

AIRD & BERLIS LLP

LITIGATION PRACTICE MANAGEMENT SEMINAR

DATE: FEBRUARY 26, 2013

TIME: 12:00 – 2:00 PM

PROFESSIONALISM CONTENT: 1.5 HOURS

SUBSTANTIVE CONTENT: 0.5 HOURS

First meeting with client:

- (a) Have a colleague or student present
- (b) Cross-examine
- (c) Confirm with memorandum

Retainer agreement:

- (a) Who is responsible for fees?
- (b) Make sure they are all party to the agreement
- (c) Do not rely on a numbered company without a guarantor
- (d) State the scope of the work
- (e) Very important to state what you have not been retained to do
- (f) Advise of yearly change to rates as reflected in accounts

Searches: corporate profiles, correct names of individuals, addresses, title searches, PPSA, etc.

Authority to instruct lawyer

Transfer of interest

Preparing documents:

- (a) Write for the judge
- (b) Stick to the facts
- (c) Avoid overstatement
- (d) Don't get personal
- (e) Less is better than more
- (f) Can someone without a university education understand it?
- (g) Use overviews, schedules, appendices, chronologies, graphs etc.

Communicating with client:

- (a) Keep regularly informed
- (b) If client does not agree with recommendation, confirm it in writing
- (c) Written estimate of costs and time
- (d) Update estimates when appropriate (before the communication)

Managing expectations: don't overpromise and underperform; do the opposite

Beware of:

- (a) The overzealous client
- (b) Clients who say it is a matter of principle and whatever it costs
- (c) The client who has fired more than one lawyer
- (d) The file that seems too good to believe
- (e) Don't accept client's word as gospel

Examinations:

- (a) Written instructions
- (b) Mock cross-examination
- (c) Explain process, including room set up, location of people, do's and don'ts
- (d) Caution about speaking to you in adjournments
- (e) Caution about speaking to you when on the record
- (f) Don't give undertakings
- (g) Don't get annoyed
- (h) Stay composed
- (i) How the other lawyer can use the transcript

Be honest:

- (a) Tell the bad news as well as the good news
- (b) Don't let the client learn the bad news at the mediation/pre-trial/discovery: you lose credibility instantly
- (c) How to tell the bad news without looking weak:
 - (i) Tell client it is your job
 - (ii) It will make your case stronger if you know the weak parts and find a way to counter them

- (iii) It will make your client a better witness
- (iv) It will take the opponent by surprise

Dealing with the referring lawyer:

- (a) Don't let the referring lawyer overstate the case
- (b) Or, try to be the litigator
- (c) If he/she does, state your position in writing
- (d) Seek second opinion if the referring lawyer persists

Dealing with the difficult lawyer on the other side:

- (a) Do not allow the lawyer to intimidate or harass
- (b) Stay professional; rise above it
- (c) Do not ever make personal attacks
- (d) If you are about to lose composure during discovery etc., take a break
- (e) Be passionate towards the issues, not the lawyer or his/her client
- (f) Consult a colleague if need a gut check; ask if anyone has dealt with the lawyer in the past
- (g) Remember that whatever the lawyer is doing to annoy you, the judge will not permit it; best advice is to ignore it and just out work your opponent; sooner or later the lawyer will realize that these antics are not working

Dealing with the angry client:

- (a) Keep calm
- (b) It's not personal (hopefully)
- (c) Everyone gets fired at some point
- (d) Bounce it off a colleague to get perspective
- (e) Have a witness at the client meeting
- (f) Refer client to previous written advice
- (g) Memo the meeting and write to the client confirming the discussion and recommendations
- (h) Keep emotion out of it; stay professional

Giving opinions:

- (a) State the facts clearly upon which you are giving the opinion

- (b) Ask the client to advise immediately if any facts are incorrect or omitted
- (c) If law is unclear, be sure to qualify opinion
- (d) If law is complex, have it peer-reviewed
- (e) Don't ever give an opinion as an associate without a partner's approval
- (f) State that the opinion may change if new or different evidence comes to light or if the law changes
- (g) Restrict opinion to the issue at hand

Offers:

- (a) Explain rules/cost consequences
- (b) Explain cost scales: make sure client understands it is not complete indemnity
- (c) Have client sign off on offer before serving
- (d) Explain the life expectancy of the offer and effect of counter offer

Mediation:

- (a) Explain the process
 - (i) Non-binding
 - (ii) Without prejudice
 - (iii) Informal
 - (iv) Not to decide but to negotiate resolution
 - (v) Prepare as if it is a pre-trial; know the facts and law
 - (vi) Tell the other party the bad news that his/her lawyer may not have told them and prepare your client for same
 - (vii) Cost out damages and fees to do trial; don't let mediator be the first to tell your client what this case is going to cost if it is not settled
 - (viii) Prepare your client for the receipt of unreasonable offers from the other side and explain that not much may happen until late in the day
 - (ix) Know ahead of time what your client's choke point is
 - (x) Think about what you feel is a reasonable position to end up at and try to get your client to buy in beforehand
 - (xi) Carefully select the mediator; ask your colleagues about the person
 - (xii) Direct the opening to the other party, not the lawyer

- (xiii) Be prepared to acknowledge if your client has offended the other party and express “genuine” regret; get emotions out of the way if possible; don’t apologize if it is not genuine as it will poison the negotiations
- (xiv) Don’t be afraid to walk away; there is always the pre-trial; don’t leave your best offer on the table if you believe it will be rejected; save it for the pre-trial

Pre-trial:

- (a) Know who your judge is, if possible
- (b) Attach all the important documents and cases/statutes and hi-light them
- (c) Refer to evidence from witnesses you intend to call
- (d) Reference helpful discovery evidence
- (e) Use demonstrative evidence such as charts, diagrams, organization charts, chronologies, agreed facts, etc.; make it easy to understand
- (f) Explain to your client the differences from a mediation
- (g) Get firm instructions ahead of time
- (h) Think about any orders you may need and if you are really ready for trial

Trial:

- (i) If it is your first trial, sit in on some trials either within the firm or just drop in at the courthouse
 - (a) Read texts on trial procedure
 - (b) Read and understand the Evidence Act as relates to trials
 - (c) Consider an agreed statement of facts/request to admit
 - (d) Prepare written questions
 - (e) Review the direct examinations with witnesses and pare them down to what is essential; every first draft is at least twice as long as it needs to be.
 - (f) Adjust the questions as the trial proceeds
 - (g) Cross-examination is all about preparation; you cannot over-prepare; cross-reference to documents and transcripts; it has to flow naturally; golden rule is “do no harm”
 - (h) Anticipate difficult evidentiary issues

- (i) Have a summary of law done ahead of the trial and consider giving it to the judge during the opening; they always appreciate it
- (j) Use chronologies/flow charts etc.; again, judges love them
- (k) Prepare the closing as if you are writing the judgment; again, judges love it if they are with you