

PERSONAL INJURY LITIGATION - PRELIMINARY CONSIDERATIONS

It's Never too Early to Prepare for Trial

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This program is focused on "Getting Ready for Trial". Trial preparation starts from the first moment that you pick up the phone to speak with a prospective new client. Failing to properly consider the impact of the initial steps in a file on the final result can have a negative impact on the client, the lawyer and the relationship between them. This paper will attempt to identify the issues that need to be considered by a lawyer at the very beginning of the relationship with the client in order to best ensure a positive result in the case through settlement or trial.

Statistics tell us that less than 2% of all personal injury actions go to trial. Taking into account the number of claims that never even make it into litigation (either because the case is settled or abandoned before a Statement of Claim is issued), the percentage of personal injury claims that go to trial is probably well under 1%. Why should a lawyer worry about a trial at the earliest part of a case when the chance of getting there is so remote? In order to get the best possible result for the client, a lawyer must be prepared to go to trial. Since it is impossible to predict which of your cases will fall into the minority of claims that eventually end up in a courtroom, the lawyer must therefore treat every case as if it will be going to trial at some point in the future.

The First Call

The interview usually starts with a call from a potential new client, or someone on his or her behalf. Getting ready for trial starts right after the word "hello".

The two most important "trial" considerations during this first contact are client relations and limitation periods.

As a general rule, the outcome of a trial will depend in large part upon the presentation of the plaintiff. Ideally, the lawyer and the client should be on the same page regarding the presentation of the case. The client must have confidence and trust in the lawyer. The client must be receptive to the lawyer's ideas and recommendations. Therefore, the lawyer must start the relationship on the right foot. The person answering the phone must be courteous and professional. If a return call is necessary, the lawyer should do so promptly. The first meeting should be arranged for a date as soon as possible after the initial call, so that the client feels that his or her case is important to the lawyer. These simple steps will help to build the client's trust in the lawyer from day one.

The very first legal consideration during this initial contact is the potential limitation/notice period. The lawyer must get as much relevant information as possible to determine if any immediate actions ought to be taken, such as sending notice letters to a municipality or issuing a Statement of Claim to protect a limitation period.

The Interview

The first in-person meeting with the potential client is extremely important. Usually, the client will decide if he or she wants to retain the lawyer, and the lawyer will decide whether or not to take the case. This is not a decision to be made lightly, as the

significant investment of time and money will usually begin immediately following the meeting.

In order to give the interview some direction, the lawyer should have some information available from the first telephone contact. The lawyer should have some basic information about the client (name, contact information, age, employment status) and the nature of the legal matter before the initial meeting. The potential client should have been instructed to bring in all documents that may be relevant to the case, so that the lawyer can get up to speed as quickly as possible. The interview should follow a general format so that the lawyer can obtain all of the information that he or she will require, while being flexible enough to meet the specific needs of the client. The lawyer should actively listen to the client, watching for body language that may suggest further lines of questioning.

Attached as Schedule "A" to this paper is a list of the information that a lawyer ought to obtain in most personal injury matters from the client at the initial interview. This is not an exhaustive list, and it should be tailored to meet the needs of a particular case.

Effective trial presentation is based on information and preparation. It is important to get as much information (both helpful and harmful) about the case as early as possible. This information will help with the next major step - the decision to take on the case.

To Act or Not to Act

Generally speaking, a lawyer must be prepared to try any case that he or she takes on. Rule 2.09 of the *Rules of Professional Conduct* state that "A lawyer shall not withdraw from representation of a client except for good cause...". Not wanting to do the trial would not be considered "good cause", unless the client had deceived the lawyer, there was some loss of confidence in the lawyer, or there was a non-payment of fees. Therefore, the decision to take on a case should not be made lightly. The lawyer must ask him or herself a number of questions:

Is this a case that I am willing to take to trial (with or without some assistance)?

Is this a case that I am competent to undertake?

Do I have time to take on the case?

Does the case have merit?

Is the case likely financially worthwhile for the client?

Is the case likely financially worthwhile for the lawyer and firm (unless it is a *pro bono* matter)?

If the answers to these questions are "yes", the lawyer should strongly consider taking on the case, subject to the discussion about fees.

Fees and Trials

For many clients, the most important issue at the initial meeting is legal fees. The client will want to know exactly how much the case will cost them. They will want to know how and when the fees will be paid. And they will usually want to know what will happen if they lose the case.

If the client and lawyer are willing to enter into a contingent fee agreement, the lawyer must make sure that the agreement covers off the possibility of a trial. The lawyer should consider an escalating fee structure to permit the percentage fee to increase if the case goes to trial. In that way, the costs to the client are more modest if the case is settled, but the lawyer has some protection regarding fees if the case goes to trial. The contingent fee agreement must also spell out exactly what will happen regarding the fees and disbursements of the lawyer in the event that the case is lost.

If the fees are paid on a periodic, hourly rate basis, the lawyer should give estimates up front about the cost of the various steps, including the trial. If the client will be asked for a retainer before the trial, the lawyer should make this very clear so there is no dispute later on. If during the course of the case the lawyer's estimate of the likely cost of the various steps, including the trial, increases, the client should be informed accordingly.

In either case, the client should be told about the costs of losing a trial. Even a case that looks like a "sure thing" can go sour if the facts relayed by the client turn out to not be entirely accurate. Where there is a reasonable risk that the case might be lost, the explanation about costs should be detailed and presented in person so that the client has an opportunity to ask questions. Where the risk is very small, the client can be provided with some written information about legal costs in Ontario, with a standard request that they read the explanation and ask if they have any questions. The adage "hope for the best, but plan for the worst" is good counsel when deciding how much detail to provide to the client about this issue.

Fees are one of the biggest areas of disagreement between lawyers and clients. The client is entitled to information about fees, and the lawyer is obligated to provide such information (see Rule 2.08 of the *Rules of Professional Conduct* and the related Commentary). Providing this information will help to reduce some of the things that lawyers hate most; complaints to the Law Society, negligence claims and cost assessments.

Serious Trial Preparation - Day One

After the lawyer has been retained, the real trial preparation begins in three ways; developing the theory of the case, detailed information gathering, and expectation management.

The lawyer should develop a tentative theory after digesting all of the information provided by the client. This theory should help to guide and focus the steps that need to be taken at the beginning of the case. Often, time and money is wasted by lawyers who do not formulate a theory, but instead follow the same path in every single case. An opinion from an orthopedic surgeon and an accident reconstruction report are not required in every case. The steps required to properly work up the case for trial should flow naturally from the theory developed by the lawyer. However, the lawyer must be prepared to modify the theory, and the resulting work up, as time goes on and new information is obtained.

The interview with the client should not end until the client has signed a number of authorizations to obtain all of the materials that will be required, sooner or later, by the lawyer. This includes clinical notes and records of treating physicians, hospital and

rehabilitation records, employment and school records, police notes and other liability information, income tax returns, OHIP records, etc. Obtaining that information as early as possible serves a number of very useful purposes. It will help to ensure that the theory of the case is properly developed and supported by the evidence. It will permit the lawyer to properly brief the client at all stages in the case. It will allow the lawyer to capitalize on the positive aspects of the case and diminish the value of the negative aspects of the case. And it will send the message to the defendant that the lawyer is ready, willing and able to proceed to trial, if necessary.

Finally, proper expectation management is key to the effective handling of any claim. If the client has reasonable expectations about the case, it is much easier to get instructions to settle the case, or proceed to trial, as required.

In many cases it is not possible, nor advisable, to tell the client exactly what the case is worth at, or soon after, the initial meeting. However, the client can be told in a general way about the cap, and where their claim fits within the cap. They should be told about the threshold and the deductible. They should be told about any limitations on suing for past lost of income, out of pocket expenses and medical costs. Any concerns about liability, or other issues that might have an impact on the value of the case, should be explained to the client.

If the client is permitted to become entrenched in their own ideas about the value of the claim, and if those ideas are out of keeping with reality, one of two things will happen. Either the client will feel "forced" to enter into a settlement that is well below what they thought the case was worth, or the lawyer will be "forced" to do a trial where the likely result will be unsatisfactory to both the client and the lawyer. Either way, the

lawyer is opening herself or himself up to a complaint to the Law Society, a negligence claim, and an assessment of his or her fees.

Conclusion

From the very first meeting with the client, every step should be conducted as if the case is going to trial. That level of preparation will help to ensure that the lawyer and the client are both ready should the case actually get into a courtroom. It will also show the other side that the lawyer and client are serious about the case. In the end, this level of preparation should lead to fair settlements for most clients, and well presented trials for the rest.

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