

# **Advice on Advocacy for Junior Counsel Professionalism and Ethics**

How to Be a Great Litigation Junior 2019  
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# Dealing with your senior and other members of the counsel team

- Be a good teammate
- Be brave in expressing your ideas
- Learn your senior's strengths and weaknesses
- How and when to correct your senior
- How to disagree, respectfully

# How to approach the brief and add value

- Be reliable and well-prepared
- Act like an owner, not like a tourist
- Understand your role
- Treat every brief as a learning opportunity

# How to approach the brief and add value (cont.)

- Play to your strengths
  - E.g., familiarity with technology
- Don't fly blind
  - Educate yourself on the law and practice applicable to each new subject before proceeding
- Avoid thinking in silos

# How to approach the brief and add value (cont.)

- Don't be superficial
  - Make sure you really understand the issues
  - A key characteristic of good counsel is pushing deeper for the right answer
- Think forensically
- Use tools to structure your preparation
  - See e.g. Mark Jette, “Preparing for the Criminal Trial”, Georgiale Lang, “Trial Preparation: Tips, Tricks and Tactics for Winning Your Trial” and Andrew Nathanson and Sarah Kalil, “‘Argue Not Just for the Day’: The Preparation of a Civil Trial”, CLEBC, Advocacy Conference, 2010

# How to approach the brief and add value (cont.)

- Learn the specific requirements of the court or tribunal before which you are appearing
- Be a problem solver
  - “If you come to me with a problem but no solution, you are part of the problem” (Simon Grant, “Running a Litigation File: Seven Tips for Junior Lawyers”, Law Society of South Australia: July 2016)

# Oral advocacy for junior counsel

- “Be brief, be clear, be gone” (John Sopinka, “Advocacy in the top court”, The National: May 1995)
- “The key to all aspects of oral advocacy is focus” (Ian Binnie, “In Praise of Oral Advocacy”, The Advocates Society Journal, Spring 2003)
- Know your case and know your audience (Judith Kaye, “Effective Appellate Advocacy”, Practical Law The Journal: September 2013)

# Oral advocacy for junior counsel (cont.)

- Create a narrative
- Be scrupulously honest with the facts
- “Don’t drown the fish” (Thomas Cromwell, “Lessons You Don’t Have to Learn the Hard Way”, The Advocate: January 2010)

# Oral advocacy for junior counsel (cont.)

- Learn your craft
- Master the rules of evidence
  - Understand hearsay and rationale for its exclusion/admission
  - Use direct examination as tool to build believable narrative
  - Practise cross-examination on inconsistent statements
  - Practise refreshing a witness's memory
  - Conduct mock examinations

# Oral advocacy for junior counsel (cont.)

- Some useful, if academic, advice from Mr. Justice Perell (Gillian Kerr, “Judges’ Tips for Young Advocates”, 31 Advocates’ J. No. 4, 20 – 21 (Spring 2013)):

Persuasion, which is what advocacy is all about, depends on three things:

- ‘ethos,’ the advocate's success in conveying to the judge the perception that the advocate can be trusted;
- ‘logos,’ the truth and logical validity of the advocate's argument; and
- ‘pathos,’ the emotions that an advocate is able to awaken in the judge to accept the views advanced and to act in accordance with them...

# Oral advocacy for junior counsel (cont.)

... An advocate achieves 'ethos' by presenting himself or herself as prepared, precise, moderate, honest, candid, natural, and clear of thought and speech. An advocate achieves 'logos' by being an educator and teaching the judge about the merits of the case so that the judge has the information he or she needs to write a judgment that is true in fact and law. An advocate achieves 'pathos' by showing that the conclusion of the advocates' argument will do justice; the advocate needs to prepare his or her case to demonstrate not only the correctness but also the justice of the case. The keys to successful advocacy are to always keep in mind the three goals of ethos, logos and pathos.

# Professionalism and Ethics

- The ideal: develop a reputation as a helpful, well-prepared and fair advocate

# Professionalism and Ethics (cont.)

- Civility is an obligation of professional conduct and “the glue that holds the adversary system together, that keeps it from imploding” (*Groia v. Law Society of Upper Canada*, [2018] 1 S.C.R. 772, 2018 SCC 27, para. 63)
  - “A lawyer’s conduct should at all times be characterized by candour and fairness. ... A lawyer should treat adverse witnesses, litigants and counsel with fairness and courtesy ...” (BC Code, R. 2.1-2 and 2.1-3; see also R. 5.1-5 and R. 7.2-1)
  - Allegations of prosecutorial misconduct or challenges to opposing counsel’s integrity must be made in good faith and have a reasonable basis (*Groia*, para. 97)
  - In any case, civility is often the most effective form of advocacy (*Groia*, para. 76)

# Cultivate positive relationships with opposing counsel

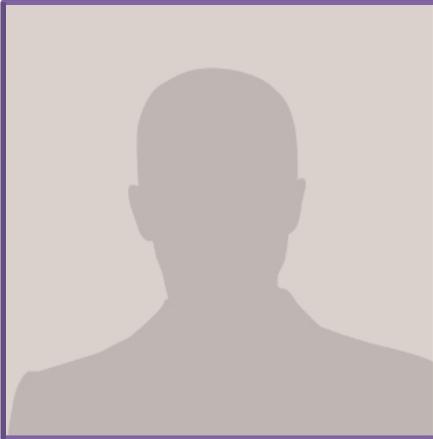
- Reach across the aisle
  - Develop respectful, cooperative relationships, including with junior counsel opposite
  - Do not make things personal
  - Refrain from commenting on irrelevant matters (personality, appearance, dress)
- Communicate and collaborate wherever possible
  - Use email appropriately and consider a phone call to resolve issues

# Cultivate positive relationships with opposing counsel (cont.)

- Avoid short term advantage in favour of playing the long game
  - Never take paltry advantage
  - Accede to reasonable requests like adjournments and scheduling accommodations that do not prejudice the rights of the client
    - BC Code, R. 2.1-4
- “Argue not just for the day but for reputation” (Antonin Scalia and Bryan Garner, *Making Your Case: The Art of Persuading Judges* (St. Paul: Thomson/West, 2008))

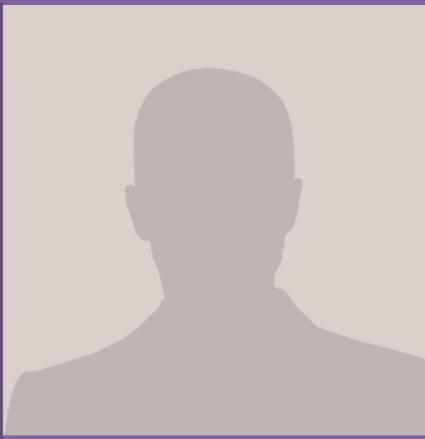
# Civility Applies Within Your Team

- Civility applies to your relationship with your senior and other colleagues
  - If your senior acts uncivilly, express your concern directly and respectfully



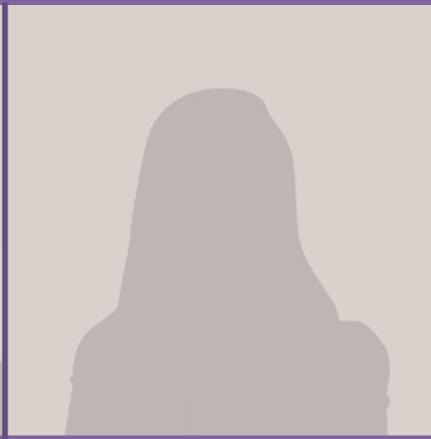
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