ONE HUNDRED DAYS TO TRIAL OR FINAL ARBITRATION HEARING

Jennifer Dolman
Osler, Hoskin & Harcourt LLP
Toronto, Ontario
Canada

William L. Killion
Faegre Baker Daniels LLP
Minneapolis, Minnesota

Mark M. Leitner
Pia Anderson Dorius Reynard & Moss
Milwaukee, Wisconsin

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I. INTRODUCTION

The final 100-day period before a trial or arbitration is, in some ways, the most critical stage of any proceeding. This “twilight zone” between the completion of discovery and the opening statement can literally be the difference between winning and losing a case. Exceptional trial skills will rarely rescue a case that is not properly “teed up” for delivery to the trier of fact at the start of a trial or arbitration.

The key to effective, final preparation for a trial or arbitration is the right combination of anticipation and organization – anticipating the challenges likely to arise during the proceeding and getting organized to meet them. Before turning to the details, we note a few caveats.

First, when it comes to the final preparation for a trial or arbitration, one size does not fit all. Every case presents a unique set of circumstances that drive what we “trial attorneys” must do to be ready on the opening day. Of course, a major driver is what is at stake in the lawsuit or arbitration. The checkbook may be wide open for the client whose franchise or franchise system hangs in the balance – the proverbial bet-the-company case. But most cases require lawyers to exercise restraint in the final stages of litigation or arbitration. The client simply will not – or cannot – pay for trial counsel to spend large amounts of time making sure we are as ready as we can possibly be. The suggestions in this paper are more a checklist of things to consider than dictates of what it takes to win at trial or arbitration. To aid with preparation, the authors have prepared a checklist that lists many of the important pretrial tasks and allows counsel to track the trial team’s progress in completing those tasks. The checklist is attached immediately following this paper.

Second, the final 100 days are just that – the final days – not a time for completing discovery and developing a game plan for victory. We assume in this paper that counsel has completed discovery and filed all necessary motions to dispose of the case or narrow the issues for trial or arbitration, leaving only motions in limine that the court or arbitrator expects to see as the case nears the first day of presentation. In short, the legal issues are by now well-defined, and the court or arbitrator has determined that there are one or more “fact issues” that may be decided only by a full-blown trial or arbitration, although it is not unusual in some jurisdictions for a court to delay hearing summary judgment motions until the start of a trial.

Third, preparing a “franchise case” for trial or arbitration is generally no different than any other case, but where there are issues unique to franchise disputes, we will address those differences. We note one significant difference at the outset. Litigation is frequently a zero-sum game – there is a loser and a winner. (The traditional view is that arbitration is more likely to lead to awards that “split-the-baby.”) Litigation between a franchisor and a former franchisee may fit this description. But if the dispute is between a franchisor and an existing franchisee, the dynamic is different because the parties may have to “make up” in some way at the end of the case. A bridge-burning approach, in that case, will do a disservice to both sides of the dispute.

We will present topics chronologically, beginning with the 100th day out from trial or arbitration and counting down to first day out. In the pages that follow, we will discuss:

- **Preparing the case for the trier of fact.** Preparation will vary depending on who will decide the case on the merits, an arbitrator, a judge, or a jury. Preparing for an arbitration is typically much different than preparing for a jury trial.
• **Knowing the basics.** This is the nuts-and-bolts of getting ready to try the case, including the logistical arrangements, from war room to courtroom.

• **Refining the theory.** The old saw is that the highly successful advocate identifies a winning theory at the beginning of the case and then develops facts during discovery that support that theory. The reality is that the case is ultimately about the facts as they have played out in discovery and will likely play out at trial or arbitration. The 100 days should start with an analysis of how the “actual” facts fit the theory at that point and whether they require a wholesale change in the theory or merely a tweak or two.

• **Organizing the team and scheduling the key milestones.** Smart trial lawyers do not assume sole responsibility for getting ready for a trial or arbitration. The size of the team depends on the complexity of the case, the amount at stake, and the clients’ financial resources. Almost all cases warrant at least administrative help with preparations as the case moves toward opening day. This is the “who-what-where-when-and-how” of getting ready.

• **Preparing and agreeing upon stipulations.** Comprehensive stipulations are typically a waste of time and effort, but limited stipulations do have their purpose.

• **Identifying the evidence that is critical to the case.** What are the elements of the causes of action or the defenses? What facts (witnesses and exhibits) prove or disprove each claim or defense? How do the facts get admitted into evidence?

• **Addressing witness issues: sequestration, subpoenas, and preparation.** A single witness may win or lose the case. Preparing witnesses for trial testimony is very different from getting them ready for depositions. Witnesses not under the control of your client must be subpoenaed a reasonable time before trial. Lawyers need to educate their witnesses on the sequestration rules of the jurisdiction where the trial will take place, which govern not only when witnesses can be present in the courtroom but what they can say about the case during trial and to whom they can say it.

• **Drafting motions in limine and pocket briefs addressing anticipated evidence and arguments.** Discovery and dispositive motions typically do not belong in the final days before trial or arbitration, but motions in limine seeking to keep out evidence are commonly filed just before trial. Pocket briefs are an effective way to prepare for issues that may or may not come up during trial.

• **Preparing the opening statement.** The purpose of the opening statement is to present your theory of the case, to introduce the parties and witnesses, to set the scene factually, and to identify the issues between the parties.

• **Ordering the presentation of the evidence.** This is one of the last decisions made before trial. The goal should be to call witnesses in the order that allows counsel to present and prove the theory of his or her case in the most persuasive fashion.
• **Determining the manner of presenting evidence.** Trial lawyers have learned about the importance of trying cases using visual evidence, and there are now many sophisticated presentation technologies designed for courtroom use. But high-tech is not always the right decision. Trial counsel must consider the specific judge, jury pool, or arbitration panel that will be deciding the case. Technological advances like computer graphics and digital photography raise novel evidentiary issues that are making their way through the courts.

**II. DISTINGUISHING BENCH TRIALS, JURY TRIALS, AND ARBITRATIONS**

Evidentiary proceedings to resolve disputes are decided in one of three ways: by judges sitting as the fact-finder and the interpreter of law in a bench trial, by a jury deciding the facts and a judge resolving legal issues, or by arbitration, with a single arbitrator or a panel of arbitrators deciding the facts and applying the law. The rules and procedures governing each of these forums vary substantially, so preparation for each will be different as well.

Jury trial preparation often begins with drafting your side’s proposed jury instructions and verdict form. Most courts require the instructions and verdict to be filed before the pretrial conference, but in jurisdictions where the jury must answer special verdict questions about whether the elements of the claims and defenses were proved, lawyers should start much earlier and use the questions of the verdict form to shape their opening statement, presentation of evidence, and closing argument. The last 100 days before trial are the time to sharpen the verdict questions in light of the facts developed in discovery and any rulings on summary judgment or evidentiary motions.

Some courts do not permit deviation from model jury instructions, allowing the lawyers to craft their own instructions only when there is no model instruction on the subject. In jurisdictions that do not have model instructions, trial counsel has to start from scratch. Local counsel can be a good source for instructions that previously have been accepted by the court that will try the case.

Voir dire is generally limited in federal courts and is usually conducted by the judge. The lawyers’ input is restricted to suggesting questions, and the judge is free to decide not to ask them. State court practice varies, but the lawyers are usually allowed to ask the questions, and the scope and duration of questioning is ordinarily much broader. Tailor the presentation of voir dire accordingly. Voir dire can be a savvy trial lawyer’s “opening opening statement,” and although the rules prohibit arguing the case to the jury pool, counsel can and should get the potential jurors talking about the difficult issues specific to the case. Avoid questions that can be answered “yes” or “no.” Instead, get them talking.

Know the rules on peremptory challenges and how the jurisdiction and the judge handle challenges for cause.

Find out whether the court will release any information about potential jurors in advance of the trial. Usually, this information comes through the clerk of court’s office. When advance information about the jury pool is made available, it is usually in the last few days before trial, so counsel must move quickly to analyze it. Local counsel can be assigned to circulate the juror information within their firm, to tap into a broader base of knowledge.

Find out whether the judge allows the jurors to take notes and ask questions.
The downside of jury research (such as mock juries) is that it is extremely expensive. The positive is that it provides counsel and the client with a strong, empirically based understanding of how the jury is likely to view the evidence, the witnesses, and the issues in the case. Especially when trying a high-stakes case in an unfamiliar venue, there may be no other way to get this knowledge.

Arbitration today is, in many ways, just like traditional litigation, and, in many ways much different. Until recent years, the main difference between the two was the streamlined nature of arbitration, with little discovery and little prehearing management of the arbitration process by the arbitrator or the administrative agency. Today, however, arbitration is largely indistinguishable from litigation when it comes to pre-hearing discovery and motions. Many arbitrators who are selected by the parties to decide significant matters have extensive experience as trial lawyers litigating such matters; as a result, they often have a favorable attitude toward extensive discovery and motion practice. As represented by the Rules of the American Arbitration Association (the “AAA Rules”), arbitrators have essentially the same tools that judges have to allow discovery, dispose of cases on summary judgment, and sanction the parties. The main difference between arbitration and litigation today is that the parties have little or no ability to challenge the rulings of an arbitrator. Recent United States Supreme Court cases limit the scope of review of an arbitrator’s decision to the grounds for vacating an award in the Federal Arbitration Act, stingy grounds for challenging an award. The AAA Rules also give the parties a right to contract for review by a different group of arbitrators.

Another often-stated distinction is the notion that “everything comes into evidence” in arbitration. But, in the experience of the authors, this is an overstatement. More and more arbitrators are sustaining objections, mostly where they believe that allowing the evidence is a waste of time. Similarly, arbitrators are free to accept affidavits in lieu of live testimony.

Arbitration is less formal than litigation. Arbitrators are more receptive than judges are to taking witnesses out of order. It is not uncommon for arbitrators to allow the respondent in arbitration to call witnesses supporting its case in chief while the claimant is still putting on its evidence.

These differences drive the trial preparation process. Thus, attorneys need not spend a lot of time planning to prepare the record for appeal of decisions allowing or denying the admissibility of testimony. That said, however, a refusal to admit evidence may lead to a successful challenge of an award, whereas admitting evidence will almost never provide a ground for vacation of an award. (Similarly, a judge’s admission of evidence in a bench trial will rarely lead to reversal on appeal on the theory that the judge (as opposed to a jury) can more readily separate the wheat from the chaff.)

Another difference is that arbitrators will not typically tolerate challenges to the admissibility of documents on grounds of foundation, relevance, or hearsay. Arbitrators expect the lawyers to agree before the hearing on the documents received into evidence.

In the pages that follow, we will focus on preparation for jury or bench trials. We will address arbitration specifically only when arbitration calls for a different preparation than that required for litigation.
III. MAKING LOGISTICAL ARRANGEMENTS AND GETTING TO KNOW THE VENUE

The trial team needs a “war room” or base of operations for the preparation phase and for the duration of the trial. It is essential to have a dedicated room where the team can meet in the morning to go over the day’s anticipated activities and then again at day’s end to debrief the client, the witnesses, and the lawyers about what happened, and to plan for the next day or two of trial. Distractions must be eliminated. As a practical matter, this means that it will be necessary to have two rooms: one to serve as the team’s room, the other for witness preparation. The team’s room is not a good place to prepare witnesses. To focus and prepare properly, both the lawyers and the witnesses need total concentration and lack of interruptions. That will not be possible in the same room where team members are strategizing about cross-examinations and taking inventory of the exhibits that have been admitted into evidence.

The first consideration in establishing the base is whether the trial is in counsel’s own city or elsewhere. For hometown trials, counsel will usually take over conference rooms in the firm’s offices. When office space is lacking, they may lease rooms from a temporary office service or hotel. Even when the trial is only 30 minutes out of town and counsel chooses not to stay in a hotel, consider leasing space near the courthouse so it is easy to get to the area early and start preparation or debriefing without having to worry about traffic jams and other possible delays.

When the trial is out of town, counsel must make arrangements with a hotel. At the very least, book rooms for all members of the trial team and for witnesses under friendly control who are coming from other cities. Although Priceline and Orbitz make online-only hotel shopping convenient, resist the temptation. It is important to investigate the hotel in person, or at the very least discuss the options with local counsel. It is also important to find out whether there are any conventions, festivals, or parties taking place at the same time as the trial. They will not only affect room availability; they can also knock out the chance to get a good night’s sleep in a quiet room. Proximity to the courthouse is a major plus, to minimize the risk that traffic issues will cause the trial team to be late. However, getting a quiet hotel that will give the trial team members the rest they need is more important than being across the street from the courthouse at a location that turns out to be Party Central.

Without local counsel or an office in the town where the trial will take place, counsel will also need to book small conference rooms or extra hotel rooms set up for office use to serve as the base of operations and the witness preparation area. (On a tight budget, witness preparation can be done in the witness’s hotel room or a quiet place in the hotel.) The preparation room should have Internet service, a printer, a scanner, a copier, a whiteboard with markers, and anything else necessary to create motions, briefs, or demonstrative exhibits on the fly. Remember to have Westlaw or Lexis/Nexis passwords handy. The preparation room also should have a box of supplies such as staplers, pens, highlighters, legal pads, exhibit stickers, and paper clips. The safest approach is to go through the firm supply room with a banker’s box and a broad view of what might be needed.

Whether the trial is nearby or halfway across the continent, do not rely on having a courthouse conference room or meeting room available for anything other than discussions during breaks in the trial. These rooms are not reliably available from day to day or sometimes even hour to hour. Even if they are available during the trial day, most courthouses are locked up at the end of the business day, and no one is allowed to stay.
When a dedicated “breakout room” in the courthouse is available, and courthouse staff allow, stock the room with bottled water, packaged snacks, and a coffee maker. Arrange in advance for lunch to be delivered during the trial, and for dinner to be delivered to the evening work site.

In an out-of-town trial that will take more than a few days, pay special attention to wardrobe. Lawyers have won motions *in limine* preventing the home-town plaintiff from telling the jury that the defense team is from out of state, only to learn from jurors in post-trial interviews that they knew the lawyers were out-of-towners because they “wore the same shoes every day for six days.” Ask local counsel about any unwritten local fashion rules. Without local counsel, come in early for a motion hearing, go to a public place, and take note of how people are dressed.

Make arrangements for the trial team, the client, and witnesses to have parking as convenient to the courthouse as is possible. If any clients or witnesses have mobility issues, check the vicinity of the courthouse for any potential problems and plan the best way to get in and out of the building in advance.

Get to know the courthouse and the court personnel as soon as possible, and be courteous to them. Clerks, secretaries, and judicial assistants are the gatekeepers to the judge. They will tell the judge which lawyers are polite and which ones are arrogant, abusive, or overbearing. In some jurisdictions, it can be difficult to develop relationships with the judge and the court personnel, especially for out-of-town lawyers. One judge may be assigned to handle contested motions early in the case, a second to handle scheduling, case management, and discovery issues, and a third to conduct the trial. This often means that different clerks and assistants are assigned as well.

Find out how the court allocates trial time. Some judges are hands-off in the extreme, and a trial that could be completed within a few days can drag on for two weeks. Other judges set limits on trial time and strictly enforce those limits, cutting off witnesses in mid-syllable if necessary. A federal judge in the Eastern District of Wisconsin used a chess clock to ensure that the parties did not exceed their time allotments. If each side is held to a specified number of hours or trial days, first establish how the court accounts for cross-examination. Then use the court’s time allocation to revise the selection of witnesses and exhibits that will be used at trial, if necessary.

Have witnesses lined up. Some judges will terminate a party’s case if the next witness is not in court and ready to take the stand when the previous witness is finished.

Know how certain the trial date really is. Some courts give firm trial dates: only one case is scheduled to start on a given day. In these courts, trial dates are usually not assigned until the parties have completed discovery and are truly ready for trial. Other courts “stack” trial dates, assigning several cases the same start date and putting them in line one behind another. In these courts, it may be difficult to know until the last minute whether any case other than the first-slotted case will go to trial. Clerks can advise whether a case has settled, but they usually cannot and will not opine on the likelihood that cases still on the docket will settle. Fortunately, it is often possible to get contact information for lawyers whose cases come next in the trial queue from the court’s calendar or the clerk, so that those lawyers can be contacted about the likelihood that their cases will proceed to trial. Keep in mind, however, that even when settlement is unlikely, it happens. So it is significantly risky to fail to prepare for any assigned trial date, regardless of the status of the cases in line ahead.
Find out the court’s policy on presenting evidence digitally or electronically. Some courts require it, and some require it on the court’s own equipment. Other courts (now a dwindling minority) forbid use of anything but the actual exhibits and blown-up versions of them.

Find out whether cell phones are permitted in the courtroom. If not, warn the client and witnesses not to bring them to the courthouse. Some judges do not allow anyone in the courtroom to check e-mail or the Internet on a cell phone even if the phone is silenced.

There is no substitute for a pretrial visit to the courtroom where the case will be tried. Some judges, like the Hon. Barbara Crabb of the Western District of Wisconsin, require trial counsel to attend a training session on the court’s presentation equipment in the last few weeks before the start of trial. Whether or not the court has such a requirement, well before the first day of trial, counsel needs to know the layout of the courtroom, the quality of the sound system and the acoustics, how much room there is at counsel table, and other things learned only by seeing the courtroom in person. Some courtrooms have been carved out of unused space in public buildings; because they were not designed for trials, they may have impediments such as pillars that block the jury’s or the judge’s view of enlarged exhibits on easels. It is too late to discover problems such as this while the prospective jurors are filing in for voir dire.

Decide who will handle any inquiries from the press and how they will be handled. If the client is a publicly traded company, be sure to consider any additional complications arising from that status.

IV. REFINING THE THEORY OF YOUR CASE

The theory of the case is a short summary of what the case is about, what relief is being sought and why, and the facts that are necessary to support the theory. The theory of the case provides the framework for preparing for trial. It helps develop a focus on the facts necessary to prove the case and the legal principles that apply. It is important to revisit the theory regularly – including in the final run-up to trial – and to assess whether any adjustments are required. When representing a plaintiff, well-prepared lawyers will have had the theory of the case in mind during the drafting of the initial complaint, and will have continued thinking about the theory during discovery to promote asking the right questions and obtaining the evidence required to prove the elements of the case at trial. Similarly, when representing a defendant, counsel should have captured the theory of the case and, armed with that defense, should have obtained the evidence needed to prove all elements of the defense at trial.

If the case involves an emotional or “human interest” aspect, consider what will be needed – in terms of witnesses and evidence – to convey that to the trier of fact. Considering that most judges and jurors want to do what is fair and just, wise trial counsel make sure to consider ways to highlight why, over and above what the law requires, the trier of fact should find in his or her client’s favor.

This is a time for taking careful stock of whether the evidence necessary to support the theory of the case has been developed. How has the theory held up through any motions practice and through discovery? Have any causes of action or defenses been dismissed along the way? How did witnesses fare during their depositions? Did they make any admissions that will be used against them at trial? Did the documents produced in discovery support the story they were expected to tell, or did they change the story? Are there unanticipated strengths or weaknesses? Are there gaps that need to be filled?
Carefully examining the theory of the case will help counsel make critical decisions in the run-up to trial, such as what pre-trial motions are necessary or appropriate, what evidence should be introduced, what evidence should be emphasized or avoided, what witnesses should be called, and what the strongest legal and factual arguments are.

V. ORGANIZING THE TRIAL TEAM AND SETTING KEY MILESTONES

Begin the 100-day period by reviewing the scheduling order, any standing orders, the tasks identified in this paper, and a personal trial preparation checklist. Create a spreadsheet that lists every deadline imposed by a statute, rule, or court order, every task that needs to be checked or completed in the run-up to trial, the person responsible for meeting the deadline or completing the task, and the current status of each item.

Hold weekly meetings of the trial team starting no later than 100 days out. The team should consist of the lawyers and paralegals assigned to the case and at least one secretary or assistant to take notes and update the spreadsheet as people report on their activities. Each meeting should be followed up with the assistant’s notes, augmented as necessary by one of the team leaders, then distributed to the team via e-mail. To keep the meetings from becoming unwieldy, it can be useful to excuse attendance by members who do not have any tasks to complete during the month following the meeting. One of the team members should be tasked with preparing notes of the meeting and circulating them to all members of the team no later than a day after the meeting.

As the trial date approaches, counsel may want to convene the team more frequently, depending on how many action items are being tracked and how much time is available for meetings. At each meeting, focus on the action items or deadlines coming up within the next two weeks and make sure that the team is on target to do what needs to be done. At the same time, do not ignore longer-term projects.

In addition to circulating internal updates on progress toward completing tasks, be sure to communicate about trial preparations with the clients. The frequency and detail of these communications may depend on the specific relationship with the clients and the nature of the case. Some institutional clients may have standardized activity reporting forms that trial counsel are required to use.

VI. STIPULATIONS

Stipulations may be appropriate at any stage of the litigation process. Indeed, Rule 16(c)(1) of the Federal Rules of Civil Procedure states that attorneys appearing at pretrial conferences (including the first conference with the court) must have authority to “make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference.” Rule 16(c)(2)(C) says that matters for consideration at pretrial conferences include “obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence.” Although stipulations are fair game at any point in a case, stipulations designed to streamline the actual trial are best left for later in the case, after the parties have concluded discovery.

Courts (and particularly arbitrators) frequently ask counsel to stipulate to a comprehensive statement of facts. In the experience of the authors, trying to do so is a waste of time. It is difficult to get two advocates to stipulate to an extensive set of facts that may
streamline the trial. At best, counsel stipulate to mundane facts that are just as easily
established with simple testimony at the start of the trial. Even so, the following topics may be
fruitful for meaningful stipulations:

- The admissibility of evidence, such as the authenticity of records and foundation
  requirements for exceptions to the hearsay rule under Federal Rule of Evidence
  803(6) and similar provisions.

- The foundation for documents.

- The testimony of witnesses whose appearance at trial may not be necessary or
  even desirable. Such stipulations typically begin with: “If called as a live witness,
  Jones will testify, under oath, to the following ….”

- A simple chronology of events. For example, in a franchise case, a stipulated
  chronology might include the date of the first meeting of the franchisor and
  franchisee, the date on which the franchisor provided the franchisee with the
  franchise disclosure document, the date of the “discovery day,” the date of the
  franchisee’s execution of the franchise agreement, the date of the opening of the
  franchised business, the dates of any meetings among representatives of the
  franchisor and the franchisee, and the date of the closing of the franchised
  business.

- A simple statement of the case to be read to the jury at the beginning of the trial.

Certain techniques may encourage the parties to enter appropriate stipulations. One
such technique is to distinguish between conceding the truth of a fact and simply agreeing not to
contest it.

VII. PREPARING AN ORDER OF PROOF

A. Depositions/Discovery Review

Ensure that the file contains copies of all deposition transcripts and of notes or
summaries prepared by the trial team. It is critical to determine whether the witnesses under
your client’s control made any errors that need to be corrected. Consider preparing transcript
summaries that identify where key issues can be found. If the opponent’s witnesses give
contradictory evidence on the stand, being able to find relevant portions of transcripts quickly
and easily will help counsel impeach them more effectively during cross-examination.
Identifying any admissions or other portions of the testimony of the opposition’s witnesses to be
read in will also prove helpful.

Make sure the clients have answered all of their undertakings. In Canadian practice,
undertakings are questions posed to a witness during a deposition (what is referred to in
Canada as an examination for discovery) that the witness cannot answer at that time but
“undertakes” to answer, usually in writing as opposed to at another session of live testimony. In
the United States, the general duty under Federal Rule of Civil Procedure 26(e) to supplement
discovery responses later learned to be incorrect or incomplete does not apply to deposition
testimony, and no other rule directly imposes an obligation analogous to the undertaking.
Counsel should review answers provided to date by the witnesses to make sure they are accurate. If errors are found, they should be corrected so that they cannot be used to impeach friendly witnesses at trial. If any of the opponent’s undertakings have not been answered, demand that they be answered. If no answers are given, consider whether to file a pre-trial motion or simply put opposing counsel on notice that objections will be made to certain related evidence unless the answer is provided.

Regarding refusals to answer, it is always a good idea to revisit the client’s refusals and determine whether any should be answered after all. If the opponent maintains its refusals and the answers are necessary to prove the client’s case, file a pre-trial motion.

B. Productions Review

Canada requires parties to exchange affidavits of documents at the beginning of a case. In these affidavits, a party must set out three categories of documents: on Schedule A, all relevant documents in the party’s possession, power, or control; on Schedule B, all documents over which the party claims privilege; and on Schedule C, all relevant documents no longer in the party’s possession, power or control. These are the documents on which a party could be examined during discovery.1

In some cases, additional documents are revealed during or after the examinations, and counsel may want to rely on some of these documents at trial. As a first step, review the affidavits of documents and determine whether a supplementary affidavit of documents is required. For example, has the client produced documents in answers to undertakings or pursuant to court order that have not been appended to an affidavit of documents? Are there documents that the other side committed to produce, or that are needed to present the client’s case at trial, that were never produced? Those documents may be made the subject of a demand and, if the opponent refuses to cooperate, a pre-trial motion to compel production of the documents may be warranted. But the court may be reluctant to hear a motion to compel from counsel who has previously represented to the court that there were no outstanding motions and he or she was ready to go to trial.

In reviewing the productions, carefully consider which documents should be relied on at trial, including which ones will be introduced through friendly witnesses and which ones will be used when cross-examining opposing witnesses.

C. Joint Evidence Books

Rather than making each separate document an exhibit, counsel may agree with the opposition to create a joint evidence book. The joint evidence book goes beyond an exhibit list; it includes a copy of all documents the parties wish to present as evidence during trial. This will require preparing an index and having opposing counsel add whatever documents they want in the joint evidence book. It is a good idea to discuss with opposing counsel how the joint evidence book should be organized. Should it be arranged both by chronology and by topic? How should it be tabbed and numbered? Should it be in binders or bound?

1 The United States, through Federal Rule of Civil Procedure 26(a)(1)(A)(ii), requires parties to identify the documents in their possession, custody, or control that they may use to support their claims or defenses. This is a narrower disclosure obligation than exists under Canada’s affidavits-of-documents rule.
To avoid having to prove the authenticity of documents at trial (unless authenticity was stipulated during discovery), counsel may need to ask the opposition to admit authenticity of all documents included in the joint evidence book. If it is not possible to get opposing counsel to admit the authenticity of certain documents, trial counsel must determine how to prove the authenticity of those documents at trial.

Likewise, if the truth of the contents of documents must be proved and opposing counsel refuses to provide admissions to that effect, then it is necessary to identify the appropriate witnesses or rules of evidence to accomplish that at trial.

D. Evidence Notices

Counsel must check the applicable rules of evidence to determine what document notices are required and when each notice must be served. In Canada, both federal and provincial evidence statutes contain notice requirements for the use of certain types of documents at trial, including business records, production of certain types of books or documents, such as evidence of judicial proceedings, notarial acts or instruments, public documents, government documents, and medical reports. Other notices are required under rules of civil procedure for such things as calling adverse witnesses and intending to waive privilege.

E. Requests to Admit Facts

Requests to admit may be used to prove the truth of certain facts or the authenticity of a document. Obtaining admissions with respect to non-controversial facts will save time at trial and may eliminate the need to call certain witnesses. Preparing requests to admit can aid in the organization of the evidence needed at trial to prove the theory of the case. Under Rule 51.02 of Ontario’s Rules of Civil Procedure, requests to admit may be served at any time, and the party responding to the request must do so within 20 days of receiving it. Where the party on whom the request to admit is served fails to serve a response, the party shall be deemed, for the purposes of the proceeding in which the request to admit was served only, to admit the truth of the facts or the authenticity of the documents mentioned in the request to admit.

VIII. WITNESSES: SEQUESTRATION, SUBPOENAS, AND PREPARATION

A. Sequestration

It is important to consider before trial what sequestration the law allows and what restrictions the lawyers for both sides may ask the court to provide. Courts must sequester witnesses when a party requests it, and courts also may order sequestration on their own motion. Sequestration can mean much more than simply entering an order preventing each witness from being in the courtroom during the testimony of others. Sequestration has been interpreted to imply that witnesses must also be prohibited from discussing the case with other

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2 The federal evidence statute is the Canada Evidence Act, R.S.C. 1985, c. C-5, as amended, and an example of a provincial evidence statute is Ontario’s Evidence Act, R.S.O. 100-, E.23, as amended.

3 Federal Rule of Evidence 615.
witnesses. Courts may also issue sequestration orders prohibiting witnesses from communicating through counsel about the substance of their testimony or issues in the case.

Avoid problems by having the court enter a specific and detailed sequestration order before trial. Do not rely on implication or inference; for example, if counsel wants witnesses to be barred from discussing the case with other witnesses until the jury returns a verdict, and the version of Rule 615 that controls in the jurisdiction where the trial will take place does not expressly prohibit those discussions, then move for an order that specifies the prohibition desired. If a sequestration order is entered, make sure that all witnesses know the terms of the order and obey it.

Rule 615 expressly provides that it does not authorize the sequestration of a party who is a natural person, or an officer or employee of a party that is not a natural person, after being designated as the party’s representative by its attorney. So the client or a client representative is permitted to attend the entire trial even though he or she may also be a witness.

Lawyers who represent individuals do not have to make a choice about who will attend the trial under Rule 615, but lawyers for corporations or other entities need to do so, and they should choose carefully. Counsel might want to pick the person who knows the most – who can give trial counsel the most assistance in evaluating the evidence as it comes in. Alternatively, the best choice for the entity’s representative might be the person who will give good testimony, leave a good impression on the jury, and be a desirable presence to keep in front of jurors for the entire trial. Finally, counsel might want to pick the witness who is most likely to gain by watching the evidence come in and learning from it. Once the choice has been made, many judges will not let a party substitute a different representative.

No matter who is selected to serve as a corporate representative, counsel must instruct that person on proper courtroom demeanor. Respectful, strong, positive body language is required at all times. The representative cannot react to adverse rulings by the judge and should never visibly react, negatively or positively, to testimony. Most courts require that communication at counsel table be done by passing notes and not by talking, even in a whisper. The corporate representative must follow this rule too.

B. Subpoenas

Be careful with unaffiliated witnesses. Do not assume that people who have cooperated in the past – by showing up voluntarily for a deposition or by providing an affidavit or declaration – will continue to do so as trial approaches. Subpoena these people so they have no choice but to testify at trial. Call friendly unaffiliated witnesses and give them a heads up that a subpoena is coming. Explain that the law requires the subpoena to be issued, but that they are being contacted as a courtesy to let them know they will be served. Work with unaffiliated witnesses as much as possible within the confines of the trial schedule and the client’s strategic objectives to set their testimony for the least inconvenient time.

Do not warn unfriendly unaffiliated witnesses that a subpoena is coming, unless court rules require it. They may use that information to avoid service.

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If it appears that a witness within the court’s subpoena power is avoiding service, make a record and be prepared to lay a foundation sufficient to support use of the witness’s deposition under Federal Rule of Evidence 804(a)(5)(A) because the witness is not available.

Do not serve subpoenas too soon or too late. When subpoenas are served more than a month before trial, witnesses may misplace them and forget about their obligation to appear. If lawyers wait until the week before trial to serve subpoenas, witnesses who claim that a conflict prevents them from attending may get a sympathetic ear from the trial judge, especially one who values planning and order. Remind the witnesses to bring their subpoenas to court. And remember to give the process server the witness and mileage fees along with the subpoenas.

C. Preparation

The art and science of preparing witnesses to testify at trial is a topic all its own, beyond the scope of this paper. Here, we simply offer general suggestions.

When counsel prepares witnesses to testify at trial, it is often useful to start by undoing any preparation they were given to testify at their depositions. The “question-answering machine” demeanor that may serve them well as deponents will not likely play well at trial. And the long pauses that allow deponents to process the questions asked and compose carefully considered answers may make trial witnesses look deceptive to a jury. Counsel can help inexperienced witnesses lose the long pauses and interact more directly with an examining lawyer by practicing direct and cross-examinations with them.

Practice, but do not rehearse. Do not go through the questions that will be asked on direct examination so often that the witness’s answers sound canned, or, worse, actually have been memorized. Remember Max Steuer’s cross-examination of Kate Alterman at the Triangle Shirtwaist Fire trial:

He asked Alterman to repeat the account of Margaret Schwartz’s death again and again. Each time, the words Alterman used were very similar, but not identical. Steuer hoped that the repetition of phrases (e.g., “curtain of fire,” a desperate man running around “like a wildcat”) would suggest to the jury that the witness had been coached . . . . [T]o many observers, Steuer had succeeded in damaging Alterman’s credibility without ever directly attacking it.6

Teach witnesses to assertively but politely add truthful clarification and context when answering yes-or-no questions on cross-examination. The standard “always” and “never” traps can be dealt with by having the witness respond, “Most of the time, yes.” When a question includes words or phrases intended to elicit a damaging admission, the witness should describe the matter accurately to add the context necessary to show the “whole truth,” and finish the answer by saying yes or no. If the lawyer insists that the witness not include the qualification in the answer and simply say yes or no, and the judge agrees, the witness should directly address the linguistic gamesmanship and respond. “If you insist on putting the question that way, then, the answer is no.”

When witnesses are prepared to use this “whole truth” approach, encourage them to avoid hairsplitting distinctions – the point is not to give a clever yes-or-no answer that is true in a

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hypertechnical, “gotcha” sense. Instead, the witness’s goal is to include additional facts in the answer that meet the substance of the question but give the judge or jury the full context necessary for a fair understanding of the subject being discussed. One important caveat: before counsel tells witnesses to employ this approach in a trial, practice with them so it is possible to make an informed decision whether they are attentive and thorough enough to carry it out.

Many witnesses get tripped up by a fast-paced cross-examination that denies them the ability to fully hear and understand the questions. This is hard to cure with objections because judges will often respond that if the witness is answering the questions, he or she must be able to understand them. Teach the witnesses that if the pace of the questions on cross-examinations is too fast for them to understand what they are being asked, they must politely ask opposing counsel to go more slowly. Once the witness has asserted that the questioning is too fast, then counsel has an opening to address the judge.

Ask the witnesses to discuss the questions they most fear being asked at trial. One of trial counsel’s most important jobs is to relieve witnesses’ anxiety and help them become calm and confident before they testify. Bringing to light their most feared questions sometimes reveals that they are worried about issues that will not come up, or about things that can be easily handled. This conversation with witnesses can signal a need for additional motions in limine. For example, counsel may want to ask the court to preclude questioning about messy events from witnesses’ personal lives that are not relevant to the case.

**IX. MOTIONS IN LIMINE AND “POCKET BRIEFS”**

Motions in limine typically ask the court to address evidentiary issues before trial begins. A motion in limine may seek to exclude irrelevant or unduly prejudicial evidence before it is offered at trial, on the ground that objecting or moving to strike the evidence cannot cure the harm done by introducing it to the jury. A motion in limine also may seek an affirmative ruling that specific evidence is admissible.

Trial courts often set deadlines for submitting motions in limine, but they also have discretion to hear such motions at any stage in a trial. “A motion in limine is ‘any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.’” Indeed, it is not unusual for a party to make an oral motion in limine during trial to preclude anticipated evidence just before an opponent plans to offer the disputed evidence.

**A. Abuses of Motions in Limine**

Motions in limine should not be used as a substitute for a motion for summary judgment. Federal circuit courts have reversed district courts for granting motions in limine to bar the presentation of all evidence in support of an opponent’s affirmative defenses in contravention of the federal rules’ procedural protections regarding summary judgment.


Similarly, motions *in limine* should not be used as late-filed motions to compel discovery.

Motions *in limine* should not overreach. Do not, for example, try to preclude the opposition from offering “any evidence that violates the rules of evidence.” Do not file “omnibus” motions *in limine* seeking to exclude a host of categories of evidence.

**B. Presenting Motions in Limine**

A motion *in limine* should identify a particular body of evidence sought to be excluded or deemed admissible, and should state a specific legal ground for the exclusion or admission of that evidence. The motion should be made before or during trial, at a time when the judge can properly consider the evidence that is the subject of the motion.

A “definitive ruling” on a motion *in limine* will preserve an issue for appeal, but it can be difficult to identify what a “definitive ruling” is in a particular setting. If, for example, the evidence ultimately offered at trial is different from the evidence anticipated and addressed in a motion *in limine*, then failure to object will likely preclude an appeal of the trial court’s decision to admit the evidence. For this reason, counsel should clarify with the trial court exactly what evidence is deemed admitted or excluded as a result of its ruling on the motion *in limine*. If in doubt, object at trial when the evidence is offered to preserve the issue for appeal.

**C. Motions in Limine in the Franchise Context**

Motions *in limine* may be appropriate for addressing any number of issues that arise in franchise litigation. A common example is evidence that a franchisor treated a party-franchisee differently than it treated other franchisees. Some franchise relationship statutes preclude a franchisor from discriminating against a franchisee, but these statutes are typically so narrow in scope that they have no practical application to franchise litigation. The general rule is that a franchisor has no obligation to treat all franchisees the same, and a motion *in limine* precluding evidence of disparate treatment may be essential in cases where it appears that the franchisee intends to try a discrimination case.

Another example is it-happened-to-me-too evidence. This may take the form of nonparty-franchisees testifying that they received earnings claims or financial performance representations just as a party-franchisee did. The party-franchisee may argue that this evidence is indicative of a custom, practice, or habit of making such claims. The franchisor may argue that offering such extraneous evidence only leads to a trial-within-a-trial.

Yet another example is evidence that a franchisor failed to enforce a post-term non-compete clause against franchisees other than the party-franchisee. Some courts will allow such evidence as proof that the non-compete is not particularly important to the franchisor, but other courts will find such evidence inadmissible on the ground that the franchisor has no duty to treat all franchisees the same.

*Daubert* motions are a classic example of motions *in limine*. Rule 702 of the Federal Rules of Evidence codifies the standard for admission of expert testimony established by *Daubert* and its progeny: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the
testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Expert testimony regarding damages is common in franchise litigation. Less common but potentially more troublesome is testimony by lawyers about whether a business opportunity is a franchise, what the FDD disclosure requirements mean, whether the franchisor complies with the disclosure requirements, and what interests of a franchisor are served by a non-compete. All of these topics may be addressed in Daubert motions.

Lastly, motions in limine may be used in franchise cases to temper opposing counsel’s efforts to use the evidence to place the white hat on one client and the black hat on the other. Franchise litigation, like other litigation, may turn on perceptions of which party is the “good guy” and which the “bad guy.” Evidence that is relevant only to this issue has no place in litigation and is properly the subject of a motion in limine.

D. Pocket Briefs

Pocket briefs are a close cousin to motions in limine. They are prepared in anticipation of evidentiary issues that may arise at trial, but they are not submitted unless those issues do, in fact, arise. Filing a motion in limine before trial may give opposing counsel ideas. The pocket brief can avoid this risk.

X. OPENING STATEMENT

An extremely important part of getting ready for trial is preparing the opening statement. The opening statement affords an opportunity, before presenting evidence, to explain the theory of the case, to introduce the parties and witnesses, to set the scene factually, and to identify the issues between the parties. The opening statement should help the trier of fact understand the significance of the evidence as it will unfold at trial. Even though the opening statement is not a place for “arguing” the case, it is certainly a place for being persuasive. The opening statement is the first impression the trier of fact, whether a jury, a judge, or an arbitrator, will have of the case and of counsel. It will often set the tone of the entire trial. It is important to present the case as credibly as possible, not exaggerate or overstate the evidence, and not make inflammatory statements.

XI. DETERMINING THE ORDER OF PRESENTING THE EVIDENCE

Establishing the order for witnesses is one of the last decisions to be made. To the extent that friendly witnesses are flexible, trial counsel’s goal should be to call them in an order that allows for presentation and proof of the theory of the case in the most effective and compelling way possible, while making the opposition’s job of cross-examining them as difficult as possible. This also involves deciding how best to enhance the good facts and downplay the bad facts. Counsel for the plaintiff may want to focus attention on the defendant’s conduct, often

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9 Different considerations come into play depending on whether the trier of fact is a jury, a judge, or an arbitrator. Although jurors typically are lay people who are unfamiliar with the court process, judges and arbitrators are sophisticated. In a jury trial, the opening statement will be based on facts (the trial judge instructs the jury on the law and how it is applied to the facts of the case). In a bench trial or arbitration, the opening statement will identify legal issues and discuss facts within the legal context. In any case, counsel’s ability to relate to jurors from the outset is important.
through testimony of defense witnesses, and leave presentation of evidence through the plaintiff for last.

Time of day also figures into this analysis. Consider whether to call certain witnesses first thing in the morning versus late in the afternoon. Many lawyers have learned the hard way that it is not a good idea to play a videotaped deposition immediately after lunch, unless, of course, the goal is to minimize the impact of that testimony.

**XII. DECIDING HOW TO PRESENT THE EVIDENCE**

Take maximum advantage of demonstratives, video evidence, and other means of presenting evidence visually. “The great value of demonstrative evidence ‘lies in the human factor of understanding better what is seen than what is heard.’” 10 Twenty years ago, courts were hesitant to admit some forms of visual evidence precisely because of their “dramatic power.” 11 With the advent of visual communication technology, trial courts are admitting visual evidence more and more, heeding the admonition of Federal Rule of Evidence 611(a)(1) to exercise their discretion over “the mode and order of . . . presenting evidence so as to . . . make those procedures effective for determining the truth.” Today, “[t]he use of demonstrative aids, including digital photographs and computer-generated images, is now commonplace in our courts.” 12 It is hard to overstate the power of well-presented visual evidence.

Visual communication technology in the courtroom does not have to be sophisticated. Rather than assuming that the newest, most sophisticated courtroom presentation tools will always best, trial counsel should consider whether the judge or jury would be better persuaded by a “high-tech” approach or a “low-tech” one. The choice may also be affected by the client’s budget, by what the court will allow, and by what the opposition plans to do. Whether the choice is for a high-tech or a low-tech presentation, counsel should plan to present a substantial share of the evidence visually.

The most important issue with any courtroom presentation tool is whether the judge or jury can see everything that counsel tries to show them without strain or effort. When that goal is not met, counsel is unquestionably better off using nothing and trying the case the old-fashioned, no-visuals way. Fact-finders get angry and frustrated when the words on enlargements are too small for them to read or when photos are blurred without explanation, and they may well take that frustration out on the client whose lawyer creates these problems. This is one reason why pre-trial courtroom visits are essential. Although enlarged photos and documents are still effective visual communication tools, some courtrooms are laid out in a way that makes it hard for jurors to read even a very large blow-up because it is impossible to position an easel near the jury box.

Sophisticated computer programs now allow lawyers to highlight text on the fly in exhibits projected on a screen, to present exhibits side by side to show changes or alterations, and to impeach a witness by showing his or her videotaped deposition on the left half of the screen while the prior inconsistent testimony scrolls slowly down the right half. When these programs are used properly with important evidence, they can make for a riveting examination.

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11 Robinson v. Mo. Pac. R.R. Co., 16 F.3d 1083, 1088 (10th Cir. 1994); see also State v. Trahan, 576 So. 2d 1, 8 (1990) (“The extreme vividness and persuasiveness of motion pictures . . . is a two-edged sword.”)

Keep in mind, however, that it takes time for lawyers (or their courtroom assistants) to become thoroughly familiar with these programs and to use them without a hitch. When trial counsel brings technology into the courtroom, jurors expect that they know how to use it. Fumbling with a program while nothing happens, displaying the wrong exhibits, or starting to play video depositions with no sound can hurt the lawyer’s credibility – and, by extension, the client’s credibility – with the fact-finder. So allow time for plenty of study and practice, for trial counsel or for another designated member of the trial team, before trial begins.

Avoid presenting witnesses through videotape unless there is no other option, or unless the objective is to minimize their impact. It is almost impossible to make a talking head look interesting to a fact-finder. When it is necessary to use videotaped depositions, keep them short and to the point. Make sure that there is enough time for the exchange of designations and counterdesignations, the resolution of objections, and the editing work that must be done before a video deposition is ready for presentation. Courts may have standing orders governing the timing of this work, or deadlines may be set in a scheduling order.

Exhibit books for jurors help ensure that all of the jurors can see all of the exhibits clearly. But they do have a potential downside. A book full of documents and photographs is likely to distract jurors, who tend to pay attention to objects or writings placed directly in front of them. (Lawyers who doubt this should pay careful attention at their next deposition to the witness playing with and glancing at an exhibit she or he is no longer being questioned about.) When counsel use exhibit books, they run the risk of losing control over the jurors’ attention.

A full discussion of the legal principles governing the admission of electronic evidence is beyond the scope of this paper, but we conclude by summarizing several issues that often arise in pretrial arguments over the admissibility of such evidence.

The easiest way to get a photograph into evidence is to have a witness – not necessarily the photographer – testify that the photograph accurately depicts a scene or situation at a time relevant to the case. Unless it is unduly prejudicial, the photograph will be admitted. The advent of digital photography initially caused some confusion because of the ease with which digital images can be manipulated. However, most courts recognized that both digital and non-digital photographs are “merely a representation of . . . recorded data.” Thus, most courts reject a higher standard for authentication of digital photographs “merely because in theory they can be manipulated”; instead, the standard foundational showing for authenticating a photograph, video, or other writing will suffice. However, when a digital image has been enhanced (for example, a shadow was removed, or colors were brightened or darkened), then expert testimony may be required to show that the digital enhancement process yields reliable and accurate results.

Computer-generated images present evidentiary dilemmas. Courts distinguish between computer animations and computer simulations. An animation is demonstrative evidence,  

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created “to illustrate and explain a witness’s testimony[.]”\(^\text{16}\) The foundation for admission of a computer animation is ordinarily established by testimony that the animation fairly and accurately portrays the facts of an event or process relevant to the case, and that it will help illustrate the testimony given by witnesses.\(^\text{17}\)

A computer simulation, by contrast, is a form of scientific evidence, admitted as substantive evidence in the case, through which a computer program performs a series of calculations based on physical or mathematical formulas grounded in science, using data from the record in the case, and generates a depiction offered as a re-creation of events as they actually occurred.\(^\text{18}\) Because they are grounded in scientific formulas and principles, computer simulations must meet the standards for the admission of expert testimony.\(^\text{19}\) Sometimes, a computer-generated image does not pass muster as substantive evidence, but still can be shown to the jury as demonstrative evidence to illustrate or explain the testimony of a witness.\(^\text{20}\) In such cases, consider asking the trial court to impose strict limits on how the proponent’s counsel and witnesses refer to the computerized images.

\section*{XIII. CONCLUSION}

Lawyers’ schedules are crowded enough as it is, but the intense focus required by trial preparation compounds ordinary time pressures under high stakes. Reinventing the wheel and preparing “on the fly” for trial inevitably leads to mistakes and omissions. This paper offers a comprehensive list of essential trial preparation topics that will help ensure nothing falls through the cracks the next time it comes time to prepare a case for trial.

\begin{itemize}
  \item \textit{State v. Farner}, 66 S.W.3d 188, 208 (Tenn. 2001).
  \item \textit{E.g., Lorraine}, 241 F.R.D. at 559.
  \item \textit{Lorraine}, 241 F.R.D. at 560.
\end{itemize}
THE FINAL 100 DAYS CHECKLIST

Personal Trial Notebook

☐ Prepare Trial Notebook Divided Into Sections
  ☐ Trial Strategy
  ☐ Jury Voir Dire
  ☐ Opening Statement
  ☐ Each Witness on Direct
  ☐ Each Witness on Cross
  ☐ Anticipated Motions
  ☐ Significant Legal Issues
  ☐ Significant Jury Instructions
  ☐ Closing Statement

☐ Include a List of Important Telephone Numbers

The Trial Team

☐ Select Trial Team
  ☐ First Chair
  ☐ Second Chair
  ☐ Paralegals
  ☐ Other Staff

☐ Assign Projects to Team
☐ Schedule Team Meetings
☐ Prepare Minutes/Summaries of Projects and Responsible Team Members

Lodging and “War Room”

☐ Cover Travel Arrangements in Out-of-Town Cases
☐ Consider a “War Room” in Office or Hotel
☐ Equip War Room With
  ☐ Supplies
  ☐ Courtroom Technology (projector, etc.)
  ☐ Laptops
  ☐ Printer
  ☐ Scanner
  ☐ Paper
  ☐ Refrigerator for Refreshments
  ☐ Food
  ☐ Lots of Coffee

Discovery Review

☐ Identify Necessary Supplemental Discovery Responses
Make Sure All Witnesses Adequately Disclosed
Address Any Remaining Inadequate Responses by Opponent
Identify Use of Responses to Limit Scope of Case

Experts
Consider Supplementing Reports
Reserve Dates on Calendar for Experts

Evidentiary Notices
Identify Required Evidentiary Notices
Serve Notices on Time

Final Legal Research
Identify Key Legal Issues
Cull and Update Research

Offers to Settle
Evaluate Settlement Positions
Update Settlement Offer
Consider Offers for Judgment

Motions in Limine/Pocket Briefs
Identify Governing Local Rules, Pretrial Orders, and Practices
Understand Broad Potential of in Limine Motions
Inadmissible Evidence
Prejudicial Evidence
Irrelevant Evidence
Include Appropriate Daubert Motions
Prepare Pocket Briefs for Issues That May or May Not Arise

Requests to Admit
Generally Completed Before 100-Day Period
Use to the Very End if Allowed
Use to
Lay Foundation for Documents
Establish Uncontested Facts
Establish a Basis to Seek Fees if Wrongfully Denied

Work With Opposing Counsel
Develop Joint Exhibit List
Prepare Stipulations
☐ Agree on a Division of Trial/Arbitration Time
☐ Identify Excerpts From Depositions and Show Edited Videotaped Depositions
☐ Exchange Demonstrative Exhibits
☐ Arrange for Attendance at Trial/Arbitration of Witnesses Under Counsel’s Control
☐ Expect and Give Advance Notice of the Order and Timing of Witnesses

Prepare Jury Instructions

☐ Use Pattern Instruction Where Available
☐ Avoid One-Sided Instructions
☐ Build Case Around Instructions

Selecting the Jury

☐ Distinguish Federal From State Practice
☐ Obtain Advance Information on Jury Pool Where Available
☐ Identify Ideal and Not-So-Ideal Jury Members
☐ Prepare Voir Dire

☐ For Court in Federal Case
☐ For Own Use in State Case

☐ Prepare Seating Chart of Jury Panel Members

Presentation of the Case

☐ Prepare Opening Statement
☐ Complete Trial Witness Checklist
☐ Identify and Prepare to Establish Elements of Claims and Defenses
☐ Consider Motions for Directed Verdict
☐ Consider Motions When Parties Rest
☐ Prepare Closing Argument

Trial Witnesses

☐ Identify Potential Witnesses – Cross, Direct, Rebuttal
☐ Finalize Witness List
☐ Confirm Contact Information
☐ Confirm Availability
☐ Secure Attendance
☐ Plan to Fill Voids in Presentation With Testimony
☐ Identify Testimony to Read Into the Record
☐ Prepare Direct and Cross Examinations
☐ Prepare Favorable Witnesses for Direct and Cross Examinations
☐ Determine Order of Witnesses

☐ Determine Whether to Call Opposing Party for Cross
☐ Determine and Discuss With Counsel Calling Witnesses Out of Turn
Trial Exhibits

- Premark Exhibits According to Court/Arbitrator Orders
- Use Exhibit Numbers From Depositions
- Consider Stipulations to Foundation
- Prepare Foundation Where No Stipulation
- Identify Objections to Admissibility
- Consider Manner of Presenting to Trier of Fact

- Hard Copies
- Electronic Copies
- Notebook of Limited Number for Jurors During Trial
- Complete Set in Notebook for Arbitrators
- Blow-Ups
- Overheads
- Trial Presentation Software

Trial Examinations

- List Each Witness on Direct or Cross
- Prepare Examinations
- Conduct Dry-Runs
- Prepare Witnesses for Cross

Prepare to Preserve the Record

- Plan to Object Sparingly
- Prepare to Make Appropriate Offers of Proof
- Consider Need to Repeat at Trial Objection in Motions in Limine

Items to Assist Judge/Trier of Fact

- Chronology
- Cast of Characters
- List of Agreed/Admitted Facts
- Brief With Key Documents
- Brief With Key Cases

Demonstratives

- Prepare
- Finalize
- Disclose?

Jury Instructions/Verdict Form

- Standard Instructions (where available)
- Special Instructions With Supporting Law
- Verdict Form
- Objections to Opponent’s Verdict Form
- Objections to Opponent’s Instructions
Findings of Fact/Conclusions of Law

☐ Prepare Findings of Facts With Record Cites
☐ Prepare Conclusions of Law With Cites
☐ Objections to Opponent’s Findings
☐ Objections to Opponent’s Conclusions
Jennifer Dolman

Education: 1989, L.L.B. from McGill University; 1986, B.A. from University of Toronto. Year of Call, 1991, Ontario. Partner in the Toronto office of Osler, Hoskin & Harcourt LLP where she has been practising commercial litigation since 1992 following her clerkship for the Chief Justice of the Ontario Court from 1991-1992. Broad commercial litigation practice with an emphasis on assisting franchisors with their business critical disputes, including defending claims for rescission, breach of the duty of good faith, misrepresentation and interference with the right to associate, enforcing terminations, and defending franchise group and class actions. Practice also includes intellectual property matters, defamation, privacy and employment. Expertise in the area of injunctions and other emergency applications, especially regarding the enforcement of restrictive covenants and the protection of confidential information. Selected as a Franchise Times Legal Eagle since 2011, named in the highest category (Most Frequently Recommended) for Franchising Law (Franchisor) in the Canadian Legal Lexpert Directory since 2011, listed in the Best Lawyers for Franchise Law since 2008 (named Toronto Franchise Lawyer of the Year for 2012), and included for Franchise in both Who’s Who Legal: Canada and the International Who’s Who of Franchise Lawyers. Actively involved in the ABA Forum on Franchising (sits on the editorial board for the Franchise Law Journal and former LADR Committee member), the Canadian Franchise Association, the Ontario Bar Association Franchise Law Section (former Program Coordinator, Secretary and currently Vice-Chair), and the International Franchise Association. Frequent speaker and writer on franchise related matters, active on social media, and writes a regular online franchise column for the Financial Post.
Bill is a partner in the Minneapolis office of Faegre Baker Daniels LLP. He provides counseling and dispute-resolution services to franchisors. Bill has been recognized for his work in franchising by *The Best Lawyers in America*, *Franchise Times Magazine*, *Minnesota Super Lawyers*, and *Who’s Who of Franchise Lawyers*. *Minnesota Law & Politics*, in 2008 and again in 2012, identified Bill as one of the top 100 “Super Lawyers” in Minnesota in all areas of practice. Bill has authored many articles related to franchising. His article, “The Modern Myth of the Vulnerable Franchisee: The Case for a More Balanced View of the Franchisor-Franchisee Relationship,” published in the *Franchise Law Journal*, received the Burton Award in 2009. Bill was the Editor-in-Chief of the *Franchise Law Journal* from 2003 to 2006. Bill is certified as a Civil Trial Specialist by the Minnesota State Bar Association. He is admitted to the bar in both Minnesota and Utah. Bill received his undergraduate degree from the University of Nebraska (Phi Beta Kappa) in 1970 and graduated from the University of Nebraska Law School, with distinction, in 1973. He was also a member of the Order of the Coif and was Editor-in-Chief of the *Nebraska Law Review*. 
Mark M. Leitner

Mark M. Leitner is a business trial lawyer with the Milwaukee, Wisconsin office of Pia, Anderson, Dorius, Reynard & Moss. He is one of the few lawyers in the United States to have achieved a verdict and a settlement each exceeding $100 million. Mr. Leitner has extensive trial and hearing experience before judges and juries in a wide variety of cases, ranging from trade secret and dealership termination injunctions to patent infringement actions to environmental pollution lawsuits. With his partner Joseph S. Goode, Mr. Leitner was class counsel for the Quizno’s franchisees in the national class action settlement approved in Siemer v. Quizno’s Franchise Co., LLC in August, 2010. He concentrates his practice in franchise and dealership litigation, class actions, fraud and other business torts, and appellate work. Mr. Leitner has been listed in The Best Lawyers in America since 2010 and is a 1985 cum laude graduate of the University of Wisconsin Law School, where he was a member of the Order of the Coif and was the Senior Articles Editor of the Wisconsin Law Review.