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What Judges Want: Dos & Don’ts of Advocacy on the Commercial List

Here are some best practices for effective advocacy on the Commercial List.

DO: Embrace the Three Cs

Effective advocacy in contested matters involves strong material and solid presentation. However, you should be cognizant that the thrust of the Commercial List is dispute resolution, and as such, judges expect you to demonstrate that the parties have been and are continuing to attempt to resolve their matters without the Court having to formally adjudicate them. Always remember the overarching ethos of the Commercial List: cooperation, communication, and common sense.

DO: Invest Heavily in Your Written Materials

Written material is very important for cases on the Commercial List, and you should devote substantial time and effort to crafting persuasive written submissions. Judges inevitably find themselves triaging material; it is impossible for a judge to read everything, but their starting point is always the factum. Within the factum, the most important part is the overview because it will be the judge’s first impression of the case. The overview must be compelling and concise. It should distill the essence of your case into a narrative that captures the judge’s attention and frames the dispute in a manner favourable to your client.

The best factums do more than present one-sided arguments. Confront opposing arguments head-on and explain to the judge how to address the other side’s position. Judges are sophisticated readers who will recognize when counsel is avoiding inconvenient facts or ignoring strong counterarguments. By anticipating the other side’s best points and providing thorough and persuasive responses, you can guide the judge through the analytical process and make it easier for the Court to rule in your favour.

DO: Respect the 25-Page Limit on Factums

The page limit is very important. The Commercial List Practice Direction imposes a strict 25-page limit on factums, and judges take this limit seriously. Judges will not read past 25 pages unless you have obtained leave to file a lengthier factum. The

Practice Direction actively encourages shorter, more concise submissions, so you should view brevity as a virtue rather than a constraint. Keep it short.

Writing a concise factum is challenging. Judges appreciate that this is not an easy task, but you should give yourself adequate time to edit and refine your materials, cutting unnecessary passages and ensuring that every sentence advances your argument.

When preparing a factum, adopt the perspective of your reader. Effective factums anticipate and answer the questions the judge will have. By predicting the Court's questions, you can ensure your written materials are responsive and persuasive.

DON'T: Be Overly Argumentative in Your Factum

A factum should present arguments with strength and conviction, but you must avoid being overly argumentative. Using inflammatory language or overheated rhetoric is one of the easiest ways to alienate the Court and undermine your credibility.

The most effective factums maintain a tone of measured confidence and present the client's position forcefully but fairly, acknowledging complexity where it exists and avoiding overstatement. Judges appreciate submissions that reflect careful thought and professional restraint. Your goal is to write factums the judge could adopt as the basis for their decision. Write as though you are assisting the Court in reaching the correct decision, rather than demanding a particular outcome, and you will find your materials better received.

DO: Listen and Respond to Signals from the Bench

Experienced counsel pay close attention to signals from the bench. When a judge asks a question, that question often reveals what the judge considers the most important issue of the case. You should answer questions directly and thoroughly. Evasive or incomplete answers suggest you lack confidence in your position and may be trying to avoid scrutiny.

If the judge appears unpersuaded by an argument, do not simply repeat the same points with greater emphasis. Rather, consider whether a tactical concession might enhance your credibility. Judges appreciate lawyers who recognize the limits of their case and acknowledge when an argument fails to gain traction. A well-timed concession on a minor point can strengthen your overall position by demonstrating intellectual honesty.

DON'T: Read Your Factum Aloud

Oral submissions complement, but do not duplicate, the written

materials. One of the cardinal sins of Commercial List advocacy is reading the factum aloud; simply reciting the content of the factum wastes valuable hearing time and suggests you have nothing of substance to add. Oral submissions should highlight key points, respond to the other side's submissions, and engage with questions from the bench.

An effective opening is short, pithy, and crisp. Within the first moments of argument, articulate your theory of the case and expose why the opposing side's position fails. This does not mean being aggressive or unfair; rather, be clear and direct about what the case is about and why your client's position should prevail.

DON'T: Quarrel With Opposing Counsel Before the Court

Professional conduct extends beyond the substance of legal arguments to encompass how counsel conduct themselves in the courtroom. Be judicious with your objections and use them only when necessary. Frequent or frivolous objections irritate judges and suggest you are more interested in obstructing proceedings than in resolving disputes.

Judges do not appreciate it when counsel quarrel in front of the court. Judges expect disagreements on legal issues, but personal animosity and unprofessional exchanges between counsel reflect poorly on all involved.

DO: Leverage the Unique Procedures of the Commercial List

The Commercial List offers procedural tools you should understand and use effectively. The 9:30 appointment is a distinctive feature of Commercial List practice, providing a brief chambers appointment with a judge to address matters that do not require substantive judicial determination.

You should also take advantage of the Commercial List's approach to case management. Case conferences provide an opportunity for more substantial discussion than 9:30 appointments and are excellent opportunities to develop a working relationship with the assigned judge.