Best

PRACTICES

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INTRODUCTION

We are pleased to introduce these *Best Practices*, the latest addendum to the *Principles of Professionalism and Civility for Advocates*.

The initial *Principles of Professionalism and Civility for Advocates* were developed primarily by senior members of the bar, through The Advocates' Society and the Institute for Civility and Professionalism. It is therefore fitting that this supplement to the *Principles*, the *Best Practices*, was prepared by the Society's Young Advocates Standing Committee. It is the junior members of the bar who so often bear the brunt of incivility, especially in motions and discovery practice. They are also the ones who have the most to gain by shaping the future of our legal practice.

Ensuring that the values of professionalism and civility are reinforced within the legal profession and legal culture is a responsibility shared by both the bar and the bench. The *Best Practices*, like the *Principles*, will be a valuable resource to lawyers and judges alike to support that shared responsibility. The judiciary has often referred to the *Principles* as reflecting its own expectations for the conduct of advocates who appear before them.

These *Best Practices* are a worthy and valuable companion to the *Principles*, as they provide clear guidance on how the *Principles* should be applied in daily practice. The *Best Practices* provide practical solutions to problems and issues that advocates may encounter in their practice. They also provide yardsticks by which counsel can measure how to serve their clients zealously while avoiding the tactical manoeuvres that often only add delay, expense and unnecessary rancour to the litigation process.

We sincerely hope that young lawyers will utilize these practices as they move forward in their professional lives. We also hope that senior members of the bar will take this opportunity to consider their own practices, to ensure that their own conduct continues to accord with the best traditions of the profession.

We congratulate the Young Advocates Standing Committee on an admirable initiative and the excellent outcome reflected in these *Best Practices*.

The Honourable Warren K. Winkler
Chief Justice of Ontario

The Honourable Heather J. Smith
Chief Justice, Superior Court of Justice

The Honourable Annemarie E. Bonkalo
Chief Justice, Ontario Court of Justice

PREAMBLE

To be completely honest, these best practices were born out of frustration – the frustration felt by two young lawyers commiserating about the challenges posed by obstinate counsel.

One day, we shared some lunch and stories about the numerous times we had struggled to explain to our clients why a motion had been adjourned on the eve of being heard, why the Court would not award costs to our client for our having had to prepare for the motion, and, frankly, why we still wanted the client to pay our bill...

Two years later, at the request of the Young Advocates' Standing Committee of The Advocates' Society, the Society and the Institute for Civility and Professionalism hosted a symposium to canvass the very real problems all counsel face with other counsel from time to time, and the need for more assistance from the bench in changing behaviour. The objective was to provide real, practical solutions and guidelines for the profession and the judges and masters on how to better deal with the obstructive conduct which is too often the product of an adversarial system. The symposium addressed the fact that while the *Principles of Professionalism and Civility* identified broad principles, it was often difficult to use those principles to formulate rules of practical application, and so we all thought about how to provide real, practical solutions to serve, not as a replacement for the *Rules of Civil Procedure*, but as guidelines for counsel and the court in dealing with common but difficult situations.

The result is these *Best Practices*. They were formulated as a companion to the *Principles of Professionalism and Civility for Advocates* and they provide commentary on many of the situations addressed by those Principles. They are meant to provide counsel and the court with a reference-point for both the question of what is civility, as well as what are its parameters in certain oft-encountered situations.

This is meant to be a practical document. We hope you find it useful.

Peter Henein *and* **Daniel Schwartz**

BEST PRACTICES

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 that were developed and refined with input from the bench and the bar as a means to make motions practice as civil, professional and cost-efficient as possible.

These best practices reflect an application of the following principles of The Advocates' Society's *Principles of Civility for Advocates*:

General Guidelines - Relations with Opposing Counsel (#1, #3)

Cooperating with Opposing Counsel (#5, #6)

Communications with Opposing Counsel (#7)

Cooperating with Opposing Counsel on Scheduling Matters (#11,#12, #13, #14)

Agreement on Draft Orders (#16)

Conduct That Undermines Cooperation among Advocates (#17)

These best practices also reflect an application of the following principles of The Advocates' Society*'s Principles of Professionalism for Advocates*:

An Advocate's Duty to the Court (#2, #4)

An Advocate's Duty to Opposing Counsel (#1, #2, #3)

An Advocate's Duty to Ensure Access to Justice (#3)

General

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

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

Communication *amongst* Counsel

3. Communicate your intention to bring a motion: Counsel 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.

4. Respond in a timely manner: Counsel 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 a substantive response cannot be provided in a timely way, counsel should acknowledge receipt of the notice and advise when a substantive response will be forthcoming.

5. Follow up if no response: Counsel 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 a motion record.

6. When seeking costs is reasonable: When opposing counsel's failure to respond or 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 counsel to seek costs thrown away, even if the motion settles or results in a consent order.

Scheduling

7. Always consult on scheduling: Unless moving *ex parte*, counsel should always consult with opposing counsel regarding his/her availability for a motion and, where 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, counsel should check with the Court as to when motions are being heard.

8. Set a realistic timetable: When settling a timetable, counsel should consider the relief sought and the urgency of the matter, and should recognize that the minimum timelines set out in the *Rules* are insufficient in most cases.

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

10. Setting a motion date unilaterally: If attempts have been made to consult with opposing counsel and he/she is non-responsive, it is reasonable for counsel to unilaterally set a motion date provided that opposing counsel is advised of the date, reasonable notice is provided and counsel is agreeable to an adjournment in the appropriate circumstances.

11. When seeking costs is reasonable: If a timetable is violated, whether or not it was approved by the Court, it is reasonable for counsel to seek costs thrown away against the party that did so.

Adjournments

12. Reasonable adjournments should be granted: Reasonable requests for an adjournment should generally be granted if doing so does not prejudice counsel's client or increase costs.

13. Agree on terms beforehand: Where an adjournment is being negotiated, counsel 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 and/or the payment of costs thrown away.

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

Offers *to* Settle/Alternative Dispute Resolution/Narrow *the* Issues

15. Consider Offers to Settle: Where appropriate, counsel 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.

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

17. Alternative Dispute Resolution: Where appropriate, counsel should attempt ADR and/or narrow the issues for an upcoming motion. If success on the motion depends on a point of law, rule, or authority, counsel should consider sending opposing counsel his/her authorities prior to preparing the full motion record and having a frank discussion.

Other

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

BEST PRACTICES APPLICABLE *to* MATTERS INVOLVING SELF-REPRESENTED LITIGANTS

Self-represented litigants create unique challenges for counsel and the Courts to ensure that civil and family proceedings proceed efficiently and in a civil and professional manner.

Below are some best practices that have been developed and refined to guide the interaction between counsel and self-represented litigants. They embody the principles of co-operation, communication and common sense.

Self-represented litigants are encouraged to abide by these Best Practices as well.

These best practices reflect an application of the following principles of The Advocates' Society*'s Principles of Professionalism for Advocates*:

An Advocate's Duty to the Court (#2, #3)

An Advocate's Duty to Opposing Counsel (#3, #4, #5)

19. Respect and Courtesy: Self-represented litigants should be treated with the respect and courtesy shown to other counsel.

20. Be fair and assist where appropriate: Counsel should try to communicate with and be fair with self-represented litigants. This is consistent with a lawyer's duty to the administration of justice. If assisting a self-represented litigant does not prejudice counsel's client, will move the case forward and will not result in significant costs, counsel should strongly consider providing assistance.

21. Scheduling: Counsel should consult in advance with self-represented litigants regarding scheduling and

ask the judge to endorse a mutually agreed-upon timetable to avoid misunderstandings.

22. Exceptions: Counsel should consider it wise — and it is not uncivil — to deal with a self-represented litigant in writing only, particularly where a self-represented party has made a complaint about the lawyer to the Law Society or has raised the lawyer's conduct with the Court. If necessary, counsel should have a witness, such as a staff person or an articling student, present for any non-written communications with a self -represented litigant in order to avoid having to become a witness in the proceeding. If this is not practical or possible, then counsel should document conversations with self-represented parties by sending confirmatory letters afterwards.

23. For further information: Counsel dealing with a self-represented party should consult and be guided by the *Canadian Code of Conduct for Trial Lawyers Involved in Civil Actions Involving Unrepresented Litigants* published by the American College of Trial Lawyers., found online at < http://bit.ly/can_code_self_rep >.

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 behavior is uncivil, unprofessional and not helpful in advancing a client's case.

Below are some best practices developed and refined to guide counsel when confronted by the threatening lawyer.

These best practices reflect an application of the following principles of The Advocates' Society*'s Principles of Civility for Advocates*:

> Comments Made about Opposing Counsel - Relations with Opposing Counsel (#26, #27, #28)

These best practices also reflect an application of the following principles of The Advocates' Society's *Principles of Professionalism for Advocates*:

An Advocate's Duty to Clients and Witnesses (#1)

An Advocate's Duty to Opposing Counsel (#1, #2)

An Advocate's Duty to the Profession (#4)

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

25. When to take additional steps: The threatening lawyer should be offered at least one opportunity to retract or back down from his/her threats. If the abusive conduct does not stop, counsel may consider whether referral to the Law Society is appropriate.

26. Advice for junior counsel: It is important for junior counsel to respond to allegations of impropriety. They should advise a senior member within their firm of the matter and seek direction/advice.

27. When seeking costs is reasonable: Personal threats, attacks, or personal and irrelevant accusations made against fellow counsel add no value to a proceeding. Counsel may ask the Court to consider such conduct in the awarding of costs.

BEST PRACTICES *for* DEALING *with* MISLEADING CORRESPONDENCE *and* COUNSEL WHO MISCHARACTERIZE TELEPHONE *and* IN-PERSON DISCUSSIONS

To ensure that proceedings move forward efficiently, counsel often communicate through in-person meetings and over the telephone. Unlike written correspondence, these methods provide no precise record as to what was said. Counsel must feel comfortable that their words will not be misstated by opposing counsel.

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

These best practices reflect an application of the following principles of The Advocates' Society*'s Principles of Civility for Advocates*:

> Comments Made about Opposing Counsel - Relations with Opposing Counsel (#29)

These best practices also reflect an application of the following principles of The Advocates' Society's *Principles of Professionalism for Advocates*:

An Advocate's Duty to Opposing Counsel (#1, #2)

An Advocate's Duty to the Profession (#4)

28. How to respond: Counsel 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, counsel should resist the temptation to provide a lengthy response or to engage in a protracted "letter writing campaign."

29. How to memorialize: Counsel should memorialize discussions with opposing counsel with sufficiently detailed memoranda for their files. If misleading accounts of discussions occur frequently, counsel 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, counsel should advise opposing counsel that a witness is present.

30. Do not stop talking unless absolutely necessary: While oral communication should be the starting point between opposing counsel, if frequent disagreements arise when communicating orally with opposing counsel, counsel should restrict his/her communication to writing; however, this should be a last resort.

31. When seeking costs is reasonable: Misleading correspondence increases costs. Counsel 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 of 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 realties of using technology in the practice of law. Civility demands that counsel be flexible in regard to service issues unless specific circumstances require otherwise.

Below are some best practices developed and refined to deal with common service issues.

These best practices reflect an application of the following principles of The Advocates' Society*'s Principles of Civility for Advocates*:

General Guidelines - Relations with Opposing Counsel (#1, #3)

Cooperating with Opposing Counsel (#5)

Conduct That Undermines Cooperation among Advocates (#17)

These best practices also reflect an application of the following principles of The Advocates' Society's *Principles of Professionalism for Advocates*:

An Advocate's Duty to the Court (#2, #4)

An Advocate's Duty to Opposing Counsel (#1, #2, #3)

An Advocate's Duty to Ensure Access to Justice (#3)

32. Be reasonable: Counsel should consider consenting to reasonable arrangements with respect to service where required by the nature of the proceedings or the schedule. Insisting on strict compliance with the *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, counsel 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.

33. Technology is moving faster than the *Rules:* E-mail is a widely accepted form of business communication. Unless there are specific reasons not to, counsel should accept service by email. 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 offload the costs of printing and binding. Where requested, paper copies of a record should still be provided.

BEST PRACTICES for DEALING with DIFFICULT COUNSEL *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, counsel must be well-prepared, courteous and civil during examinations, cross-examinations and questioning.

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

These best practices reflect an application of the following principles of The Advocates' Society*'s Principles of Civility for Advocates*:

General Guidelines – Cooperating with Opposing Counsel (#5)

Conduct at Examinations for Discovery (#21, #22, #23, #24)

These best practices also reflect an application of the following principles of The Advocates' Society's *Principles of Professionalism for Advocates*:

An Advocate's Duty to Clients and Witnesses (#2, #9)

An Advocate's Duty to the Court (#3)

An Advocate's Duty to Opposing Counsel (#1, #3)

An Advocate's Duty to Ensure Access to Justice (#3, #4)

34. Selecting a knowledgeable and appropriate witness: Counsel should choose an appropriate representative wisely and in consultation with his/her client. Counsel should ensure that his/her own witness is adequately prepared.

35. Documents: Counsel should be specific in a Notice of Examination as to what documents he/she requires a witness to bring to an examination.

36. Contentious matters: Counsel should be aware of the applicable case law ahead of time and 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, counsel should put the reason for the question and for the refusal on the record. Counsel should make sure to get all of questions (even if they are going to be refused) on the record.

37. Obstructive counsel: Counsel may consider terminating the examination if opposing counsel's conduct is substantially interfering with the conduct of the discovery and counsel's conduct contravenes Rule 34.14 of the *Rules of Civil Procedure* or Rule 20(19) of the *Family Law Rules*.

38. Refusals motions: Before bringing a refusals motion, counsel should do the following: (i) exchange refusals tables; (ii) ask opposing counsel to reconsider his/her position; (iii) ask opposing counsel to explain his/her position; and (iv) make efforts to categorize refusals and narrow the issues. In complex cases involving a large number of refusals, counsel should consider the retention of an "amicus" to assist in resolving disputes regarding the discovery process.

39. When seeking costs is reasonable: Unprepared witnesses and obstructive counsel can significantly raise the costs of the discovery process. It is reasonable for counsel to seek additional costs in such circumstances.

APPENDIX

Additional Sources *for* Guidelines *on* Civility *and* Professionalism

American Board of Trial Advocates, "PRINCIPLES OF CIVILITY, INTEGRITY, AND PROFESSIONALISM" https://www.abota.org/temp/ts_23818B6C-DCBB-8EC7-9A19445D0BB54C2723818B9B-9956-7D09-5D1DACE67F24F161/principlesciv.pdf (accessed April 19, 2013)

American College of Trial Lawyers. "AMERICAN CODE OF CONDUCT FOR TRIAL LAWYERS AND JUDGES INVOLVED IN CIVIL CASES WITH SELF-REPRESENTED PARTIES" (October 2011) http://www.actl.com/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=5626 (accessed March 25, 2013

Association Of Business Trial Lawyers of San Diego, ETHICS, PROFESSIONALISM AND CIVILITY GUIDELINES. http://www.abtl.org/sd_guidelines.htm (accessed April 22, 2013)

The State Bar of California, "CALIFORNIA ATTORNEY GUIDELINES OF CIVILITY AND PROFESSIONALISM" (Adopted July 20, 2007) http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=mPBEL3nGaFs%3D&tabid=455 (accessed April 19, 2013)

Canadian Bar Association, "CODE OF PROFESSIONAL CONDUCT", Revised and Adopted By Council, August 2004 And February 2006 http://www.cba.org/CBA/activities/pdf/codeofconduct06.pdf (accessed April 19, 2013)

The Idaho State Bar, United States District Court, District of Idaho and the Courts of the State of Idaho "STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT" http://isb.idaho.gov/pdf/general/standards_for_civility.pdf (accessed April 19, 2013)

Massachusetts Bar Association, "CIVILITY GUIDELINES FOR FAMILY LAW ATTORNEYS", http://www.massbar.org/media/300168/civilityguide6-06.pdf (accessed April 19, 2013)

New York State Unified Court System, "The New York State Standards of Civility" http://www.nycourts.gov/press/old_keep/stnds.shtml (accessed April 22, 2013)

Continued ...

The Sedona Conference, "THE CASE FOR COOPERATION", 10 Sedona Conf. J. ____ (2009 Supp.)." http://www.clearwellsystems.com/e-discovery-blog/wp-content/uploads/2012/02/Case-for-Cooperation1.pdf (accessed April 22, 2013)

The Sedona Conference® "Cooperation Proclamation: Resources for the Judiciary" (October 2012) https://thesedonaconference.org/judicial_resources (accessed April 22, 2013)

YOUNG ADVOCATES' STANDING COMMITTEE SYMPOSIUM *on* CIVILITY 2012

Steering Committee

The Honourable Justice Kathryn N. Feldman
The Honourable Regional Senior Justice Edward F. Then
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