

The Butler Bulletin

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The Court Edition

The #1 Tool for Surviving Estate Litigation

Estate litigation has a reputation for tearing families apart. Not only are you fighting with your siblings, but all of you are arguing over what happened with a relative. If the case gets to the point where it ends up in a trial, both sides say things about the others that are hard to get past once the trial is over.

One of the ways you can make estate litigation easier is by keeping the lines of communication open with both your lawyer and the other people involved.

With Your Lawyer

It is in your best interest for your lawyer to have all of the information when the time comes for him or her to present your case to the judge. If your lawyer isn't fully informed on everything that is relevant to the situation, he or she is likely to be blindsided by the things the other lawyer brings up.

This won't help your case. Your lawyer won't be able to argue your position if he or she doesn't know what it is based on. Open communication with your lawyer can prevent this from happening. It is not your lawyer's job to judge you on your situation or your family history.

Anything you say is received in a professional capacity, rather than an emotional or personal capacity. Any lawyer that has experience in estate litigation has likely heard from previous clients about family issues that are similar to yours since all families have struggles.

Also, communicating with your lawyer means that he or she will have everything necessary to give you an informed decision about your case. Either your lawyer will be fully equipped to develop a strong case, or be able to let you know that your position is not very strong. Either way, you'll have the info you need to handle the situation.

Sometimes we hear that people are "saving" pieces of information for when their case gets to trial. Mostly this stems from people thinking that they will hold onto a final piece of info in their arsenal that will help them win the case. However, in situations where clients do not communicate everything with their lawyer, the case probably won't make it all the way to a trial because the info that has been withheld was necessary earlier on in the process.

With Each Other

In estate litigation, families are most often divided into two "sides". Communication with the other people on your side is essential for

making it through litigation with your relationships intact.

In an ideal scenario, people who are on the same side of an issue will regularly communicate with each other, whether over the phone, in person, or via email. Keeping the lines of communication open allows each person to see the whole picture. If you've entered into litigation, you've decided which team you're on. Your team cannot function properly if each person is out for themselves.

For example, consider a situation in which four people are on one side of the issue. Three have email, and one does not. All four should agree who will print emails from the lawyer to pass on to the person without access to the internet. This keeps the fourth person in the loop, so he or she can contribute to any discussions and help make decisions.

Family dynamics play a huge role in determining whether or not everybody communicates. People who naturally take the lead in the family tend to do the same when it comes to going to court. While it is a smart choice to have someone who can keep everything under control, it is also important to ensure that everyone involved has a say in the situation. This can be difficult to achieve when the leader of the group doesn't get along with everyone.

Does your personal relationship with your lawyer impact the outcome of a court hearing?

In our podcast *How to Break Up with Your Lawyer* we talked about the fact that sometimes lawyers and clients do not get along. In any business relationship there is the possibility that your personalities will clash.

However, the relationship between client and lawyer is a bit different. Clients tell their lawyers all sorts of personal info that they wouldn't share with others.

This requires both parties to be able to ask questions and receive honest answers. Does disliking each other impact the outcome of a court hearing?

The answer is both yes and no. Being comfortable with your lawyer makes it easier to share personal details about the situation. These kinds of discussions go much more smoothly when you feel like you can openly talk to your lawyer. As a result, you may feel like you can say everything, which gives your lawyer the best chance at successfully arguing your case.

Conversely, when the lawyer-client relationship isn't positive it can be more difficult to collect all of the pertinent information. Regardless of whether or not you and your lawyer like each other, he or she has an ethical obligation to present the strongest possible case to the judge. In this respect, the personal relationship is completely irrelevant.

Law Cartoon #7311

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"This time, when asked how you would characterize your relationship with the co-defendant, do not under any circumstances say 'thick as thieves.'"

What's a retainer letter for?

When you first hire a lawyer, you should receive what is referred to as a retainer letter. While this sounds like a letter from your lawyer saying how much money you need to provide for a retainer fee, there is more to it.

A retainer letter is used to clearly set out the expectations of each party, and to avoid taking the client by surprise when it comes time to pay the bill.

Whether or not you are required to pay any money in advance should definitely be covered in this letter. It should also include a summary of any money that you have already paid.

The retainer letter should also clearly state how you will be billed. It is commonly understood that lawyers bill by the hour, but how often do you receive that bill? Most often it is monthly or bi-weekly. This should be made clear in the retainer letter.

In situations where there is one set fee, rather than an hourly rate, the letter should cover what services are included for this amount.

Along with discussing billing, a retainer letter may include a list of things you need to do or prepare before your next meeting, such as gathering information required for court applications.

Representing Yourself in Estate Court

Not everyone chooses to use a lawyer when they need to go to court. Whether you want to represent yourself because the matter is simple, or because you can't afford a lawyer, there are a few things you should know about representing yourself in court before you take on the job.

You need to do everything a lawyer would do to prepare.

There is more involved with going to court than simply showing up and making your argument. In order to effectively represent yourself, you will need to prepare the same way a lawyer would. This includes filing any affidavits or other documents on time and in the correct place, following all court procedures, and providing the opposing counsel with any necessary documents.

Documents that have not been properly filed cannot be introduced in the courtroom. It is up to you to make sure that all relevant documents have been filed on time if you want to use them in your case. If they are late, it is likely the judge won't accept them. You cannot include any document that was not filed.

Following the accepted procedures is crucial. Filing documents with the incorrect file numbers, in the wrong place, or withholding information that is meant to be shared with the opposing counsel will all lead to your case being thrown out.

Do your research.

Research is an essential component of any matter in court. The research is the backbone of your argument, as it shows what decisions have been made in the past on similar matters.

In estate litigation, you will likely need to prepare a document called an "authority". This document includes a brief which outlines your position, as well as the supporting research. Keep in mind that the research is *legal* research – this means it needs to come from legal sources, not Google.

Your authority needs to include a copy of each case in full, not just a summary. Read each case thoroughly so you completely understand not only what the decision was, but also what was involved in leading up to that decision.

When doing your legal research, use reputable sites. Be sure to choose academic sources such as CanLII.

Know the roles of everyone involved.

There are several people involved with estate litigation. You'll notice that each person in the courtroom has a specific role. Regardless of the position, each person must be respectful of everybody else.

The judge is in control at all times. He or she is responsible for listening to each person's argument, and making a decision based on those arguments. The judge can make a decision for or against you, ask for more information, put the matter off until another day, or withhold the decision until he or she has had more time to consider the issue. No matter what the decision is, it is final.

The opposing counsel is there to make an argument contrary to yours. Remember the Godfather – it isn't personal, it's business. The lawyer for the other side isn't emotionally involved in the situation the way you are. If you've been to watch any other court hearings, you'll notice that the lawyers involved are very cordial and polite to each other. This is because they are there for business, despite the fact that they are directly opposed.

The clerk is there to keep the court record, provide possible dates for future hearings, and to act as an intermediary between the judge and everyone else. If the judge asks to see a document that you have, be sure to hand it to the clerk instead of directly to the judge.

Your role is to make your argument as professionally as you can. When the judge asks you a question, answer the way the other lawyer does. For example, it is acceptable to refer to a judge as "Your Honour", "Justice", or "Sir/Ma'am". It is not acceptable to interrupt.

Courtroom Theatrics

Television and movies regularly depict courtroom scenes as highly entertaining events. There's usually a lot of waving around, banging on the table, and dramatic pauses. Quite often the judge needs to repeatedly bang the gavel to regain control of the courtroom. While these scenes are certainly fitting for movies, they don't accurately represent what happens in court.

Lawyers in these scenes have a tendency to be very boisterous and loud. They have passionate speeches prepared that they announce to the judge, jury, and audience. In reality, this type of blustering doesn't get you very far. The part that gets forgotten is the fact that the judge was once a lawyer as well, and knows full well that these lawyers are putting on a show.

The vast majority of people will never be required to attend a trial, and unless you are a law student you probably haven't gone to the courthouse to watch one.

As a result, many people who hire a lawyer to argue their case feel that the ones who put on the kind of show they see on TV are pit bulls who aggressively fight for their clients, and the ones who don't are less likely to win.

Acting out in court is strictly for the benefit of the client. The judge isn't impressed since he or she is focused on the facts of the case rather than the lawyer's ability to puff out his or her chest, and the opposing lawyer isn't awestruck since he or she knows exactly what is going on.

The expectation that lawyers will behave the way they do on TV and in movies can be detrimental to the way that clients perceive their lawyer's performance. A lawyer who concisely presents well thought out arguments is doing his or her job. However, clients who anticipate that there will be more to the performance are disappointed when the arguments are over, whether not they won.

When it comes to how your lawyer presents your case in court, factors such as whether or not the arguments were clear, if the supporting cases were relevant, and if your lawyer was prepared are much more reliable for determining your chances of being successful than how theatrical the performance was.

Did You Know...?

Our radio show starts this month!

Tune in to VOXM on Thursdays at 11:30 to listen to *The Law Show*. We'll be covering a variety of estate law topics, ranging from probate to adult guardianship to preparing to go into long-term care.

If there is something you have a question about, send it to

thelawshownl@gmail.com.

If we pick your question to answer on the show, we'll send you a free copy of one of Lynne's books.



One of our upcoming shows will feature guests from CIBC to cover topics such as:

- **What a trust company does if you choose to include them in your planning**
- **The fee structure**
- **Who is a good candidate for using a trust company**
- **And more!**

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