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Young Advocates Braving the Virtual Courtroom: Practical Tips & Advice from the Commercial List

On November 19, 2020, Torys LLP and Thornton Grout Finnigan LLP held the 6th annual panel discussion with the Commercial List judges, providing valuable insight on effective practice and advocacy, particularly in a remote setting. The panel was geared toward litigators called less than 10 years and was followed by small group discussions with the Commercial List judges in various Zoom breakout rooms. The first panel consisted of three junior advocates sharing tips, suggestions and stories based on their experience with remote litigation in the past six months. Next, a judicial panel consisting of all the Commercial List judges, provided over 100 attendees with best practice tips and pragmatic advice with respect to remote litigation. Below are some key takeaways.

Prior to the panel discussions, Justice Hainey provided an overview of the Commercial List, noting that it is a great place for young litigators to practice. He reminded everyone of the three C's of the Commercial List: Communication, Cooperation, and Common Sense, this time adding a bonus C – Courtesy.

Tips from Young Advocates Braving the Virtual Courtroom

Virtual Hearings: Planning and Attendance

Before attending a virtual hearing, it is important to plan ahead as much as possible. Having a designated quiet space with the appropriate background (virtual or not) is vital. However, the planning process starts before the day of the actual hearing.

Prior to the hearing, all materials should be drafted with the virtual nature of the proceedings in mind. For example, when drafting a notice of motion, counsel should include the Zoom information in a schedule enclosed and ensure that the body of the motion has language reflecting the virtual nature of the hearing. Counsel should also make sure any orders being drafted include language stating that the proceedings were conducted by “judicial teleconference due to the COVID-19 Pandemic”. Additionally, it is always a good idea to include standard Commercial List language in the body of the order,

indicating that the order is effective from the date it is made, without the need to issue and file.

Another important step in preparing for a virtual hearing is to ensure that the technology being used is tried and tested. In order to have a smooth virtual hearing, counsel should test the computer's microphone and speakers, and be sure to join the zoom call 5-10 minutes early in order to address any technical difficulties. If any screen sharing is necessary, it should be practiced in advance. When working with others, counsel are encouraged to think about other individuals' level of comfort with the technology being used and make themselves available for run-throughs ahead of the hearing.

When attending the actual hearing, it is helpful to have any submission notes on the same screen as the camera to ensure proper eye contact is maintained. Phone and other notifications should be turned off to avoid any interruptions while making submissions. Counsel should set up a designated way to communicate with colleagues during the hearing, outside of the platform being used for the hearing by all parties.

Practical Tips from Commercial List Judges: Remote Advocacy Edition

Effective Oral Advocacy - Remote vs In Person

Justice Conway discussed effective oral advocacy during remote litigation. She noted that effective advocacy in court starts with good advocacy outside of court and shared the following key points for counsel to consider:

- Avoid bringing unnecessary motions and know the relevant procedures and protocols.
- Keep up to date with continuous changes and communicate with opposing counsel as much as possible.
- Remember that you are in court even when behind a computer screen. Appropriate decorum is always necessary.
- Judges are able to see counsel more clearly than ever, be mindful of face expressions.
- Know the case, stay focused on the issues, communicate what you are asking of the court and get to the point.
- Do not interrupt other counsel and when you see a judge's box light up, stop talking and allow for the question. Respond directly and help the judge navigate through the documents.

Physical Courtroom vs Virtual Courtroom Etiquette

Justice McEwen commented on the judicial thinking when it comes to virtual courtroom etiquette and offered the following advice for counsel participating in virtual hearings:

- Have a counsel slip ready and introduce everyone on the call when possible, including clients, if present.
- When not speaking, place yourself on mute.
- Obtain a virtual background if necessary.
- Wear appropriate business attire and avoid being underdressed when attending court virtually.

The Most Effective Use of Compendia During Remote Litigation

Justice Gilmore shared the following tips on when compendia are useful, particularly during remote litigation:

- Compendia are not necessary during short motions, however, are necessary and effective for any trial or lengthy hearings.
- Compendia must be bookmarked with the tabs named appropriately. They should be organized in a logical manner.
- Compendia must be concise and to the point.
- Compendia should only include relevant excerpts of various documents.
- Highlights are often very helpful in bringing attention to the relevant portions of a document.

Taking of Evidence in Remote Litigation

Justice Koehnen commented on the evidentiary process in the world of remote litigation. He offered the following key advice for counsel:

- Ensure witnesses have the ability to access any documents being relied on directly. Screensharing is often not helpful when dealing with a witness.
- If there are concerns with providing the witness with documents well in advance, email the documents to the witness shortly before the hearing begins.
- Go through a dry run with the witness in advance of a hearing.
- Obtain the witness' phone number/contact information, so that they can be reached quickly in the event that there are any technical problems.

Dealing with Confidential Information

As the newest member for the Commercial List, Justice Cavanagh shared some tips on best practices for providing the court with confidential documents and for referring to any such documents during the virtual hearing:

- To provide confidential documents, counsel are to email the documents to the judge directly, with no other parties copied.
- When referring to confidential documents during the hearing, depending on the nature of the documents, counsel should direct the judge to the confidential information and ask the judge to review the information without disclosing the content.

Written Advocacy in the Remote Litigation Context

Justice Dietrich discusses written advocacy, noting that while many aspects of written advocacy remain the same in the remote litigation context, there are some small changes to consider. She offered the following tips:

Document organization and delivery is more important than ever.

- Judges spend the most amount of time reading the factum.
- In delivering a good factum, counsel should make sure there is lots of white space.
- Headings are often very helpful in organizing the factum.
- Factums should be hyperlinked to cases and the evidence.
- Less is more when it comes to written advocacy. A factum is never more persuasive because it is longer.