

What Are they Thinking Up There? True Confessions from the Bench

Effective trial counsel must establish and maintain a good connection with the Bench. A strong professional reputation is key; our goal is to be recognized as capable, trustworthy and conscientious counsel. As they say, reputation is everything. But, on what is our reputation based? What do Judges consider when evaluating trial counsel? We contacted a number of Justices and asked them to identify best and worst practices among counsel. Here are the highlights:

Understand the Role of the Judge v. The Role of Counsel

In the words of the Honourable Roger T. Hughes, Judge of the Federal Court of Canada:

“A Judge wants to make the right decision, a barrister wants to persuade the Judge that his or her client’s position is the right one. It is overwhelming to know that every Judge has, as a single goal, the doing of the right thing. This means that all parties must have a full and fair opportunity to present their case. It means avoiding, whenever possible, the sidetracking of meritorious cases on grounds that are merely procedural. It means bringing the most informed version of all relevant facts to bear on the true state of the law.”¹

In achieving their goal of making the “right decision”, Judges rely on counsel as Officers of the Court to present evidence and argument in an even and direct manner.

Counsel’s First Obligation is to the Court

Many counsel forget that our primary duty is as an Officer of the Court; the client comes second.

Counsel's job is to present the facts and the law accurately. Ensure that your representations to the Court are always above reproach. Do not exaggerate or spin facts. Paraphrase at your peril; it is always preferable to take the Court directly to the evidence rather than risk misleading the Court. If there are unfavourable facts, present them and deal with them. If there is case law that is not supportive of your argument, do the same. “A judge becomes very sceptical very quickly when it is learned that counsel concealed or failed to disclose pertinent facts or legal authorities ... Sometimes you just have to take the hit. Do so openly and with dignity.”²

Remember, you are "Counsel" to your client, not "Unconditional Supporter". If your client has a bad case, it is your job to counsel them, encourage and facilitate settlement. If your client gives you instructions that are unreasonable, unfair, designed to delay, or designed to mislead opposing counsel or the Court, you must refuse to act on such instructions.

¹ “*From Bar to the Bench: A Rookie Judge’s Point of View*,” IPIC Bulletin, May/June 2006 at p.11.

² *Supra.*, at p.12.

Get Your Act Together!

Take pride and care in the preparation of your submissions. Written materials are often reviewed by the Judge in advance of the hearing. Effective and timely materials can give you a huge leg up. One judge remarked that when she was counsel, she often raced the clock to get her materials filed and, as such, skipped the step of highlighting her authorities. She now admits that it drives her crazy (as a Judge) when she receives unhighlighted authorities: “what am I supposed to take from the cases? Point me in the right direction, and I’m up to speed in advance of the hearing.”

One Judge enumerated his “top ten” pet peeves, the majority of which are in the “get your act together” category:

- (i) Lack of Preparation: lack of knowledge of the basic facts and legal principles;
- (ii) Lack of Focus: arguing 10 points when only 2 are key;
- (iii) Underestimating the time required for the Motion (often, in order to jump the queue);
- (iv) Failure to speak to opposing counsel in advance and agree on minor matters;
- (v) Frivolous motions designed to obfuscate/stall;
- (vi) Unreasonable and over-reaching costs submissions;
- (vii) Unhelpful Factums: unfocussed; poorly written; too few appropriate citations;
- (viii) Lack of organization: uncompartmentalized submissions; no introductions; no context; no succinct summaries;
- (ix) Citing numerous cases rather than the one or two most recent/meaningful;
- (x) Failure to reference case law, and/or failure to bring copies of cases to Court.

Another Judge said, “I always tell people to imagine that they are the Judge. Would you grant the relief that you are seeking based on your presentation?” Take the time to present your case simply and effectively. Make it easy for the Court to decide in your favour.

Civility and Cooperation

According to more than one Justice, “the number of counsel who come to Chambers without trying to work out a consensual arrangement first, is astounding. We are the last resort, not the first resort.” Another notes that counsel should avoid getting personal; leave the backroom bickering in the backroom.

Hear Me, Read Me

“Listen to and answer the Judge’s questions,” said one Justice. “I am the one deciding the case. If I ask you a question, it is because I think it is important. Don’t try to weasel out of it. Don’t speak over me or suggest that my question is irrelevant. Don’t try to distract me with smoke and mirrors. Answer.”

Other Judges appreciate the ability of some counsel to “read” them. “It is a pleasure when Counsel are so attentive that they know when I want them to move on without my having to speak the words.” Another said, “watch your Judge, we send important signals.”

Learn to Lose

Counsel are obliged to fight hard and fair. At the end of the Trial or Motion, there is a winner and a loser. “Sour faces or suppressed indignation are very very visible.”³ Judges remember such responses and do not hesitate to share their impressions of counsel with their colleagues.

Maureen Killoran

Osler LLP

³ *Supra.*, at p 12