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May 6, 2026

Top 15 Trial Tips for the Commercial List

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1. Know your forum. If appearing in a court or tribunal for the first time, learn its practices. Read, watch, and listen. Remember the “Three Cs of the Commercial List”: cooperation, communication, and common sense. Judges will expect counsel to try to resolve matters amicably, not bring unnecessary disputes before the Court, maintain open dialogue to ensure the efficient conduct of litigation, and take a practical, common-sense approach to the dispute.
2. Familiarize yourself with the Commercial List Practice Direction. Before setting a matter down for trial, ensure you thoroughly review the current version governing scheduling, case conferences, pre-trial procedures, and trial management expectations. Non-compliance can result in adjournments, cost consequences, or other sanctions.
3. Professionalism is good for results. Judges and jurors agree that confidence and credibility are the markers of persuasive advocates. Be organized, know the facts and law, be respectful, concede what you should, and do not attack everyone in sight.
4. Prior to trial of a civil action, go through a pre-flight check. Consider the transcript of the examination for discovery, answers to undertakings, and refusals of your clients. Can you live with the consequences of your refusals? Can you lead evidence you need? If not, fix it!
5. Take case conferences seriously. The Commercial List makes extensive use of case conferences to manage litigation efficiently. Approach each case conference as a meaningful opportunity to shape the course of the proceeding. Prepare a concise conference brief that identifies the real issues in dispute, proposes a realistic

timetable, and addresses any procedural or substantive matters that require the Court's direction.

6. Judges are jurors at heart. In summing up, whether judge alone or before a jury, work the facts! Often trial lawyers spend a disproportionate amount of time on the legal issues and leave too little time to argue the factual findings they need.
7. Develop a story and a path to victory. One says why you should win; the other says how. Once you have developed your path to victory, make sure you have the facts necessary to support it and the means to properly lead that evidence at trial.
8. Every case has its weaknesses. Identify them without catastrophizing and plan to deal with them before your opponent does. Deal with the weaknesses up front and on your own terms. Put a positive interpretation on the evidence and use it to create empathy, or consider how, despite any bad facts, your position results in a fairer and more practical outcome for the parties.
9. Keep your opening statement focused. Your opening should be a concise and compelling overview of your case. Identify the key issues, outline the evidence you intend to call, and tell the Court what you want it to find. Focus on providing the judge with a clear roadmap of the facts and avoid arguing the law at length.
10. Avoid leading questions in examination in chief. Keep a teeny list in your notes with these starting words: who, what, when, where, why, how, explain. Prepare your witnesses before they take the stand. Effective preparation meetings can go a long way in making sure the witness feels comfortable and can answer open-ended questions concisely, accurately, and consistently.
11. To control and set the tone early, always start a cross-examination on a point you will not lose. Have a backup plan if the witness does not respond as you anticipated. Contemporaneous documents and discovery transcripts are invaluable in keeping a witness from changing their story and obtaining key admissions on cross-examination, particularly in document-intensive commercial disputes.
12. On objections: make every objection you can win, and none you can't. If you plan to make an objection, be brief, be clear, be gone.
13. Use chronologies and visual aids. Complex commercial

disputes often involve intricate factual matrices spanning years of transactions and communications. Prepare clear, accurate chronologies and, where appropriate, visual aids such as corporate organizational charts, transaction flow diagrams, or financial summaries. These tools can be invaluable in helping the judge understand the factual landscape.

14. Implement a clear protocol for your joint document brief. Counsel should work collaboratively to provide the Court with a comprehensive joint document protocol that addresses not only the questions set out by the Court of Appeal for Ontario in *Girao v Cunningham*, but practical considerations including how you will reference and mark documents during the trial, which party will be responsible for preparing and updating the exhibit list, and how you will treat visual aids and put them before the Court.
15. Electronic trials are here to stay, even if they are an adjustment. Coordinate with opposing counsel, the Court, and third-party service providers well in advance of trial to ensure the courtroom can accommodate electronic documents and virtual witness testimony. Whenever possible, attend the courtroom prior to the hearing to confirm the setup works. Beyond efficiency, going paperless protects you from the consequences of dropping your paper trial briefs in a driving rainstorm. Tip: hold on tight.