The Advocates' Society

Principles of Civility and Professionalism for Advocates

February 20, 2020

Preamble

It is an honour to present the 2020 edition of the *Principles of Civility and Professionalism for Advocates.* The goal of these principles since their inception has been to foster civil and professional conduct in an adversarial system and thereby improve the administration of justice. While The Advocates' Society's publications about civility have been updated over the years, that goal has never changed.

In 2000, the Society held a symposium on civility, which led to the development of the original *Principles of Civility for Advocates.* In 2009, the Society created the *Principles of Professionalism for Advocates* to broaden the guidance provided to advocates. In 2013, the Society's Young Advocates Standing Committee added *Best Practices* to accompany the broader principles and provide practical solutions to issues commonly faced by advocates.

Together, these principles and best practices reflect the collective wisdom of leaders of the bench and the bar on matters of professionalism and civility. They encourage conduct that characterizes an exemplary advocate both inside and outside the courtroom.

On the 20th anniversary of its original symposium, the Society has undertaken a review of these publications to ensure they apply to the realities of the practice of advocacy across Canada in the 21st century. While much has remained the same since that original symposium, there has also been considerable change. The need for a more diverse and inclusive profession has become readily apparent. Technology has intensified the pace of communication and our expectations of fellow advocates, while giving everyone with a social media account a platform.

In the course of our review, it became clear that principles of professionalism and civility are closely intertwined: civility is a part of professionalism, and vice versa. We therefore consolidated the *Principles of Civility for Advocates*, the *Principles of Professionalism for Advocates*, and the *Best Practices* into one authoritative document for advocates to consult as needed for guidance.

The rules of professional conduct established by the various Canadian Law Societies stipulate minimum standards for professional conduct to protect the public interest. Every lawyer is required to know and abide by those standards. The goal of the *Principles of Civility and Professionalism for Advocates* is a more aspirational vision of the profession, which is less adversarial, less technical, more diverse, and more focused on ensuring that justice is done, while not losing sight of advocates' duties to advance their clients' interests.

Because the Society is not a regulator, the principles deliberately specify what advocates *should* do, rather than what they *must* do. However, they should not be taken as mere recommendations. Rather, the principles that specify how to deal with the court, other lawyers, and self-represented litigants reflect basic and essential obligations to which the Society recommends consistent adherence. In some cases, these expectations are articulated as mandatory standards by some provincial Law Societies. Others reflect aspirations that will be achieved over the course of an advocate's career.

The Advocates' Society extends its thanks to the many advocates and judges who volunteered their time to produce and consult on these updated *Principles of Civility and Professionalism for Advocates.* Everyone who participated in the process ensured that the principles continue to be distilled from the knowledge and experience of the profession as a whole.

We hope you find these principles useful in your advocacy practice.

Principles of Civility and Professionalism for Advocates

An Advocate's Duty to Society

1. Advocates should support the maintenance and development of democratic principles, the rule of law, and the independence of the bar and the judiciary, in Canada and elsewhere.

2. Advocates should promote the fair, accessible, effective, and efficient administration of justice.

3. To the extent practicable, advocates should be engaged in their communities through activities including philanthropy, volunteerism, education, and public service.

An Advocate's Duty to Promote Access to Justice

4. Advocates should support and contribute to organizations, initiatives, and other efforts to improve access to justice and to make legal services available to persons of limited means.

5. To the extent practicable, advocates should provide legal services on a *pro bono,* reduced fee, or alternative basis for those unable to pay and who would otherwise be deprived of adequate legal advice or representation.

6. Advocates should conduct themselves in a way that decreases the costs of litigation and other forms of dispute resolution.

7. Advocates should have regard for the principle of proportionality in conducting litigation and in advising clients. Advocates should advise clients of alternative methods for resolution of their disputes and encourage their use when appropriate.

An Advocate's Duty to the Profession

8. Advocates should promote and participate in self-governance and self-regulation of the profession in the public interest.

9. Advocates should conduct themselves in a way that enhances the public's regard for the legal profession. They should not engage in activities that tend to bring the profession or the administration of justice into disrepute.

10. Advocates should promote equality, diversity, and inclusion within the profession and their workplaces. Advocates should make conscientious efforts to support equality, diversity, and inclusion in their own practices, including in hiring, mentoring, and professional evaluation and advancement.

11. Advocates should actively seek out and make time to mentor junior colleagues in their workplaces and in the profession at large. They should particularly look for opportunities to mentor junior lawyers with different lived experiences than their own.

12. Advocates should assist in creating opportunities for new advocates. When possible, they should offer articling programs to meet the demand of graduating law students. When offering an articling program, it should be high quality to ensure that the public is provided with qualified, well-trained advocates.

13. Advocates should be conscientious and respectful in their treatment of their colleagues within their workplaces. They should show sensitivity and understanding of their colleagues' circumstances and make the workplace inclusive and welcoming.

An Advocate's Continuing Duty to Learn

14. Advocates should be skilled, knowledgeable, capable, and competent within the area of law in which they practise. They should remain current regarding developments in the law relevant to their practice.

15. Advocates should participate in continuing legal education programs.

16. Advocates should be culturally competent. Cultural competency is an evolving, ongoing process. It requires advocates to acquire, develop, and maintain practical skills to serve clients across different cultures effectively.

An Advocate's Duty to Clients

17. Advocates should pursue the interests of their clients resolutely, to the best of their abilities, within the bounds of the law and the rules of professional conduct. Advocates should "raise fearlessly every issue, advance every argument and ask every question."[1] At all times, however, they should represent their clients responsibly and with civility and integrity. The duty of zealous representation should be pursued in a manner consistent with duties to the court, to opposing counsel, and to the administration of justice.

18. Advocates should refrain from acting on instructions from a client that conflict with their duty to the court or other professional duties.

19. Advocates should advise their clients with honesty and candour.

20. Advocates should not allow personal judgments with respect to a client or the client's cause to impede their representation of the client.

21. Advocates should continue to act for a client unless there is good cause to terminate the relationship, such as a breakdown in communication, a loss of confidence, or a failure to pay fees. Advocates should only terminate the relationship on reasonable notice to the client and, when necessary, with the permission of the court.

An Advocate's Duty to the Court

22. Advocates should use tactics that are legal, honest, and respectful of courts and tribunals.

23. Advocates should act with integrity and professionalism, while maintaining their overarching responsibility to ensure civil conduct.

24. Advocates should educate clients and others about court processes and promote the public's confidence in the administration of justice.

25. Advocates should promote the efficient and effective operation of the judicial system. They should not seek adjournments without proper reason and, when appropriate, should cooperate with opposing counsel in achieving the most expeditious and least costly resolution of proceedings.

26. Advocates should not knowingly permit a witness or affiant to give false evidence. Advocates should not engage in any conduct designed to induce the court to act under a misapprehension of the facts.

27. Advocates should ensure that the court is informed of any known changes in the law and of important judicial authorities relevant to the legal questions in a proceeding.

28. When the court or tribunal makes a ruling, advocates should respect it and not attempt to revisit it, except through appropriate avenues such as appeal, judicial review, or a motion for reconsideration.

An Advocate's Duty to Opposing Counsel

29. The proper administration of justice requires the orderly and civil conduct of proceedings. Advocates should always act with civility. They should engage with opposing counsel in a civil manner even when faced with challenging clients, issues, conflicts, or disagreement. This duty applies to communications with all opposing counsel, including those that are more junior at the bar, and also taking into account diversity, equity, and inclusion.

30. Advocates should require those under their supervision to conduct themselves with courtesy and civility.

31. Advocates should extend professional courtesies to opposing counsel that do not prejudice their client.

32. Ill feelings that may exist between clients, particularly during litigation, should not influence advocates in their conduct, demeanour, or overall civility toward opposing counsel.

33. Advocates should always be honest and truthful with opposing counsel.

34. Advocates should demonstrate the same courtesy and civility shown to opposing counsel towards paralegals, articling students, self-represented litigants, or others.

35. Advocates should avoid unnecessary motion practice or other judicial interventions by negotiating and seeking agreements with opposing counsel whenever practicable.

Communications with Opposing Counsel

36. Advocates should respond promptly to correspondence and communications, including electronic communications, from opposing counsel.

37. When advocates are about to send written or electronic communication to the court, or are about to take a fresh step in a proceeding that may reasonably be unexpected, they should provide opposing counsel with reasonable notice when to do so does not compromise a client's interests.

38. Advocates should cooperate in facilitating reasonable requests for the electronic transmission of documents to promote efficiency and cost effectiveness.

39. Advocates should avoid sending intemperate correspondence, including e-mails.

40. Advocates should avoid acrimony or disparaging personal remarks when interacting with opposing counsel.

41. Advocates should consider whether oral communication with opposing counsel may be more effective than written communication in resolving issues.

Comments Made about Opposing Counsel

42. Advocates should not make ill-considered, gratuitous, derogatory, or uninformed comments about opposing counsel to others, including clients and the court. However, reasoned criticism based on evidence of lack of competence, unacceptable or discriminatory conduct, or unprofessional acts may be made in the appropriate forum.

43. Advocates should avoid posting critical comments about an identifiable opposing counsel on social media.

44. Advocates should not attribute bad motives or improper conduct to opposing counsel, except when well-founded and relevant to the issues of the case. If such improper conduct amounts to a violation of applicable rules of professional conduct, advocates may (or may be obliged to) report the conduct to the appropriate regulator.

45. Advocates should not ascribe a position to opposing counsel that opposing counsel has not taken, or otherwise seek to create an unjustified inference based on opposing counsel's statements or conduct.

Cooperating with Opposing Counsel on Scheduling Matters

46. Advocates should consult opposing counsel regarding scheduling matters and make a genuine effort to avoid conflicts.

47. Advocates, and not the client, have the sole discretion to determine the accommodations to be granted to opposing counsel and litigants in all matters not directly affecting the merits of the cause or prejudicing the client's rights. Advocates should not accede to a client's demands that the advocate act in a discourteous or uncooperative manner.

48. Advocates should attempt to accommodate the commitments of opposing counsel previously scheduled in good faith for hearings, examinations, meetings, conferences, seminars, professional development programs, vacations, personal commitments, or other functions.

49. Advocates should agree to reasonable requests for scheduling changes, such as extensions of time and adjournments, provided the client's legitimate interests will not be materially and adversely affected.

50. Advocates should not attach unfair or extraneous conditions to extensions of time. However, they are entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize. Advocates may also request reciprocal scheduling concessions but should not unreasonably insist on them.

51. Advocates should promptly notify opposing counsel when it becomes necessary to cancel or postpone hearings, examinations, meetings, or conferences.

Promises, Agreements, Undertakings, and Trust Conditions Given to Opposing Counsel

52. Advocates should not give any undertaking or promise that, to their knowledge or belief, cannot be fulfilled. Undertakings should be confirmed in writing and should be unambiguous. Advocates should fulfill or comply with all undertakings and promises given to, or agreements with, opposing counsel, whether oral or in writing. Undertakings should be fulfilled as promptly as circumstances permit.

53. If an advocate does not intend to accept personal responsibility with respect to any promise, agreement, or undertaking given, this should be stated clearly in the promise, agreement, or undertaking itself. In the absence of such a statement, the person to whom a promise, agreement, or undertaking is given is entitled to expect that the advocate will honour it personally.

Conduct That Undermines Cooperation among Advocates

54. Advocates should avoid sharp practice. Advocates acting in civil proceedings and prosecutors in criminal proceedings should not take advantage of, or act upon, slips, irregularities, mistakes, or inadvertence.

55. Advocates should not falsely hold out the possibility of settlement as a means of seeking an adjournment or delay.

56. Subject to the applicable rules of practice, advocates should not cause any default or dismissal to be entered without first notifying opposing counsel, if the identity of opposing counsel is known.

57. Advocates should not record conversations with opposing counsel without the prior consent of everyone involved in the conversation.

An Advocate's Duty to Self-Represented Litigants

58. Advocates should treat self-represented litigants with the same respect and courtesy shown to other counsel.

59. Advocates can expect and insist on being treated with the same respect and courtesy by self-represented litigants. Accordingly, self-represented litigants are also encouraged to abide by these principles and best practices.

60. Advocates should not attempt to gain a benefit for their client solely because a litigant is self-represented. To the extent practicable, advocates should assist the court in dealing with a self-represented litigant and should cooperate with the court in ensuring that a self-represented litigant receives a fair hearing.

61. Advocates should consider providing assistance to a self-represented litigant when doing so will not prejudice the obligations that each advocate owes to their client, will move the case forward, and will not result in significant costs.

62. Advocates should not take advantage of a self-represented litigant's unfamiliarity with the rules of practice and procedure, and, if practicable, should point them to sources of information to help them understand their obligations under those rules.

63. Advocates are entitled to raise proper and legitimate objections and arguments. However, advocates should not take advantage of technical deficiencies in a self-represented litigant's case that do not prejudice their own client or adversely affect the conduct of the proceeding.

64. Advocates should attempt to consult in advance with self-represented litigants regarding scheduling and should consider asking the court to endorse a mutually agreed-upon timetable to avoid misunderstandings.

65. It is not uncivil to deal with a self-represented litigant exclusively in writing. When circumstances require oral communication with a self-represented litigant, advocates should have a witness present in order to avoid the advocate becoming a witness in the proceeding. If this is not practicable or possible, then advocates should document conversations with self-represented parties by sending confirmatory letters or e-mails.

66. Advocates dealing with a self-represented party should consult and be guided by resources such as:
   a. Canadian Code of Conduct for Trial Lawyers Involved in Civil Actions Involving Unrepresented Litigants published by the American College of Trial Lawyers, and
   b. Canadian Judicial Council's Statement of Principles on Self-represented Litigants and Accused Persons (2006).

An Advocate's Duty to Other Parties and Witnesses

67. Advocates should not communicate with any party who is represented by counsel, except through or with the consent of that counsel.

68. Advocates may tell clients, potential witnesses, or others for whom they act that they are not obliged to submit to an interview or to answer questions posed by opposing counsel unless required to do so by law. However, advocates should not advise clients, witnesses, or others to evade or ignore service of a summons or subpoena, or to destroy or hide evidence.

69. Advocates should always be honest, courteous, and civil in their communications with witnesses. Advocates should not abuse, intimidate, or harass a witness.

70. Advocates should identify themselves, and, subject to privilege and confidentiality, for whom they are acting when communicating with witnesses or other parties.

71. When seeking information from a witness, advocates should avoid deceiving or otherwise misleading the witness and should avoid asserting improper influence over the witness's evidence.

An Advocate's Duty to the Judiciary

The following principles are drafted with reference to judges, but should be adapted as necessary to apply to other judicial officers, administrative tribunal members, other adjudicators, arbitrators, and mediators.

What Judges Can Expect from Advocates

72. Judges are entitled to expect that advocates will treat the court with candour, fairness, and courtesy.

73. Notwithstanding that the parties are engaged in an adversarial process, judges are entitled to expect that advocates will assist the court in doing justice between the parties and avoiding miscarriages of justice.

74. Judges are entitled to expect advocates will assist them in fostering and maintaining public confidence in the administration of justice. In particular, judges are entitled to expect that advocates will conduct themselves with dignity and decorum and will avoid disorder and disruption in the courtroom.

75. Judges are entitled to expect advocates to be punctual, appropriately attired, and adequately prepared in all matters before the courts.

76. Judges are entitled to expect advocates to be respectful to court staff at all times.

77. Judges are entitled to expect advocates to properly instruct their clients as to behaviour in the courtroom and any court-related proceedings. Advocates are expected to counsel clients and witnesses to act respectfully and refrain from causing disorder or disruption in the courtroom.

78. Judges are entitled to expect that advocates will not engage in personal attacks on the judiciary or unfairly criticize judicial decisions in their public statements, including on social media.

What Advocates Are Entitled to Expect of the Judiciary

79. Advocates are entitled to expect judges to treat everyone before the courts with appropriate courtesy.

80. Advocates are entitled to expect that judges understand that some cases require judicial resolution. Neither advocates nor the parties should be unduly pressured to settle in such cases.

81. Advocates are entitled to expect that judges will maintain control of court proceedings and ensure that they are conducted in an orderly, efficient, and civil manner.

82. Advocates are entitled to expect that judges will not unfairly or unjustifiably reprimand, criticize, disparage, or impugn counsel, litigants, and witnesses, or demonstrate or engage in intemperate and impatient behaviour. Advocates can also expect that judges will not make statements evidencing pre-judgment of the issues in the case.

83. Advocates are entitled to expect that judges will be considerate of the schedules of counsel, parties, and witnesses when scheduling hearings, meetings, or conferences.

84. Advocates are entitled to expect that judges will be punctual in convening all trials, hearings, meetings, and conferences. If judges are delayed, they should notify counsel when possible.

85. Advocates are entitled to expect judges to perform all judicial duties, including the delivery of reserved judgments, within statutory requirements, or in the absence of such requirements, with reasonable promptness.

86. Advocates are entitled to expect judges to use their best efforts to ensure that court personnel under their direction act civilly towards counsel, parties, and witnesses.

87. Advocates are entitled to expect that judges will be aware of and sensitive to diversity and inclusion, and challenges that may arise from systemic disadvantage.

Communications with the Judiciary Outside of Court

88. As a general principle, unless specifically provided for in a direction provided by the court to the profession, advocates should not communicate directly with a judge out of court about a pending, current, or completed case unless invited or instructed to do so by the court.

89. If it is necessary to contact a judge directly, advocates should advise opposing counsel of their intention and, whenever possible, should share a draft copy of their proposed communication. Any direct communication with a judge should be copied to opposing counsel and should indicate whether opposing counsel has had an opportunity to review the communication and whether opposing counsel has agreed to its contents.

90. Unless there is a rule, practice direction, or local practice to the contrary, unsolicited communications with the court should be brief. The communication should state that an issue has arisen, state the issue in neutral terms, and ask the judge to set a process to deal with the issue.

91. Unless invited or permitted by the judiciary, communications between advocates should not be copied to the court.

92. Telephone conferences that include a judge are court proceedings and are subject to the same principles of civility and professionalism as any other court proceeding.

93. Advocates and judges should be able to expect that their interactions with one another will be governed by courtesy and respect. When advocates and judges know each other outside of the proceedings, neither should publicly exhibit a level of informality that may give rise to an appearance of special consideration.

94. If an advocate encounters a judge outside of the courtroom, the advocate and judge should avoid discussing any pending or current cases in which they are directly or indirectly involved.

Best Practices for Dealing with a Threatening Lawyer

The pursuit of zealous advocacy on behalf of a client never includes the use of personal threats, attacks, or personal and irrelevant accusations made against fellow counsel. Such behaviour is uncivil, unprofessional, and unhelpful in advancing a client's case.

Below are some best practices to guide advocates when confronted by a threatening lawyer.

- How to respond to threatening communications: The response should primarily deal with the substance of the issue in the litigation. Advocates should refrain from responding in kind. Advocates should correct the record as necessary and ask opposing counsel to stop making such threats.

- When to take additional steps: The threatening lawyer should be offered at least one opportunity to retract or back down from their threats. If the abusive conduct continues, advocates may consider whether referral to the appropriate professional disciplinary authority is appropriate in order to obtain assistance in moderating counsel's conduct. Advocates may also consider whether the issue should be raised with the court.

- Advice for junior counsel: It is important for junior advocates to respond to allegations of impropriety. They should advise a senior colleague of the matter and seek direction and advice. Senior advocates should assist in these circumstances.

- Seeking costs: Personal threats, attacks, or personal and irrelevant accusations made against fellow counsel add no value to a proceeding. Advocates may ask the court to consider such conduct in the awarding of costs.

Best Practices for Dealing with Misleading Correspondence and Counsel or Parties Who Mischaracterize Telephone and In-Person Discussions

To ensure that proceedings move forward efficiently, communications often occur in person or over the telephone. Unlike written correspondence, these methods provide no precise record as to what was said. Advocates must feel comfortable that their words will not be misstated by opposing counsel or parties.

Below are some best practices to guide advocates when confronted by misleading correspondence and by counsel or parties who mischaracterize telephone and in-person discussions.

- How to respond: Advocates should respond completely but concisely to any misstatements to the extent necessary to protect a client's interests. Responses to uncivil correspondence should avoid invective and responding in kind. Unless absolutely necessary, advocates should resist the temptation to provide a lengthy response or to engage in a protracted "letter writing campaign."

- How to memorialize: Advocates should memorialize discussions with opposing counsel or parties with sufficient details for their files. If misleading accounts of discussions occur frequently, advocates should bring a student or other lawyer to witness the conversations (and as necessary, have that witness prepare notes to the file). If the conversation does not take place in person, advocates should advise opposing counsel or parties that another person is present.

- Do not refuse to speak to opposing counsel unless absolutely necessary: Some opposing counsel prefer to communicate orally, and oral communication is often the most efficient and effective way to conduct a litigation file. When oral communications frequently result in disputes about what was said, it may be appropriate to restrict communications to writing. However, such an approach should be adopted with restraint. See also principle #65 above.

- Seeking costs: Misleading correspondence increases costs. Advocates should consider raising such conduct at the appropriate time and seeking additional costs relating to unnecessary steps arising from this conduct.

Best Practices for Dealing with Service Issues

The evolution of the rules applicable to civil procedure has often lagged behind developments in technology. This is very apparent when reconciling the strict letter of the rules relating to service with the modern realities of using technology in the practice of law. Civility demands that advocates be flexible in regard to service issues unless specific circumstances require otherwise.

Below are some best practices to deal with common service issues, which may not apply to service of originating process.

- Be reasonable: Advocates should consent to reasonable arrangements with respect to service when required by the nature or the schedule of the proceedings, unless it would prejudice their client's case. Insisting on strict compliance with the applicable rules of civil procedure can be uncivil and impede the orderly conduct of the proceeding. Refusing service after 4:00 p.m., refusing faxes over 16 pages or turning off the fax machine, and refusing to acknowledge service by e-mail or courier are examples of practices that may be uncivil. If opposing counsel engages in such conduct, advocates should consider raising such conduct at the appropriate time in the proceeding and seeking additional costs relating to any unnecessary steps required due to opposing counsel's refusal to accept or acknowledge service.

- Technology is moving faster than the rules: Unless there are specific reasons not to, advocates should accept service by e-mail. A best practice is to request and provide an acknowledgment that the e-mail has been received. Service by e-mail should not be used as a means to avoid the costs of printing and binding. When requested, paper copies of a record should still be provided.

Best Practices Applicable to Motions

In most civil and family proceedings, motions consume a significant amount of time and expense. Realistic timetables, active and regular engagement amongst counsel, and the identification of opportunities to narrow the issues in dispute can mean the difference between a motion that is heard in a reasonable amount of time and for a reasonable cost, and a motion that drags on for months and consumes significant resources. Many motions go awry because of a lack of communication, sharp practice, or poor planning.

Below are some best practices to make motions practice as civil, professional, and cost-efficient as possible.

- Step-by-step approach: Advocates should adopt a step-by-step approach to motions, giving opposing counsel opportunities at each stage to successfully resolve the dispute and to avoid unnecessary expense.

- Communicate your intention to bring a motion: Advocates should communicate an intention to bring a motion, articulate the basis for the motion, and seek a mutually convenient date well in advance of preparing or serving motion materials.

- Respond in a timely manner: Advocates should respond to notice of an intention to bring a motion and a request for scheduling within a reasonable time. The response time should be proportional to the urgency of the issue. If an informed and measured response cannot be provided in a timely way, advocates should acknowledge receipt of the notice and advise when a substantive response will be forthcoming.

- Follow up if no response: Advocates should consider follow-up communications advising that motion materials are being imminently prepared. For complex motions, consider sending over a draft notice of motion (without affidavit evidence) before preparing motion materials.

- Always consult on scheduling: Unless moving *ex parte*, advocates should always consult with opposing counsel about their availability for a motion and, when appropriate, a timetable for the hearing of the motion (i.e. delivering materials, conducting examinations and cross-examinations, and delivery of facta). Before contacting opposing counsel, advocates should check with the court as to when motions are being heard.

- Setting a motion date unilaterally: If attempts have been made to consult with opposing counsel and they are non-responsive, it is reasonable for an advocate to unilaterally set a motion date provided that opposing counsel is advised of the date, reasonable notice is provided, and the advocate is willing to agree to an adjournment in the appropriate circumstances.

- Set a realistic timetable: When settling a timetable, advocates should consider the relief sought and the urgency of the matter, and should recognize that the minimum timelines set out in the applicable rules of civil procedure are insufficient in most cases.

- Update a timetable when necessary: As the hearing date approaches, if an advocate decides that they may have to take additional steps not contemplated in the timetable (e.g. preparing reply materials, conducting cross-examinations not previously contemplated), they should promptly confer with opposing counsel to re-arrange the timetable, and if necessary, re-schedule the hearing date with the court.

- Agree on terms beforehand: When an adjournment is being negotiated, advocates should attempt, as part of the agreement or before the hearing, to agree on the terms of the adjournment. This may include a new return date, a new timetable, interim relief, or the payment of costs thrown away.

- Stay in touch: Advocates should communicate with opposing counsel throughout the motion process. Doing so creates opportunities for settlement and for narrowing the issues in dispute, and can help facilitate the most efficient disposition of a motion.

- Alternative Dispute Resolution: When appropriate, advocates should attempt to engage in alternative dispute resolution and attempt to narrow the issues for an upcoming motion. If success on the motion depends on a point of law, rule, or authority, advocates should consider sending opposing counsel a copy of their authorities and having a frank discussion prior to preparing the full motion materials.

- Report to Clients: While not always dispositive of a case, motions can cost a significant amount of money. It is important for advocates to keep clients apprised of how the motion is proceeding and, when appropriate, to identify how costs and delay can be avoided and the matter perhaps resolved.

- Consider Offers to Settle: When appropriate, advocates should consider serving an offer to settle all or part of the motion in advance of preparing motion materials and again in advance of the hearing of a motion.

- When a draft order is to be prepared to reflect a court ruling, advocates should draft an order that is accurate and complete. They should promptly prepare and submit a proposed order to opposing counsel and attempt to reconcile any differences before the draft order is presented to the court.

- Seeking costs:

    - When opposing counsel's failure to respond or to acknowledge notice of a pending motion within a reasonable period of time results in unnecessary correspondence and the needless preparation of motion materials, it is reasonable for advocates to seek costs thrown away, even if the motion settles or results in a consent order.

    - If a timetable is violated, whether or not it was approved by the court, it is reasonable for advocates to seek costs thrown away against the party that did so.

    - If an adjournment request is received at the last moment and rescheduling a matter will require additional preparation, it is reasonable for advocates to ask that the party requesting the adjournment pay for costs thrown away.

    - When a party consents to all or substantially all of the relief sought at the last moment, it is reasonable for advocates to seek costs against that party.

Best Practices in Examinations, Cross-Examinations, and Questioning

Examinations and cross-examinations, questioning in family law proceedings, and motions arising from these events consume significant resources and time. To facilitate the efficient and orderly progression of a case, advocates should be well-prepared, courteous, and civil during examinations, cross-examinations, and questioning.

Below are some best practices to guide advocates on appropriate ways of conducting examinations, cross-examinations, and questioning.

- Advocates should select an appropriate representative for examinations for discovery, with knowledge of the facts in issue (assuming there is one), in consultation with their client. Advocates should ensure that their witness is sufficiently prepared for the examination.

- Advocates should instruct their witnesses regarding the appropriate conduct during examination and the requirement for courtesy and civility to opposing counsel and their clients.

- During examination for discovery, advocates should at all times conduct themselves as if a judge were present. Advocates should avoid inappropriate objections to questions, discourteous exchanges amongst counsel, and excessive interruptions of the examination process.

- Advocates should not ask repetitive or argumentative questions or engage in making self-serving statements during examination for discovery.

- Advocates should treat all witnesses being examined with respect. Witnesses should not be exposed to discourteous comments by opposing counsel or their clients.

- Advocates should not engage in examinations for the sole purpose of imposing a financial burden on the opposite party.

- Documents: In provinces where this is relevant, advocates should be specific in a Notice of Examination as to what documents they require a witness to bring to an examination.

- Contentious matters: Advocates should be aware of the applicable case law in advance and attempt to have off-the-record discussions with opposing counsel during the examination when matters become contentious with respect to relevance or counsel's objections. Following these discussions, advocates should put on the record the reason for the question and for the refusal. Advocates should put all questions (even if they are going to be refused) on the record.

- Dealing with obstructive counsel:

    - Fighting ire with ire rarely works and rarely serves the advocate's client well. Advocates should avoid the temptation to respond with anger.

    - It may be helpful to ask for a break from the questioning and have a discussion with opposing counsel without clients present. Sometimes, an aggressive approach is motivated by a desire to impress a client.

    - If issues persist, advocates should also consider suggesting an adjournment and having whatever is causing the contention resolved by a master or a judge, depending on the jurisdiction.

- Refusals motions: In provinces where this is relevant, advocates should do the following before bringing a refusals motion: (i) exchange refusals tables; (ii) ask opposing counsel to reconsider their position; (iii) ask opposing counsel to explain their position; and (iv) make efforts to categorize refusals and narrow the issues. In complex cases involving a large number of refusals, advocates should consider retaining a neutral arbiter to assist in resolving disputes regarding the discovery process.

- Seeking costs: Unprepared witnesses and obstructive counsel can significantly increase the costs of the discovery process. It is reasonable for advocates to seek additional costs in such circumstances.

Best Practices in Trials & Hearings

The following principles are drafted with court proceedings in mind, but should be adapted as necessary for other adversarial proceedings, including hearings before regulatory and administrative tribunals or other bodies, arbitration proceedings, and mediations.

Preparing for Court Proceedings

- Advocates should be adequately prepared before going to court, to facilitate the proper administration and orderly conduct of proceedings.

- Advocates should cooperate with other counsel and the court in the use of technology to present evidence when appropriate, including the use of videoconferencing to accommodate witnesses and an electronic record.

- When possible, advocates should cooperate to try to narrow the issues.

- Advocates should cooperate with other counsel in the timely preparation of a brief of documents to facilitate the management of documentary evidence by the court, witnesses, and counsel.

- Advocates should cooperate in the timely exchange with opposing counsel of any required witness lists and witness "will-say" statements.

- Advocates should provide as much notice as possible of any adjournment to the court and other counsel, together with the reason the adjournment is requested.

- Advocates should avoid hostile and intemperate communications, which adversely affect the administration of justice.

During Court Proceedings

- Advocates should introduce themselves to the court staff at the start of proceedings.

- When addressed by the judge in the courtroom, advocates should rise. When one advocate is speaking, the other(s) should sit down until called upon. Advocates should never have their back turned when the judge is speaking.

- Advocates should not engage in acrimonious exchanges with opposing counsel or otherwise engage in undignified or discourteous conduct.

- In the course of a proceeding, advocates should not accuse opposing counsel of impropriety unless such accusation is well-founded and the advocate has first given reasonable notice to opposing counsel so they have an adequate opportunity to respond.

- Objections, requests, and observations during a proceeding should always be addressed to the court, not to other advocates.

- Objections are properly made as follows:

    - Advocates rise and calmly state to the court, "I have an objection," or words to that effect.

    - The basis for the objection should be briefly and clearly stated. Following a clear statement of the objection, advocates should present argument in support of it and then sit down.

    - Advocates opposing the objection should in turn, or as directed by the judge, rise and clearly state their position. They will then make their argument, if any, in support and sit down.

- In the absence of a jury, a question to a witness by counsel should not be interrupted before the question is completed for the purposes of objection or otherwise, unless the question is patently inappropriate.

- Advocates should not elicit a response from a witness if the question has been objected to.

- When advocates rise to make an objection or to address the judge, other advocates should be seated until the judge asks for a response. Under no circumstances should two or more advocates be addressing the court at the same time.

- Advocates should be considerate of time constraints they have agreed to or that have been imposed by the court.

Evidence

- Advocates should encourage their clients to make reasonable admissions about undisputed facts and the authenticity of documents.

- During a proceeding, advocates should not allude to any fact or matter which is not relevant or with respect to which no admissible evidence will be advanced.

- Advocates should never attempt to elicit evidence that is improper. If advocates acting in civil matters, or prosecutors acting in criminal matters, intend to lead evidence to which opposing counsel is expected to object, they should alert opposing counsel and the court of that intention.

- Advocates should not condone or participate in the use of perjured evidence.

- Advocates, or any member of their firm, should not give evidence relating to any contentious issue in a proceeding in which they are acting as counsel of record.

After Court Proceedings

- Advocates should not communicate with a judge following a hearing and during deliberations unless specifically invited or directed to do so. A request for consideration of additional factual material or evidence should be brought by motion on notice to opposing counsel.

- Any additional legal authority should be brought to the attention of the judge on notice to opposing counsel, without further comment. If either advocate wishes to make further submissions, they should make that request to the judge. With respect to authority released prior to closing arguments, advocates should only send them to the court if it is necessary to comply with their professional obligations.

- When a draft judgment or order is to be prepared to reflect a court decision, advocates should draft a judgment or order that is accurate and complete. They should promptly prepare and submit the proposed judgment or order to opposing counsel and attempt to reconcile any differences before the judgment or order is presented to the court.

- Advocates who are successful in a case should be gracious toward their opponent. Advocates who are not successful in a case should not complain.

Endnotes

1. Law Society of Ontario, *Rules of Professional Conduct*, Rule 5.1-1.

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