

# 5 Evidence Rules to Keep In Mind Before a Civil Trial

Sam R. Sasso

Most civil litigators have heard — and likely repeated — that statistic of questionable origin and accuracy: More than 95% of all civil claims settle. Our careers are largely spent preparing for trials that do not happen. A hard-fought trial, which seems so likely the first day a client comes into the office, fades into compromise and minutes of settlement after years of examinations, motions and other practical hallmarks of our civil justice system. The commonality of settlement can lead to complacency on the part of the lawyer in preparing the case for trial.

Not all cases settle, but it is incumbent on the lawyer to prepare each case expecting it to go to trial. There is no end to the number of rules and practice tips which need to be considered when preparing for a trial, but here are five evidence rules to keep in mind to assist in being ready when a trial actually happens.

## 1. Use a request to admit

Rule 51 of the *Rules of Civil Procedure* provides that a party may request the other party to admit the truth of a fact or the authenticity of a document. While an admission has particular relevance when it comes to evidence used at trial, rule 51 can be utilized “at any time” and must be responded to within 20 days.

Requests to admit are underutilized, especially considering how effective they are. Requests to admit can reduce the amount of time required to prove facts and have documents admitted. Further, having the other side admit a particular fact strengthens your case. Including admitted facts in an opening can set the tone before any witnesses testify.

Lawyers commonly try to narrow the issues in dispute; a request to admit can reduce the facts in dispute. Before a court can make any findings regarding the issues, the court must first make findings of fact. A court will likely be appreciative of a lawyer who has attempted to narrow the

facts necessary for a decision and tried to obtain agreement in the most cost-effective way; conversely, the court will likely not appreciate counsel who refused to admit facts which should have been admitted and wasted the court’s time to prove.

A request to admit also helps a counsel prepare for trial because it requires the lawyer to itemize all the key facts that need to be proven. Not all key facts may be included in a request to admit (there are tactical considerations as well), but the lawyer will have considered everything needed.

## 2. How to use business records

Business records can demonstrate to the court that your client conducted its business in an efficient and open manner in compliance with all statutory requirements and business practices. This increases the credibility of your client, which can help weather the storm of whatever issue needs to be tried.

Notice of business records is governed by s. 35(3) of the *Ontario Evidence Act* and provides that 7 days notice must be given. However, even if insufficient notice of business records is given, the court can still admit the evidence if there is no prejudice to the opposite party.

To qualify as a business record, the submitting party must show that the record was created in the “usual and ordinary course of business.” Generally, two criteria are required: (1) the record must have been made in the usual course of business; and (2) it was in the usual course of business to make such writing.

While s. 35 of the *Ontario Evidence Act* makes it easier for business records to be admissible, it does not assist in establishing the weight a trier of fact should give those business records, as stated by the Court of Appeal for On-

tario in *Inno-Vite Incorporated v. De Wit Trading Co. Inc.*, 2008 ONCA 362 (Ont. C.A.) at para. 1: “The business records were properly admitted under s. 35 of the *Evidence Act*; their weight was for the trial judge.” [Emphasis added]

Admitting business records pursuant to the rules can drastically reduce the amount of time your client has to deal with mundane technical issues while on the stand.

## 3. Notice periods for experts’ reports

Service of an expert’s report is governed by rule 53.03 of the *Rules of Civil Procedure* and provides that a party who intends to call an expert witness must serve a signed report by the expert not less than 90 days prior to the pre-trial conference. If a party wishes to call an expert witness to respond to the report, that party must serve a signed expert report within 60 days prior to trial.

If necessary, a court may grant leave to abridge the time for service of an expert report, as with other evidence, under rules 53.03(4) or 53.08.

From a practical standpoint, being able to serve an expert’s report in compliance with rule 53 means that a lawyer must have the report available sometime shortly after setting the matter down. The court usually requests that lawyers set a date for the pre-trial a couple of months after setting the matter down and pre-trials can happen within a couple of months after that. The ninety days before a pre-trial can sneak up quickly after the matter is set down.

## 4. How experts’ reports have changed

Rule 53.03 and the corresponding form now require that an expert acknowledge that the expert’s duty to the court prevails over any duty to the party who retained the expert. The practical result of this requirement is that a court may encourage — especially in commercial list matters — that a single expert be used by both sides; this, however, is different than an expert being retained directly by the court as in rule 52.03. If an expert’s job is to provide expert assistance for the benefit of the court and the expert can have no prevailing duty to the retaining party, then why shouldn’t one expert be used?

The answer to that question will invariably come down to whether one side thinks the use of one expert will end up costing them more in the long run, as in the case of competing valuations of a company, for example. However, the court is acutely aware of this tack by counsel and the use of more than one expert when one would have sufficed will be looked at with increasing cynicism.

## 5. Use rules forgiving non-compliance at your own risk (and credibility)

There are several rules a lawyer can use to cure a default in compliance: expert’s report notice under 53.03(4), 52.10 failing to prove a fact or document, as just two examples. However, all of these rules not only require discretion, they require an analysis of the reasonableness of a lawyer’s conduct. Immediately, the lawyer’s credibility comes into question. This type of analysis does not advance a client’s case; in fact, it just makes the case weaker.

A minor default is understandable, and is what these rules are meant to remedy: a reasonable oversight, an inability to comply, an unforeseen occurrence. These rules are not meant to act as a remedy for an unprepared lawyer; a court’s patience will be tried by excessive and preventable requests for leave or forgiveness. Not only does the lawyer risk losing these requests on a particular case, the lawyer risks obtaining a reputation as someone unprepared and lacking credibility.

Use of these rules deteriorates the confidence the court can have in your client’s case and the confidence the court can have in trusting the lawyer’s arguments. These rules should be used as a last resort, not as a matter of course.

The rules discussed above deal with trying to save time (request to admit, using business records) and complying with deadlines (experts’ reports and admitting business records). Given the ever-increasing abundance of evidence available for each case, culling the evidence required and complying with deadlines isn’t just a matter of good practice, but demonstrates whether the lawyer will be able to mount a viable case.

As trial lawyers, we should never lose sight of the fact that our duty is to tell our client’s story clearly and effectively. A court will appreciate the efforts of counsel, as described above, to make sense of the mass of evidence and focus in on key facts and documents. Conversely, the court will likely have little sympathy for, and will question the credibility of, a lawyer who is unprepared and must resort to asking leave to be able to argue the client’s case. Essentially, a lawyer chooses which of these two camps to be in during the planning stages of an action, not at the trial itself. A lawyer who is in the unprepared camp shortly before trial will invariably be more inclined to settle than one who is not.

*Sam Sasso is an associate with Ricketts, Harris LLP in Toronto. His practice focuses mainly on commercial litigation. Sasso has been involved in some of the largest directors and officers insurance cases as well as a number of significant shareholders dispute matters.*