Remarks on Correspondence, Collegiality, and Courtesy

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I. Introduction

Language and the ability to use language to communicate effectively are fundamental elements of the lawyer’s skill set. Although sonorous oratory and a well-timed indulgence in rhetoric can occasionally make or break a trial or appeal, trials and appeals are the exception to the sort of work that makes up the bulk of the family law lawyer’s usual practice; facility with the written word is the lawyer’s true bread and butter. We use the written word to draft affidavits, arguments and agreements, all important products to be sure, but in a family law practice the largest share of our written output is made up of our day to day correspondence with colleagues and clients.

The routine nature of correspondence should not be allowed to lull you into neglect and indifference, however. As language is the lawyer’s essential skill, the lawyer’s essential attribute is reputation, and the tone and tenor of your correspondence has a direct impact on your reputation.

The lawyer’s reputation among the bench influences the court’s willingness to take the lawyer at his or her word and rely on the lawyer to honour an obligation. The lawyer’s reputation in the community has a direct impact on the quantity and quality of new work, and the client’s opinion of the lawyer has an impact on the continuation of his or her retainer. The lawyer’s reputation among the bar, however, is absolutely fundamental to success of his or her practice, and the lawyer’s competence and character are measured in large part by the lawyer’s written communication with colleagues.

This paper will discuss some practical issues arising from our written correspondence, our duties to our clients and to ourselves, and our responsibilities as professionals. It is less of a formal essay than a collection of observations from Jim, one of the silverbacks of the lower mainland family law bar, and JP, an upstart in his thirteenth year of practice, but should nevertheless prove useful for those entering practice.

II. Remarks on Style and Content

A. Courtesy and Professionalism

1. The Client

You owe a duty of respect and courtesy to your client; your client is, after all, the person who’s paying your bills. Few lawyer-client relationships are entirely free of conflict, however. We act for people at one of the most vulnerable points in their lives, in respect of the things closest to their hearts and wallets, in a context that is often adversarial and is always fraught with uncertainty. Do not allow any such conflict to creep into your correspondence. Remember that clients are the largest source of complaints about family law lawyers to the Law Society, and the complaints investigator will almost certainly be provided with any intemperate correspondence.

When responding to hostile communications from the client, do not reply in a similar vein. Instead, reply—if reply you must—in simple, direct factual statements explaining how the current circumstances came to be. Except in potentially reportable situations where you must speak to our insurer before doing anything else, accept responsibility for what fault may be yours and if a solution can be offered, offer it. Clients uniformly appreciate a blunt, rational explanation of any difficulties and will welcome your frankness in refraining from gilding the lily.

Do not speak poorly of opposing counsel in your correspondence to your client. Not only is this highly unprofessional, if your comments escape into the community, as such remarks often do, you will earn the disapprobation and distrust of not only the target of your comments but many of your colleagues.
Do not speak poorly of the court to the client following an adverse result or otherwise. You are an officer of the court and must respect the institution, publicly and in private. Litigation is inherently uncertain, and the client should be told, and frequently reminded, that no result can be guaranteed.

2. **Opposing Counsel**

You owe a duty of respect to opposing counsel and should always strive to be collegial and courteous; unless you relocate your practice, the lawyers you are working with at present are the lawyers you will be involved with throughout your career. Entirely apart from all the nice things that the *Professional Conduct Handbook* has to say on the subject, life is too short to make enemies of those with whom you will inevitably wind up working time and time again.

It is especially easy to personalize disputes in family law matters; the reasons why an issue is important to a client tend to make it important to us too. It is, however, imperative that you rise above the fray. If you do not, you will be aggravating an already tense situation and you risk compromising your judgment. You are your client’s advocate and an officer of the court, not a cobelligerent. Expressions of emotion rarely have a place in lawyers’ correspondence.

You may experience some pressure from your client to fight fire with fire and be at least as sharply-tongued in your outgoing correspondence as opposing counsel is in your incoming correspondence. This will require a conversation with the client about your professional obligations. You set the standard for your correspondence, not the client.

This said, there are times when bombast and brimstone are what the situation requires, either in the hope of modifying the behaviour of the opposing party or mollifying the outrage of the client. Needless to say, these letters should be the exception rather than the rule, but when they are necessary, call opposing counsel to warn him or her of what’s coming. With forewarning, most counsel will take your letter for what it is.

When corresponding to counsel about a fact or event, never impute motive to the opposing party and never presume to chastise the opposing party through the veil of your correspondence. This is unhelpful in the extreme and may lend the impression that you are a pompous ass.

You will find, however, that our colleagues do not universally follow this golden rule. That is their prerogative, but do not rise to the bait. If you must reply, do so in a calm and temperate manner.

3. **The Unrepresented Party**

The second largest source of complaints about family law counsel is, unsurprisingly, opposing parties. Govern yourself accordingly, and write to unrepresented parties as if you were copying the letter to your complaints investigator. Reply reasonably promptly, in a scrupulously accurate and factual manner, and without rancour, hostility or exclamation marks.

Although you cannot offer legal advice to the opposing party, explaining court processes, such as judicial case conferences or the deadlines for bringing an application in chambers, may help to: minimize unnecessary adjournments; improve the likelihood of the party’s compliance with the rules; and, defuse some of the hostility that comes from anxiety and uncertainty. In providing this information, however, you must be factually accurate in your descriptions and ensure that nothing in your correspondence could be construed as bending the truth to your client’s advantage. Consider providing links to neutral information available online, such as the courts’ websites or the website of the Queen’s Printer.

4. **The Court**

Correspondence to the court should be factual, courteous, devoid of argument and maximally concise.
B. Write for the Audience

1. The Client

Letters to the client are primarily written to obtain instructions, information and documentation, confirm instructions and dates, and provide information. The lawyer-client relationship is a professional relationship and demands a concomitant degree of formality; humour and salty language should be reserved for oral communication. Remember that if matters go awry, your correspondence forms a part of the record that may be considered on a complaint to the Law Society or claim in negligence.

Letters to the client should be written to the client’s degree of sophistication and fluency. This will at times require adjustment to your choice of language and extra effort explaining legal concepts; there is little point in writing to the client to obtain or confirm instructions if your client doesn’t understand the letter. Such letters should always invite the client’s questions, comments and concerns.

2. Opposing Counsel

The intended audience of letters to opposing counsel is often not counsel but his or her client. This is particularly the case when writing to propose compromise, settlement or the use of dispute resolution processes other than court. If the handicap of the letter’s origin is to be overcome, these letters should be written to persuade not with the use of rhetoric and appeals to sentiment but factual analysis and objective reasoning; your task is to convince the opposing party that your proposal is rational, and this may be at odds with the party’s previous experience of your client.

Letters written to opposing counsel intended for opposing counsel should be brief, business-like and to the point, they should be purposeful and professional. These letters are functional and purpose-driven. Brevity will sharpen the purpose of your letter and help crystallize the issues you seek to address. Letters more than a page long should only be written for good reasons; length risks the dilution and obfuscation of the points you are trying to make. Since you are writing to counsel, but bearing in mind that the client will also want to read your letter, you are free to indulge in such legal shorthand as the situation warrants.

Where your letter is likely to spark a prolonged series of correspondence, as is often the case with offers to settle, make a point of numbering your paragraphs and consider using headings to divide the content by subject matter.

3. The Unrepresented Party

Unrepresented parties should be communicated with in writing to the extent possible; the printed word should be your preferred if not exclusive medium. The written record of your remarks is your first and best defence against the unlikely possibility that you will be misquoted, whether to the court or to the Law Society.

Letters to unrepresented parties are sent for all manner of purposes but are primarily sent to obtain or provide disclosure, arrange hearing and conference dates, and record agreements including agreements on administrative matters. They must be written in language the party is certain to understand, and where there is uncertainty as to the party’s probable comprehension, legal advice should be recommended.

The unrepresented party is likely to be distrustful and suspicious of your motives, and you must be correspondingly vigilant against the possibility of misinterpretation and minimize your use of adjectives and adverbs as much as possible. Given that you are writing to someone with an inevitably divergent view of reality than your client, consider depersonalizing statements of facts and events by prefacing them with language such as "I am advised that ....," "I understand that ...." or "my client tells me that ...."
4. **The Court**

Letters to the Supreme Court on a proceeding are addressed to the manager of Supreme Court scheduling even where the intended audience is a specific judge or master. Be concise and to the point.

C. **Grammar Errors and Spelling Errors**

Nothing undermines one’s impression of a lawyer quite like typographic mistakes. Our clients pay us sums most would think of as exorbitant and an appropriately professional attention to detail is expected. Grammar and spelling errors give the impression of haste and carelessness, and provoke the inference that sloppiness is a hallmark of the lawyer’s work generally. They also give the opposing party the much-relished opportunity to deride you to your client: “Your lawyer doesn’t know the difference between preemptory and peremptory! What a buffoon!”

Here is some particularly valuable advice: the red squiggly line beneath a word is your word processing program’s way of alerting you to a spelling error. Although the red line isn’t always right, it pays to pay attention when it pops up. The squiggly green line means one of two things, that your syntax is more sophisticated than your word processor is built to handle or that you’ve made a grammar error. Although the green line is correct less often than the red line, it is nevertheless also a helpful tool. If you never see the red line or the green line, make sure that your spell-check function is not disabled.

Minimizing the opportunity for typographic errors is, incidentally, another powerful argument for brevity in one’s correspondence: the more verbose your disquisition, the more opportunity you have to screw it up.

D. **Style and Layout**

Issues about style and layout are kith and kin to issues about spelling and grammar. You are a professional and your correspondence should look professional. This is not to suggest that you should run out and hire a graphic designer, however a letter should employ the same font, type size, line spacing and justification throughout, and just as you should never use novelty fonts, you must also never use Courier or any of the other equally wretched monospaced fonts.

E. **Mandatory Content, Helpful Content, and Content to Avoid**

1. **The Client**

Section 9 of the *Divorce Act* requires counsel to point out the act’s provisions for reconciliation, discuss the possibility of reconciliation and canvas the possibility of negotiation and mediation as a means of resolving disputes related to children and support. Sections 8 and 197 of the *Family Law Act* will impose additional duties. All can be efficiently addressed in a standard form client letter, and may even be dispensed with through your retainer letter.

Other subjects amenable to form letters include: explanations of the JCC and FCC processes, proceedings at examinations for discovery and the effect of divorce on wills and estates matters; instructions for securing the equalization of Canada Pension Plan credits; and, requests for the client’s documents and execution of authorizations and releases.

2. **Opposing Counsel**

You may wish to refrain from marking your correspondence as having been copied to client. There are two reasons for this caution. First, what you provide to your client is a matter privileged to the
solicitor-client relationship and none of anyone else's business. Second, whether you've actually copied the letter to the client or not, it helps to protect the letter from being put to the client in cross-examination. “You’ve read this letter sent by your lawyer, haven’t you?”

3. The Unrepresented Party

The Professional Conduct Handbook requires that you advise your client and an unrepresented party that you are not protecting the unrepresented party’s interests; do so in your first letter to the unrepresented party. The Lawyers’ Insurance Fund and the Law Society recommend that you also state that: you are the lawyer for your client; you are unable to provide legal advice to the opposing party; and, the opposing party should obtain legal advice if not actual legal representation.

Depending on the circumstances, it may be prudent to occasionally repeat your suggestion that the party obtain legal advice in subsequent correspondence.

4. The Court

Always copy correspondence to the court to opposing counsel and any unrepresented opposing parties, and be obvious about who has been copied with your letter. PD-27 requires that counsel or parties should consult with each other before writing to the court and that correspondence set out the opposing party’s views if different from those of the writer.

III. Email

A. Email is Just like Ordinary Mail, but Faster and More Dangerous

The speed of email has resulted in at least three negative consequences for the family law lawyer: it has encouraged people to believe they will have a reply from us within the day, if not the hour; it has encouraged an informality which is at times inappropriate; and, the rapidity of reply robs us of the opportunity for sober second thoughts offered by the useful pause between the dictation of a letter and its availability for review.

Client expectations about the speed of your reply can be adjusted at the outset of the retainer by a simple warning about how busy you are and a caution that it may take you a day or two to reply. You may wish to make a point of not replying to client emails right away even when you can reply right away.

You must discipline yourself against an undue degree of informality when communicating with opposing counsel about a file. Some degree of informality is almost inevitable, but consider two things: the impression your client would draw from reading your email; and, the impression the court would draw if it were attached to an affidavit. At a minimum, write to opposing counsel presuming that his or her client will be copied on your correspondence.

Refrain from discussing more than one file in each email. You are obliged to protect the confidentiality of your clients and you should expect opposing counsel will want to do the same.

The speed and ease with which email is sent encourages a corresponding haste on the part of the writer. Most of our routine correspondence requires no special scrutiny, however we are particularly prone to sending imprudent emails when frustrated, stressed or angry; be alert to your emotional state, and consider shutting your email program down for the day when you realize that you are annoyed or angry. If you cannot down tools for some reason, at least delay hitting the send button for a few hours; all email programs, including web-based services like Hotmail and Gmail, have a draft option that will let you save unsent emails.
Haste should also be avoided when writing on a sensitive subject or issuing a settlement proposal. Take your time with such emails and make a point of reading through the entire email at least once before sending.

**B. Copying, Blind Copying, and Forwarding**

It will rarely be necessary to copy anyone other than the recipient on an email. Emails to the client are protected by solicitor-client confidentiality and are for your client alone. Emails to opposing counsel or an unrepresented party should not include your client as a recipient; either forward the sent email to the client for his or her records or blind copy the client on the email. However, emails to the court, to joint experts, to mediators and arbitrators, and to other persons with a mutual engagement on a file should be copied to opposing counsel.

Pay attention to who has been copied on an email; this may influence the content and tone of your reply. Be especially alert to the difference between "reply" and "reply-all." Much embarrassment has been caused by the inadvertent reply-all.

The ease with which email can be forwarded is yet another curse of the medium. This is both another reminder of the importance of maintaining a certain dignity and gravitas in one's communications and a warning of the potential for breaches of confidentiality. The client should be cautioned, perhaps in the lawyer’s retainer letter, against forwarding any of your emails to the opposing party, and you must never forward your client’s emails to anyone outside your office. If you simply must use something from a client’s email, cut-and-paste the relevant portion into your own email without an attribution of authorship.

**C. Helpful Content**

In the good old days, mail would occasionally be lost. Although “lost in the mail” has a the-dog-ate-my-homework quality to it, it actually happens from time to time. Email is a surprisingly more vulnerable communications medium. Your email server may be down for reasons beyond your control; incoming email may be intercepted by your server’s spam filter or by your email program’s spam filter; or, the sender may have gotten your email address wrong.

The point here is that lots of things can go wrong with email, including errors of which you are unaware. As a result, you may wish to refrain from providing an email address for service.

Email signatures are an excellent way to address these and other problems. The footer to JP’s email says this:

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IMPORTANT NOTICE: We do not accept ordinary service by email. Ordinary service may be
effected by post, courier or fax.

WARNING: Occasionally, our spam settings and service provider automatically eliminate
legitimate emails. If your email contains important instructions or information, please
ensure that we acknowledge receipt of your email and/or instructions.
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**IV. Demands and Settlement Proposals**

**A. Time Limits**

Refrain from setting pointless and arbitrary time limits in your correspondence; such deadlines merely invite disdain and disregard. Although you may not have the same confidence when dealing with an unrepresented litigant, you should expect opposing counsel to attend to a matter with reasonable alacrity, subject to the occasional need for a collegial reminder.
Unless there is a good reason to demand documents, a reply or performance by a specific date, don’t. The only time limits that matter are those prescribed by the rules of court.

B. Disclosure

Many lay persons find the basic disclosure requirements of the litigation process to be uncomfortably and unfairly broad; many do not appreciate their obligation to make production of all documents relevant to a matter at issue, especially those unhelpful to their own case, or see it as the lawyer’s job to ferret everything out.

It can be helpful to point the party toward the sections of the rules and Child Support Guidelines that set out the minimum disclosure requirements when financial matters are at issue, or even reproduce those provisions in the lawyer’s letter. When referring to legislation or regulation, provide a link to where these materials can be found online.

C. Proposals to Compromise or Settle

Some lawyers prefer to handle offers to settle as either a stand-alone document along the lines of a memorandum, others prefer to state the terms of the proposed compromise as a letter. Regardless of the method chosen, the offer must be stated in such a way that the terms of the proposal are sufficiently complete and clear so as to bind the party making the offer; correspondence between counsel may be used to demonstrate settlement when a party later seeks to resile from a deal.

From a drafting perspective, it can be helpful to lay out the separate terms of a settlement proposal in such a way as will facilitate protracted discussion and counter-offers; numbering each paragraph will usually suffice.

Where a case is likely to proceed to trial, remember to conclude your letter with the language required by SCFR 11-1(1)(c)(iii):

The [claimant/respondent] reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding.

D. Letters Written “Without Prejudice” and “With Prejudice”

The phrase “without prejudice” is used far too frequently and too often inappropriately.

“Without prejudice” means that the content of a letter is being transmitted with the intention that it cannot be used to the detriment of the client’s position by being introduced in evidence. However, the phrase only operates to protect letters proposing or replying to a compromise of the client’s position from use in evidence, and even then may only serve to protect the portions of a letter making or replying to a settlement proposal.

To be completely clear: marking a letter “without prejudice” is ineffective to shield a churlish threat, a statement of facts or a relevant document.

The injudicious use of “without prejudice,” particularly when the correspondence sought to be protected from production does not contain a proposal of compromise, reflects poorly on counsel and lends the impression of insincerity and an unwillingness to commit to a position on a matter.

Although it is entirely proper to protect a legitimate settlement proposal by marking the letter “without prejudice,” it is not necessary to do so and you may wish to refrain from deploying the phrase unless the proposal represents a genuinely improvident compromise of the client’s position that you would not want broadcast, as might be the case where:
(a) a cash settlement is offered to placate a party bringing a meretricious claim, in the expectation that payment of the lump sum will be less costly than payment of the legal fees required to defend the case; or

(b) the proposal goes further than counsel’s estimate of the outer range of probable results at trial.

Absent circumstances like these, declining to mark a settlement proposal “without prejudice” emphasizes the client’s willingness to be bound by the offer and the sincerity of counsel’s belief that the proposal is fair and reasonable.

The phrase “with prejudice” is meaningless nonsense and adds nothing to your correspondence but a marginally diminished albedo.

V. Management Issues

A. Managing Incoming Correspondence

Some lawyers give the impression that they have just one file, the one they’re writing to you about. These lawyers generate a tremendous volume of correspondence and will send four or more letters on the same file on the same day.

Other lawyers write as if you are responsible for the misfortune befalling their clients or somehow control your client’s conduct. These lawyers write horrible letters, filled with vitriol and improper insinuations about your conduct and professionalism. Still other lawyers use italics, underlining, bold and all-caps, sometimes in combination, to emphasize the importance or irrefutability of a particular point. These letters tend to be angry and combative and can be taxing to read as a result.

These lawyers are generally not well liked.

No matter how provocative and bestial the correspondence you receive may be, you must never reply in kind; bite your tongue and rise above the fray. It can be difficult to refrain from the barrage of righteous criticism that you may wish to level, but engaging with the persons who author of this sort of correspondence only encourages them and risks an unwelcome escalation. Instead, post a copy on the fridge in the lunchroom.

For the lawyers with just the one file, you might consider allocating a specific time slot, perhaps once a week, which you will devote to addressing the correspondence accumulating thus far. When using this approach, send a letter saying so. “I will reply to your correspondence once each week unless a matter of genuine urgency arises. In the event you find it more efficient to consolidate your commentary in fewer letters, I invite you to consider so doing.”

For counsel prone to personal attacks, reply to only those issues of actual substance, but let the lawyer know that you don’t intend to get down into the gutter with him or her. “I write to address the legal issues raised in your recent letter; I do not, and will not in the future, respond to your ad hominem polemics.”

Be creative in dealing with unpleasant and obstreperous counsel like this. You do not need to address every point in every letter; you do not need to answer every letter; you can control the manner and content of the dialogue.

B. When to Put Down the Pen and Pick Up the Phone

Although a certain degree of conflict between counsel is at times unavoidable, it can happen that the conflict escalates to a point where it threatens to affect the efficient carriage of a file. To distance ourselves from conflict, we naturally retreat from face to face communication to communication by
telephone, and from the telephone to written communication. Where counsel have gotten off to a bad start, their conflict will migrate with this withdrawal, and without the mediating influence of personal contact, conflict can escalate unchecked.

It can be difficult and at times extremely difficult, but when you begin to sense that things are going off the rails, it may be time to put your Dictaphone down and try to re-engage counsel by picking up the phone and addressing the problem. “Look, it seems to me that we’re having an unusual amount of difficulty communicating, and I’m worried that the conflict between our clients is beginning to affect how we’re managing this file, and I want to apologize for my part in that.” Not all lawyers will hear what you’re trying to say, but a failed effort costs you nothing. If you can restore the objectivity of the professional relationship and get a file back on track, you will have done your client a tremendous service and will have improved the quality of your practice.

VI. Comprehensive Checklist

☐ Would it embarrass me or my client for this correspondence to be attached as an exhibit to an affidavit?