expert opinion is not, however, admissible with respect to legal issues to be determined by the judge[22]. Thus, while a lawyer who has specialized in corporate governance may properly opine with respect to standards of corporate governance, they should not be allowed to stray into giving an opinion on the legal rules and principles that will determine the case. Some additional advice re filing expert's reports is attached as schedule "E".

(e) **Unfair or unsubstantiated demonstrative evidence**:

There are numerous excellent papers and articles on the use of demonstrative evidence, including properly admissible exhibits or simply demonstrative aids[23]. In a personal injury action where demonstrative evidence is particularly common, you must, as plaintiff's counsel, be ready to establish a sound foundation for the use of the photographs, computer simulations, animations, diagrams or models; while as defence counsel you must object to any such documents or exhibits which are not properly established.

(f) **Inadequate similar fact evidence**:

There is no doubt that similar fact evidence which establishes the improbability of coincidence is properly admissible[24]. You should, however, be quick to object to much so-called similar fact evidence as it is often unfairly prejudicial to your case

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[21] See, for example, *Zellagate Holdings Inc. v. Beechlawn Holding Ltd.*, [1996] O.J. No. 1067, in which an experienced realtor was found not be qualified to give appraisal evidence.

[22] *R. v. Century 21 Ramos Realty Inc.* (1987), 58 O.R. (2d) 737 (C.A.).

[23] See, e.g., *The Oatley-McLeish Guide to Demonstrative Evidence*, LSUC December 3, 2009 (2 volumes).

[24] See *Mood Music Publishing Co. v. De Wolfe Ltd.*, [1976] Ch. 119, [1976] 1 All E.R. 763 (C.A.); and *R. v. Trochyn*, [2007] 1 S.C.R. 239.

and, equally importantly from the judge's point of view, will unduly delay the conduct of the trial[25].

(g) **Improper reply (i.e., a party is not allowed to split its case)**:

As counsel for the plaintiff, you cannot choose to introduce reply evidence which should have been produced when you were first calling witnesses[26]. Make your objection forcibly or there is a real risk the trial judge will simply allow the evidence to be called while affording defence counsel the opportunity not only to cross-examine but to call rebuttal evidence, if appropriate. For minor matters see rule 52.10 which allows you, with leave, to prove at a later stage some material fact or document which was omitted through accident or mistake.

(h) **The judge is unduly interfering in the conduct of your case**:

The judge should not unduly interfere with the conduct of your case. If things are going badly you should object. To be prudent you may choose to make your objection with all counsel present in chambers. A court reporter should be present.

(i) **Spoliation**:

This will be a rare objection but potentially fatal to the other side, if successful. If a successful objection can be mounted—based on evidence which you will have to lead at the appropriate time—on the basis that the other side has destroyed or failed properly to preserve relevant documents—you may choose to object to the introduction of evidence in the related area. Whether the judge will throw out the evidence entirely is open to serious question but an unsuccessful objection will set the stage for a reprise in closing argument to the effect that an adverse inference should be drawn against the party that committed the spoliation (or perhaps, by way of counterclaim, that the party committed the tort of spoliation)[27].

(j) **The answer will disclose privileged information**:

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[25] *Boer v. Cairns* (2003), 65 O.R. (3d) 343. See also *New Developments: The Law of Evidence in Civil Cases*, Advocates' Society Spring Symposium 2005, Peter Wardle, tab 3.

[26] See *R. v. Krause*, [1986] 2 S.C.R. para. 20-21; *Springer v. Aird & Berlis*, 2009 CarswellOnt 1307 (SCJ) (when the plaintiff's evidence is shaken by the defendant, the plaintiff cannot call confirmatory evidence in reply) and B. Zarnett, *Reexamination and Reply*, 2004 Advocates' Society Spring Symposium, tab 2.

[27] See, e.g., K. Thomson, *The Bermuda Triangle of Litigation*, 2008 Advocates' Society Spring Symposium, tab 8.

Objections here are essential. This is a large topic which is discussed well elsewhere[28].

(k) **The cross-examination is intimidating your witnesses**:

This is a rare objection—some relevant advice is attached as schedule "F".

(l) **The questions and proposed answers are irrelevant to the issues**:

I.e., unduly prejudicial without adequate probative value. Another rare objection.

You should only object either when you are reasonably satisfied that the objection will be successful or, where there is significant risk that the objection will not be sustained, the evidence is crucial to the case. Remember that the answers to collateral questions are final.

WRITTEN SUBMISSIONS: BEFORE AND AFTER THE EVIDENCE HAS GONE IN.

The opening statement should capture the judge or judge and jury. In a complicated commercial case written submissions may be helpful, provided they are not turgid and, as with oral submissions, do not over-promise the case that will be delivered. It is always better to err on the side of brevity. Obviously, the more complicated the case, the longer the trial and the more extensive the opening.

As opening statements should not contain argument, the written submissions, if any, should be confined to providing a roadmap for the court. The written submissions might simply provide a cast of characters and reference the crucial documents which may be provided in a compendium—provided there are no authenticity or related issues. Any such issues should be raised at the outset.

You should certainly hand up a legal brief containing at least the most important authorities.

Make sure you do not put in writing or state orally anything that will not be established by the evidence. Make sure you start your argument strongly and end strongly. The facts, law and inferences should be logically organized. You should err on providing less rather than more information.

There seems to be a common misconception that judges are happy to listen to counsel talk endlessly or, for that matter, are happy to read page upon page of a detailed brief. This is not likely to be true. Focus your brief on the key issues. Reduce it and reduce it again until you have distilled the case to its essence. If you have any doubt about any aspect of the written submissions, leave them out.

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[28] See, for example, E. Cherniak and J.L. McDougall, *Privilege Issues and the Barrister's Brief*, April 2, 2004, Advocates' Society Spring Symposium, tab 1, and P. Perell, *A Privilege Primer*, 2006 Advocates' Society Spring Symposium, tab 5.

While Earl Cherniak may say "thorough and heavy on the documents", make sure it is a case in which such an approach is warranted. As David Scott has said "eliminate the unnecessary".

CLOSING ARGUMENT

There is little doubt that almost every good counsel today will provide written submissions at the end of the trial. Some great counsel, like David Scott, have the privilege of making such submissions bullet points with minimal content. When you have David Scott's experience you can do the same. In the meantime, you should prepare legal argument which is thorough yet concise. It must incorporate all the crucial documents as well as the important cases.

You will have commenced preparation of your written closing submissions long before the trial ever began. Those draft submissions will have formed the basis for your trial plan, your opening and your examinations. They will expand as the trial proceeds and you incorporate additional details. They will then be edited (not created) just before the time set for closing. In an ideal world you will provide the written submissions to the judge a day or two prior to oral argument. You should not worry that this provides the other side an opportunity to respond. They already intend to do so.

In the unlikely event that you have daily transcripts do not include "chapter and verse". Make sure you condense your written submissions so they are truly useful to the trial judge.

If you do not have daily transcripts you should consider ordering transcripts during the course of the trial in respect of a crucial witness, such as an expert.

Remember that your submissions, oral or written, should not be a dry exposition of the facts and law. You must tell a story, whether it is a criminal case, a personal injury, or a product liability case. For example, in a product liability case it is not enough simply to summarize the evidence of the experts. You must explain why the defendants manufactured the defective products and the harm that they have caused. You are telling a story and you must persuade the judge. Finally, remember that to be persuaded the judge must still be awake.

PRACTICALITY OF AN AGREED STATEMENT OF FACTS

An agreed statement of facts should shorten a trial. One has to exercise extreme caution with an agreed statement of facts. Trials are unpredictable. The turn of events may render prior admissions inappropriate or at least dubious.

In a somewhat analogous situation the Court of Appeal has criticized reliance on a "paper record" as a basis for determining issues which require evaluating credibility, weighing evidence and drawing factual inferences.[29] What appeared to be helpful does not always end of up that way.

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[29] See, *Kilpatrick v. Peterborough Civic Hospital*, (1999) 44 O.R. (3d) 321 at paras. 10-14 and 20 relying on the former provisions of rule 20.

In some cases I have proceeded by what is ultimately similar to an agreed statement of facts in the form of an application: in one particular case, it was an application for partition and sale of a property. The application judge determined (correctly) that a trial was required to hear the oral evidence of the experts with respect to where the lands should be partitioned. Ultimately the case turned not only on that oral evidence but on the oral evidence of one of the parties with respect to prior use of the property—a point which had not been in the original application material.

In short, an agreed statement of facts may be appropriate with respect to clearly uncontested issues, but it will be counterproductive to attempt an agreed statement of facts with respect to anything remotely contentious. In one particular case I spend some weeks trying to negotiate an agreed statement of facts with the Ontario Crown with respect to a land transfer tax matter only to have the Crown refuse to cooperate at the last second. An agreed statement of facts is often not worth the effort.

It may well be better to submit a detailed request to admit and force the other side to respond appropriately. In one particular case, I submitted an extremely long request to admit which was promptly rejected out of hand with a two line denial by one of the defendants. However, the case settled shortly thereafter, immediately prior to trial, with counsel for the other defendant saying that the request to admit had focussed his attention on certain contentious issues and facilitated settlement.

HOW TO CROSS-EXAMINE ON A TRANSCRIPT OR OTHER PRIOR STATEMENT

It is important to emphasize that, as with objections, just because you can cross-examine a deponent on a prior inconsistent statement does not mean that you should do so. Not all discrepancies in a transcript of discovery when compared to trial evidence are worth bringing to the judge's attention. All too often I have sat amusing myself as other counsel attempted hopelessly to pin a minor or explainable discrepancy on a witness. This generally only allows the witness to elaborate on their own story to the detriment of the examining counsel. Not only that but repeated cross-examination on irrelevancies will exasperate your trial judge sooner rather than later.

When it is worthwhile, however, the proper technique is as follows:

(a) Pin down the witness as to exactly what they said at trial in chief. If they revert to what they said on discovery, so be it: that is still helpful.

(b) If they maintain their trial evidence and you believe it to be both clearly inconsistent with prior evidence as well as material to the outcome of the trial then ask the witness if they recall being examined for discovery on a particular date.

(c) If the witness does not recall the examination you will have to threaten to seek an adjournment of the trial to call the court reporter to testify as to the accuracy of the transcription of the questions and answers. The witness will almost invariably back down and recall the examination.

(d) Either at this stage or later you must establish that the questions and answers on the prior occasion were given under oath, in the case of discovery.

(e) You will then hand a copy of the examination transcript to the trial judge and to read the disputed questions and answers to the witness.

(f) You will ask the witness if they gave those answers to those questions on that occasion.

(g) If the witness denies it you will show them a copy of the transcript and read through it again. Again, they will almost invariably concede the accuracy of the questions and answers.

(h) If you have not already done so, you will confirm that their answers were given under oath.

(i) At this stage the witness will either concede the accuracy of the prior answers, say that the answers previously given were wrong or more likely attempt to explain the answers away. (Hopefully you will have contemplated the latter possibility and dealt with it in your prior questioning of the witness before dealing with the transcript.)

(j) In any event, you will likely be able to establish with the witness that they reviewed the transcript when it was first delivered to counsel (likely years prior to trial) and that they did not provide any correction to the transcript between then and trial.

(k) Similarly, you will likely confirm that they reviewed the transcript in preparation for trial and again did not provide any correction to the evidence prior to this day.

(l) Finally, you will likely establish that their memory some years ago at the time of discovery was likely better than it is today. They will at least concede that people's memories usually diminish with the passage of time.

This procedure will satisfy the requirements of s. 20 of the *Evidence Act*. Note that rule 31.11(2) permits a discovery transcript for impeachment but does not obviate the need to comply with the *Evidence Act*. The process will be varied only in minor respects in respect of other prior written statements, such as affidavits or written statements on other occasions. Proof of contradictory oral statements must be done in a similar manner so as to satisfy the requirements of s. 21 of the *Evidence Act*.

Prior to trial you should check other court proceedings in which a party or witness has been involved to attempt to find, where appropriate, prior inconsistent statements. You should obtain certified copies of such documents, where possible, in order to facilitate proof at trial.