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What Judges Want: Dos and Don’ts of the Commercial List

On April 9, 2021, The Advocates’ Society held a virtual panel discussion on the topic of Commercial List Advocacy. Co-chaired by The Honourable Peter J. Osborne, former partner at Lenczner Slaght and Deborah Palter of Thornton Grout Finnigan LLP, Commercial List judges and seasoned practitioners shared the dos and don’ts of 9:30 appointments, pre-trial hearings and judge-led mediations. We also heard directly from judges about what they want to see when you appear before them and received practical advice on effective oral advocacy in the era of Zoom-court. What follows is a short summary of the key takeaways.

Commercial List Update for 2021 from The Honourable Justice Hainey

Due to the onset of the COVID-19 global pandemic, the Toronto Commercial List, as of March 17, 2020, has conducted all mediations, motions, hearings, applications, case conferences and trials completely digitally. The Commercial List has been operating at a business-as-usual level due to the fantastic support from the commercial bar. Working together has not been more valuable than during these challenging times and as a result the court has maintained the administration of justice at a high level.

- In 2020, the Commercial List heard 5,600 matters, down from 6,500 matters. So far in 2021, over 2,200 matters have been heard, which adjusted annually is over 8,000 matters; there is no question there has been an increase in volume.
- In 2020, 43 commercial trials were scheduled, 14 were tried, 14 were settled and the remaining were adjourned. The time to schedule a hearing are comparable to pre-COVID times: time out for a long motion is 10 weeks, whereas time out for a short motion is only 10 days. The court is currently scheduling trials in early 2022 and there are a couple short slots open for the fall of 2021.
- The matters remain a mix of different subject areas, but restructurings and receiverships are much greater. There have been a lot of insolvency matters and CCAA filings due to the current economic pressures. The court tends to give priority to cases where there are hundreds of jobs

at stake in order to help keep the lights on and maintain jobs.

Operating digitally remains a work in progress but the Commercial List is now at a stage where the use of Zoom and CaseLines is a very efficient way to conduct business of the court. In accordance with the evolving Notices to the Profession , there are currently no in-person hearings. The moment it is safe to return to the courtroom, in-person hearings will resume. However, for the traditional 9:30 list for non-contentious matters and scheduling: Zoom is here to stay.

Productive Chambers Appointments, Pre-Hearing Appearances and Judge-led Mediations

9:30 Appointments

Although COVID-19 has changed how 9:30 appointments are conducted, the rules have not changed.

- For 9:30 appointments, no materials should be filed; there should not be anything for judges to read or decide.
- Counsel should be aligned and in agreement on the relief being sought.
- The appointments should be typically 10 minutes and no longer than 15 minutes, and are appropriate for consent adjournments, scheduling motions or pre-trial matters, and setting a date for trial.
- 9:30 appointments are not appropriate for contested matters.

Judge-led Mediations

Judge-led mediations are a very powerful tool. The Commercial List judges are committed to these cases and getting a resolution, therefore it is important to make sure your client is motivated to settle, and along with the other side, prepared to discuss a resolution. This means not asking for a judge-led mediation too early and ensuring your case has matured such that a mediation, as opposed to a case conference, is the correct tool to bridge the gap. If you are asking a judge on the Commercial List to take their time to mediate your matter, they are expecting a resolution and thus it can have an adverse reaction to how the case unfolds over time if there is miscommunication with opposing counsel regarding expectations.

Views from the Bench: What Judges Want

1. Virtual Hallway Advocacy & Informal Chats

Informal dialogue between counsel is not happening nearly as

much as it did when we met in person at 330 University Avenue, which is a distinct disadvantage of the Zoom world. While it is not as easy for counsel to meet and talk and work things out, there is still an opportunity, and in fact obligation for counsel to talk to each other before they get in a Zoom hearing with the Commercial List judges. One of the reasons the Commercial List is busier is because they are settling less matters; many more motions and interlocutory matters would be resolved if counsel were meeting in person and it is not happening because there is less opportunity for informal chats. What judges want: pick up the phone and call one another, get on Zoom 20 minutes before a hearing, share a coffee and engage in dialogue.

2. Helping Judges Prepare for Virtual Hearings

Preparation is very different now as the judges have been catapulted into a new way of dealing with the caseload and materials submitted. They have had to evolve even more over the course of the last year from email to sync.com to CaseLines; everyone is learning on-the-go. It is critical to have materials in advance of the hearing and all in the same place. Make sure all parties have materials in CaseLines in advance of the hearing. If you are expecting a judgment, note that the judges used to be able to download judgments themselves in email or pdf, however, in CaseLines they cannot download judgments and need counsel to deliver the judgment that needs to be signed using a different method. Ensure you are ready to go at the designated hour and ensure any technical issues are sorted out ahead of time; there is no room in the schedule for people showing up late or wanting to participate beyond the scheduled time.

3. Effectively Using PowerPoint

Zoom advocacy is PowerPoint – and you have an advantage if you can do it. It is a great tool for counsel – an easy and effective way of presenting your case. PowerPoint forces counsel to focus on key boiled-down evidence or parts of the test you need to present, and it is more seamless than screensharing or trying to use presenter mode in CaseLines.

4. Getting Younger Lawyers Involved

With respect to non-contentious matters when there is junior counsel on the Zoom call, it is the developing practice of judges, such as Justice Hainey, to ask the junior counsel to do the submissions, when it is the junior counsel that has done the majority of the work. It is important because there are fewer opportunities to get in the courtroom.

According to Justice Hainey: “Zoom is a great equalizer; older

lawyers have war room techniques that are no longer effective over Zoom. Younger lawyers that can screen share, highlight, etc., fare better than older, seasoned lawyers and have an advantage."

5. Effective Use of Technology

- Use technologies to their greatest effect e.g., screensharing, hyperlinking, etc. – master those.
- Be aware of how you present. Stay in view at all times, stay centered, and look directly at the camera when you can. Remember that you are on the screen at all times and your reactions and movements may become a distraction.
- Try to improve your lighting, and ensure you are clearly heard; you want your argument to be the main event and not your technology.
- Utilize multiple screens (i.e., use an iPad for notes). Keep your head up and do not have your camera pointing to the side of your head.
- Do the best you can to control for technology glitches; ensure your headphones, microphone and speakers are set up. It is good practice to log on 20 minutes beforehand and test your tech.
- With screensharing you do lose eye contact with the judge, which can be helpful but can be overused. Think carefully about what you want to focus on and use it surgically and precisely.
- Stay on mute and use interjections sparingly. In the virtual platform it is particularly important counsel do not talk over one another.

6. Efficiency Makes for Great Advocacy

The Honourable Justice Koehnen's 5 tips for improving efficiency are as follows:

- **Point-first advocacy.** Before you tell a judge anything, tell the judge what the point is you are making. A judge is never going to understand information in the way you want them to unless they know the point you are making. Write out your notes for your argument and then look at them – you will probably find the real point you want to make is likely at the end of your notes. Simply take that point at the end and put it at the top.
- **Use simple direct language.** The goal here is to make the case as easy for the judge to understand as possible; simple language does this. Avoid subordinate clauses

and avoid changing direction mid-sentence. Try to discipline yourself to finish the point you are on and then start a new point. One very effective way to discipline yourself is to rehearse what you are going to say. Eliminate adverbs and adjectives – they do not help your arguments. The best way to get a judge indignant is to just give the judge simple facts.

- **Simplify things.** If you find yourself saying it is a complicated matter, that is a sign you have not rehearsed enough.
- **Be practical and not technical.** Judges want to get a substantive just result as quickly as possible. Technicalities do not help them get there – rely on a technicality if it truly has an effect on a substantive aspect of the case. If it is just a technicality, it is not worth spending the time.
- **Try to identify the deep issue.** The deep issue is the issue the case really turns on – try to frame the issue as specifically as possible for two reasons. First, in any piece of litigation there is wheat and a lot of chaff. Identifying the deep issue eliminates the chaff and focuses you on the important evidence and legal issues to help you win. The second reason is judges take a course on judgment writing, and the theme of all of those courses is to identify the deep issue. After any hearing the judges have pages of notes and the first thing they ask themselves is what do they have to decide in this case. If you identify the deep issue, it makes it a lot easier for the judge.

The virtual world has made effective oral advocacy even more important. There is an immense time pressure on judges and that means we need to limit the time for oral advocacy which puts pressure on counsel to use that time as efficiently and effectively as possible. That pressure can make for better advocacy and we should use it to our advantage.