



THE J.D. JURIST DICIT

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J.D. NEWS

**J.D. SELLIER + CO
NEW BRANCH OFFICE**

J.D. is pleased to announce the opening, effective February 10, 2014, of a new branch office located at :

Ground Floor – Back
Unit Trust Corporation Building
Mulchan Seuchan Road
Endeavour
Chaguanas



The Role of Instructing Attorney-At-Law in the Trial Process

Historical Background

Traditionally in Trinidad and Tobago, lawyers practiced as either barristers or solicitors as we followed the English legal system. The strict application of this division has, for the most part, been dispensed with in our local jurisdiction since 1986. After the commencement of the Legal Profession Act, 1986, every person who appeared on the roll of barristers and on the roll of solicitors was entered on the Roll of “attorneys-at-law”. Notwithstanding this, a divide of sorts still exists in practice. It is therefore useful to briefly outline the role and functions of both barristers and solicitors.

A barrister is a lawyer whose ultimate function is to act as an advocate in court to argue a client’s case. This may be before trial (i.e. at the “interlocutory” stage of the case), at trial (where the Court hears oral evidence of the witnesses and legal submissions of counsel) or on appeal (where the reasoning and correctness of the decision of the interlocutory or trial court is challenged). Counsel, formerly called barristers-at-law, settles the pleadings and gives advice connected with this specialist advocacy function.

Counsel, sometimes referred to as “advocate attorney-at-law”, is an independent lawyer who works individually in chambers and not in

firms. However, most form a network with other counsel in chambers where they have shared facilities.

On the other hand, an “instructing attorney-at-law” is involved largely in the preparation of the case. The tasks of the instructing attorney include taking instructions from and corresponding with the client, identifying and interviewing witnesses, preparing witness proofs, researching the law to provide a note to Counsel, engaging experts, giving advice, preparing court documents and generally instructing counsel.

Practically speaking, while the legal profession in Trinidad and Tobago is fused, it largely operates with this split in the functions of lawyers, albeit not a strict divide. In Port-of-Spain for example, there exists a number of law firms operating in partnerships such as “J.D. Sellier + Co.”, “Hamel-Smith & Co.”, “Fitzwilliam, Stone, Furness-Smith and Morgan”, “Hobsons”, *etc.* On the other hand advocate attorneys establish “chambers” such as “Bethany Chambers” and “Chancery Chambers” in which the legal practitioners are predominantly engaged in litigation and in particular advocacy.

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The relationship among lawyers here in T&T (and in other English speaking Caribbean jurisdictions) remains somewhat symbiotic. The litigation instructing attorney-at-law prepares the case for hearing and instructs the advocate attorney-at-law to argue the case before the courts. In an effort to facilitate this, the instructing attorney, as he/she is commonly referred to, provides counsel with a “brief”. The primary role of an instructing attorney is to instruct, or “brief”, counsel to advise, settle pleadings, affidavits, applications to the court and to appear at the hearing of court applications and the trial of cases.

What is a “brief”?

Simply stated, a brief is a document which summarizes the facts which give rise to a problem or dispute, a concise statement of the problem/dispute and a statement of what the counsel is being asked to do. A note on the law may also be useful. It should also provide relevant factual material and documentary material as well as references to any cases or statutory provisions that the instructing attorney deems relevant.

ABOUT OUR AUTHORS



Dennis Gurley, S.C., MCI Arb (Certified Mediator and Notary Public), practiced as a solicitor in England following his admission to practice in 1976.

He joined the firm in September 1977 and practiced civil litigation. In 1997, Dennis became a member of the firm's corporate and commercial team. His breadth of experience therefore spans both litigation and corporate and commercial law.

Dennis advises on a wide range of matters, including acquisitions, joint ventures, company incorporation, corporate governance, banking, commercial litigation, estate planning and administration, pension schemes and tax appeals.

Tips in preparing the brief

1. Select Counsel appropriate for the task

Very often, the instructing attorney's firm may have an established relationship with a particular counsel or particular chambers. The counsel selected also often depends on the nature of the matter, e.g. whether the matter involves a claim in tort where the claimant has suffered damages and/or personal injuries, whether it is a corporate/commercial matter, a family matter or a criminal matter. The experience and specialization are important factors to consider in the selection of the right counsel.

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2. Discuss the matter with counsel before sending the brief

This is important in establishing whether counsel is available or whether there is any possible conflict or whether counsel is not willing to accept the brief for some other reason. There are many reasons why instructing attorney should contact counsel before sending the brief including *inter alia*, where the brief requires an appearance on a particular day and one needs to ascertain counsel's availability for that day; where paperwork is urgently required for example, when the statutory period of limitation is about to expire and one needs to ascertain whether counsel will be able to complete the task in sufficient time; to agree counsel's fee on brief and retainers, if any, and to consider whether a special arrangement is proposed in relation to the payment of counsel's fees.

3. Specify on the brief precisely what counsel is instructed to do

Each brief should have a clear and succinct statement of counsel's instructions. If the brief is a brief to appear, it should also unequivocally specify where and when counsel is required to appear. If it is a brief to advise, counsel should be told what kind of advice is sought – whether it is advice on evidence, or advice on prospects of success, or advice on some specific legal issue.

4. Include “Instructions” and/or “Observations” as a prominent item in the brief

There is no set or prescribed form which these must take as they will depend on the nature of the particular case. However, the brief should be placed in proper order, and matters which should generally be included are:-

- a. A brief summary of the facts and issues, not details, which should generally appear from witness statements and documentary evidence;
- b. Observations highlighting specific issues which are potentially problematic, including cross-references to witness statements;
- c. The results of any legal research, including reference to any relevant statutes, case-law and to any relevant legal arguments which may not be immediately apparent from the pleadings or other material in the brief.

5. Ensure that the brief includes everything that counsel will need

This will include legible filed copies of all the pleadings, any relevant affidavits, interrogatories and answers thereto, discovered documents, witness statements, court orders/directions, hearsay notices, admissions, agreed documents, list of issues and relevant correspondence.

ABOUT OUR AUTHORS



Marcelle, Managing Partner, leads the firm's litigation team and has over 30 years experience as a litigation attorney-at-law with particular emphasis on Commercial Litigation, including Banking, Public law, Medical Negligence, Admiralty, and Arbitrations. She also practices Family Law and has undergone training in family mediation and is very experienced at resolving family disputes in a non-adversarial atmosphere.

Marcelle is a former Chairman of the Adoption Board of Trinidad and Tobago, a statutory authority charged with responsibility for regulating and facilitating the adoption of children in Trinidad and Tobago.

LITIGATION AND DISPUTE RESOLUTION

The firm's litigation and dispute resolution practice group manages a substantial civil litigation portfolio which includes public law, admiralty, banking, mortgage and foreclosure actions, wrongful dismissal, workmen's compensation and medical negligence. Its non-commercial litigation portfolio comprises contentious probate matters, personal injuries claims, defamation and a family practice that includes divorce and custody proceedings, property settlement and maintenance applications.

The firm's litigation attorneys-at-law have also undergone extensive training in arbitration and mediation to further develop their skills to enable them to resolve their clients' differences and disputes without recourse to the Court.

The practice group is headed by Marcelle Ferdinand, an attorney-at-law with more than 30 years experience in litigation. She is ably supported by a team of highly qualified and dedicated associates and a complement of well-trained, committed support staff who work assiduously to ensure the efficient delivery of services to the firm's clients in a timely manner.

6. Be careful not to overload the brief with material that is irrelevant

Providing counsel with too much material is almost as bad as providing counsel with insufficient material. The inclusion of unnecessary documents runs the risk of causing delay, confusion and added expense.

7. Arrange/organize the brief in a logical order

Generally speaking the brief can be arranged in separate sections containing the following:-

- Instructions to counsel;
- Pleadings (current and superseded);
- Other court documents;
- Witness Statements/Proofs of evidence;
- Expert reports (on behalf of both parties if any);
- Discovered documents/ agreed list(s) and bundle(s) of documents;
- List of Issues;
- Statement of agreed facts, if available;
- List of authorities (usually counsel will copy the authorities, including copies for the court and for the opposing counsel);
- Counsel's Advice on Evidence;
- Copies of other documentary evidence;
- Relevant correspondence, if not included in the agreed bundle of documents.

Other categories which may be relevant include previous instructions to counsel and counsel's previous advices; loss adjuster's reports; documents obtained by third party discovery; documents pertaining to related litigation *etc.*

In most cases it is preferable if not essential, that the brief (and the bundles within it) should be arranged in chronological order.

Other practical considerations are

- Each page of the brief should be adequately secured to prevent pages becoming lost;
- The form of binding should be such as to allow the brief to be easily opened and remain open if necessary;
- Where it is anticipated that there may be further documents to be added to the brief, it is helpful if the brief is in a form, such as a ring binder, which allows pages to be inserted and removed easily;
- A number of smaller volumes is easier to maneuver than one large volume;
- The use of “separators” in the brief may also be useful in making the brief more reader-friendly, especially when dealing with a large volume of documents;
- All briefs must be indexed and paginated;
- All documents in the brief must be copied legibly
- Do not provide counsel with original documents as these may be misplaced by counsel or even lost.

8. Prominently highlight matters which counsel should note

This may include trial dates or dates of other court appearances; the instructing attorney or other attorney at the firm whom counsel can contact; the name of the counsel being briefed; the name and contact details of the briefing firm; the name of the matter; any out of ordinary arrangement with respect to fees; expiry date of the limitation period.

9. Arrange conferences where necessary or appropriate

This includes pre-trial conferences and other conferences. Instructing attorney should always arrive at counsel’s chambers (for conferences) on time, if not early, and should ensure that the client and all witnesses are informed and reminded of the place and time for conferences and appearances.

At the pre-trial conference, counsel meets the client and other witnesses, discusses their evidence, and - without “coaching” them as to what they are expected to say- advises them on the manner in which they are expected to give their evidence. Counsel also uses this opportunity to clarify any apparent inconsistencies and/or ambiguities in their witness statements and to prepare the witnesses for cross-examination by the opposing Counsel.

Other conferences may be arranged so that counsel can be briefed and give advice in conference.

Under the Civil Proceedings Rules Counsel is required to attend all pre-trial reviews and case-management conferences that may arise, and therefore it is desirable that the brief be delivered to counsel’s chambers in good time before the hearing/conference/trial date.

10. Ensure that the situation regarding fees for counsel is clearly understood

This is crucial and best practice requires that counsel’s fees and the terms of payment should be reduced into writing very early in the day, ideally as soon as the choice of counsel is decided, so as to avoid confusion/misunderstanding and difficulty later on.

The tasks of the instructing attorney include taking instructions from and corresponding with the client, identifying and interviewing witnesses, preparing witness proofs, researching the law to provide a note to Counsel, engaging experts, giving advice, preparing court documents and generally instructing counsel.

Instructing Attorneys Role during the Trial or Hearing

Instructing attorney’s role in connection with the Court hearing includes the following:-

1. Ensuring that counsel has received his brief
2. Ensuring that all witnesses have been informed of the date, place and time of the hearing/trial, and/or ensuring that witnesses have been properly subpoenaed to attend (whether with or without documents)
3. Attending the pre-trial conference with the client, witnesses and counsel (often a brief meeting held in the precincts of the court immediately prior to the commencement of hearing/trial)

4. Ensuring that all witnesses are out of court and hearing until they are called to give their evidence
5. Ensuring that all original documents are available for production by the relevant witnesses
6. Taking a comprehensive note of the proceedings (preferably in question and answer format)
7. Locating and retrieving Case Law Reports, Statutes and other authorities from the court library if required by counsel
8. At the end of each day's hearing, preparing a type written note/transcript of the hearing and forwarding same to Counsel in sufficient time for the next hearing
9. Pointing out to counsel any apparent gaps, omissions or inconsistencies in his/her presentation of the case
10. Providing counsel with information in relation to costs and where appropriate reminding counsel to make submissions in relation thereto as well as any other aspects of the matter.

[The views expressed in this article are the views of the authors only and are for the benefit of the clients and associates of J.D. Sellier + Co. generally; they are not intended to be legal advice and clients are encouraged to consult with their professional advisors for advice concerning specific matters.]

ABOUT J.D. Sellier + Co.

J.D.Sellier+Co. was founded by Jean-Baptiste Denis Sellier who was admitted to practice as a Solicitor and Conveyancer in Trinidad and Tobago in 1882. He practiced on his own until 1916 when he invited his colleague and friend George Cecil Pantin to join him in a partnership.

Today, J.D.Sellier+Co. has expanded to approximately 20 attorneys-at-law and 77 employees and offers its clients quality legal services. Our clients include industrial, commercial and financial enterprises, domestic and foreign, public and private, ranging in size and complexity from small single location business enterprises to large diverse, multinational corporations.

Our firm is a general practice law firm divided into four areas of civil practice, namely: Corporate + Commercial (including banking + finance; energy + regulated industries; probate; estate planning + administration; mergers + acquisitions; tax), Real Estate, Intellectual Property, and Litigation + Dispute Resolution (including admiralty + shipping).

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