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The Corrections: Learning Your Lessons
and Changing Your Ways

A Judge's View: Things Lawyers Do to Annoy Judges; Things They Do to Impress Judges

The Honourable Mr. Justice Joseph W. Quinn
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Ontario Bar Association
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A judge's view: things lawyers do that annoy judges; things they do that impress judges[1]

I INTRODUCTION

[1] I have reached a point in my life where everything annoys me. Precisely when this happened, I do not know. It seems to have occurred suddenly and it is particularly evident when I am sitting in Family Court where I am on the verge of becoming a judicial curmudgeon.[2]

[2] As soon as I walk into Family Court I am annoyed.[3] On mornings when I am scheduled to hear a family case, if someone greets me in the court house hallway with, "Have a good morning, your Honour," I typically reply, "Thank you, but I have other plans." I adhere to the view that a legal system without Family Court is like Christianity without Hell.[4]

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[1] I do not speak for all judges. Therefore, you should use your own judgment when determining the likelihood that you are annoying (or impressing) other members of the bench.

[2] It may be that I am merely a grouch, because "you're a curmudgeon only when someone *else* says you're a curmudgeon" (emphasis in the original): see Jon Winokur, *The Portable Curmudgeon* (New York: New American Library, 1987), p. 6.

[3] Most annoyances are merely a matter of advocacy; and, good advocacy is as much about knowing all of the things that you should *not* do as it is about being aware of those things that you *should* do. To the extent that this paper is another screed on advocacy, I apologize. In the last 100 years or so, countless books, chapters and articles on courtroom advocacy have been penned by renowned jurists and brilliant counsel. Perhaps it might be helpful for you now to hear from someone in the mid-range of the intellectual spectrum.

When I was in practice, I thought that the most difficult job in the world was being a courtroom lawyer. Since becoming a judge, I have arrived at a different view. I am now satisfied that a competent and polished advocate does not require the genes of Eddie Greenspan. Competency and polish are largely *learned* talents.

Successful advocacy is rarely the result of a single overriding ability. Instead, it consists of an accumulation of little skills coupled with the avoidance of annoyances such as those that I will mention. I become misty eyed when I see a lawyer acting lawyerly in Family Court because I realize how difficult that is to do. I know that Family Court drains from me all things judicial, leaving me feeling like an overdressed social worker. Consequently, I sympathize with the challenge of acting lawyerly and I am impressed when the challenge is met.

[4] You see, I experience physiological changes when presiding in Family Court for any length of time: after three days, I develop a facial tick; within five days, I begin to limp; after more than seven days, I start to drool and repeatedly ask the courtroom registrar what month it is; longer periods of time cause excessive ear- and knuckle-hair growth.

[3] It is unnerving to have been sought out for the topic of this paper. I was unaware that I had become so obvious.

II THINGS LAWYERS DO THAT ANNOY JUDGES

[4] My list of annoyances is in no particular order.[5] As well, I offer the reminder that an annoyance is, by nature, something trifling or minor; yet, when you make your living practicing the science of persuasion,[6] does it not make sense to avoid as many unnecessary annoyances as possible? What follows will allow you to calculate your annoyance rating.[7]

1. Rolling eyes, dancing eyebrows and other mannerisms

[5] Most mannerisms are annoying; more importantly, they are distracting. Do you want me to be focusing on your mannerisms (clicking a pen, jingling pocket change, making faces) or your submissions?

[6] Many counsel would do well to receive Botox injections to their face. I say that because an overly expressive face is a distracting liability to one's courtroom conduct.

[7] When I make a ruling for or against your client, try to conceal your glee or disappointment, as the case may be. I recall one senior trial counsel who scowled and pouted every time I ruled against him. It was the strangest sight.[8] Was he expecting me to say: "Counsel, I see that you are upset with my ruling. I am very sorry. I will reverse myself immediately."

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[5] I attempted to construct some order to the list, but the task became too annoying.

[6] There are too many rules, and dos and don'ts, to label it an art.

[7] To calculate your annoyance rating, assign one point for every annoying practice of which you are guilty: 0 excellent (entitling you to dinner with Philip M. Epstein, QC, LCM); 1-4 very good (qualifying you to have lunch with Mr. Epstein); 5-8 good (you receive a telephone call from Mr. Epstein); 9-15 poor (you are given four random digits from his telephone number); more than 16 (you should actively seek an appointment to the bench).

[8] I assume that he was grandstanding for his client.

[8] Do not openly show disapproval at a ruling by the court through facial expressions, slamming books or looking to the heavens for divine intervention.[9]

[9] Do not bob or nod your head in agreement if I make a point which meets with your approval.[10] A bobbing or nodding head belongs on the dashboard of one of those motor vehicles with oversized tires and a loud muffler.

[10] Keep a poker face. No one should be able to ascertain from your expression or body language whether your client has just been non-suited or awarded a million-dollar judgment. Practice facial serenity.

[11] I find that mugging and facial grimaces are distracting, unprofessional and sometimes downright silly in the courtroom.[11]

2. Blindfolds, darts and estimating the length of a trial

[12] I am convinced that lawyers are missing the gene necessary for accurately estimating the length of trials or long motions.[12] It is not uncommon for sober, experienced counsel to advise the court that a trial will take two weeks only to have it go on for six weeks. How is it possible to misjudge the case so miserably? It is better to overestimate the length of a trial by two weeks than to underestimate by two days.

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[9] And, unless you are in the process of fainting, do not roll your eyes.

[10] Apparently, there are lawyers who think that I am sufficiently obtuse as to find in their favour if only they can nod their head appropriately in advance of the ruling. I have had to remind more than one counsel that if they spotted a turnip truck in the court house parking lot that morning, it was not mine.

[11] The most common facial mannerism is the scrunched nose coupled with the furrowed brow (as if a foul odour has been detected), usually employed when counsel wishes to create the impression that he or she does not understand, or disputes the truth or the relevance of, the point being made by the other side.

[12] In St. Catharines, where I primarily sit, the last lawyer who correctly estimated the length of a trial died in 1974. Unfortunately, even he was not without fault, because, at the time, he was in the seventh week of a three-week trial.

3. Has your Honour read the material?

[13] In motions court, never ask me, "Has your Honour read the material?" Never. Never.[13] What school of advocacy recommends embarrassing the judge at the outset of your motion? You might as well inquire whether I had bathed that morning. Commence your submissions on the assumption that the material has *not* been read. If it has been read, or if I want you to truncate your submissions for some other reason, I will let you know.[14]

4. No sir

[14] It is annoying when lawyers address me as "Sir" in court. I find such an appellation too generic. I realize that some judges profess not to mind "Sir," however, I do not believe them.[15]

[15] Does it make sense that: thinking you are late for court, you stop a man on the street and ask, "Sir, do you have the time?"; bumping into an angry former client who curses the amount of the legal account you rendered to him, you respond indignantly, "How dare you, sir"; approaching the court house, a gentleman opens the door, and you say, "Thank you, sir"; spotting a court official in the hallway, you inquire, "Sir, in which courtroom is Justice Quinn sitting this morning?"; and, finally, appearing before me you announce, "Sir, I am representing the applicant in this case." That is carrying egalitarianism too far.[16]

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[13] Never.

[14] The situation is not improved with the variation, "Has your Honour had the *opportunity* to read the material?" That can be doubly embarrassing for me, if my answer is, "Yes, I had the opportunity, but I chose to do something else."

[15] And I have not yet found a female judge who likes being called "Madam," the social equivalent to "Sir," which may be due, in part, to "madam" being defined in most dictionaries to include, "an affected fine lady," "a conceited or precocious girl or young woman," and "a female brothel-keeper."

[16] Remember, when I am sitting in Family Court I have the time to think about such things.

5. Blissful oblivion

[16] I am annoyed by lawyers who, during a trial, function in blissful oblivion to their surroundings.[17] By this I mean, for example, they are unaware: (a) that the time for the morning and afternoon recesses or the noon and end-of-day adjournments have arrived (turning me into a clock-watcher);[18] (b) that I am furiously making notes and falling behind in the task; (c) that I am obviously lost in the documents brief or fumbling with the factum; (d) that the witness has not answered the question asked, yet the next question is underway; (e) that I am trying to attract the attention of counsel;[19] (f) that the court house is on fire.

[17] Competent counsel are alert to all of these things and more. They wear courtroom antennae, not blinders.

6. Lost in the geography of the courtroom

[18] There is a geography to the courtroom and it is annoying how often counsel become lost:

(a) *keep your distance from the witness*

[19] Counsel should ask their questions of witnesses from the counsel table.[20] It is not forbidden for counsel to loiter around the witness box while posing questions, but it leads to things such as huddling, *sotto voce* exchanges with the witness and pointing at documents. Putting your

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[17] Some counsel are so oblivious to what is taking place around them that I could drop through a trap door and it would go unnoticed for hours.

[18] If you find yourself about to commence a line of questioning that will go over the magic hour, point that out to me and ask: "Would this be a convenient point at which to recess (or adjourn for lunch) Your Honour?" Or, "I realize that it is not yet time for the morning recess, but could we break now so that I might . . .?"

[19] Many counsel, while questioning a witness, keep their head down as if walking into a strong headwind, thereby aiding and abetting the state of oblivion.

[20] A few counsel wander about the courtroom during their questioning, leading me to suspect that they are being paid by the kilometre.

questions to the witness from the counsel table makes for better questions and, in general, a more dignified presentation.

[20] I once observed a lawyer actually enter the witness box to assist his client who was having difficulty locating a particular passage in a document. It was the strangest sight to see the two of them crammed into a space barely adequate for one person. I asked: "Should I leave? Would you like to be alone?"

(b) *keep your distance from me*

[21] In court, counsel should never hand anything directly to the judge. Give the item to the courtroom registrar who will hand it up to the judge.[21] I have observed very experienced counsel attempt to scale the dais for the purpose of handing papers to me.[22]

(c) *the counsel table – who may sit there?*[23]

[22] The counsel table is a mystery to some counsel. It presents issues as to who may sit there and where.

1. <u>obtaining permission</u>

[23] The counsel table is so named for a reason: it is meant to be occupied by counsel. It is not an all-purpose table. If it is proposed that someone other than a lawyer sit at the table, seek permission from the judge. This is done immediately after the courtroom registrar calls the case and counsel are introduced to the court.

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[21] Admittedly, some courtrooms are awkwardly configured for that purpose, having been designed by bureaucrats.

[22] When this happens, I recoil as if being handed an invoice.

[23] For a detailed review of this subject, see a superbly written and most helpful text incorporating the work of numerous brilliant authors, *Ontario Courtroom Procedure* (Markham, Ont.: LexisNexis Canada Inc., 2007).

2. <u>ungowned lawyers</u>

[24] Ungowned lawyers have no special status. Permission is required for them to sit at the counsel table.

3. <u>client in a civil or family law motion or trial</u>

[25] It is common, in a civil or family law motion or trial, for me to enter the courtroom and see counsel and their clients camped at the counsel table. This is presumptuous. The clients should be in the body of the courtroom. Counsel will then seek leave of the court for the client to join him or her at the counsel table. Unless the case is factually complex, and counsel is not comfortable with his or her grasp of the evidence (something to which one should not readily admit), I refuse leave. Counsel must advance a good reason why a client should enjoy the privilege of sitting at the counsel table. Clients should not feel badly at being relegated to the body of the courtroom. Everyone in the courtroom has a position assigned by history and tradition, and a client at the counsel table is not a regular part of that history and tradition.[24]

4. <u>case and settlement conferences</u>

[26] In family law case and settlement conferences, it is customary for the parties to sit at the counsel table with their lawyers.[25]

5. <u>experts</u>

[27] Leave is required for an expert to sit at the counsel table. If counsel requires an expert to be at his or her side to assist in the questioning of a witness, leave probably will be granted.

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[24] As a practical consideration, one may wonder why any counsel would want the distraction of a sleeve-tugging, note-passing, whispering client at his or her side.

[25] However, if I were running the system, I would conduct these conferences with the clients excluded. Many complaints made by parties to the Canadian Judicial Council arise out of comments made by judges during such conferences. While bluntness usually is appreciated by counsel, it is misunderstood by the parties. But, I digress.

6. juniors, legal assistants, articling students

[28] Leave of the trial judge is necessary where it is desired that junior counsel, legal assistants, articling students or others sit at the counsel table.

(d) *the counsel table – where to sit*

1. Queen's counsel

[29] Other than in Osgoode Hall, where the front bench is traditionally reserved for them, Queen's Counsel do not have any special seating privileges in the courtrooms of the Province.[26] They are recognizable only by their silk gowns.

2. which side?

[30] In civil and family matters, counsel for plaintiffs, applicants, moving parties and appellants sit on the right side of the counsel table facing the judge (in other words, to the judge's left). Counsel for defendants, respondents, responding parties and respondents on appeal sit on the left side of the counsel table facing the judge (to the judge's right).

3. multiple counsel

[31] In civil and family proceedings, where there is one plaintiff, applicant, moving party or appellant represented by more than one counsel, lead counsel sits nearest the lectern at the counsel table[27] with the other counsel positioned to his or her right. In cases with more than one plaintiff, applicant, moving party or appellant, counsel sit in the order that their clients appear in the title of the proceeding, with counsel for the first party sitting nearest the lectern.

[32] Similarly, where there is one opposing party represented by more than one counsel, lead counsel sits nearest the lectern at the counsel table with the

[26] Which is appropriate, as the title of QC has not been granted in Ontario for many years.
[27] Assuming that the lectern is situated at the centre of the counsel table.

other counsel positioned to his or her left. In cases with more than one opposing party, counsel sit in the order that their clients appear in the title of the proceeding, with counsel for the first of such parties sitting nearest the lectern.

7. Judges are not pen pals

[33] Do not write directly to a judge about an ongoing case or one that the judge is scheduled to hear, no matter how benign the topic, unless specifically invited to do so. Your correspondence should always be addressed to the trial co-ordinator or the secretary to the judges. I am astounded by how many counsel, even very senior counsel, are unaware of this protocol *faux pas.*

8. Your tell-tale paper trail

[34] When I was in practice and confronted with a prospective client who had fired his or her previous lawyer, I made a point of ascertaining why they had parted company. Once, in the 1970s, in response to such a question, a lady showed me a fistful of letters written by her former lawyer. She asked me to read them. I did. They were filled with typographical errors. I explained to her that the lawyer had not typed the letters. Presumably, I said, he had dictated them and they were typed by his secretary and simply not read by him. The lady remained unfazed. She associated him with his work product and had lost confidence in both. At the time, I thought that she was being unfair.

[35] In chambers, when perusing *ex parte* or consent motions, and, in court, when confronted with affidavits, facta, document briefs, case and settlement conference briefs and written submissions, judges also get to see the work product of counsel and reputations are tarnished or enhanced in the

process.[28] I now fully understand the point of view of the lady client I just mentioned. I find myself generally unwilling to attribute sloppy work to a secretary.

[36] Every piece of paper that leaves your office is an advertisement for you and your law firm. In family cases, the work product that judges most often see consists of conference briefs, orders, affidavits and *ex parte* motion materials.[29] Every piece of paper counts.[30]

9. Settlement conference briefs

[37] A settlement conference brief is the second most important document in a family court proceeding.[31] I will mention five annoying shortcomings that I see on a regular basis:

(a) *no introduction or overview*

[38] At the outset of your settlement conference brief, tell me whether the proceeding is a change motion or an initial application. Also, give me an introduction and an overview. Set the scene.[32]

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[28] If you acquire the reputation for preparing sloppy materials, that reputation will follow you into court like body odour.

[29] As an aside, when you file an *ex parte* motion, it is improper to volunteer or ask to attend upon the judge to explain or otherwise supplement the material filed. A judge's chambers are not a court of record. An *ex parte* motion succeeds or fails on the material filed and nothing more. Not an additional word is permitted. At least monthly, I am handed an *ex parte* motion, usually one where there is urgency, and it is accompanied by a letter from counsel saying, "If your Honour has any questions, I would be pleased to attend upon you and provide clarification or additional information." That is wrong, wrong, wrong. (It is more common in civil matters.)

[30] Even counsel slips are important. Before the judge enters the courtroom, counsel should inquire of the courtroom registrar whether a counsel slip is required and, if so, they must ensure that it has been properly completed and handed to the registrar. This is not an opportunity to display one's shorthand abilities. Make it legible.

If possible, one counsel slip should be provided. The names of counsel should be inscribed on the slip as they would want them to appear in the Reports of Family Law. If a surname is a challenge to pronounce, it is helpful to include the phonetic spelling to spare the judge any linguistic struggles. Recently, I presided over a trial where a party was represented by out-of-town counsel with a four-inch surname, where consonants outnumbered vowels ten to one. The counsel slip was of no help. I did not grasp the pronunciation when counsel was introduced at the beginning of the trial and, foolishly, rather than seek clarification, I thought that I would catch on later. Each morning, I carefully listened to the courtroom registrar call the case and, each morning, the registrar pronounced the name differently. Fortunately, the case settled and I was spared the embarrassment, five days into trial, of having to ask the poor man his name.

[31] The most important is an offer to settle.

(b) *reliance upon extraneous material*

[39] Bear in mind that I may take settlement conference briefs home to read or, in some cases, they are sent to me. Do not assume that I have access to the court file. Therefore, it is annoying to settle into my home office and pick up a brief that begins, "The judge should read tabs 1-3, 5 and 7-10 of the continuing record."[33] A settlement conference brief should be a self-contained entity.

(c) *order sought to be changed*

[40] If the matter is a change motion, either quote the provisions of the order it is sought to change or append a copy of the order to the brief (I prefer the latter).

(d) *disclosure orders*

[41] There is a section of Form 17C (settlement conference brief) where one sets out any disclosure being sought. That relief should be described in language suitable for an order, thereby permitting the presiding judge to make a simple endorsement, "disclosure orders to issue as *per* paragraph 13 of the settlement conference brief of the applicant." Consequently, if your brief, for example, merely asks for "full disclosure of all of the respondent's business records," that is unhelpful and would produce a problematic order if the same wording were to be used. The requested records should be particularized.[34]

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[32] I prefer that you not describe the parties as "applicant" and "respondent." Why? Because, from time to time, I will be given a brief where the history of the marriage is given with those terms being transposed, making it difficult for me to fathom who did what (apart from who gave birth to the children of the marriage). Call the parties "husband" and "wife" or, if divorced, by their given names.

[33] I have actually seen settlement conference briefs that say, "The judge should read the continuing record." You might as well stand on the counsel table and proclaim, "I am lazy."

[34] I once read a settlement conference brief in which approximately eight different disclosure requests were peppered throughout the brief and, when it came to paragraph 13 of Form 17C, the lawyer inserted "See above," thereby necessitating something in the nature of a scavenger hunt to identify the needed disclosure. I would give a year's salary to know what was going on in the mind of that lawyer at the time.

(e) *case law*

[42] I do not recall a single instance of case law being attached to a settlement conference brief or even excerpted. As a generalist judge, I like to have my memory refreshed regarding the governing legal principles. I realize that, in family law, we have principles of common sense masquerading as principles of law. Nevertheless, there are leading cases; remind me about them. Do not assume that I know anything. With each passing year, I know less and less about more and more.

10. Orders

[43] The quality of draftsmanship for orders is annoyingly bad. Every day, I am asked to sign orders which are improperly worded and otherwise contain inappropriate provisions. I dread that part of my duties. My practice is to make changes on the face of the order in red ink and send the order back to counsel for corrections. On average, 50% of the orders that I am asked to sign require corrections. These "boomerang" orders (so-called because they come back to me), are time-consuming and tedious. As the topic of orders is one that could justify an entire continuing education program, I briefly will mention only four of the most common shortcomings.

(a) *orders that do not order*

[44] Orders are not supposed to tell a story; they order someone to do or not to do something. Orders should not read like reasons for a decision.

(b) *"shall" not "will"*

[45] Although separation agreements and minutes of settlement may provide that someone "will" do something, when it comes to orders, "will" must be changed to the imperative, "shall."

(c) *inconsistent terminology*

[46] It is common for orders to refer to people, assets and events in several different ways throughout an order. For example, the applicant will be called "the applicant, Joan Smith" in one paragraph, "the applicant" in another paragraph and "the wife" in yet another. Pick one descriptor and stick with it.

(d) *paragraphs and subparagraphs*

[47] Orders should not consist of many sentences lumped into one paragraph. They must be broken down into paragraphs and subparagraphs to facilitate identification and comprehension. I am going to set out a paragraph from an actual order that came to me for signature (and which is very typical of what I see daily) and then repeat it in proper form:

> 1. THIS COURT ORDERS that the applicant shall have custody of the children and that the respondent shall have generous access to include every second week-end from Friday at 4:00 p.m. until Sunday at 7:00 p.m. with the respondent to provide all transportation. If the Monday following an access week-end falls on a statutory holiday, the access will be extended to include the Monday until 7:00 p.m. The respondent will be permitted to participate in all major decisions involving the health and education of the children. The respondent will be entitled to receive copies of all health and school records involving the children and shall be informed of all extracurricular activities pursued by the children. The respondent shall be entitled to attend all extracurricular activities.

[48] It will be seen that although "shall" has been used in four instances, "will" appears three times and must be changed. Thereafter, the order should read as follows:

> 1. THIS COURT ORDERS that:
> (a) the applicant shall have custody of the children;
> (b) the respondent shall have generous access to the children:
>   (i) the generous access in (b) shall include every second week-end from Friday at 4:00 p.m. until Sunday at 7:00 p.m. with the respondent to provide all transportation; and
>   (ii) if the Monday following an access week-end falls on a statutory holiday, the access shall be extended to include the Monday until 7:00 p.m.;

(c) the respondent shall be permitted to participate in all major decisions involving the health and education of the children;
(d) the respondent shall be entitled to receive copies of all health and school records involving the children and shall be informed of all extracurricular activities pursued by the children;
(e) the respondent shall be entitled to attend all extracurricular activities.

[49] With lengthy orders, it is helpful to insert subject headings.

11. Strong language

[50] I am aware that family cases are emotionally charged. However, when in court, avoid strong language. Never refer to the submissions of opposing counsel, for example, as "ridiculous." Instead, make use of your many years of university education and express your feelings with erudition by saying, "The argument of my friend lacks merit" or, if you are feeling particularly brutal, "The reasoning of my friend[35] is threadbare." That sounds so much better; and, more in keeping with your $200-$600 *per* hour fees.

12. Objections

[51] When making an objection, it usually is only necessary for you to rise to your feet and opposing counsel then stops whatever he or she is doing or saying in order that you may state your position. It is appropriate to say, "objection, Your Honour" as you rise. This is preferred to yelling, "Whoa! Whoa! Whoa!" as I witnessed from one objecting senior Toronto counsel. Do not make objections from a seated or squatting position.[36] Fully commit to the objection and stand.

13. Speak through the court

[52] Counsel should not engage in conversation with each other but, instead, speak through the court, as in, "Your Honour, will my friend be

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[35] You, no doubt, are aware of the traditional reference to opposing counsel as "my friend." Do you know when to say, "My *learned* friend"? Where your opponent is a Queen's Counsel.

[36] It is impossible to be graceful or elegant while squatting.

amending his pleading?" rather than addressing opposing counsel directly and asking, "Dumbo[37], are you going to amend your pleading?"

[53] A police officer was testifying at trial and he asked the lawyer who called him whether he might refer to his notes. The lawyer answered, "Yes." This is incorrect. Counsel should have looked to the judge who would then have sought the position of opposing counsel and made a ruling.

[54] When a witness asks if he or she may retrieve something, perhaps a file, from the body of the courtroom, it is not the place of counsel to give permission. Counsel should ask the judge if the witness may do so.

[55] I recall an instance in a criminal case where a senior counsel hastily instructed an accused to leave the dock and the courtroom immediately upon hearing that the Crown was withdrawing all charges.[38] Instead, counsel should have asked, "Your Honour, in the circumstances, may my client be permitted to leave the courtroom?"

[56] The easiest way of avoiding these little missteps is to remember that the judge is the boss in the courtroom. His or her permission is required for everything, from calling witnesses to going to the bathroom.

14. I submit, I submit, I submit

[57] Counsel should never say, "I think . . . ," "I believe . . . ," I recommend . . . ." or "In my opinion . . . ." Instead, you "submit," "submit" and "submit" again, until the paint peels from the courtroom wall. The lack of formality that has crept into family proceedings[39] is starting to oust this historical nicety.

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37 I would intervene here on incivility grounds.

38 Perhaps fearing that, if the accused dallied, the Crown would rethink its position.

39 Actually, it has marched, not crept.

15. When to stand and when to sit

[58] Counsel for both sides of a case should never (except very briefly) be on their feet at the same time.[40] I see this bit of protocol breached every day. If you are not speaking, or being spoken to, sit.

[59] When you are examining a witness and opposing counsel makes an objection, the latter stands to do so and the former sits while the objection and the grounds for the objection are voiced.

[60] Do not stand to examine a witness until called upon by the judge to do so or until the judge otherwise indicates that he or she is ready for you to proceed.

[61] Do not stand until you are addressed by the judge. For example, do not jump to your feet to give argument until you get a nod or some other less subtle sign from the judge. Wait until called upon by the judge.

[62] Always stand when addressing the court. It is not enough to assume a position somewhere between sitting and standing. Do not go into a squat.[41]

16. Your appearance counts . . .

[63] If I tell you that your physical appearance counts, this fact, surely, will have some of you inching towards the door.[42] Lest you think the matter is too trivial for attention, let me quote from a wonderful little book – *Advocacy: Views from the Bench*, published in 1984 by Canada Law Book Inc. and authored by Robert F. Reid and Richard E. Holland, two giants on the Ontario High Court bench in the 1970s:

> Successful counsel look successful. They look the part. They do not wear crumpled gowns or soiled linen . . . They do not suffer from "gaposis" – a slash of bulging white shirt across the abdomen between vest and belt buckle. Their gowns fit; they are neat and clean; they look as if they mean business.

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[40] Visualize the game "Whack-a-Mole."

[41] I believe that I earlier expressed my view on squatting. Such a posture should be reserved for elsewhere.

[42] And, remember what I have said about rolling your eyes.

> If you do not believe this go to court and watch the good counsel. You will see exceptions, but the exceptions are so good at their job that they can afford to ignore the dress code a little. They do not ignore it much. Walter Williston was sometimes a little rumpled, but everyone knew he had probably been up all night honing his argument. You will be permitted to play with the standards a little when you are that good.
>
> I do not propose to analyse the connection between proper dress and success, but it is there. One judge has a test. It is called 'droopy-tab syndrome'. When he sees counsel in a set of wrinkled, floppy, soiled tabs he makes a mental note born of long experience: do not expect much from this one. He is not always right, but you would be surprised at how often he is . . . (Another judge once called counsel into his chambers and *gave* him a set of clean tabs.)

[64] It is rarely of benefit for counsel to emulate the slept-in look. Ours is a superficial society and so the way you dress in the courtroom counts.[43] It is a part of advocacy.

17. . . . as does the appearance of your clients

[65] I have adjourned trials for half a day while a party returns home to dress appropriately (I do so after looking at the financial statement filed and forming certain views). It is disrespectful to attend court dressed as if you have just rotated the tires on your automobile.

18. Punctuality

[66] It is annoying to observe the lackadaisical manner of some family counsel who saunter into court as if all start times are merely suggestions. The easiest part of professionalism to master is punctuality. Quoting, once more, from the Reid-and-Holland book:

> You should never be late, but some day you will be: fate will see to that. The first thing you must do when court opens is to apologize and explain the delay briefly. You need not cry or wring your hands. Be brief and sincere. Dabblers walk casually into court ten minutes late acting as if nothing were amiss. They look hurt and puzzled when the judge lands on them. Being pulled up for such a small thing is a

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[43] I am able to estimate the number of years male counsel have been in practice by mentally measuring the gap between the top of their trousers and the bottom of their waistcoat (and I count myself lucky if a white shirt is the only thing visible in the gap).

> bad way to start your case, or your day, particularly if it happens in front of your clients.
>
> I once told a lawyer who excused his repeated tardiness on [the] ground that [his] 'watch was slow' that it was an excuse I did not permit my children. He was so cross that he appealed my decision in the case. (I know that was the reason because he later told me so.) That resulted in a waste of time and money for he had to find a better ground than that for his appeal and, failing to do so, lost the case a second time. I tell the story not to suggest that my decisions are unappealable but to illustrate how a little thing like being on time can affect the proceedings and, in particular, your composure.

19. Amendments

[67] Do not leave amendments to an Application, Answer or Reply to be dealt with at the opening of trial, even if they are sought on consent. No matter how minor, amendments should be addressed in a motion brought prior to trial, hopefully a consent *ex parte* motion. The first step in a trial should not be the correction of your mistakes.[44]

20. Master your facts

[68] It is annoying how often counsel do not know some of the basic facts in their case. Moreover, they are unable to locate the information in their trial brief or in their file, often suffering the shame of slinking into the body of the courtroom to obtain the information from their client.

[69] You must master your facts (technically, I realize, you master the evidence and the judge determines the facts).[45]

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[44] Bad optics.

[45] To that end, I did something when I was in practice that I highly recommend. I developed a client in-take form for criminal, civil, personal injury and family cases. It was a fill-in-the-blanks format. For example, in a matrimonial file, I would record the obvious information such as name, address and date and place of birth of the client. I would obtain a full address history (tracking my client's residences since the parties met) and a full education and employment history and do the same for the other spouse and for the children. I would note all bank accounts opened or closed since marriage – and on and on.

At this point, some of you are grumbling, "I did not come here to sit through a lecture on how to interview a client." But, I guarantee if you follow the suggestion I am making, you will go into court with the confidence that, if you forget a particular fact, you will know where to find it swiftly. My in-take form for a matrimonial client was 30 pages long (many pages would be inapplicable in a given case).

21. Be organized

[70] Be organized. Avoid paper confusion. What has become of trial binders? I rarely see them anymore.[46] At least two months before trial, you should devote thirty minutes to setting up a trial binder, with tab dividers and lined paper.

[71] Insert a tab for the pleadings and place there a copy of the pleadings. Use a separate tab for financial statements of the parties and for any temporary or other orders governing the case.

[72] Have a tab for each witness that you may be calling and each witness that you expect to testify for the other side. From time to time, when preparing for trial, you will note, behind the tabs, questions or areas of questions that you plan to cover at trial.

[73] Insert tabs for your opening and closing statements. Add notes and comments there as they occur to you.

[74] Put in place other tabs that may be appropriate to your case.

[75] At the front of the binder, there should be a few sheets of paper of a different colour on which to keep a running "to-do" list (maintained during preparation for, and throughout, the trial, where you record all of the many things to which it is necessary to attend).

It is important to leave plenty of space in the form for after-acquired information to be inserted. At the top right corner of the first page there were five or six lines for dates to be placed. The date of the first interview would be entered there and the information obtained on that date would be handwritten in the form using the same colour of ink that was used for the date. On each subsequent interview with the client, a new date is inserted using a different colour of ink and the new information is entered in that colour. In this way, you know what you learned and when you learned it. An advantage of this approach is that, when you run out of coloured ink, you know the time has come to settle the case or to set it down for trial.

Much of the basic information that you need to know about your case will be found in this one form, kept at the back of your file. In court, if the judge inquires when your client graduated from Niagara College and what she did for the first three years thereafter, you will know that the answer is found at the bottom of page three of your in-take form.

[46] If they have been replaced by something else, it is not working.

[76] The goal is peace of mind. It provides a sense of control and comfort knowing that much of what you need is in that binder. The *feeling* that you are prepared is almost as effective as actually *being* prepared.[47]

22. Fewer is better and brevity is best

[77] Strive for quality, not quantity, in the issues that you raise or the points that you argue.[48] The strength of your strongest arguments is diluted by the weakness of your weakest arguments. Avoid the shotgun approach. Shotguns are for those with a poor aim.

[78] When you raise, for example, ten grounds for your argument, you are saying to the court, "Because I am unsure of the validity of my first three grounds, I am adding seven more, hopefully, to confuse you in the event that I can get lucky in the fog of battle."

[79] If you cannot succeed on your best three arguments, you are not likely to prevail on the rest. Offer a select menu to the court, not a buffet.

[80] I admire brevity in others, but it is not something for which I have a talent.

[81] Justice Willard Zebedee Estey is credited with the 3Bs-advice to counsel: "Be brief, be clear, be gone."

[82] A commonly told anecdote is of an American television evangelist, frequently on the lecture circuit, who required a month's notice if his speech was to be less than 20 minutes, two weeks if his speech was to be an hour long, and no notice at all if he could speak without a time limit. The delays connected with court scheduling afford you ample opportunity to achieve brevity.[49]

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[47] Not really.

[48] This admonition has been articulated in every paper on advocacy (and, for a reason).

[49] Brevity may be too much to ask of a profession that, in the beginning, required payment by the word.

[83] Long-windedness is the love-child of laziness.

23. Have order to your argument

[84] Your argument must have logical order, if you are to be persuasive. "It has been said that an English appellate judge once told counsel who was . . . in the midst of a jumbled submission with no apparent logic or direction, '[Counsel], could you not put your submissions in some order, even if only alphabetical.' "[50]

24. The written word is more effective

[85] I am sorry to be the pin that pricks your thespian balloon, but oratory wins elections, not family trials. The written word reigns.

(a) *put position in writing for court at earliest opportunity*

[86] Put your position in writing for the court at the earliest opportunity. It is no longer true that a factum is merely "a prop for oral argument."[51] With the volume of cases now heard in our courts and the frequency with which decisions are reserved, the impact of oral submissions will fade with time. There is no good substitute for your own position on an issue and the *surest* way to that end is to put your position in writing and hand it up to the judge (through the courtroom registrar, of course).

[87] I happen to believe that the only purpose served by oral argument is to respond to questions by the court arising from written argument.

(b) *opening statement by counsel for applicant*

[88] Many counsel in family trials do not give an opening statement and those that do seem not to have devoted advance thought to the matter. Too often the opening is an opportunity wasted. It is a chance to identify the issues, briefly tell of the evidence to be adduced, put your position to the

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[50] Alan D. Gold, *Effective Advocacy in Judge Alone Trials,* National Criminal Law Program, July 1998, at p. 4.

[51] J. Sopinka and M. Gelowitz, *The Conduct of an Appeal* (Markham: Butterworths, 1993), at p. 205.

court and diffuse any weaknesses in your theory of the case. All of this should be done succinctly and without argument or overstatement.

[89] Anything that counsel can do to lessen the work of the judge as a scribe is likely to be well-received. Therefore, reducing your opening to writing will be appreciated. Judges prefer to listen and think than to scribble. Of course, even if it is in writing an opening should still be delivered orally. Personally, I do not object to counsel reading his or her opening (this is much preferred to handing up a written opening and then delivering a different opening orally).

[90] If the opening is provided to the judge in writing, a copy should also be given to opposing counsel.

[91] No case is too straightforward and no trial is too short for an opening.

[92] Justice John Sopinka once stated that, "The most telling characteristic of bad counsel is the failure to begin with a prepared opening statement."[52]

[93] When giving an opening (and, indeed, at all times in motions and trials), remember that you have lived with the case for months, maybe years, while the judge has done so for hours or, perhaps, minutes.

(c) *opening statement by counsel for respondent*

[94] An opening statement is just as valuable for the respondent as it is for the applicant and all of the above comments apply. However, counsel for a respondent has the additional consideration of whether to open immediately after the applicant or at the commencement of the case for the respondent. The decision is a tactical one and will depend on the nature of the case.

(d) *prepare your examination-in-chief in writing*

[95] One part of a trial that should proceed smoothly and uneventfully is the examination-in-chief of a witness. Have your questions written out,

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[52] *The Advocates' Society Journal*, March 1990, at p. 6.

every last one of them, so as to avoid this kind of exchange that once occurred in front of me:

Counsel: Is Andrew your brother?

Witness: Yes.

Counsel: How long have you known him?

[96] Examination-in-chief is the opportunity to ask perfect questions; and, perfect questions are short questions.

[97] With written questions you will avoid the embarrassment of not hearing what the witness is saying because you are too busy thinking of your next question.

[98] Ask your questions slowly. Give the judge time to soak up the evidence. Judges prefer to follow than be dragged.[53]

25. Case conferences

[99] Case conferences, where both sides are represented by lawyers, in my opinion, are the most unproductive use of my time; annoyance, therefore, comes prepackaged on those occasions. But, the annoyance escalates when it appears that the lawyers are turning their minds to the conference, and looking at their files, for the first time. What follows, and variations thereof, occur too often:

THE COURT: Lawyer A, in your case conference brief, at paragraph 17, you are requesting certain disclosure. Are all of your requests still outstanding?

LAWYER A: Have I asked for disclosure? What is the paragraph number?

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[53] When counsel question witnesses too quickly, I feel like a dog tied to the bumper of a speeding car.

THE COURT:	Paragraph 17.
LAWYER A:	Paragraph 17?
THE COURT:	Yes, paragraph 17.
LAWYER A:	Oh, yes. "The applicant requests copies of the respondent's income tax returns and notices of assessment for the years 2007-2010 and a year-to-date statement of his income for 2011." Yes, those requests are still outstanding.
LAWYER B:	I have already forwarded those documents to you, lawyer A.
LAWYER A:	You have?
LAWYER B:	Yes. On the 20th of last month.
LAWYER A:	Were they delivered or mailed? I don't see them in my file.
LAWYER B:	Delivered. Hand delivered.
LAWYER A:	On the 20th you say? I don't think so.
LAWYER B:	Yes, they were.
LAWYER A:	No. I don't think so.
LAWYER B:	Yes, they were.
LAWYER A:	Oh, here, I see something in my file. One moment, please. Yes. I have your client's 2007 income tax return. And his 2008 return. But that is all.
LAWYER B:	Well, if you have the 2007 and 2008 returns, you obviously must have the rest.
LAWYER A:	No, I don't think so. I don't think so. They're not here.

LAWYER B: It does not make sense that you would have some of the returns and not all of them.

LAWYER A: Sorry. The 2007 and 2008 returns are all that I have. Oh, wait a minute, wait a minute. I see something here. Yes. Yes. 2009, 2010. Yes, I have the 2009 and 2010 returns.

LAWYER B: What about the notices of assessment?

LAWYER A: Nope. I don't have those.

LAWYER B: But they were delivered to your office at the same time as the tax returns.

LAWYER A: Sorry. I don't have them.

LAWYER B: The letter that accompanied these hand-delivered documents clearly states that the notices of assessment for 2007-2010 were included. I don't understand how you can say that you don't have them.

LAWYER A: Sorry. I don't. Oh, wait. What is this? What is this? OK. You're right. You're right. Here they are. The notices of assessment. But, I only have 2007 and 2008.

LAWYER B: (*trembling from the exertion of self-control*) That's impossible. They were all hand-delivered at the same time.

LAWYER A: Sorry. I don't have them. They're not here.

LAWYER B: Please keep looking.

LAWYER A: There is no point. They're not here.

LAWYER B: (*eyes closed and ashen-faced*) Please.

LAWYER A: Oh, what's this? OK. OK. Here they are. Notices of assessment for 2009 and 2010. Yes, I have them.

[100] At this point, I will have made eye contact with lawyer A's client, whose facial expression has gone from mild interest to horror, as he/she telepathically pleads with the court: "Please help me! Please! I am paying my lawyer by the hour!"

26. Misstating facts or law and candor

[101] Judges have short memories. We are not likely to recall our previous decisions without prompting, or the last case in which counsel appeared in our court, or whether he or she won or lost or what the case was about. However, we remember our embarrassments. If counsel is found to have seriously misstated facts or law and the judge relies upon either – and I have been the victim of both – the judge will be embarrassed and he or she will remember you forever and ever.[54] You will have lost the trust of the court.[55]

[102] On a related topic, there is candor. You probably have no idea of the sense of relief that overcomes a judge when a counsel candidly concedes an issue or agrees that a particular authority is unfavourable to his or her case. More importantly, the judge is likely to trust the balance of that counsel's argument.

[103] Candor involves admitting the shortcomings in your piece of litigation. Chief Justice Cartwright once told a law school class that, when facing a difficulty in a case: "Nail it up on the side of the barn, for everyone

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[54] And ever.

[55] In which event, you might as well concentrate on developing a commercial or real estate practice.

to see. Then proceed to show that it is neither as large nor immovable as it first appeared."[56]

[104] Never lose sight of your role in the courtroom: it is to persuade. And, to persuade, you must have the trust of the court. If the judge does not trust you, only the manifestly clear issues will fall your way.

[105] Candor in your written and oral advocacy elevates your trustworthiness in the eyes of the court.

[106] I once presided over a motion in which counsel for the responding party referred to several significant reported decisions that contradicted the position of, and had not been mentioned by, counsel for the moving party. When asked why he had not addressed these decisions, the latter, a first-year lawyer, calmly answered that he had been trained not to raise, in argument, cases that were contrary to his position. This represents the most remarkable thing that a lawyer has ever said to me in court.

27. Manners matter

[107] Part of being a competent counsel involves nothing more complicated than exhibiting good manners.

(a) *general*

[108] It has been said that "the legal profession is a high and noble calling grounded in skill, knowledge and honour. Lawyers are officers of the court, gowned in its dignity, and compelled by tradition and regulation to discharge their duties with integrity, courtesy and respect."[57]

[109] Lord Moulton, a great English jurist, stated that the quality and height of our civilization will be measured against manners and etiquette. The same, I think, is true of our legal system.

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[56] Brian H. Greenspan, *Appellate Advocacy: Maximizing Oral Persuasiveness,* National Criminal Law Program, July 1998, at p. 1.

[57] Marvin Joel Huberman, "Manners and the Law," *National,* January/February 1994, at p. 8.

(b) *apologies*

[110] Apologies are part of good manners.

[111] Every time that a lawyer is late for court, my mind goes back to the 1970s on an occasion when I was appearing in Divisional Court in Toronto. Opposing counsel (who represented the appellant in a motion for leave to appeal) was from Hamilton. He was late. The court recessed and 20 minutes later counsel arrived. The court reconvened and tardy counsel commenced his submissions. The Justice interrupted and asked, "Are you not forgetting something?" Counsel paused, gave the matter deep thought, repeated the rule under which he was proceeding and answered, "No." The Justice leaned forward and said, in a seething tone, "What about an apology for being late?"

[112] Apologize when the situation calls for an apology. It is what mannerly people do. You need not be an Osgoode Hall gold medalist to have manners.

[113] If President Nixon had apologized immediately after Watergate, he would have been able to complete his second term in office. People (of which judges are a subspecies) are forgiving to the apologetic.

(c) *technology*

[114] It is mannerly to ask permission of the judge to use a computer in the courtroom. And, when you come to court, leave your cell phone in a different county.

(d) *civility*

[115] Included in good manners, if I may mention the obvious, is civility amongst counsel. A judge with the Seventh Federal Judicial Circuit in the

United States referred to the decline of civility in society generally and wrote:[58]

> Today our talk is coarse and rude, our entertainment is vulgar and violent, our music is hard and loud, our institutions are weakened, our values are superficial, egoism has replaced altruism and cynicism pervades. Amid these surroundings none should be surprised that the courtroom is less tranquil. Cardozo reminds us that judges are never free from the feelings of the times.

My own observation is that society is largely impatient and uncivil and this crudeness has seeped into the courts and the world of advocacy.

[116] Do not make distracting noises and sounds from the counsel table. Do not sigh, moan or shuffle papers during the submissions of opposing counsel.

[117] Some counsel employ sarcasm and sniping to make their case and to counter the position of the other side. If those counsel only knew how silly they looked and sounded from the bench, they would stop immediately. Sarcasm and sniping are demeaning to counsel. They are also uncomfortable for the court to witness.

[118] You never advance your argument by belittling an opponent.

[119] One can litigate aggressively and with civility. Argue without being argumentative; object without being objectionable.

[120] Civility also includes being courteous to witnesses.

[121] If there is incivility in the courtroom that you think is not being addressed, raise it with the judge. It is the obligation of judges to stamp out incivility when it occurs.

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[58] Justice Michael Bolan, *Issues of Civility in the Courtroom: The Role of the Trial Judge,* May 11, 2001.

(e) *bowing*

[122] I am disheartened by the number of times I observe counsel (of every age and level of experience) who fail to return the bow of the court.[59] These counsel are oblivious to my entering the courtroom, and select that moment to become busily engaged in all sorts of activities: head buried in a briefcase, searching for something; stooped over, pulling up their socks; checking for spots, real or imaginary, on their eyeglasses; studiously pouring over papers; standing, facing away from the court, conversing with someone in the body of the courtroom; etc., etc. Once, upon approaching the dais, I observed that all three counsel in the case were pre-occupied with some task (each was doing something different). I stopped in my tracks, said, "I appear to have come at a bad time," turned around and departed for my chambers where I read the morning newspaper, returning a full hour later.[60]

[123] All along, I assumed that my experiences were a reflection of a lack of respect for me, personally, until I came across an article in the *Gazette,* volume XXV, 1991 by The Honourable Mr. Justice John D. Arnup, of the Ontario Court of Appeal, entitled "Some Things I Worry About." This article consists of an address given by His Lordship at the Call to the Bar ceremony on April 10, 1984 and it includes the following passages:

> Finally, I worry about what I perceive to be an erosion of good manners in litigation . . .
>
> Even some of the traditional courtesies seem to be failing. For 150 years judges have bowed to counsel, and counsel to judges, at the opening and closing of court, and at each end of the noon recess. I frequently find myself bowing to men who are gathering up their papers, or have their back to me. And usually this unthinking discourtesy is by people who know better.

[59] Offending the one whom you hope to persuade is a curious form of advocacy.
[60] This petulant reaction felt good at the time, but it is not recommended.

[124] If counsel could turn their back on Justice Arnup, I no longer take personally their poor manners when they do not practice this traditional courtesy of bowing. However, on those occasions, I make a mental note that I am in the presence of an amateur (or as Justices Reid and Holland would say, a "dabbler").

(f) *conclusion*

[125] So, this manners thing – is it worth the effort? It may relieve your level of courtroom anxiety, and otherwise be helpful, to learn that judges do not remember or much care whether you won or lost a particular case. What they *do* remember is how you performed – how you conducted both the case and yourself. I realize that clients are solely interested in winning, but you will be judged by the judges on how you conduct yourself, not on whether you win or lose.

[126] The reality is that you can look bad to your client, while looking good in the eyes of the court. Manners matter.

28. Introducing other counsel

[127] Proper introductions of counsel are rare in Family Court. When you rise to open a case, introduce other counsel. Say: "May it please the court, I appear for the applicant; Ms. A. is with me; my friend, Mr. X, appears for the respondent, Smith; Mr. B. is with him; my friend, Mr. Y, appears for the respondent, Jones." Counsel being introduced stand when their name is spoken, they bow and sit down.

[128] By the way, I never hear the phrase, "May it please the court." It is a tradition that has been lost out of ignorance and commonly preceded all introductions, openings, arguments and closings. It is little wonder that the court is so rarely pleased.

29. Thank you

[129] There is something that was common when I was in practice, but is now rarely observed. At the conclusion of a motion, for example, counsel for the moving party, regardless of the outcome, rises and says, "Thank you, your Honour." Counsel is thanking the court for dispensing justice. Hearing this may be difficult for a client to understand where he or she has just lost the motion, but legal tradition is not set by clients. Similarly, in a trial, after the judge makes a ruling, it is proper for the counsel who asked for the ruling (such as counsel who objected to a question) to do likewise.

30. Last lawyer in the courtroom

[130] When you are the last lawyer in the courtroom, you must ask the judge for permission to be excused. Do not simply walk out.

[131] Even if you are not the last lawyer in the courtroom, do not leave the counsel table until you are excused. This may come in the form of the judge reading his or her endorsement and saying, "Thank you." Or it may be something as subtle as a nod of the head in your direction. Certainly, when the next case is called you may safely assume that you are excused.

31. Direct answers to questions from the bench

[132] When you are asked a question from the bench, answer it directly or explain why you are unable to do so. If you develop a reputation for evasiveness, you might as well start cashing in your RRSPs to cover office overhead.

32. Documents brief

[133] An easy way to antagonize a trial judge is to tender documentary evidence one document at a time, and in no particular order.[61] Counsel must

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[61] The oh-here's-a-document-let's-make-it-an-exhibit approach is the mark of a novice or a lazy litigator.

commence marshalling the documentary evidence from the moment their file is opened. Originals should be kept separate, with counsel working from copies. Invariably, the best order for documents is chronological. Occasionally, topical order may be more helpful.[62]

[134] Prior to trial, counsel should meet and/or review their lists of documents, with the goal being a joint documents brief. Such a brief is tendered as an exhibit during the opening of counsel for the applicant, with a working copy being provided to the judge and copies to all opposing counsel. The contents will be tabbed *and* the pages numbered.[63] Subsequent references to the brief will be, for example, "Exhibit #1, Tab 4, p. 12."

[135] Where there is no magic to whether the documents are originals or copies, the brief tendered as the exhibit may, on consent and with leave, contain only copies. Otherwise, originals should be in the brief that is marked as the exhibit.

[136] Sometimes, despite the best efforts of counsel, documents are tendered as exhibits that are not found in the brief. Therefore, counsel may want to provide for the judge a tabbed, three-ring binder into which those additional documents can be inserted as they arise.

33. Agreed statement of facts and admissions

[137] One of the first things a trial judge notices or senses in the courtroom is the degree of cooperation between counsel. An immediate tip-off that counsel are incompatible is the absence of an agreed statement of facts and admissions. In almost every case, agreement can be reached regarding some of the evidence. Do not be one of those counsel who requires the other side

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[62] I once had a lawyer, God bless him, file both at trial.

[63] What is going through a lawyer's head when, for example, there are 50 pages of e-mails or cell phone records behind a tab and the pages are not numbered? "Witness, please count 21 pages in at Tab 2 and tell the court… no its 23 pages in, yes, count 23 pages in and…." Nothing will make a judge feel underpaid more quickly than an afternoon of such nonsense.

to prove that the earth is round. Put the uncontested facts in writing and tender them as an exhibit on consent. This is done during the opening of counsel for the applicant.

34. Chronology

[138] It is annoying how often a chronology is not provided in family trials. Experienced counsel begin to compile a chronology upon being retained and add to it as the matter proceeds through motions, out-of-court examinations and case and settlement conferences. It has been said, "Competent counsel will have one (in some form) in their working papers, and the sooner incompetent counsel prepare one, the better": see, The Honourable William J. Anderson, "The Conduct of a Non-Jury Civil Trial," *The Advocates' Society Journal,* September 1993, at p. 2.

[139] Madam Justice Hilda M. McKinlay, of the Ontario Court of Appeal (1987-1999), when speaking about advocacy, once stated, "The single most helpful tool in an argument is a chronology and we rarely see this."[64]

[140] The following is the best format for a chronology:

Date	Event	Documentary source of event, where applicable
Jan. 5/10	Applicant admitted to Toronto Hospital	Toronto Hospital admission record (applicant's brief of documents, Tab 1, p.3)
Jun. 2/10	Applicant's employment was terminated	Letter from CNR dated Jun. 1/05 (applicant's brief of documents, Tab 4)

[64] The citation has been lost to antiquity.

[141] A chronology will include all of the salient events in the case. It cannot be too detailed. A draft copy should be sent to opposing counsel before the trial to permit careful review.

[142] A joint chronology is preferable. Where certain events in the chronology are disputed, they can be denoted with an asterisk. A joint chronology may, of course, if both sides consent, be tendered as an exhibit.

[143] Where the sequence of dates plays a role in the case, have a year-at-a-glance calendar for each year in issue.

[144] True, a comprehensive chronology involves effort. But, litigation is not for the lazy. Your primary function as counsel is to persuade the judge. Therefore, does it not make sense to assist the judge as much as possible in the task at hand?[65] Blessed is the lawyer who embraces the glorious drudgery of litigation.[66] By "drudgery" I mean all of the tedious things that are involved in the care and preparation required for court attendances. Although this drudgery adds to the expense of the litigation, if a matter has reached trial, costs have long since gotten out of hand. Litigation is war with rules and war is very expensive.[67]

35. Dump truck advocacy

[145] I have coined the somewhat inelegant phrase "dump truck advocacy" to describe trials where counsel annoyingly dump a quantity of jumbled evidence in my lap, with little effort having been made to particularize or research the issues. Whether this is because the client's retainer has been

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[65] This assistance can be as simple as handing up a written consent in motions court, when a matter has been settled, rather than dictating the terms of the settlement to the judge.

[66] Sadly, despite mastering this masochistic drudgery, your impact on the case still will be limited. Justice John Sopinka once estimated the importance of counsel to the outcome of a case as follows: Trial: up to 50%; Appeal to the Court of Appeal: about 25%; and, in the Supreme Court of Canada: 10-20%. Thus, you probably are not as important to the case as you think: see *The Advocates' Society Journal,* March 1990, at p. 3.

[67] "I was never ruined but twice: once when I lost a lawsuit and once when I won one": Voltaire**,** pseudonym of François-Marie Arouet (1694–1778).

exhausted (with no hope of replenishment) or whether the lawyer is lethargic, I do not know.

36. Get courtroom experience, somehow

[146] Most counsel do not have enough trial experience.[68] Would you undergo an operation at the hands of a surgeon who only performs one surgery every two or three years?[69]

[147] Get courtroom experience, even if you must take cases to trial for little or no fees (pick those cases carefully; but *pick* them). Do not view all of your files from a financial perspective.[70] Treat some as educational opportunities that will advance your reputation as counsel and may lead to profitable future files.

[148] You cannot become a competent counsel while camped in your office.

[149] Do not fear losing a case. If you win a high percentage of your trials, I suspect you are selling many clients short because you obviously are not litigating the tough cases.[71] Most of the high-profile counsel in the United States and Canada lose far more often than they win.

[150] Losing is a part of advocacy – a *big* part.

37. Litigation as a spectator sport

[151] Because advocacy can be learned, it makes sense that watching other counsel argue a motion or try a case will be beneficial. In fact, watching bad lawyers[72] is as enlightening as observing good ones. I rarely see young lawyers linger in motions court after their matter has been heard and it is

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68 Attending 1,000 case and settlement conferences will not advance your skills as a trial lawyer.

69 Some day there will be a computer program devised to permit counsel to conduct a virtual trial – a form of courtroom calisthenics that will serve as a warm-up to the real thing.

70 I suspect you are thinking – is this salaried person glibly forgetting a little thing called "overhead"?

71 A bank loans officer with a very low default rate probably would be fired as not exhibiting the necessary level of risk-taking.

72 In this paper, I am using "lawyer" and "counsel" interchangeably.

equally uncommon to spot such a lawyer serving as a spectator in a trial involving experienced counsel.[73] These are missed opportunities to add to your courtroom toolbox. You don't know what you don't know.

[152] I must tell you that the quality of advocacy is falling. Although there are still top-notch lawyers to be found, they are becoming fewer and the number of mediocre counsel is swelling. Counsel today are as intelligent as their predecessors, but they lack the training and experience to be effective in court. I was presiding in motions court last year when a young lawyer approached the counsel table as his case was called. He addressed the court by saying, "Hi." How can that happen?[74]

38. Trippingly on the tongue[75]

[153] Whatever your style of advocacy,[76] your manner of speech is something entirely different. "[S]peak clearly and reasonably slow. A good rule of thumb is to speak no faster than a judge can write. For the most part, speak in short sentences, using plain simple language . . . Vary the cadence of your [speech]. Vary the length of your sentences and the tone of your voice."[77] Pause often.

[154] Some of you would be horrified were you to listen to an audio reproduction of one of your oral arguments in court. I recommend that you tape some arguments in private. It would be tremendously educational.

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[73] Some time ago I presided over a messy and protracted family proceeding in which the parties started out self-represented. Halfway through the trial, the respondent retained Jeffrey Wilson. In my opinion, every family law lawyer in St. Catharines, with less than 10 years of experience at the bar, should have shuttered his or her office and logged some spectator time.

[74] I suppose it could have been worse. He might have greeted me with, "Hi, dude."

[75] "Speak the speech, I pray you, as I pronounced it to you, trippingly on the tongue . . .": William Shakespeare, *Hamlet,* act III, sc. ii, l. 1.

[76] What is your style of advocacy? If you are unable to describe it, you probably have not given much thought to the whole subject of advocacy and, therefore, you will not be conscious of your strengths and weaknesses as a litigator.

[77] *Arguing Legal Issues at Trial,* John K. Mitchell, Q.C., National Criminal Law Program, July 1998, at p. 2.

[155] Lowering your voice can be as effective as raising your voice when emphasizing a point.[78] And, sprinkle in the occasional rhetorical question.

[156] Slow down. Remember that the judge is probably taking notes.[79] Successful counsel have a measured cadence to their speech. Entice, do not annoy. And, do not become excited or emotional. Be disciplined in your deportment.

[157] The way you speak is important. Almost everyone can find room for improvement here.[80]

39. Premature termination

[158] "Annoying" is putting it too strongly, but it is *disappointing* when a lawyer jettisons an argument at the first quizzical word from the bench. Do not be too quick to abandon argument on an issue. Do not be deterred by what you perceive as a closed judicial mind. Do not confuse judicial bluntness with bias. A closed judicial mind may actually be ajar (admittedly, the distinction is subtle to spot and dangerous to flog).

[159] If you are being taken on a rough ride, it may just be the judge testing your knowledge of where you are going and how you intend to get there.

40. Educate your clients and witnesses

[160] How your client acts in court is a reflection on you. I am astounded how often it appears to me that the parties and their witnesses do not fully appreciate the nature of the proceedings and what is expected of them. Counsel should have a series of form letters that are sent to clients prior to

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[78] *Arguing Legal Issues at Trial, ibid.*

[79] Speak at the pace the judge is writing. Someone once cautioned not to speak at the pace the judge is *thinking*, as this would unduly slow the proceedings.

[80] Reading a few transcripts of your trials will allow you to identify areas for improvement. When I read transcripts in which I have spoken, I am aghast to see how often I begin a sentence with the word, "Well." I take no consolation from the fact that President Ronald Reagan was similarly afflicted, as are many television journalists and politicians. Also, I am king of the run-on sentence. I no longer read my transcripts, as it makes me ill.

out-of-court examinations, motions, case conferences, settlement conferences and trials and to witnesses in advance of trial, telling them how to dress, what to do and not do, and, generally, helpfully advising them on the proceedings.

[161] Just as the appearance and conduct of children may be a reflection on their parents, so too may the appearance and conduct of clients and witnesses reflect on their lawyer. It is counsel's responsibility to instruct his or her clients and witnesses as to proper attire[81] in court and the correct manner of addressing the court and other counsel.

[162] Also, regardless of how closely acquainted you are, never call your client by his or her first name in court. It bespeaks a level of familiarity that might bring into question your credibility as an advocate for that client. Similarly, your client should not address you in court using your given name.

III THINGS LAWYERS DO THAT IMPRESS JUDGES

[163] That which does not annoy, impresses.

IV CONCLUSION

[164] No matter how many courtroom annoyances you successfully shed, and whatever the level of skill you attain, there will be days when the burdens of litigation seem crushing. When that happens, maintain perspective; there is a reason that the Nobel Prize does not have a lawyer category. And, as I sit in Family Court, with my cup of annoyances overflowing, I promise to bear in mind that neither is there a judge category.

The Honourable Mr. Justice Joseph W. Quinn
Ontario Superior Court of Justice, February 10, 2012

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[81] I once adjourned a trial for several hours while a successful businessman (represented by counsel), dressed as if he had a 10:00 o'clock tee-time, returned home to re-visit his clothes closet.