

Client Trial Prep Checklist

Prepare your client for the ups and downs of trial with this customizable checklist, which covers topics to discuss with your client, including process, timing, outcomes, risks and costs. From managing emotions to the day-to-day workings of a trial, the checklist covers important topics to discuss with your client in preparation for trial.

Below are some top tips.

Client Trial Preparation Tips

As you prepare for trial, you may overlook your client's perspective. After all, you have an opening to prepare for, statements of law and documents to put together, demonstrative evidence to prepare, motions to consider, a host of witnesses to herd, and opposing counsel to deal with. Of all the witnesses to be paraded in court, your client may testify for a mere fraction of the time. But your client is the whole reason you are there.

After years of stressful buildup in discoveries, pre-trial motions, and failed mediations, your client may well be biting nails and losing hair by the time the trial arrives on your doorstep. While you are familiar with the ups and downs of a trial file, the process may be totally new to your client. A client can be in for an unpleasant surprise if possible outcomes and costs have not been discussed. Prepare your client to guard against the inevitable roller-coaster of emotions of a trial, and minimize the risk of a malpractice claim.

1. Discussing outcomes, risks, and costs

Discussing the risks of trial with your client is difficult. Even when a trial has excellent prospects, a risk-averse client may be scared into early settlement.

Start with canvassing the possible outcomes, from the best to the worst. Then provide a risk assessment with each outcome. Ultimately the choice of going to trial or taking a settlement is the client's to make. Malpractice claims arise when this choice is taken out of the client's hands by not informing the client of the relevant risks involved with each outcome.

Having covered the risks involved with each income, it's time to get down to details about costs. Estimate how much a full trial will cost. What counts as a winning verdict? If your client will be awarded damages, how much of that goes in your client's pocket? Alternatively, if the verdict is unfavourable, can your client pay the costs award? Is the client "judgment proof"? Walk through the numbers involved in the relevant scenarios with your client. Ensure the client is willing to embrace the risk and to accept the costs.

Spend time balancing the costs of trial with the benefits of settling. What has the opposing side offered? Should the offer be re-considered in light of the costs of trial? If

damages of less than the cost of the trial are ultimately awarded, the bottom line may be that the battle is won but the war is lost, as your client will end up with even less. Is a scorched earth policy being taken that is unreasonable? Perhaps it is better to settle now. Remember to document discussions with and instructions from your client about settlement offers, and to calculate the numbers – the amount the client will be awarded in damages, disbursements, fees, HST, and/or what the client will “take home.”

A successful discussion about the risks is more easily achieved if you have shaped your client's expectations from the beginning. If, at the outset of the case, you have given a reasonable range your client will be more willing to accept your recommendations.

Research suggests that anchoring bias occurs when people attach extra significance to the first piece of information they are given. Control your client's expectations from the first intake meeting. If you remain consistent, by the time trial arrives, your client is more likely to come to terms with the risk. It is helpful to document your advice with an email or letter to the client.

If adverse cost insurance has been obtained, discuss the risks with the client. Will the insurance cover the costs of the trial, including disbursements and HST? Adverse cost insurance may embolden your client, but achieving a false sense of security can fall flat if your client is not fully covered in the event of a loss.

If the client has insisted on going forward with a trial contrary to your recommendation, document your recommendation and the reasons behind it. Outline the anticipated fees. If a file is taken on contingency and an increased fee is involved, point this out to the client. The reporting letter may help drive your point home and convince the client to take your recommendation – and even if it does not, it will protect you from an allegation that you did not give adequate advice in the event of an unfavourable verdict.

2. Reviewing the evidence

Teaching the case theory to the client is helpful. Don't assume the client knows it just because it's the client's case. Walk the client around the landmines. Go over the client's own prior testimony including statements and affidavits and prepare for contradictions. Then review the client's testimony at discovery. Was anything previously said that should be corrected or massaged at trial? Canvas any evidence by any witness that is harmful to the client's case, which the client can speak to. It may also help to show the client the exhibits that will be used in court, to prevent the client from being taken unawares.

The extent to which you should discuss the law with the client is a judgment call. If the facts could teeter one way or the other on a thin legal line, it may be critical to go over the law. On the other hand, going too deep may be confusing. A client who has never dealt with the legal system may need more handholding than a sophisticated one. This will invariably depend on the nature of the case and the level of sophistication of your client.

Reviewing the evidence with your client serves to both prepare your client for trial and to help you investigate, one last time, the finer details of the case. Inadequate investigation is a leading cause of claims, and digging in deep with your client can help uncover any last minute problems.

Consider a full mock examination-in-chief and cross-examination while videotaping the client giving evidence. Seeing oneself on video can quickly bring home one's weaknesses on the stand. If you also invite a focus group (mock jury) to observe, you can gather information about the strengths and weaknesses of the case.

3. Special considerations: Multiple clients, minors, and disabled clients

Several scenarios deserve special treatment. If you are dealing with multiple clients, take care to avoid a conflict of interest. While you may have conducted the litigation thus far by giving updates to a single point person, preparing for trial is a time when you may need to discuss the finer points with all clients. Your clients may disagree, unbeknownst to the point person, whether going to trial is the best option. Should the trial proceed, who will foot the bill? Do not assume the point person knows all. Malpractice claims may occur when the lawyer fails to obtain instructions from all clients.

A vulnerable client like a minor or disabled client should also be handled with care. Is the litigation guardian acting in the best interest of the client? Is the minor or disabled client capable of testifying at trial, and if so, under what circumstances? Give thought to the practical issues – how often will the client need breaks? How far away are the washrooms and are they accessible? Who will support the client in court as you make submissions? Proper care of your client, literally, is helpful to maintaining good client service.

4. Managing emotions

Sometimes managing emotions is relegated to the bottom of the heap. Having taken care of the legal issues, the lawyer's job is apparently complete. But if a client's emotions have not been considered, things can derail quickly. Here are some tips to help your client adapt to trial "life."

Advise your client that it is normal to be stressed. While you may have conducted several trials before and are accustomed to what happens in court, your client is not. This may well be the client's one and only experience at trial. Expect the client to be stressed. Describe the life of a trial and what will happen daily. Like going to any big event, give the client directions to court and a daily schedule so the client knows what will happen.

Help your client understand the roller-coaster of emotions a person goes through during a trial. An examination-in-chief can appear to go well on one day, while cross-

examination can appear to go badly the next. While every moment of the trial is scrutinized, the battles won and lost along the way all contribute to whether the war is won. While you may be a battle-hardened lawyer, your client may have no experience handling the ups and downs.

Discuss your availability during trial – your client should know you will be busy attending to trial matters and only available during certain times. How accessible can you really be? If you cannot bear being interrupted during submissions, let your client know you can only debrief after the day is over. If you don't mind tapping out answers on your cell phone, let the client know.

If your client will give testimony, show the client the courtroom. Have the client sit and speak on the stand a day or two before giving testimony. Let the client get comfortable. The view from the stand, where everybody is facing you, is totally different from the lawyer's view giving submissions. Remind your client that you cannot give advice while the client is giving testimony, even during breaks. Your client may be in need of handholding, but take care to avoid any appearance of impropriety.

Conclusion

Every file has its own life. A client proceeding into one trial may be completely different, and have different needs, than another. Included with this paper is a one-page checklist to help you prepare your client, but remember to tailor it to meet the needs of the particular client and file. Have the client sign the checklist with you – it may help ensure you have covered all the bases. Preparing the client for trial is, sometimes, an overlooked task. The key is to go in with a plan.