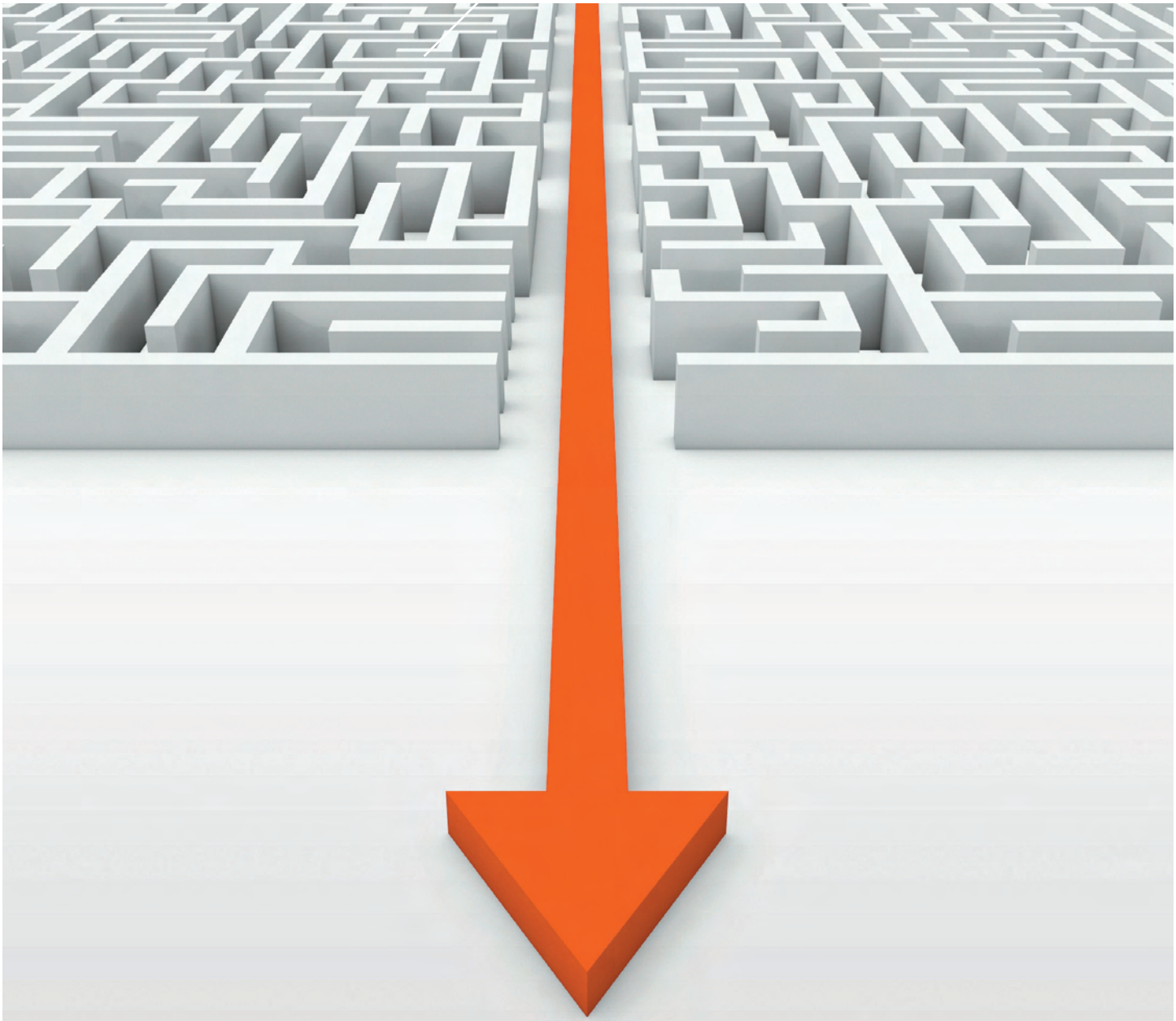

GUIDE TO BEST PRACTICES

Barreau du Québec

OUR MISSION

To ensure the protection of the public, the Québec Bar seeks to forge bonds of trust between lawyers, governments and the public. In pursuit of that goal, the Québec Bar oversees professional legal practice, supports member practitioners, fosters a sense of belonging within the membership and promotes the rule of law.

Guide to Best Practices
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/// GUIDE TO BEST PRACTICES

FOREWORD

The practice of law is based on an impressive body of rules, and the way they are used can make a difference. To facilitate access to the courts and reduce costs, it is essential to maintain a proper balance between procedural means and the issues in dispute. This *Guide to Best Practices* contains advice of a substantive and technical nature, precisely for the purpose of reaching this objective.

As the practice of law changes over time, this *Guide* will be revised every year and members of the Bar are invited to submit their comments and suggestions at information@barreau.qc.ca. The *Guide to Best Practices* is available both in English and French on the Barreau du Québec's website.

This *Guide* was produced on the initiative of Nicolas Plourde, who was the Bar of Montreal's Bâtonnier at the time. It was published in September 2010 and revised in September 2011. The Barreau du Québec considers its teachings to be of interest to its members and has decided to adopt it, with the kind authorization of the Bar of Montreal.

We wish to thank the representatives of the judiciary of the Court of Appeal, the Superior Court and the Court of Quebec for their comments and suggestions, as well as Lysanne Pariseau-Legault for her special contribution to the Appeal section.

We also want to express our thanks to the members of the Barreau du Québec who took part in producing this Guide and its update: Gerald N. Apostolatos, Nathalie Bédard, Martin Bernard, Julie A. Blondin, Christian J. Brossard, Jean-Guy Campeau, Nathalie Chalifour, Sylvie Champagne, Carla Chamass, Marc Charbonneau, Robert-Jean Chénier, Guylaine Duplessis, Denis Ferland, Suzanne Gagné, Ad. E., Réal Goulet, Elizabeth Greene, Patrice F. Guay, Nathalie Guertin, Patrick C. Henry, Bruce W. Johnston, Christine Kark, Henri Kélada, Marie-Christine Kirouack, Bernard Larocque, Doris Larrivée, Catherine Pilon, Roxane Préfontaine, Neil Stein, Martine L. Tremblay, Dominique Vézina and Mario Welsh.

Jean-François Michaud

PREAMBLE

The *Guide to Best Practices* is intended as a tool for lawyers to assist them in advising clients faced with a legal dispute. It contains teachings that have one single objective: to help lawyers efficiently manage their files, whether or not before the courts, in the interest of their clients and the administration of justice. The *Guide* is therefore designed to allow for better conduct of files, by promoting cooperation between lawyers and thereby helping to reduce costs and improve access to justice.

Lawyers will appreciate the numerous references contained in the *Guide* and the fact that it draws attention to the particularities of certain districts with regard to case management.

The *Guide* is educationally oriented and is taught at École du Barreau, so that future lawyers are made aware of these best practices and the philosophy that inspires them.

The *Guide* isn't meant to create new obligations not provided for by the law, nor does it replace the rules of the *Code of Civil Procedure* or the rules of practice. Nor is it a codification of rules of ethics. For their relations between colleagues, the courts and clients, members of the Bar are encouraged to consult the Bar of Montreal's *Guide of Professional Courtesy*.[1]

[1] Guide of Professional Courtesy of The Bar of Montreal, online:
www.barreaudemontreal.qc.ca/loads/Guides/GuideCourtoisieProfessionnelle_an.pdf

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THEORY OF THE CASE[2]

When accepting a mandate, whether litigious or not, lawyers' duty of competence and the duty to advise[3] require them to develop a theory of the case for the file. This is the starting point for the proper conduct of any file and this is what will guide the court in the administration of justice.[4]

And so a file is properly prepared when it is clear, complete, well documented and, above all, when it can be easily reviewed by a colleague who is not familiar with the facts and issues involved. The theory of the case is essentially an **open-ended work process aimed at developing the legal reasoning in support of the case**. It consists of determining the legal framework for the case, the relevance of the facts and the evidence, anticipating the opposing party's strategy and assessing the evidence as a whole.

Moreover, this operation must be repeated throughout the process, as the case proceeds (even before meeting the opposing party's lawyer, for example, or before asserting any claim before the court).

The lawyer must also quickly consider the possibility that other authorities may serve as better forums for efficiently resolving the dispute, such as judicial or quasi-judicial bodies, whether of a contractual nature or otherwise.

Lawyers must make sure that they are familiar with the particular rules applicable to the various authorities.

At this step, lawyers must check whether their client has any insurance coverage.

THE MANDATE WITH THE CLIENT

To avoid any misunderstanding, it is essential that lawyers—before accepting a mandate and obtaining any confidential information from the person consulting them—make sure that there is no conflict of interests with any of the parties that may be involved in the case.

This will avoid needless payment of the costs of withdrawing from a file or having the lawyer and the lawyer's legal firm be obliged to withdraw from a file in which they are already involved, due to privileged information that the lawyer may have obtained.

Once this step has been completed, it is recommended that an agreement be reached with the client at the very start of the professional relationship, concerning the scope of the mandate to be performed and the resulting billing. As for the scope of the mandate, it should be noted that there is a new trend settling in here in Québec and called limited scope representation (also known as "unbundling of legal services" in English and "*services à la carte*" in French), The members of the Bar are encouraged to consult the Lawyer's *Guide to Limited Scope Representation* in this regard.[5] The client must be provided with all useful information on the nature of the professional services and the related financial terms and conditions.[6]

It is therefore in the lawyer's interest to opt for a written fee agreement that accurately describes the object of the mandate and to give preference to written communication over any verbal exchanges. If the mandate is changed while under way, or if a new mandate is given, it would be advisable for the lawyer to draw up a new mandate in writing in order to be sure of the client's expectations.

[2] Monique Dupuis, « L'élaboration de la théorie d'une cause », in Collection des habiletés 2006-2007, École du Barreau du Québec, *Théorie d'une cause* (Montréal, École du Barreau du Québec, 2006) p. 5. This is a working method developed and taught exclusively at École du Barreau du Québec.

[3] *Code of ethics of advocates*, R.R.Q. 1981, c. B-1, r.1, s. 3.00.01 [hereinafter, "*Code of ethics of advocates*"].

[4] C.C.P., art. 4.2; *Wightman c. Widdrington (Succession de)*, 2007 QCCA 440 (CanLII); *St-Adolphe-d'Howard (Municipalité de) c. Chalets St-Adolphe inc.*, 2007 QCCA 1421 (CanLII).

[5] **www.barreaudemontreal.qc.ca/loads/Guides/GuideMandatPorteeLimitee_an.pdf.**

[6] *Code of ethics of advocates*, s. 3.08.04.

The following points should always be confirmed in writing:[7]

- What steps are to be taken
- The possibility that urgent steps may be necessary
- The instructions received
- Any change or update in the instructions received
- All legal opinions and recommendations
- All offers of settlement received from the opposing party
- All important decisions made in the file
- The client's refusal to follow advice
- The end of the mandate

The fee agreement should be adapted to the nature of the mandate and the lawyer must consider the availability of legal insurance. The terms and conditions planned for carrying out the mandate and the methods of compensation must at no time negatively influence the lawyer's proper handling of the file.

Several models of fee agreements and retainer letters have been developed by the Canadian Bar Association as well as by the Barreau du Québec's professional inspection department.[8]

THE LAWYER'S ROLE

In aiding their clients, lawyers must be careful not to wind up being a witness to potential proceedings. Lawyers should therefore avoid directly gathering evidence and leave this task to their clients or experts.

SENDING A FORMAL DEMAND[9]

To avoid unnecessary litigation concerning a dispute, it is advisable to draft formal demand letters in such a way that opens the door to dialogue and the exchange of information. The demand letter should:

- Accurately describe the facts underlying the claim, the reasons supporting the claim of liability and the details of the claim.
- Include all supporting documents.
- Invite the other party to a meeting to encourage the exchange of information, where appropriate.
- Open the door to a joint expert witness, where appropriate.

If no agreement is reached, the response should:

- Accurately explain the reasons for the author's position, both on the issues of liability and quantum.
- Include all relevant information.
- Suggest dates and places for meetings in order to encourage the exchange of information, ensure efficient progression of future proceedings and perhaps even help reach a settlement.
- Respond to the offer to use a joint expert witness, where appropriate.

At subsequent meetings, subject to applicable prescriptive period(s), depending on the nature of the dispute, the parties may provide for a time frame for the exchange of additional information, for joint expert testimony to be given and the possibility of negotiating a settlement of the dispute.

And so if the negotiations fail, the parties are in a better position to understand the issues on which they disagree. This should enable the parties to ensure that any legal proceedings that may be instituted comply with the rule of proportionality set out in the *Code of Civil Procedure*.

[7] Professional Liability Insurance Fund of the Barreau du Québec, *PREVENTIO*, September 2008, Self-assessment questionnaire to evaluate customer service, online: **www.assurance-barreau.com/en/pdf/auto-evaluation.pdf.**

[8] The Canadian Bar Association and the Barreau du Québec have created various documents available online at **www.cba.org/ABC/groups_f/conflicts/toolkit2.aspx** and at **www.barreau.qc.ca/pdf/formulaires/avocats/comptabilite/modeles/convention_honoraires_fr.pdf** (in French only).

[9] This section is inspired by pre-action protocols in force in England. To learn more about this topic, see: Guy Gagnon, *"The 'Pre-Action Protocol', Is It Part of the Solution? Reflection on civil procedure"*, March 2009, online: **www.tribunaux.qc.ca/mjq_en/c-quebec/Communiques/Pre_Action_Protocol_Anglais.pdf**; Guy Gagnon, «Développements récents et tendances nouvelles en procédure civile», in Développements récents, vol. 320, *Développements récents et tendances en procédure civile (2010)* (Montréal, Barreau du Québec, 2010), online: **www.caij.qc.ca/doctrine/developpements_recents/320/1747/index.html** (in French only).

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USE OF MEDIATION

It is not necessary to wait until legal proceedings have been instituted and significant costs incurred before considering mediation. There are numerous advantages to submitting a case to a mediator[10] before legal proceedings are instituted:

- Unlike proceedings instituted before the courts, except where a transaction is sanctioned by the court, the file remains completely confidential.
- The parties will be more amenable to maintaining a civil relationship once the problem is resolved—a very important consideration when disputes arise between relatives, neighbours or companies carrying on a business relationship.
- Disputes are often settled more quickly.
- While the cost of the mediator is borne by the parties,[11] this option is generally less costly than a judicial process.

PROPORTIONALITY

When advising a client, a lawyer must take into account the financial realities and the costs associated with the various available options. It will obviously be up to the client to choose the option that best suits his expectations.

PRE-ACTION PROTOCOL

The purpose of a pre-action protocol is to provide the parties with an opportunity to settle the dispute between them without it being necessary to initiate legal proceedings or, if that can't be avoided, to prepare good case management.

The purpose of a pre-action protocol is to encourage the parties to exchange information on their dispute in a sufficiently detailed manner so that they can clearly understand the respective position of each one and reach an informed decision in order to resolve the dispute or consider alternate methods, thereby avoiding the initiation of legal proceedings.

In other jurisdictions, pre-action protocols have been established in certain specific fields, such as in construction and engineering disputes, professional liability following health care services, claims of bodily harm, defamation, hidden defects, etc. These protocols set forth the principles that ought to guide parties as well as a process to facilitate and speed up the exchange of relevant information.

The pre-action protocol aims at promoting a culture with less conflict and geared more toward cooperation between the parties in order to reach a fast settlement of the dispute at a cost that is in proportion to the issues at hand.

PRESERVATION OF EVIDENCE

Although there are certain laws governing the obligation to preserve documents, there are no provisions in this regard in the *Code of Civil Procedure*. Lawyers should nevertheless inform their clients that the notion of good faith demands that evidence that might be useful to a dispute be preserved.[12]

[10] The list of mediators certified by the Barreau du Québec is available by practice area at **www.barreau.qc.ca/public/trouver/mediateur/**.

[11] Note that since 1997, family mediation is free, in whole or in part, for couples with children, regardless of their income, through a Family Mediation Service of the Superior Court. For more information, see: Simon Descoteaux, "La médiation familiale" in Collection de droit 2010-2011, École du Barreau du Québec, Vol. 3, *Personnes, famille et successions* (Montréal, Barreau du Québec, 2010), online: **www.caij.qc.ca/doctrine/collection_de_droit/2011/3/ii/2173/index.html** (in French only).

[12] *Jacques* c. *Ultramar ltée*, 2011 QCCS 6020; on electronic evidence, see Sedona principles (**www.thesedonaconference.org/publications**).

II / JUDICIAL PHASE

II / JUDICIAL PHASE

THE MANDATE WITH THE CLIENT

The recommendations in the Mandate With the Client section, within the Pre-judicial Phase, remain relevant all throughout the judicial phase.

However, in light of the developments within the pre-judicial phase, it is recommended that the lawyer keep in touch with the client, on a regular basis, with regard to the following aspects:

- the various judicial steps in the recourse taken or to be taken
- the costs related to each of the steps
- all factors likely to influence, complicate or extend the proceedings, and particularly considering the attitude of the opposing party.

It is also important to adapt the strategy and theory of the case according to the developments all throughout the judicial phase and to communicate with the client in order to adapt the mandate, if need be.

It is also recommended that the terms of the mandate be renegotiated after each of the proceedings (first instance, appeal and appeal to the Supreme Court of Canada).

Lawyers should also draw up and share the theory of the case with their clients from the time of their very first meetings, as they may be required to disclose the general thrust of the theory of the case at a number of stages in the dispute, and in particular:

- from the time of appearance in court in certain districts where special case management is the rule
- from the time of the presentation of the motion to institute proceedings, in most districts
- within the case management sessions or case conferences
- at the time of preparing a plea plan within the hearing

Defendants' lawyers will have to take into consideration that they will have less time than the plaintiffs' lawyers to acquaint themselves with the facts and analyse them before having to take a stand. This will have a significant impact on the definition of the mandate, and any changes that may be made thereto, over time, if the lawyer decides to accept it. Clients should be quickly informed of the lawyer's refusal to accept a mandate so that they can resort to other solutions, if need be.

THE JUDICIAL FRAMEWORK

The judicial districts don't always offer the same services and it is therefore in the lawyer's interest to inquire about the specific services in the various districts by consulting the website of the Barreau de Longueuil (www.barreaudelongueuil.qc.ca/outils), for example.

As for the different operating rules in certain districts, these may be found on the Court of Québec's website (www.tribunaux.qc.ca/c-quebec/fs_regles_reglements.html).

Nevertheless, it is preferable to check with the court clerk of the district concerned, with regard to the rules applicable to the various courts.

At all steps in legal proceedings, the statement of principle regarding work-family balance (Déclaration de principe - Conciliation travail-famille) must be considered.[13]

[13] **www.barreau.qc.ca/pdf/medias/positions/2010/20100331-travail-famille.pdf** (in French only).

THE PRINCIPLE OF PROPORTIONALITY

Proportionality is a codified principle (art. 4.2 C.C.P.) whose purpose is to seek and maintain a balance between the various issues involved in the litigation and the clients' resources. The recourse to the judicial process must respect the principles of good faith and not give rise to any abuse of the courts. This rule also applies to motions for leave to appeal.[14] This principle of proportionality serves as a guide in relation to the conduct of proceedings and case management.[15]

From now on, articles 4.1 and 4.2 C.C.P. must therefore be read in conjunction with articles 54.1 et seq. of the C.C.P.,[16] which allow the court, on request or on its own initiative, to declare that an action or proceeding is improper and to impose a sanction[17] or condition upon the party concerned which may have severe consequences for the party.[18]

The Supreme Court of Canada has confirmed that the principle of proportionality is not a mere interpretative rule and has established it as a source of power for the courts, allowing them to intervene in the conduct of the proceedings.[19] The Court of Appeal and the Superior Court are relying on it more and more frequently. For example, they have invoked this principle to:

- refuse disproportionate requests for undertakings[20]
- refuse the communication of tens of thousands of invoices to cross-check an allegation made in the defence[21]
- refuse the examination after defence of the plaintiff's former representative[22]
- determine the security for costs, after the court found that joint expert testimony for the defendants would reduce the costs[23]
- invite the trial judge to impose a reasonable limit on additional evidence to be adduced at the trial[24]
- decide whether it was appropriate to carry out a medical examination and the conditions for doing so[25]
- refuse to sever the cross-demand from the main action[26]
- refuse to sever the action in warranty from the main action[27]
- deny a motion for leave to appeal[28]

[14] *Société en commandite Les bois de Pierrefonds c. Domaine de parc Cloverdale*, 2007 QCCA 292 (CanLII).

[15] *Telus Mobilité c. Comtois*, 2012 QCCA 170.

[16] *Acadia Subaru c. Michaud*, 2011 QCCA 1037 (CanLII); *Préfontaine c. Lefebvre*, 2011 QCCA 196 (CanLII); *Walker Nappert (Succession de)*, 2009 QCCS 4784 (CanLII): *« [70] Le tribunal note que le législateur, à l'article 54.1 C.C.P., édicte que l'abus peut résulter d'une demande justice ou d'un acte de procédure manifestement mal fondé ou même frivole ou dilatoire ou d'un comportement vexatoire ou en quérulent. Le législateur mentionne également que l'abus peut aussi résulter de la mauvaise foi, de l'utilisation de la procédure de manière excessive ou déraisonnable ou de manière à nuire à autrui.[…] Or, les termes utilisés par le législateur à l'article 54.1 sont identiques à ceux qu'il utilise à l'article 4.1 C.C.P. qui prévoit que les parties sont tenues de ne pas agir en vue de nuire à autrui ou d'une manière excessive ou déraisonnable allant ainsi à l'encontre des exigences de la bonne foi »*; *Nissan Perla c. 6715826 Canada inc.*, 2009 QCCS 3891 (CanLII).

[17] *Tannenbaum c. Lazare*, 2009 QCCS 5072 (CanLII) (under appeal); *Structure Laferté inc. c. Cosoltec inc.*, 2009 QCCS 3326 (CanLII) (leave to appeal to C.A. granted, 500-09-019868-090); *Walker Nappert (Succession de)*, 2009 QCCS 4784 (CanLII); *Droit de la famille — 092794*, 2009 QCCS 5237 (CanLII); *Bernard c. Desrochers*, 2009 QCCS 5535 (CanLII).

[18] *Nissan Perla c. 6715826 Canada inc.*, 2009 QCCS 3891 (CanLII).

[19] *Marcotte c. Longueuil (Ville de), 2009 SCC 43, [2009] 3 S.C.R. 65.*

[20] *Geysens c. Gonder*, 2010 QCCA 2301.

[21] *Aviva, compagnie d'assurances du Canada c. René Poisson inc.*, 2010 QCCA 246.

[22] *Ali Excavation inc. c. Construction De Castel inc.*, 2011 QCCS 1093.

[23] *Smith c. Bélanger*, 2009 QCCS 4272 (CanLII).

[24] *Wightman c. Widdrington (Succession de)*, 2007 QCCA 440 (CanLII).

[25] *Compagnie d'assurance Standard Life du Canada c. Beaudry*, 2009 QCCA 1174.

[26] *Cosoltec inc. c. Structure Laferté inc.*, 2010 QCCA 1600.

[27] *Préfontaine c. Lefebvre*, 2011 QCCA 196.

[28] *Société en commandite Les bois de Pierrefonds c. Domaine de parc Cloverdale*, 2007 QCCA 292.

DRAFTING A PROCEEDING

A written proceeding that is excessively long and detailed unnecessarily complicates the judicial proceedings, lengthens the hearings and increases the costs of the proceedings, in addition to forcing the parties to spend too much time on responding. Only what is relevant should therefore be alleged, and "writing a novel" or using inappropriate words that only add fuel to the fire of the dispute are to be avoided.[29]

It is always advisable to consult the guidelines on drafting principles (l'aide-mémoire des principes de rédaction),[30] prepared by École du Barreau du Québec.

AFFIDAVIT

A motion does not require a supporting affidavit when the relevant evidence is already contained in the court file. If this is not the case, the motion should be supported by an affidavit signed by a person with knowledge of the alleged facts. A simple affidavit is an accessory to the proceeding.[31]

Where the Code of Civil Procedure requires a detailed affidavit,[32] the affiant need not repeat, at length, the allegations contained in the proceeding. It is sufficient for the affiant to affirm that the paragraphs relevant to his testimony are true and to attest, if need be, the relevant evidence not already alleged in the motion.[33]

Unless the lawyer is the only person capable of attesting to the facts, he should avoid signing an affidavit in support of motions, since this exposes him to being examined by the opposing party. Moreover, the opposing party should abstain from examining the lawyer in such a case, unless required by the file. By examining a lawyer on his affidavit without having serious grounds for doing so, the opposing party and his lawyer may be subject to sanctions by the court under article 54.1 et seq. of the C.C.P.[34]

When a party contests the integrity of a technology-based document, the contestation must be supported by an affidavit, as required by article 89(4) C.C.P.[35] Bear in mind that article 89 C.C.P. provides for other cases in which an affidavit is required to contest the validity of a document.

SERVING A PROCEEDING

Every proceeding must be served on all the parties to the case, whether they are involved in the principal action or an action in warranty, for example. Subject to applicable law, if the opposing party is given a reasonable time to respond to a demand letter, to a motion to institute proceedings, or to a motion presented during the proceeding, adjournments will be avoided and the file will proceed much more expeditiously.

Although service by email does not yet have the force of law, nothing prevents the parties—subject to the rules of procedure—from making use thereof by consent for the service of any proceedings during the course of the case,[36] as is in fact provided for in the interactive model agreement on the conduct of the proceeding.[37]

Proof of service by email may be obtained by asking for an acknowledgment of receipt or notification of reading when the email is sent. Such proof will then be filed with the email in a sub-directory created in the email management application or saved in a document management system.[38]

[29] See *Guide sur le langage clair* published by the Barreau du Québec.

[30] René Gauthier & Josée Payette, *Rédaction*, in Collection des habiletés 2009-2010 (Montréal, École du Barreau du Québec, 2010, 90 pages); *Association des propriétaires de Boisés de la Beauce c. Monde forestier*, 2009 QCCA 48 (CanLII).

[31] C.C.P., art. 88; Pierre Tessier & Monique Dupuis, *« Les qualités et les moyens de prevue »*, online at: **www.caij.qc.ca/doctrine/collection_de_droit/2011/2/ii/2163/index.html**.

[32] C.C.P., arts. 196, 404, 754.1, 813.10 and 835.3.

[33] C.C.P., art. 93.1; Monique Dupuis entitled *« Les qualités et les moyens de preuve »*, online at **www.caij.qc.ca/doctrine/collection_de_droit/2010/2/ii/1840/1840.pdf**.

[34] *Anber c. Piché*, 2009 QCCS 4159 (CanLII).

[35] *Bouchard c. Société industrielle de décolletage et d'outillage S.I.D.O. ltée*, 2007 QCCS 2272 (CanLII).

[36] C.C.P., art. 151.1.

[37] C.C.P., art. 151.2; *Rules of practice of the Superior Court of Québec in civil matters (District of Québec)*, c. C-25, r.8, art. 3; *Regulation of the Court of Québec*, c. C-25, r.1.01.1., art. 19.

[38] Art. 15, *Regulation respecting accounting and standards of professional practice of advocates* [unofficial translation], online at: **www.barreau.qc.ca/pdf/avis/reglement-comptabilite_en.pdf**

EXHIBITS

PAGE NUMBERING OF EXHIBITS

Before they are submitted to the other parties and filed in court, the pages of any voluminous document intended to be produced into evidence (medical file, accounting documents, email exchanges, etc.) should be numbered by the lawyer. This practice allows for more efficient use of court time for the hearing, by facilitating the testimony of witnesses and references to the evidence during the hearing and oral arguments.

SUBDIVISION OF EXHIBIT NUMBERS

Exhibits filed together in a bundle (*en liasse*), using a single letter-number combination, may be further subdivided, if need be, for ease of reference (for example, P-7A, P-7B).

ADDITIONAL EXHIBITS

Subject to the applicable rules of evidence, if additional exhibits are filed during the trial, it is customary practice to make a sufficient number of copies for everyone involved in the proceeding (the judge, the opposing party, the witnesses, etc.).

ELECTRONIC COMMUNICATION OF EXHIBITS

From the very start of the file and provided that the legal requirements are complied with, the parties should consider electronic communication of exhibits to one another.[39] Moreover, it is suggested that in the agreement on the conduct of the proceeding, the parties provide for the communication and service of exhibits electronically.

CONFIDENTIAL EXHIBITS

When documents must remain confidential, other than those whose confidentiality is already protected by the rules of practice,[40] they should be filed in the court under seal, and a confidentiality agreement should be signed and ultimately approved by the court.

[39] Arts. 2837ff C.C.Q.; *An Act to establish a Legal framework for information technology*, R.S.Q. c. C-1.1; *Citadelle (La), Cie d'assurances générales c. Montréal (Ville) et als.*, CanLII 24709 (QC C.S.).

[40] *Rules of practice of the Superior Court of Québec in civil matters*, C-25, r.8, s. 3; *Regulation of the Court of Québec*, c. C-25, r. 1.01.1, s. 19.

COSTS OF EXHIBITS

The costs of reproducing and assembling the exhibits are at the expense of the party who must communicate and file them.

INSCRIPTION BY DEFAULT

If the opposing party fails to appear or plead, the lawyer may make an inscription by default. Moreover, in the case where the opposing party is no longer represented by a lawyer or the party changes status, notices will have to be transmitted and default may be recorded in accordance with the provisions of the *Code of Civil Procedure*.

It is important, however, for the lawyer subject to a default on the part of the opposing party not to take the party by surprise. Lawyers must act with transparency.[41]

It is recommended not to be uncompromising and, faced with serious grounds, not to oblige a party to submit a motion to be released from its default.

AGREEMENT ON THE CONDUCT OF THE PROCEEDING[42]

The drafting of the agreement on the conduct of the proceeding should be based on the lawyer's reflections in preparing the theory of the case, and should be discussed or negotiated with the opposing party's lawyer.

DATE OF PRESENTATION OF THE MOTION TO INSTITUTE PROCEEDINGS

The date set for the presentation of the motion, as determined by the applicant's lawyer, should give the parties sufficient time to ensure that they, their lawyers and the court are realistically committed to a process that will lead to a hearing within

[41] On the attitude to adopt, see: *Berthelette c. Autonum Presto Locations inc.*, 2012 QCCA 359.

[42] The interactive model agreement on the conduct of the proceeding developed by the Bar of Montreal in collaboration with the Superior Court is available online at **www.barreaudemontreal.qc.ca/loads/DocumentsCours/Avis_entente_sur_deroulement.pdf** (in French only).

a reasonable time, even if it means postponing the date of presentation and thereby, the filing of the agreement as well. This period of time should allow the lawyers of record to exchange information and available documents, consider the issues at the heart of the dispute and determine the need for expert witnesses, where appropriate.

By providing an opportunity for each lawyer of record to negotiate and agree, after consultation with his client, on every step to be taken in the proceeding, the parties will be able to agree on realistic and reasonable time lines to make the file ready.

CONTENT OF AGREEMENT

Agreements must be drawn up in accordance with the principle of proportionality (art. 4.2 C.C.P.). The parties must determine the various steps in the proceeding, taking the issues into consideration and the costs involved. In particular, they should determine the duration of each step in the proceeding, agree on specific dates for examinations and make note of those dates in their court agendas, in order to ensure the agreement is respected and adjournments are avoided.

Since March 7, 2012, all files in the districts of the Superior Court under the jurisdiction of the Montréal division must provide for the production of a Joint Declaration that a file is complete.[43] Starting September 4, 2012, the same procedure will be applicable to files on family matters[44] and those in the Commercial Division.[45] No directive of this nature is applicable to the districts within the Québec City division.

SETTLEMENT CONFERENCE AND NEGOTIATION OF SETTLEMENT

When establishing the terms of the agreement, the parties should consider holding a settlement conference as soon as possible.[46] It is also recommended that the parties provide for adequate time in the agreement for the negotiation of a potential settlement. For files from districts under the jurisdiction of the Montréal division, the Superior Court has made provision for no request for a settlement conference to be made once a hearing has been scheduled for the file, unless under exceptional circumstances.[47] For files under the jurisdiction of the Québec City division, requests for a settlement conference submitted less than 30 days before the date of the hearing on the merits are accepted only in exceptional situations.[48]

EXAMINATIONS

In line with the principle of proportionality, the parties should identify, in the agreement, the persons they intend to examine; ensure that such examinations are relevant, given the issues in dispute, factor in the duration of the examinations, and plan the dates thereof.

[43] See Superior Court notice of January 5, 2012.

[44] See Superior Court notice – Montréal Division – of April 16, 2012.

[45] See Superior Court notice of June 11, 2012.

[46] See comments relating to section "Settlement Conference and Mediation", page 9.

[47] See Superior Court notice of December 2, 2011.

[48] Article 16 of the *Rules of practice of the Superior Court of Québec in civil matters (District of Québec).*

COMMUNICATION OF DOCUMENTS: Prior to these examinations, the lawyers should provide all required documents that have not already been communicated and that are not contested. The agreement should make provision, within a reasonable amount of time prior to the date of the examination, for the time limit to submit the documents requested by the examining party. The requests for authorization to obtain documents from third parties (medical files, for example) should be exchanged as soon as possible, given the time it generally takes to obtain such documents.

UNDERTAKINGS: The parties must allow for a reasonable amount of time to obtain the stenographer's transcript and submit the undertakings made at the examinations. In this respect, it is suggested that the parties agree to electronically communicating and submitting the undertakings as well as the exhibits communicated and filed in support of the proceedings.

OBJECTIONS: Aside from exceptional cases that must be submitted to the court, objections to requests for the communication of documents or to questions asked during an examination should not suspend the proceeding and delay the date set in the agreement for the readiness of the file. So as not to hinder the conduct of an examination, lawyers should consider taking the objections under reserve or, if they are able to anticipate the objections, they should consider having a decision reached—prior to the examination being held—on those objections that cannot be taken under reserve.[49]

EXPERT WITNESSES

Where the issue lends itself to doing so, the parties should identify the aspects that could be subject to an expert report, with a view to considering the joint use of an expert. Failing same, the parties should submit the experts' reports in support of their proceedings as soon as possible, and not solely at the time they attest that the file is complete. The parties should also agree on the premises that are to form the basis of the experts' opinions.

In the same manner, a meeting between the experts to identify the points where they disagree would make it possible to focus on the real issues and disregard non-litigious matters.

VACATIONS AND OTHER HOLIDAYS

In preparing their agreement, lawyers must take into account summer vacations, Christmas holidays, religious holidays and school breaks.

180-DAY TIME LIMIT[50]

In a number of large cases involving more than two parties or several experts, it may be necessary to increase the period allotted for bringing the file to a state of readiness. Where the parties know that the 180-day deadline will be exceeded, they should submit the request for an extension to the court at the time they file the agreement, and the preamble of the agreement should include the reasons for such an extension.

[49] C.C.P., art. 396.3: *"Before an examination on discovery is held, the parties may, by mutual consent, submit any foreseeable objection to the judge for a determination."*

[50] In family matters, the peremptory time limit is one year (Art. 110.1 C.C.P.).

CASE MANAGEMENT NOTICE[51]

When the conduct of the proceeding makes it impossible to abide by the agreement signed by the lawyers and filed with the court at the start of the proceeding, the provisions of article 4.1 C.C.P. allow the court, upon the application of a party, to manage the proceeding issue by issue, depending on the districts. It is recommended that lawyers check the website of the court concerned or check with the court clerk in the district to find out if certain rules or procedures apply, with regard to dates or means of presentation, whether by telephone or not.

For example,[52] the court may intervene in the following cases:

- any problem concerning the terms contained in the agreement on the conduct of the proceeding and on compliance therewith
- exhibits or other documents to be communicated
- difficulties in managing the preliminary exceptions
- issues relating to out-of-court examinations:
  - communication of exhibits and other documents before the examinations are held
  - adjudication of anticipated objections
  - management of the undertakings
  - examinations of third parties and re-examinations
- in relation to expert testimony:
  - accessibility of exhibits, other documents or objects relevant to the expert testimony
  - filing deadline
  - new expert testimony or counter-expertise, where appropriate
  - meeting of experts (413.1 C.C.P.)
- any issue over delay, due—for example—to an amendment, the intervention of a third party, or the substitution of the attorneys of record, and
- any case management issue requiring the judge's intervention following the attestation that the file is complete

The Court of Appeal has specified that in management matters, judges of first instance have vast discretion to support the orderly progress of proceedings.[53]

PRELIMINARY OR INTERLOCUTORY EXCEPTIONS

SECURITY FOR COSTS

The parties should agree that the amount to be deposited as security for costs of the opposing party be kept in the general trust account of the lawyer of the party ordered to provide such security, as this method offers more flexibility and less expense than depositing the amount with the court. Generally speaking, the amount of the security is determined by the tariff of judicial fees, plus a certain additional amount to cover disbursements, as these may vary according to the lawyers' submissions. For more complex cases, the tariff of judicial fees is adjusted in line with the criteria developed by case law.[54]

USE OF TECHNOLOGY

CONFERENCE CALLS[55]

In some districts, motions for the extension of the time limit of 180 days or 365 days, motions to examine a third party by consent, or for rulings on foreseeable objections, may be presented by telephone.

Motions and case management notices are heard at the dates and times indicated by the court. In the telephone room, the judge presides over the conference as soon as he is able to hear the matter.

[51] Standard notices of a case management conference for the Superior Court and for the Court of Quebec are available online at **www.barreaudemontreal.qc.ca**, under the heading *"Publications"*; See also the non-exhaustive list of subjects that may be dealt with at a case management conference, online: **www.barreaudemontreal.qc.ca/Ang/EFM102b_1.html**.

[52] See also the non-exhaustive list of subjects that may be dealt with at a case management conference, online: **www.barreaudemontreal.qc.ca/Ang/EFM102b_1.html**

[53] *Aviva* c. *Procureur général du Québec*, 2012 QCCA 223.

[54] In particular, see *Bertrix Corporation c. Valeurs mobilières Desjardins inc.*, 1999 CanLII 13165 (QC C.A.).

[55] See the procedures for using the telephone on the notice of the Superior Court to members of the Bar – Montréal division, online: **http://www.barreaudemontreal.qc.ca/Ang/EFM102b_1.html**. The telephone room is available for civil and family matters.

EXAMINATIONS BY VIDEOCONFERENCE

Law firms that have the necessary equipment may hold examinations by videoconference with the consent of the parties alone; however, those who want to use the equipment at the courthouses must submit such a request by means of a motion or by case management notice.

PRE-TRIAL EXAMINATIONS[56]

SUBPOENAING A WITNESS AND TRAVEL EXPENSES

To examine a representative of the opposing party, it is recommended that all of the lawyers of record agree on the date of the examination, and that a *subpoena* be used only in the absence of cooperation.

When a witness is subpoenaed, whether or not the witness is a party to the proceeding, the witness's travel expenses must be paid to him in advance. If the witness is not subpoenaed, travel expenses are advanced only if required by the opposing party. If the witness is not required to attend, travel expenses that have been advanced should be reimbursed. Moreover, a party requiring an examination following the filing of a detailed affidavit does not have to advance travel expenses.[57]

A party may compensate a witness for the loss of income caused by his testimony in court. This rule also applies to a testimony given at a trial. Such compensation is intended only to indemnify a witness called upon to participate in litigation that does not concern him and not to reward him for his testimony.[58] The Barreau du Québec's ethics committee does not believe that the lawyer is obligated to disclose such compensation, although, in such a case, he is putting himself in a "[translation] *dangerous situation because he is acting as the sole judge of the reasonableness of the compensation offered.*[59]"

Even if the parties agree, the examination of a third party always requires the authorization of the court. Such authorization may be obtained at the time the agreement on the conduct of the proceeding is filed. When circumstances so allow and examination of the expert witness of one of the parties proves to be necessary, the court's authorization must be obtained as well.

UNDERTAKINGS

The party whose witness undertakes to communicate information and documents should follow up on this undertaking as soon as the examination is completed, without necessarily waiting for receipt of the stenographer's transcript.

Failing agreement between the parties, the reproduction costs of the undertakings should be borne by the party requesting the undertakings. In case of disagreement, the parties should submit their dispute to the court by means of a case management notice.

[56] See also sections entitled *"Interaction with the Witness during the Examination"* and *"Exclusion of Witnesses"*, page 10.

[57] *Innu-science Canada inc. c. Laboratoire Choisy ltée*, 1999 CanLII 13503 (QC C.A.).

[58] Section 3.02.02 of the *Code of ethics of advocates: "Paragraph g of section 3.02.01 must not be interpreted as preventing the advocate from guaranteeing payment of or agreeing to pay: a) reasonable expenses incurred by a witness to appear or testify; b) reasonable compensation to a witness for loss of time in appearing or testifying;".*

[59] Ethics Committee [unofficial translation], "Opinion 43 – Payment of witness for certain costs – obligation to inform the opposing party", issued on April 29, 2005, online: **www.barreau.qc.ca/avocats/deontologie/capsules/opinions/43.html** (in French only).

OBJECTIONS

In some districts, such as the one in Québec City for example, objections may be immediately ruled on by the judge in chambers. If the examination isn't held at the courthouse, the parties may communicate with the judge in chambers in order to see whether the hearing may be held by means of a conference call.

When objections aren't argued on the same day as the examination is held, the lawyers must submit a copy of the transcript of the examination and a chart listing the objections to the judge who will be ruling on them and to the clerk who will prepare the minutes of the hearing.

CONFIDENTIALITY OF EXAMINATIONS ON DISCOVERY

The information obtained during an examination on discovery is protected by a rule of confidentiality. Unless the court relieves the parties of this obligation,[60] they are bound by this rule until the transcript of the examination is used during a public hearing—on the pleading of objections or at trial—in which case only the excerpts filed in the court record become public. This rule does not apply to examinations held under section 163 of the Bankruptcy and Insolvency Act.[61]

Therefore, until an examination has been filed in the court record, the lawyer who does not represent this witness may not disclose the contents of the examination or provide a copy to third parties other than his client, the client's representative—whether a current or former employee—and the expert; moreover, these persons must be advised that they are bound by the rule of confidentiality.[62]

CONDUCT OF EXAMINATION

When a witness is examined by more than one party, the lawyers may refer to the initial examination—making use of the questions and answers as if they were their own—and file the deposition obtained in court.[63] Nevertheless, the lawyers must reach a mutual agreement on this process before the start of the examinations in order to avoid any subsequent contestation.[64]

FILING

Even though the transcript of an examination lists the exhibits identified during the examination, the exhibits should be specifically identified when the list of exhibits is prepared.

Since answers to undertakings do not form part of the court record when the examination is filed, a party wishing to file the answers should identify them and communicate them to the other party as exhibits.

And lastly, the examinations themselves should be marked as exhibits when communicated to the other party in order to facilitate the identification thereof.

[60] *Lac d'Amiante du Québec Ltée c. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; *Jacolson-Sulitzer c. Sulitzer*, 2003 CanLII 35403 (QC C.A.); *Lanthier c. Institut québécois de planification financière*, [2002] no AZ 02019033 (C.A.): *« Les règles qui régissent les informations divulguées dans le contexte d'un interrogatoire au préalable sont suffisantes pour protéger la confidentialité. »*; *Industrie Remac inc. c. Construction CLD 1985 (inc.)*, EYB 2008-135245 (C.S.).

[61] *Bankruptcy and Insolvency Act,* RSC 1985, c B-3.

[62] See also the section entitled *"Exclusion of Witnesses"*.

[63] *Pellemans c. Lacroix*, 2008 QCCS 5260 (CanLII); *Lafortune-Coulombe c. Assurance-vie Desjardins*, [1997] R.J.Q. 2746 (C.S.).

[64] *Alumico Architectural inc.* c. *Hydro-Québec*, 2011 QCCS 5390.

EXPERTS

ROLE

The expert's role is to enlighten the court and help it assess the evidence on scientific or technical issues.[65] The lawyer must check whether the chosen expert, in addition to his technical skills, has the abilities required to fulfil his role. The expert should be reminded that his duty to be objective and impartial toward the court has precedence over any obligation he may have to the party that hired him or that is paying for his services, and that under no circumstances may he replace the judge, who has the sole responsibility for assessing the evidence.[66] The expert's mandate should be given to him by the lawyer.

NUMBER

Where the nature of the technical or scientific opinions required is such that the judge needs to obtain differing viewpoints on a specific issue, then insofar as possible, each party should be limited to one expert on any given subject, with the focus being on the quality of the opinion over the quantity.[67]

JOINT EXPERT

Where the parties agree to the use of a joint expert, communication between the lawyers involved and the chosen expert must be frank and courteous. Conversations between the expert and one of the lawyers should be held only after the other lawyer has been given the opportunity to be present. If he chooses not to be present, these conversations should be followed up by a letter sent to the absent lawyer, describing the content of the conversation.

Unless they are protected by professional privilege, all documents and information in a party's possession and which the expert considers necessary to fulfill his mandate must be provided to him, at his simple request.

Since the judge is ultimately responsible for determining the facts, each lawyer is free to submit to the joint expert the facts that he feels he is able to prove, and the theories on which he would like an opinion. Thus, depending on the facts taken into consideration, the judge will be in a position to draw the necessary conclusions.

The joint expert's costs are to be paid equally, in advance, by all the parties involved, and the losing party must subsequently reimburse each of the other parties for the costs they had advanced,[68] all subject to the judgement rendered on the merits.

MEETING OF EXPERTS

Rather than waiting for the court to apply article 413.1 C.C.P., the parties may agree that the chosen experts discuss the issues, on a "without prejudice" basis, with or without the lawyers in attendance, and without the parties being bound by the conclusions of their discussions. This will allow the opinions to be reconciled and identify the points on which they differ.[69]

FILING OF THE REPORT

It is recommended that the expert's report be marked as an exhibit when it is communicated with a notice pursuant to article 402.1 C.C.P.

In addition, the party that produces an expert report must, at the same time, produce its author's curriculum vitae, a statement of account to date and the expert's current fee schedule for his presence at a trial on the merits.[70]

[65] Jean-Claude Royer & Sophie Lavallée, *La preuve civile*, 4th ed. (Cowansville, Yvon Blais, 2008), para. 465; *Hôtel Central (Victoriaville) inc. c. Compagnie d'assurances Reliance*, 1998 CanLII 12934 (QC C.A.); *R.* v. *Mohan*, [1994] 2 S.C.R. 9; *Roberge c. Bolduc*, [1991] 1 S.C.R. 374.

[66] *« Rapport du sous-comité magistrature-justice-Barreau sur les expertises »*, section IV, para. 2, p. 39, online: **www.barreau.qc.ca/export/sites/newsite/pdf/medias/positions/2007/200707-expertises.pdf** (in French only).

[67] Barreau du Québec, *« La position du Comité sur la procédure civile concernant l'utilisation des expertises lors de recours civils et commerciaux et la position du Comité sur le droit de la famille concernant l'utilisation des expertises en matière familiale »*, August 2005, online: **www.barreau.qc.ca/pdf/medias/positions/2005/200508-expertises.pdf** (in French only).

[68] C.C.P., art. 477.

[69] *"Rapport du sous-comité magistrature-justice-Barreau sur les expertises"*, section IV, no 8, p. 70, online: **www.barreau.qc.ca/export/sites/newsite/pdf/medias/positions/2007/200707-expertises.pdf** (in French only); see also the notice of the Bar of Montreal on the reconciliation of experts' reports, online: **www.barreaudemontreal.qc.ca/loads/DocumentsCours/Avis_Conciliationexpertises.pdf** (in French only).

[70] *Rules of practice of the Superior Court of Québec in civil matters*, RRQ 1981, c C-25, r 8, s. 18.2.

TESTIMONY

Before examining the expert, the lawyer will first have to establish his qualifications. He will then have to ask the court to recognize the witness as an expert in a clearly defined area of expertise. When the expert presents his report at his examination and cross-examination, he will have to adopt an attitude of independence, objectivity and neutrality. When using technical terms, he must provide an accepted definition or refer the court to the glossary of terms appended to his report, where appropriate.

FEES

The expert's fees, both for the plaintiff and the defendant, must be claimed as costs and not as damages.[71] Nevertheless, the parties will have to prove the expert's fees incurred by them, including not only his fees for drafting the report, but also for the preparation and testimony of the expert at the hearing on the merits.[72]

ADMISSIONS AND SATISFACTION OF THE PLAINTIFF'S CLAIM

ADMISSIONS

Admissions simplify the proceedings, reduce costs and avoid the need for witnesses to appear in court.

Although the decision as to whether or not one should admit specific facts alleged by the opposing party is an important one, every effort should be made to avoid the systematic refusal of admissions for fear of making mistakes, even those that simplify the conduct of the proceeding. To avoid the unnecessary attendance of a number of witnesses, one should therefore assess, in good faith, what facts may be responsibly and realistically admitted.

Admissions may sometimes be made subject to restrictions. For example, a party making an admission may restrict it to the filing of the document, so that it can still contest the contents and basis thereof.

Admissions will be much easier to make once the theory of the case has been determined.

SATISFACTION OF THE PLAINTIFF'S CLAIM

Where the plaintiff is an innocent victim who must not incur any liability, which rests mainly with the defendants (principal and in warranty), the value of the claim should be assessed and the defendants should agree between themselves to pay the plaintiff and satisfy his claim, provided that they continue the proceedings between themselves on the apportionment of liability. The process must be structured in such a way that prevents an innocent victim from being dragged into a long and costly debate caused by litigation between the defendants.

And likewise in a situation in which several actions have been instituted, based on the same event and several innocent victims (neighbours, etc.) must wait for a final judgment to be rendered in a test case: Where the parties ascertain that one or more of the claimants is/are not liable, they should then settle those claims on a provisional basis, even if they must subsequently readjust the apportionment of the amounts between themselves according to the circumstances.

Of course, financial and insolvency issues may interfere with this process; however, where all the defendants are insured, the claims of the innocent victims should be satisfied before the issue of liability is addressed.

[71] *La Maison Simons inc. c. Lizotte*, 2010 QCCA 2126.

[72] *Rules of practice of the Superior Court of Québec in civil matters*, c C-25, r 8, s. 18.2.

SETTLEMENT CONFERENCE AND MEDIATION

It is recommended that the client be informed as soon as possible of the option of participating in a settlement conference or mediation.[73] The other party must also be quickly informed of the possibility of using these other conflict resolution methods. Participation in this process at an early stage of the proceeding helps avoid costs and doesn't mean that the file contains weaknesses. Where a judge will be presiding over the conference, the parties must also provide for the lead time between the date the conference is requested and the date it is held.

Moreover, the Superior Court in the Montréal division issued a notice on December 2, 2011, providing that for the files in its districts, no request for a settlement conference will be accepted once a hearing has been scheduled for the file, unless under exceptional circumstances.[74] For files under the jurisdiction of the Québec City division, requests for settlement conferences submitted less than 30 days before the date of the hearing on the merits are accepted only in exceptional situations.[75]

It is a good idea to plan on holding a discussion prior to the settlement conference with the appointed judge, in order to become familiar with the way that the judge intends to conduct the conference. This preliminary conference may be carried out by telephone. During this discussion, it is important to make the appointed judge aware of the particular issues in the file and, if need be, of the existing state of affairs between the parties and even, sometimes, between the lawyers.

It is necessary to explain to the client what the advantages of this process are and to discuss the importance of compromise as well as reiterate the importance of respecting the confidentiality of the process and also to discuss how the conference will be conducted and the judge's role. It is equally necessary to make the client aware of the importance of reflecting, beforehand, on the content of the representations that he would like to make within the scope of the settlement conference. It must also be explained to the client that he is at the heart of the process and that his active participation is essential, in cooperation with the lawyer, who will be able to guide him and therefore contribute toward a positive, constructive exchange.

Furthermore, it is necessary for a lawyer to reflect on—and discuss in advance with his client—the various compromises and scenarios that must be contemplated within the context of the settlement conference. In appropriate cases, the settlement conference is an excellent forum for discussing issues that may lead to a more complete solution to the dispute between the parties.

It is important to prepare well for the settlement conference and, in particular, to be very familiar with the elements of the file that support the contention that the party wants to assert, and especially with regard to the assessment of damage. The lawyer must share with his client all relevant information that might influence the parties' positions.

It is of the utmost importance to take part in this exercise with openness and to be an exemplary listener all throughout the process. The lawyer and his client must also opt for frank, direct communication with regard to the position they are defending, by openly expressing to the opposing party the elements that justify their stand.

It is worthwhile preparing, beforehand, draft closing documents that could be completed and adapted if a settlement is reached, and namely a declaration of settlement and a draft acquittance and transaction. It may be advantageous to discuss the contents of these documents, in advance, with the opposing party, in order to avoid having to spend time on writing or wording, if an agreement is reached. Having a laptop computer and a USB thumb drive help easily finalize the settlement documents, which may then be printed and signed on site.

[73] The list of mediators certified by the Barreau du Québec is available by field of practice at **www.barreau.qc.ca/public/avocat-mediateur/index.html**. See also the Barreau du Québec's website on justice participatory justice: **www.barreau.qc.ca/avocats/justice-participative/index.html**.

[74] See the Superior Court notice of December 2, 2011.

[75] Article 16 of the *Rules of practice of the Superior Court of Québec in civil matters (district of Québec).*

COMMUNICATION BETWEEN LAWYERS

The content of communications between lawyers should adhere to the rules set out in the *Guide of Professional Courtesy*[76] and address only the issues involved in the litigation. The tone of such communication should be professional and devoid of any emotion.

All requests made to a lawyer must be communicated as well to the other lawyers concerned by the request. The lawyer must answer these promptly.

Unless authorized by the court in advance, communications between lawyers must not be sent to a judge, except where warranted by special circumstances, in which case, they must also be sent to all the lawyers of record and all parties representing themselves.[77]

Throughout the entire process, the dialogue between lawyers must promote cooperation, with the mutual objective of avoiding more legal proceedings than necessary as well as court appearances.

The lawyer must also be courteous, patient and pleasant, not only in dealing with lawyers, but also with judicial service employees as well as with anyone involved in the judicial process.

The lawyer must not only avoid any outbursts, but must also intervene, if need be, when he witnesses any wrongdoing contrary to the most basic courtesy.

PREPARATION OF THE FILE FOR READINESS

For files in the districts of the Montréal division, the Superior Court issued a notice on January 5, 2012, requiring a Joint Declaration that a file is complete, in accordance with the model available on the Superior Court's website.[78] Effective September 4, 2012, the same procedure will be applicable to files on family matters[79] and those in the Commercial Division.[80] No directive of this nature is applicable to the districts within the Québec City division. In addition, lawyers must produce their Declaration in compliance with articles 274.1 and 274.2 C.C.P., within the agreed upon time limits in order to avoid the penalties provided for under the Code of Civil Procedure and a delay in being assigned a hearing date.

The parties must cooperate in order to allow, wherever possible, that exhibits be produced. Unjustified refusal could result in the striking of allegations and more severe penalties.[81]

It is the responsibility of the parties and their lawyers to cooperate with the court in order to avoid exceeding the allotted time for the hearing.

POSTPONEMENT AND MOTION TO CEASE REPRESENTING

A case that has been scheduled to be heard on the merits will be postponed only on serious grounds that could not be foreseen at the time the hearing date was set.

Once the hearing date has been set, a lawyer who wishes to cease representing must obtain the authorization of the court. If the mandate has been revoked, the lawyer must notify his client that the proceeding should (i.e., will most likely) take place nevertheless.

[76] Guide of Professional Courtesy of The Bar of Montreal, online: **www.barreaudemontreal.qc.ca/loads/Guides/GuideCourtoisieProfessionnelle_an.pdf**.

[77] Section 4.02.01(b)(i) of the *Code of ethics of advocates*: *"4.02.01. In addition to the derogatory acts referred to in sections 57, 58, 59.1 and those determined pursuant to the second paragraph of section 152 of the* Professional Code *(R.S.Q., c. C-26), the following are derogatory to the dignity of the profession of advocate: […] b) in contested matters, communicating, in respect of that matter, with the judge or any person holding a judicial or quasi-judicial office before whom such matter is pending, except: i. in writing, if he promptly delivers a copy to the opposite party who has appeared or to his attorney […]"*

[78] See Superior Court notice of January 5, 2012.

[79] See Superior Court notice – Montréal Division – of April 16, 2012.

[80] See Superior Court notice of June 11, 2012.

[81] *Schwartz Levitsky Feldman* c. *Werbin*, 2011 QCCS 6863.

THE HEARING AND TIME MANAGEMENT

During the months prior to the proceeding, the lawyers should discuss how it will be conducted and, in particular, the timeliness of producing the factual evidence before hearing the experts' testimonies and of grouping the experts' testimonies together, based on their specialty. In lengthy proceedings, a schedule of the conduct of the hearing should be prepared in order to maximize the hearing time, while minimizing the witnesses' long waiting times in the hallways.

It is preferable to inform the master of the roles or the court clerk in advance—depending on the districts—of all needs relating to audiovisual or technological equipment required in the court room, for the proceeding. Similarly, it is advisable to inquire about the customary practices in the district (the time that the court house opens, access to a photocopier, computer or Wi-Fi network, the time of the calling of the roll and the need to attend, access to the barristers' robing room, the existence of rooms for meeting with witnesses and access to these rooms, etc.).

From the very start of the hearing or, if need be, during a prior conference call, it is advisable to inform the court about any agreements reached between the parties with regard to the presentation of the evidence and to inquire about the usual times for breaks and meals. It is appropriate to ask when it will be possible to have a copy of the minutes of the day's hearing and to check it as quickly as possible after receiving it in order to make sure that it is an accurate record of the proceeding.

At all times, the judicial services staff should be treated courteously and the statement of principle regarding work-family balance (Déclaration de principe - Conciliation travail-famille) should be taken into consideration.[82]

[82] **www.barreau.qc.ca/pdf/medias/positions/2010/20100331-travail-famille.pdf.**

WITNESSES

The following rules apply both to examinations on discovery and at the time of the proceeding.

Examinations or cross-examinations must never be vexatious or abusive.[83] In addition to observing the rules of courtesy[84] in communicating with witnesses, the lawyer must also abide by the rules contained in the Statement of Principle regarding Witnesses[85] and other uncodified rules.[86]

SUBPOENAING WITNESSES FOR TRIAL[87]

The lawyer should first meet with any person he is considering calling as a witness, in order to determine the relevance of his testimony or to prepare the witness.[88]

As soon as he knows the hearing date, the lawyer should give all his witnesses notification of that date, without delay. A letter should be sent with the *subpoena* explaining the context in which the witness's testimony is required and inviting him, if he is not represented by a lawyer, to contact the lawyer who issued the *subpoena* in order to prepare him for court. If the *subpoena* requires the witness to bring a document already known to the parties, a copy of this document should also accompany the *subpoena*, in order to facilitate the identification thereof. If the witness is represented by counsel, it is recommended that the lawyer communicate with the witness's counsel to ensure the witness's

[83] *Fillion c. Chiasson*, 2007 QCCA 570, paras. 43ff.

[84] *Guide of Professional Courtesy of The Bar of Montreal*, online: **www.barreaudemontreal.qc.ca/loads/Guides/GuideCourtoisieProfessionnelle_an.pdf**.

[85] See the *"Statement of Principle regarding Witnesses"*, dated June 1, 1998, between the *Ministère de la Justice du Québec,* The Judiciary and the Barreau du Québec, online at: **www.justice.gouv.qc.ca/english/publications/generale/declar-a.htm**.

[86] *Widdrington c. Wightman & al.*, 2001 CanLII 15048 (QC C.S.); *Banque Nationale du Canada c. Société de développement industriel du Québec*, [1997] R.J.Q. 979 (C.S.).

[87] See the section entitled: *"The lawyer's conduct toward witnesses"* of the Guide of Professional Courtesy of The Bar of Montreal, online: **www.barreaudemontreal.qc.ca/loads/Guides/GuideCourtoisieProfessionnelle_an.pdf** the *"Statement of Principle regarding Witnesses"*, dated June 1, 1998, between the *Ministère de la Justice du Québec,* The Judiciary and the Barreau du Québec, online at: **www.justice.gouv.qc.ca/english/publications/generale/declar-a.htm**.

[88] Réal Goulet, « La préparation des témoins » in Collection des habiletés 2010-2011, École du Barreau du Québec, *Representation*, (Montréal, École du Barreau du Québec, 2010), p. 15.

attendance in court. If the witness is uncooperative, a copy of the *subpoena* should be sent to the lawyer representing this witness. When the hearing is scheduled to take several days to complete, the lawyer must make sure that the witness is available, while notifying him, as soon as possible, when his testimony will be required. The lawyer must do the same with all his witnesses. Such planning with regard to the presentation of the testimonies will facilitate the conduct of the hearing and will create the least possible inconveniences for the witnesses.

If there is a lengthy time period between communication of the hearing date and the actual date of hearing, a letter should be»sent to the witness reminding him and confirming the date of his appearance in court.

And lastly, when an out-of-court settlement is reached or a request for postponement is granted, the lawyers must promptly notify the witnesses they had subpoenaed in order to prevent them from needlessly going to court.

INTERACTION WITH THE WITNESS DURING THE EXAMINATION[89]

When a lawyer introduces a witness in his examination in chief, he may not speak to the witness, during the cross-examination, about the testimony he gave or will be giving, unless there are special circumstances justifying his doing so and he has obtained authorization from his fellow counsel or the judge. The purpose of this rule against communication with the witness is to prevent the witness's testimony from being altered or otherwise affected, even if only inadvertently, by such communication. This authorization from counsel or the court should be obtained as well for communication with the witness between the conclusion of the cross-examination and that of the re-examination, but should not be refused, except in special circumstances. Indeed, given the purpose of the re-examination (art. 315 C.C.P.), prohibiting such discussions could deprive the court of possibly highly relevant facts.

Although the rules in the foregoing paragraph also apply to examinations on discovery of the opposing party, they must not prevent otherwise legitimate communications between a lawyer and his client, especially where the examination is adjourned for several days.

Moreover, once the examination has been completed, subject to the communication of undertakings, the lawyer must get involved in their transmission.

The foregoing rules do not apply to cases where a lawyer produces a witness whose testimony is adverse to the case of his client,[90] to whom he may speak during the various stages of his examination, subject to the ethical rules prohibiting communications between a lawyer and the party represented by counsel.[91]

EXCLUSION OF WITNESSES

On request (art. 294 C.C.P.), the court has the discretion to permit the exclusion of witnesses,[92] including an expert witness, in exceptional circumstances.[93] The lawyer must then advise his witnesses and his client that they must exercise restraint in their communications until the end of the trial, failing which they are at risk of being charged with contempt of court.[94] On the other hand, this exclusion does not prevent a lawyer from discussing with his witnesses that have not yet been examined on the facts and documents referred to in the proceedings,

[89] *Widdrington v. Wightman & al., 2001 CanLII 15048 (QC C.S.); Banque Nationale du Canada c. Société de développement industriel du Québec, [1997] R.J.Q. 979 (C.S.)*; *Brouillette c. R.*, [1992] no AZ-92012090 (C.A.), J. Tyndale, p. 2785, J. Proulx, p. 2792; *Berg v. Schochet*, (1995) O.J. No. 2983; *413528 Ontario Ltd. v. 951 Wilson Avenue Inc.*, (1989) 71 O.R. (2d) 40; Earl A. Cherniak, "The ethics of advocacy" in Franklin R. Mostkoff, Q.C., ed., *Advocacy in Court. A tribute to Arthur Maloney, Q.C.* (Toronto, Canada Law Book, 1986), p. 105; Canadian Bar Association, *Code of professional conduct*, Ottawa, CBA, 2009, Chapter IX, note 18, online: **www.cba.org/CBA/activities/pdf/codeofconduct.pdf**; John Sopinka, Sidney N. Lederman & Alan W. Bryant, The law of evidence in Canada, 2nd ed. (Toronto, Butterworths, 1999), para. 16; Hon. D.W. Griffiths, "View from the bench" in Mark J. Frieman & Mark L. Berenblut, ed., *The litigator's guide to expert witness* (Aurora, Canada Law Book, 1997), p. 31.

[90] E.A. Cherniak, "The ethics of advocacy", in Franklin R. Mostkoff, Q.C. (dir.), *Advocacy in Court. A tribute to Arthur Maloney, Q.C.*, Toronto, Canada Law Book, 1986, p. 106; Canadian Bar Association, *Code of Professional Conduct,* Ottawa, ABC, 2009, Chap. IX, note 18, online: **www.cba.org/abc/activities_f/pdf/codeofconduct.pdf**.

[91] Section 3.02.01(h) of the *Code of ethics of advocates*: *"3.02.01. The following acts, among others, are a breach of the obligation to act with integrity*:
h) communicating in a matter with a person whom he knows to be represented by an advocate except in the latter's presence or with his consent or unless he is authorized to do so by law."

[92] *Hôtel-Dieu de Québec c. Bois* [1977] no AZ-77011161 (C.A.).

[93] *Léger c. Montpetit*, 1999 CanLII 13802 (QC C.A.).

[94] Pierre Tessier & Monique Dupuis, « La preuve à l'instruction », in Collection de droit 2010-2011, École du Barreau du Québec, vol. 2, *Preuve et procédure* (Montréal, Barreau du Québec, 2010), online: **www.caij.qc.ca/doctrine/collection_de_droit/2011/2/ii/2165/index.html** (in French only).

provided the lawyer does not reveal the questions and answers given by the witnesses that have already testified.[95]

The rules concerning the exclusion of witnesses apply equally to examinations on discovery.[96] In such a case, the parties must agree on the scope of such exclusion, i.e., as to whether it applies solely to the examinations on discovery or until trial. Failing agreement, the parties should apply to the court for a ruling by means of a case management notice under article 4.1 C.C.P.[97]

EMPLOYEES OF A PARTY REPRESENTED BY COUNSEL

The ethical rule prohibiting communication with a party represented by counsel, where its counsel is not present,[98] does not automatically apply where the witness is not associated or affiliated with a party to the case,[99] or where the potential witness is a current or former employee of said party. The only witness benefiting from this prohibition[100] is one who can be likened to the party itself due to his decision-making power or his strategic role within the organization, or a witness who owes the party a statutory duty of professional privilege of information.

CONFRONTING A WITNESS WITH A PRIOR STATEMENT

It is not necessary to file an excerpt or the entire transcript of an examination on discovery in the court record before confronting a witness with his prior statement. However, after doing so, the lawyer must file the prior statement or examination (or excerpts thereof) as an exhibit.

SUBMISSION OF AUTHORITIES TO THE COURT

The authorities should be organized in such a way that makes it easier for the court and the other lawyers to refer to the relevant excerpts.[101] The lawyers should:

- Limit the use of doctrine and case law to the issues pertaining to the theory of the case.
- Only cite the most significant decision where several decisions address the same point of law.
- Group together and distinguish decisions on points of principle from those that apply to the facts of the case.

When available, the outline of arguments should be submitted to the court and to the opposing party on a computer storage device, in word processing format, so that the court can incorporate it into the written judgment, where appropriate.

[95] E.A. Cherniak, *supra* note 72, p. 107.

[96] C.C.P., arts. 395 and 294.

[97] See the section entitled *"Case Management Notice"*.

[98] *Caisse populaire Desjardins de La Malbaie c. Tremblay*, 2006 QCCA 697 (CanLII); *Sodexho Québec ltée inc. c. Compagnie de chemin de fer du littoral Nord de Québec et du Labrador inc.*, 2007 QCCA 1782 (CanLII).

[99] *Code of ethics of advocates*, s. 3.02.01 h).

[100] *Caisse populaire Desjardins de La Malbaie c. Tremblay*, 2006 QCCA 697 (CanLII); *Axa Assurances inc. c. Groupe de sécurité Garda inc.*, 2008 QCCS 280 (CanLII); J.-C. Royer & S. Lavallée, *La preuve civile*, 4th ed., Cowansville, Éditions Yvon Blais, 2008, no. 1179, p. 1055.

[101] For example, in civil matters, the Superior Court requests that quoted passages be marked (*Rules of practice*, *supra* note 59, s. 31).

THE *SUB JUDICE* RULE

It is the courts' role to deal with legal issues that are brought before them. The courts' role should not be usurped by others making public statements about how these issues should be dealt with.[102] Lawyers should avoid commenting on files in which they are acting as counsel and that are pending before the courts. They should also avoid giving an opinion on the conduct of a file that is before the courts.

BILL OF COSTS

To avoid unnecessary costs, a bill of costs should first be submitted, for comments and payment, to the lawyer for the party against whom costs were awarded, before it is served and taxed. Failing agreement and payment, the lawyer should then proceed to have the bill of costs taxed in accordance with the prescribed procedure. The lawyer will have to check the specific requirements of the district concerned, with regard to the contestation procedures.

[102] Ministry of the Attorney General of Ontario: **www.attorneygeneral.jus.gov.on.ca/english/legis/subjudicerule.asp**: *"The term sub judice literally means "under judicial consideration". The sub judice rule is part of the law relating to contempt of court. The rule governs what public statements can be made about ongoing legal proceedings before, principally, the courts."*

III / SPECIAL CASES

III SPECIAL CASES

INTERIM INJUNCTION

Although the *Code of Civil Procedure* does not require the service of the motion for an interim interlocutory injunction, it is customary, except in special circumstances, to notify the respondent before the motion is presented. The proceeding does not need to be served, but it should be sent to the opposing party or its lawyer, if known to the applicant.

A draft judgment must be prepared and submitted to the judge—ideally on a thumb drive—so that he can immediately make changes. The draft judgment should be sent to the opposing party before the start of the hearing, so that all parties understand what conclusions are being sought and requested from the judge.

SUPERIOR COURT IN FAMILY MATTERS

Although special rules apply in family matters, these rules are part of the general framework of the *Code of Civil Procedure*. The best practices contained in this Guide therefore also apply, with the necessary adjustments, to family proceedings.

RELATIONSHIP WITH THE CLIENT

It is in the lawyer's interest to establish the terms of the mandate jointly with the client, based on the client's needs and considering the social context of the law.[103]

The Barreau du Québec's Service de l'inspection professionnelle has prepared a number of family law checklists to help lawyers better prepare their files. These checklists include such matters as the initial interview, the topics to be discussed at that time and the information that should be obtained there, before legal proceedings are instituted.[104]

PREPARING THE PROCEEDINGS AND FORMS

In support applications, several forms are required, including:

- The Child Support Determination Form (including the various possible scenarios) and the required accompanying documents (art. 825.9 C.C.P.)
- The statement of income and expenses and balance sheet (Form III of the R.F.P. [S.C.])
- The sworn statement containing the information prescribed by regulation (827.5 C.C.P.)

[103] Jean-François Gaudreault-DesBiens & Diane Labrèche, « Le contexte social du droit dans le Québec contemporain » in Collection de droit 2010-2011, vol. 1 *Éthique, déontologie et pratique professionnelle* (Montréal, Barreau du Québec, 2010), online: **www.caij.qc.ca/doctrine/collection_de_droit/2011/1/ii/2145/index.html** (in French only).

[104] See the Barreau du Québec's checklist on the initial interview, online at **www.barreau.qc.ca/pdf/listes-registres/famille-entrevue-matiere-familiale.doc** (in French only). Checklists for various family law proceedings are also available on the Barreau du Québec's website. A table of contents may also be accessed online at **www.barreau.qc.ca/pdf/listes-registres/famille-tdm.pdf** (in French only).

ARTICLE 827.5 C.C.P. Lawyers are advised to file the form required under article 827.5 C.C.P. at the very start of the proceeding, paying special attention to the information marked on the form. Processing of the application for the collection of support payments will be delayed if the form is not filed on a timely basis, or if there is erroneous or missing information, as the collector of support payments must have all the required information to process the application.

Several software programs are available to calculate support payments. Some of them can even produce the legal forms required in a divorce or separation proceeding.[105]

SAFEGUARD ORDERS: Since safeguard orders are a form of interim injunction, the criterion of urgency is an essential element for the granting of same.[106] Accordingly, both the arguments and the conclusions of the motion must therefore be concisely worded.

- As for the affidavits, they must be limited to three in number, regardless of the number of motions to be heard,[107] and both in demand and in defence, they must have been communicated before the day fixed for the hearing. Moreover, the relevant exhibits must be attached.

CASE MANAGEMENT ROOM

In the district of Montréal, there is a case management room where either party may submit any problems arising during the proceeding. The issues should be set out in a notice of case management conference served on the opposing party. These issues will be heard by the judge sitting in the family case management room.

For example, the following matters may be dealt with in a notice of case management conference:

- Requests for postponement of cases already fixed
- The following motions:
  - Motions for the filing of documents
  - Motions to quash subpoenae
  - Motions for a fourth or additional postponement
  - Refusals by the special clerk to inscribe a matter on the roll
  - Submissions concerning the agreement on the conduct of the proceeding

[105] See, in particular, the *JuriFamille* application, online: jurifamille.com and the Aliform application, online: **www.cch.ca**.

[106] C.C.P., art. 813.3, para. 2; see also the Superior Court notice dated December 18, 2009 to members of the Bar, online: **www.tribunaux.qc.ca/c-superieure/avis/index_avis.html**.

[107] C.C.P., art. 813: *"If the parties so wish, they each may present their evidence by means of a single affidavit, which must be sufficiently detailed to establish all facts in support of their claims. If the respondent proceeds in this manner, the applicant is entitled to serve one additional detailed affidavit on the respondent as a reply. Any further detailed affidavit must be authorized by the court."*

CASES PROCEEDING BY DEFAULT

DEFAULT CASES WITH A COURT HEARING: A draft judgment should be prepared in accordance with the guidelines on affidavit evidence in family matters. Two copies should be provided and it should be available in an electronic format so that changes may be made to it at the hearing.

***The guidelines* ("aide-mémoire") *entitled* "Matières familiales : Analyse des dossiers matrimoniaux quand la preuve se fait par affidavits" *are available online at www.tribunaux.qc.ca, in the menu for the Superior Court, under the heading* "aide-mémoire".**

DEFAULT CASES REFERRED TO THE RÉDACTION DES JUGEMENTS DEPARTMENT: By adhering to the guidelines ("aide-mémoire") on affidavit evidence in family matters,[108] lawyers will avoid receiving "incomplete file" notices, which delay the process of obtaining judgments.

To ensure that they file all the required documents, a checklist for lawyers* ("Liste de vérification des documents à produire[109]") *is available at www.barreaudemontreal.qc.ca.

AGREEMENT ON CONDUCT OF PROCEEDING AND JOINT DECLARATION THAT A FILE IS COMPLETE

Effective September 4, 2012, all files in the districts of the Superior Court under the jurisdiction of the Montréal division will require the production of a joint declaration that a file is complete, in accordance with the model available on the Court's website. In order for the parties to avoid having to fill out the declarations provided for under articles 274.1 and 274.2 C.C.P., in addition to the joint declaration that a file is complete, the lawyers—in their agreement on the conduct of the proceeding—should provide for the filing of a joint declaration.[110]

[108] The checklist *(aide-memoire)* entitled *« Matières familiales : Analyse des dossiers matrimoniaux quand la preuve se fait par affidavits »* is available online at **www.tribunaux.qc.ca/c-superieure/aide-memoire/Aide-memoire_Familial.pdf** (in French only).

[109] *Liste de vérification des documents à produire (*in French only).

[110] See the Superior Court notice dated April 16, 2012 (**www.tribunaux.qc.ca/c-superieure/avis/pdf/decl_comm_dos_complet_mat_fam_16avril2012.pdf**) and the joint news release dated May 2, 2012, from the Barreau de Montréal and the Association des avocats et avocates en droit familial du Québec (**www.barreaudemontreal.qc.ca/loads/DocumentsCours/Com-DeclarationCommune_02-05-2012.pdf**).

CHILDREN'S LAWYER

The lawyer must inform his client that if a lawyer is appointed to represent a child or children involved, a Legal Aid mandate will be issued to this lawyer. In such a case, if the parent is not eligible for Legal Aid, that parent will be billed for all or part of the fees paid to the children's lawyer. In addition, where a lawyer represents several children from the same family, he is entitled, as determined in accordance with the Tariff of Fees, to bill for the services rendered on behalf of each of the children represented by him.[111]

IMBALANCE BETWEEN THE PARTIES AND CONJUGAL VIOLENCE: The lawyer must be sensitive to situations of conjugal violence. He must make sure that his client truly benefits from all the rights that he is recognized as having, and all without any violence or coercion.

COMMERCIAL DIVISION OF THE SUPERIOR COURT

On June 11, 2012, the Superior Court issued general guidelines on the conduct of a case before the Commercial Division, in the district of Montréal. A lawyer who acts in such cases should familiarize himself with these guidelines that have been drawn up.[112] No corollary guidelines are applicable to all the districts as a whole in the Québec City division.

[111] *Barreau du Québec c. Centre communautaire juridique de Montréal*, 2006 QCCQ 11874 (CanLII).

[112] See the Superior Court notice dated June 11, 2012.

LATE SERVICE

When court proceedings are served on very short notice prior to the hearing date, requests for postponements often occur, as the parties have not been given sufficient time to familiarize themselves with the documents. From inception of the case, the lawyers should therefore agree on a minimum time period for service and agree, as well, that no document should be served or sent after 5 p.m. on the day before the presentation of the proceeding.[113]

MODEL ORDERS

Although use of various model orders developed by the Bar of Montreal is compulsory in the Commercial Division,[114] the terms of these orders may need to be modified, depending on the specific circumstances of each case, and in such situations, the modifications must be submitted to the court, for its approval.

When using one of the models, a lawyer must clearly indicate to the court all the changes he wants to make to the model order.

MOTION TO APPEAL

The *Bankruptcy and Insolvency Act* allows motions to be filed to appeal decisions rendered by the registrar or trustee, such as the disallowance of a proof of claim. In such a case, the motion to appeal must be filed within ten (10) days following the decision of the registrar or within thirty (30) days following the service of the notice of disallowance sent by the trustee.[115] Similarly, orders rendered under the *Companies' Creditors Arrangement Act*[116] sometimes allow motions to be filed to appeal decisions rendered by the monitors. In such cases, the time for appeal is set out in the order.

[113] s. 3.7 of the new *General Rules of the Commercial Division*, which are expected to come into force soon: *"No party or attorney shall send any proceeding or exhibit by e-mail to a judge of the Commercial Division unless authorized to do so by that judge. Where same is permitted, no such e-mail may be sent after 5 p.m. on the juridical day preceding the date of hearing, unless previously authorized by the judge."*

[114] The Standard Initial Order Short Form, the Standard Provisions relating to Interim Financing as well as the Standard Short Form relating to Claims and Meetings Procedure Order and the Standard Short Form appointing a receiver, pursuant to s. 243ff of the *Bankruptcy and Insolvency Act*, are available online at: **www.barreaudemontreal.qc.ca**, under the heading "*Publications*".

[115] s. 30 of the *Bankruptcy and Insolvency General Rules*, CRC, c 368.

[116] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.

CLASS ACTION DIVISION OF THE SUPERIOR COURT

Class actions are governed by articles 999 to 1051 C.C.P. and rules 55 to 69 of the *Rules of practice in civil matters of the Superior Court*. Lawyers must therefore refer to them in order to ensure that their proceedings conform to these rules, while keeping in mind that the principles of good faith and proportionality provided for in articles 4.1 and 4.2 C.C.P. govern the conduct of class actions both before and after authorization.[117]

All notices to the class members must be drafted in simple, clear language at each stage of the class action.

AUTHORIZATION STAGE

To avoid changing the class representative in mid-stream, the proposed representative should be informed at the very start of the proceeding of the scope of the responsibility that this role entails.

The description of the class, the facts giving rise to the action and the collective issues should be sufficiently precise to meet the requirements of article 1003 C.C.P. and to allow the court to render a judgment that will be binding on the class.

If a lawyer intends to present a motion to submit relevant evidence under article 1002 .C.P., it should be filed before the hearing of the motion for authorization in order to avoid any surprises upon presenting that motion and to limit the debate. Also, the judge will be in a better position to rule on such a motion if he is informed in advance of the nature of such evidence.

All newly instituted actions must be entered in the Class Actions Registry of the Superior Court, available on the Courts of Québec website (www.tribunaux.qc.ca). This registry lists all class actions instituted since January 1, 2009. Class actions launched prior to that date may be consulted in the National Class Action Database of the Canadian Bar Association (www.cba.org).

[117] *Marcotte c. Longueuil (Ville de)*, 2009 SCC 43, [2009] 3 S.C.R. 65.

ONCE THE ACTION IS AUTHORIZED

While specific rules apply to class actions, they remain a part of the general framework of the *Code of Civil Procedure*, whose provisions apply where they are not inconsistent with the class action provisions (art. 1051 C.C.P.). The best practices set out in this guide therefore apply equally to class actions, with any necessary adjustments.

COURT OF QUEBEC, CIVIL DIVISION

FIXING CASES ON THE ROLL FOR HEARING

On the Court of Québec's website (www.tribunaux.qc.ca/c-quebec/accueil-cqhtml), the lawyer may consult the rolls for hearing of the cases on the merits and in the Practice Division.

CIVIL MATTERS / VIRTUAL CALLING OF THE PROVISIONAL ROLL: In the districts where the Court of Québec proceeds by a calling of the provisional roll, it is not necessary to attend this calling of the provisional roll in order to schedule cases that will involve two days of hearings or less. Once a lawyer receives the notice of the calling of the provisional roll, he just needs to fill out and submit the form, available online, requesting that the case be placed on the roll (*formulaire de Demande de mise au rôle*).[118] Confirmation of the date chosen will be sent by email within 24 hours.

TAX CASES: In the district of Montréal, it is not necessary to wait for one of the two annual dates set in June and December for the calling of the provisional roll in order to fix cases for trial that are scheduled for three days of hearings or less. This may be done by consent of the parties. The lawyers may jointly determine the dates on which they are available and then contact the master of the rolls by telephone to set a date. Once the date for trial has been fixed verbally, the lawyers must confirm the date by letter to the master of the rolls, who will then return an initialled copy thereof, officially confirming the trial date. As with any request to fix a case for hearing, the declarations required under articles 274.1 and 274.2 C.C.P. must be filed before doing so.

For the other districts, it is advisable to check the applicable rules by contacting the court clerks concerned.

PARTIES REPRESENTING THEMSELVES[119]

A lawyer's communications with a party not represented by counsel should be in a language that is easily understood by laymen.

From the beginning of the file, the lawyer must notify a party not represented by counsel that he is not allowed to give that party any advice, and the lawyer must act in a transparent manner in order to avoid taking that party by surprise. Moreover, the lawyer should advise a party not represented by counsel to consult a lawyer. It is highly suggested that such notification be given in writing.

[118] The information about how to proceed is available online at: **www.tribunaux.qc.ca/c-quebec/roles/Role_Civil.htm** (in French only).

[119] Barreau du Québec, « *Guide pratique de l'accès à la justice* » (Montréal, Protégez-Vous, 2009, 70 pages); Fondation du Barreau du Québec, « *Representing yourself in Court in civil matters* », online: **www.fondationdubarreau.qc.ca/publications**; Fondation du Barreau du Québec, « Representing yourself in Court in family matters », online: **www.fondationdubarreau.qc.ca/publications**.

IV / APPEAL

IV APPEAL

The right of appeal is a statutory right. *The Code of Civil Procedure* and certain special statutes may prohibit an appeal. In such cases, the lawyer will have to consider the other possible recourses available to him.[120]

The best practices referred to under the heading "*Judicial Phase*" also apply to appeals, with the necessary adjustments.

LEAVE TO APPEAL

The appeal may require that leave be obtained. In such cases, the lawyer's role is to verify whether the criteria for obtaining leave are met. Since obtaining leave is far from automatic, the lawyer should carefully review articles 26, 29 and 511 of the *Code of Civil Procedure* and properly research the issue. He must take into account the principle of proportionality under article 4.2 C.C.P.[121] and therefore the financial implications as well as the costs associated with the appeal process. In all cases in which a final judgment is being appealed, the motion will have to establish that the matter at issue is a question of principle, a new issue or a question of law that has given rise to conflicting judicial precedents, and that the interests of justice favour the granting of leave to appeal. The fact that there are errors of fact or law in the judgment appealed is not sufficient in itself.

If the appeal is from an interlocutory decision, the motion will, on the one hand, have to refer to one of the three situations set out in the first paragraph of article 29 C.C.P. and, on the other hand, show that the "[translation] *matter appears to be serious and would contribute to the proper functioning of the judicial process*[122] ".

Some motions for leave to appeal may be filed under various legislative provisions other than the *Code of Civil Procedure*. Such motions are subject to their own criteria and time limits. For example, in certain circumstances, the *Bankruptcy and Insolvency Act* allows a motion for leave to appeal to be filed within ten (10) days of the judgment or order rendered.[123] Under the *Companies' Creditors Arrangement Act*, the time limit is twenty-one (21) days.[124] For motions appealing decisions rendered by registrars or a notice of disallowance of a proof of claim, lawyers should refer to the section on the Commercial Division.

In all cases, a motion for leave to appeal must be accompanied by the judgment at first instance as well as the proceedings and exhibits that are useful for understanding the appeal. This motion must be presented as quickly as possible. The date of presentation should nevertheless give the respondent sufficient time to prepare and to allow for a discussion with the respondent on a draft case management plan. The clerk of the judge assigned to motions is the appropriate person to contact at the court concerning requests for adjournment or to arrange for the use of a technology (telephone conference call, videoconferencing).

[120] For example: s. 164 of *An Act respecting administrative justice* applied in *Michalakopoulos c. Montréal (Ville de)*, 2009 QCCA 308; C.C.P., s. 273.2 applied in *Aliments Breton (Canada) inc. c. Bal Global Finance Canada Corporation*, 2008 QCCA 1420.

[121] *A.M. c. Kliger*, 2011 QCCA 17.

[122] *Fleury c. Québec (Procureure générale)*, 2009 QCCA 1968 (CanLII)., page 4; C.C.P., art. 511.

[123] s. 31 of the *Bankruptcy and Insolvency General Rules*, CRC, c 368.

[124] s. 14 CCAA.

APPEAL AS OF RIGHT

An appeal as of right is brought by filing an inscription in appeal with the court office of the court at first instance, within the specified time limit. The drafting of the inscription in appeal is extremely important. "[Translation] *We note, once again, that the appeal is not an occasion to retry the case.*[125]" A new theory of the case must be developed based on the judgment at first instance: What are the errors in the judgment? If they are proven, would this allow the court to intervene? A well-written inscription in appeal will make it difficult to obtain the dismissal of the appeal upon a simple motion to this effect.

Specific statutes may permit the filing of a notice of appeal, the *Bankruptcy and Insolvency Act* being one example. Where a full right of appeal is allowed in situations involving a bankruptcy or insolvency, the time for appeal is ten (10) days. It is crucial to ensure that there is, in fact, a full right of appeal and, if so, to verify the applicable deadline. Once again, it is essential to do the appropriate research.

To develop the theory of the case on appeal, the lawyer must master the standards of review laid down by the Supreme Court in the area of law involved on the appeal. He must therefore read the key court decisions in the relevant area of law.[126]

As a general rule, the inscription in appeal must show that there are errors of law or clearly identify palpable and overriding errors in the judgment—errors that led the judge to make erroneous conclusions. In this last situation, the appellant will have a triple burden, to: (1) identify the error, and show (2) that it is palpable, and (3) critical in its scope. If this is not shown, the respondent may present a motion to dismiss the appeal. This motion must then prove that the judgment is unassailable and that the appellant has not met his obligation to prove the contrary. As a general rule, the motion to dismiss should be short and concise, because by taking several pages to show that an appeal is futile or bound to fail, one risks proving the opposite.

SUSPENSION OF EXECUTION OF JUDGMENT NOTWITHSTANDING APPEAL

If the provisional execution of the judgment at first instance is ordered notwithstanding the appeal, or provisional execution occurs as of right, despite the appeal,[127] it is advisable for the lawyer to apply for the suspension of the execution of the judgment as soon as possible, since the appeal does not suspend the execution of such a judgment. If the lawyer delays in seeking the suspension, he may risk having his appeal dismissed on grounds that it has become moot, because the judgment at first instance has been executed.[128]

[125] *Regroupement des CHSLD Christ-Roy c. Comité provincial des malades*, 2007 QCCA 1068, paras. 54-55.

[126] *Housen* v. *Nikolaisen*, (2002) 2 SCR 235; *H. L.* v. *Canada (Attorney General)*, 2005] 1 SCR 401; *Matte c. Charron*, 2010 QCCA 1496, paras. 46-49; *Droit de la famille - 101922*, 2010 QCCA 1440, para. 9; on provisional measures: *Droit de la famille - 10960*, 2010 QCCA 872; on quantum of damages: *Morel c. Tremblay*, 2010 QCCA 600, para. 12.

[127] C.C.P., arts. 469.1 and 547; Belleau, Charles - *L'exécution forcée des jugements,* in Collection de droit 2010-2011, Volume 2, *Preuve et procédure, Titre I, La procédure*, online: **www.caij.qc.ca/doctrine/collection_de_droit/2010/2/i/1837/1837.pdf**; Pariseau-Legault, Lysanne - *L'appel,* in Collection de droit 2011-2012, Volume 2, *Preuve et procédure, Titre I, La procédure, online:* **www.caij.qc.ca/doctrine/collection_de_droit/2010/2/i/1835/1835.pdf**.

[128] *Forest c. Raymor Industries inc.*, 2010 QCCA 578 (CanLII): [Translation] "*[8] The respondents asked for and obtained an order from the judge at first instance for provisional execution notwithstanding the appeal [9] The appellant did not immediately ask the court to suspend the order for provisional execution notwithstanding the appeal. […] The effect of these developments is that, independently of the appellant's apparent lack of legal interest, the appeal has become moot because the reorganization of Raymor has been implemented.*"

THE APPEAL PROCEEDING

An appearance should be filed quickly by any party who intends to actively participate in the file, to ensure efficient management of the proceeding.

As soon as the appeal file is opened, the lawyer should consider whether his client may wish to use the judicial mediation service offered by the Court of Appeal. Judicial mediation may often allow for a more satisfactory resolution of the dispute than a judgment on appeal. In any event, the mediating judge will be excluded from the panel of judges charged with hearing the appeal.[129]

From the very start of an appeal file, the lawyers should reflect on how it should be managed. When the motion for leave to appeal is presented, it is recommended that the lawyers take the opportunity to set up the case management of the file with the judge. The same applies in the event an interlocutory motion is presented to the court. In the case of an appeal as of right, it is also possible to send a joint case management proposal to the court clerk who will then submit it for approval to the motions judge. If a consensus cannot be reached, a motion for case management of the file may also be made to a judge.[130] The purpose of such case management is to find ways to reduce costs, shorten wait times, allow for the electronic filing of evidence and exhibits, and even set a hearing date, if the case is urgent.

The cost of transcribing the testimony is certainly the greatest initial expense to be incurred. The lawyer should verify with his opponent whether it is possible to agree on a partial or complete joint statement of facts.[131] Such a joint statement can reduce or eliminate the cost of transcripts.

PREMATURE DISMISSAL OF THE APPEAL

Before submitting a motion to dismiss the appeal, the respondent should assess the costs and chances of success of this process. Would justice be better served by agreeing to a faster and less costly case management of the appeal? Each case must be assessed not only on the basis of the stakes involved in the appeal, but also on the parties' financial means, since the serious drafting and presentation of a motion to dismiss the appeal will require numerous hours of work.

THE ARGUMENT OR FACTUM

The argument or factum should be drafted in a succinct, concise manner. The goal should certainly not be to reach the maximum number of pages at all costs. If any arguments have been abandoned, it should be indicated. In the contrary event, if any matters were omitted, one should ask for permission to amend the inscription in appeal to include them. It is suggested that the respondent unequivocally concede anything that is indisputable. In any event, the arguments pleaded at first instance, but not upheld by the judge, must be submitted to the Court of Appeal to prevent a round-trip of the file back to the court at first instance.[132]

[129] C.C.P., art. 508.1.

[130] C.C.P., art. 508.2.

[131] s. 65(2) of the *Rules of the Court of Appeal of Québec in Civil Matters*, D. 06-04-17, 2006 G.O. 2, 5800 (hereinafter "*Rules in Civil Matters*").

[132] *Syndicat des métallos, section locale 2843 c. 3539491 Canada inc.*, 2011 QCCA 264, paras. 24-29.

When drafting their factums, lawyers may get a different perspective on their case. If so, it is never too late to ask for a judicial mediation session.

It should be mentioned, as a reminder, that the appellant has the burden of reproducing all evidence that the Court will need in order to resolve a dispute, and that if he fails to do so, the respondent may obtain a dismissal of the appeal.[133]

BOOK OF AUTHORITIES

Refer to the rules of the Court of Appeal[134] and avoid submitting decisions by the Supreme Court on the standard of review of the Court of Appeal. The recommendations made in the section entitled *"Submission of Authorities to the Court"*, under the heading *"Judicial Phase"*, also apply to the appeal.

THE HEARING

Generally speaking, the time allowed for submissions on a motion is 15 minutes per lawyer. If this time is insufficient, the lawyer should contact the court clerk assigned to the hearing room as soon as possible so that the roll may be adjusted accordingly.

The time allowed for a case at the hearing on the merits is indicated on the roll for hearing. It is imperative that the lawyer not exceed his allotted time. In files where several lawyers must share the allotted time, they are strongly advised to confer on the allocation of this time prior to the start of the hearing.

COMMENTS

For any practical issues that arise, lawyers would be well advised to consult the Court of Appeal's website, which contains a variety of useful information, including model proceedings, checklists, frequently asked questions, the rules of the Court, hearing schedules, etc.[135]

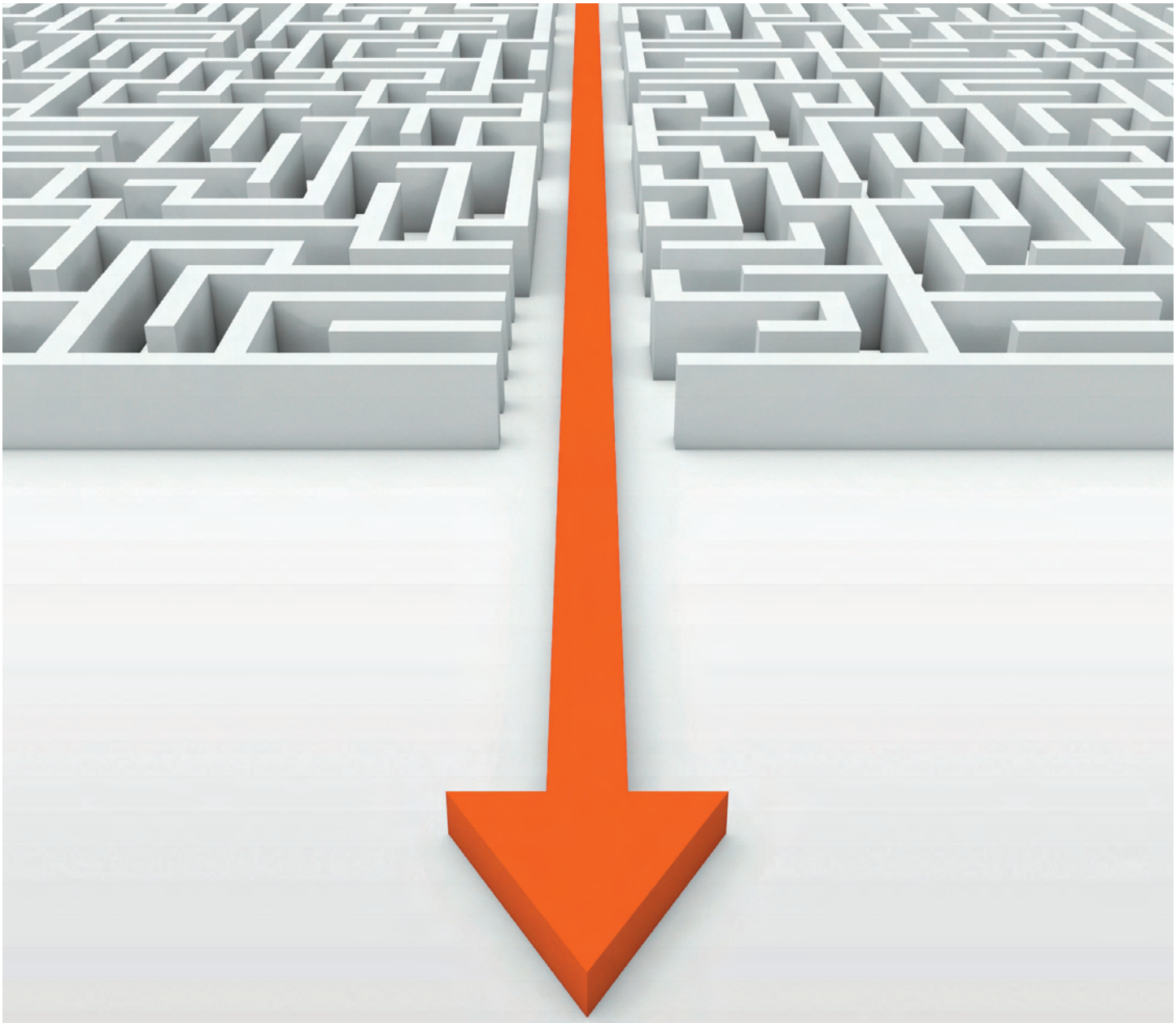
In addition, it is essential to consult more in-depth works dealing with appeals.[136]

[133] *T… C…* c. *A…K…*, 2011 QCCA 1554, paras. 18-26.

[134] ss. 85 to 87 of the *Rules in Civil Matters*: *"85. Authorities. […] (2) The book of authorities may be limited to relevant excerpts only, in which case the pages immediately preceding and immediately following any excerpt shall also be included, as well as the citation and the headnote of the decision, if there is one. […] (5) When the book of authorities contains judgments or extracts of judgments rendered by the Supreme Court of Canada, such version must be that published in the Reports of the Supreme Court of Canada, or any computer based version that has the same paragraph numbering as the version published in the Reports of the Supreme Court of Canada.*

[135] **www.tribunaux.qc.ca**.

[136] For example, see Louise Mailhot and Lysanne Pariseau-Legault, *L'appel,* 2nd ed., Cowansville, Éd. Yvon Blais, 2008.



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