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New & Young Lawyer Track

Don't Just Go Through the Motions: Effective Motions Practice in Bankruptcy Court and Trial Advocacy Tips

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DON'T JUST GO THROUGH THE MOTIONS: EFFECTIVE MOTIONS PRACTICE IN BANKRUPTCY COURT AND TRIAL ADVOCACY TIPS

I. PRACTICE POINTERS ON DRAFTING MOTIONS.[1]

A. Simplify, Simplify, Simplify. You're job as an advocate is to explain your position in simple terms. Toward that end, supply the court with aids that will assist the judge in understanding your position. I suggest you prepare an expendable hearing booklet containing these aids to distribute to the judge and all parties at the commencement of my argument. Examples of aids that might be included in this booklet are the following:

1. List of Players. It is difficult to keep track of the names of numerous parties and other players that are involved in the event or transaction that gives rise to your claim or defense. So list these parties out with their affiliations and an explanation of their role in the case.

2. Timeline of events. A chronology of the dates of events and transactions is helpful in understanding the whole story.

3. List of Acronyms and Industry Specific Terms. While generally the use of acronyms is to be avoided, in some cases they are an integral part of a business. If so, prepare a list of the acronyms and their definitions.

4. Excerpts from Key Exhibits. In commercial cases, documents are often lengthy and complex. While you will generally have to introduce the whole document into evidence, it is often helpful if you excerpt as a demonstrative aid the portions of the document that you will be referencing during trial.

5. Key Cases. While your motion may contain a number of cases, as a practical matter you most likely will be discussing a small portion of those during oral argument. Put copies of those in your booklet with the portions that you are relying on in bold.

6. Charts. It is often helpful in understanding complicated transactions to use a chart depicting the key transactions. For example, "before and after" charts depicting a complex corporate transaction that forms the basis of an alter ego or successor liability case is helpful.

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[1] This portion of the materials is an excerpt from Judge Williamson's Practical Evidence Manual, available at his court's website: http://www.flmb.uscourts.gov/judges/tampa/williamson/practical_evidence.pdf.

B. Keep it Short. Few motions need to exceed three pages. Even if it is a really complex matter, try to keep the page count down to 10 pages. The more succinctly your writing, the better. Don't drag your motion out to the maximum page limit if you have nothing left to say. In the words of Chief Justice Roberts, "I've yet to put down a brief and say,'I wish that were longer.'"

C. Preview Relief Sought. Explain in the introductory paragraphs the relief you are seeking, and as simply as possible, factual and legal bases for the relief requested.

D. Avoid Legalese. Plain language is easier to understand. As Justice Scalia once said, "A good test is, if you use the word at a cocktail party, will people look at you funny?"

E. Avoid Minutiae. When drafting your motion, first ask yourself what the court needs to know, then include that information in the motion. You need to communicate the big picture in a fashion that it can be understood quickly by the reader. Avoid minutiae. For example, a tedious recitation of every document in the loan file is neither needed nor helpful. In a similar vein, do not cut and paste the identical case history and introductory paragraphs from earlier motions into later ones.

F. Avoid Excessive Case Citations. If there is a novel legal issue, cite a case or two that supports your position. One or two cases is ordinarily sufficient. Avoid long string cites unless you are trying to make a point. Also, citation of well-settled law is not helpful. For example, taking two pages to review the standards for summary judgment is a waste of space.

G. Never Disparage Your Opponent. As Justice Ginsburg once said, "You should aim to persuade the judge by the power of your reasoning and not by denigrating the opposing side." Using words such as "outrageous," "disingenuous," and the like reflects poorly on you.

H. Be Intellectually Honest. If you have weaknesses in your position, "pull the teeth" by addressing them in your motion explaining that while you concede that these weaknesses exist, they should not compel a different result. Similarly, address your opponent's best argument in your motion.

I. Provide Copies of Cases. Many judges welcome the filing of cases that will be relied on at the hearing so long as the cases are furnished to opposing counsel. Depending on a judge's practice, it is often useful to highlight the portions of the cases that you will be relying upon. Include those highlights in the cases you provide to opposing counsel.

J. Footnotes. Footnotes for citations generally makes for a motion that is easier to read. However, don't put substantive portions of your argument in footnotes. If it's substantively important, then it should be included in the text of your motion.

K. File Your Memo of Law Well Before Hearing. When you do file briefs or cases, they are of very little use to the court unless they are filed in a timely manner so as to allow sufficient opportunity for their review in advance of the hearing (delivery to chambers at the end of business hours on the eve of a hearing or on the day of the hearing is not timely). You should assume that the judge will rule from the bench, and briefs or cases filed at or immediately before the hearing will not be reviewed prior to the court's making its ruling.

II. Rules You Should Know.

Bankruptcy practitioners are often confronted with the issue of whether certain relief can be granted in a case with a simple motion or if an adversary proceeding is required. Rule 7001 of the Federal Rules of Bankruptcy Procedure provides guidance as to the specific types of relief that require the filing of an adversary proceeding, but practitioners in a fluid bankruptcy environment sometimes attempt to skirt the rule in order to save on costs or get an issue before the court quickly. Assuming the purpose of seeking the relief is to ultimately obtain an order granting such requested relief, best practices require practitioners to understand and follow the Federal Rules of Bankruptcy Procedure. Likewise, practitioners representing parties opposing relief in these situations should also have a commanding understanding of the rules in order to stop strategic attempts by the moving party to shortcut the requirements under the rules.

A. Rule 7001

Fed. R. Bankr. P. 7001 provides that Part VII of the Rules are applicable in all adversary proceedings. Rule 7001 goes on to provide a list of ten (10) separate proceedings that require the filing of an adversary proceeding in a bankruptcy case. The matters include: (1) a proceeding to recover money or property; (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property; (3) a proceeding to obtain approval under 11 U.S.C. § 363(h) for the sale of joint interests of the estate and a co-owner in property; (4) a proceeding to object to or revoke a discharge; (5) a proceeding to revoke an order of confirmation of a chapter 11, 12 or 13 plan; (6) a proceeding to determine dischargeability of debt; (7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, 11, 12, or 13 plan provides for the relief; (8) a proceeding to subordinate any allowed claims or interest, except when a chapter 9, 11, 12, or 13 plan provides for subordination; (9) a proceeding to obtain a declaratory judgment relating to any of the above proceedings; and (10) a proceeding to determine a claim or cause of action removed to bankruptcy court under 28 U.S.C. §1452. Fed. R. Bankr. P. 7001.

B. Rule 9014

Fed. R. Bankr. P. 9014 governs contested matters. A contested matter is a contested request for relief from the bankruptcy court in a debtor's main case (as

opposed to an adversary proceeding). To the extent an adversary proceeding is required under Rule 7001, Rule 9014 requires relief to be requested by motion with reasonable notice to and an opportunity to be heard by the party against who relief is sought. While not required under Rule 9014, many bankruptcy court's require responses in their respective local rules, since a contested matter is not technically created until the requested relief is actually contested. Rule 9014 also incorporates many of the Part VII Rules in contested matters. Unless otherwise directed by the court, Rules 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071 apply in contested matters. Rule 9014 specifically excludes the following subparts of Rule 7026: 7026(a)(1) (mandatory disclosure), 7026(a)(2) (disclosure regarding expert testimony); 7026(a)(3) (additional pre-trial disclosure); and 7026(f)(mandatory meet and confer regarding discovery plan). Finally, Rule 9014 provides that testimony of witnesses shall be taken in the same manner as testimony in adversary proceedings and that the court shall provide procedures that enable parties to determine at a reasonable time prior to any scheduled hearing whether the hearing will be an evidentiary hearing. Fed. R. Bankr. P. 9014.

Despite knowing and understanding the rules, in certain circumstances some practitioners may make calculated decisions to deviate from the rules and seek relief by motion that is required to be brought as an adversary proceeding. Because procedures in contested matters tend to be abbreviated, practitioners may strategically bring a matter as a motion in order to conserve time and costs, which tend to be crucial in most bankruptcy cases. Some bankruptcy courts have ruled that a litigant waives its rights to require the commencement of an adversary proceeding if party received notice and had a fair opportunity to defend against the claim. *See Trust Corp. of Mont., Inc. v. Patterson (In re Copper King Inn, Inc.)*, 918 F.2d 1404 (9th Cir. 1990). Litigants who ignore Rule 7001 do so at their own peril. While some bankruptcy courts will be more concerned with the substance of the pleadings and not the form, litigants must appreciate that any deviation from the rules may lead to the court to simply denying the relief requested. *See In re Habor Oil Co., Inc.*, 12 F.3d 426, 437 (5th Cir. 1994). In other cases, courts have limited the preclusive effect of a ruling if an adversary proceeding was required and not commenced. *See Cen-Pen Corp.v. Hanson*, 58 F.3d 89, 93 (4th Cir. 1995). Ultimately, various factors may be considered by litigants trying to determine the appropriate vehicle to seek their relief, but any consideration must start with Rule 7001.

C. Other Considerations

Keep in mind that Rule 7001 allows certain types of relief to be sought through an adversary proceeding or through a debtor's chapter 9, 11, 12, or 13 plan. A party may seek an injunction or seek to subordinate claims of a party through an adversary or a chapter 9, 11, 12, or 13 plan.

III. MOTION FOR INJUNCTIVE RELIEF.

A. Rule 7065

Fed. R. Bankr. P. 7065 provides that Fed. R. Civ. P. 65 applies in adversary proceedings with one important exception. Under Rule 7065 an injunction may be granted for the benefit of a debtor, trustee, or debtor in possession without posting of any security required under Fed. R. Civ. P. 65(c). Fed. R. Bankr. P. 7065.

B. Rule 65

Fed. R. Civ. P. 65 provides courts with authority to issue injunctions and restraining orders. Section (a) of the Rule provides that the court may issue a preliminary injunction only on notice to the adverse party. Section (b) of the Rule provides that a temporary restraining order may be issued without notice to the adverse party if specific facts in an affidavit or verified complaint clearly show that immediate and irreparable injury, loss or damage will occur to the movant before the adverse party van be heard in opposition. Section (b) further requires any temporary restraining order issued without notice to: (i) include the date and hour it was issued; (ii) include a description of the injury and why it is irreparable; (iii) include an explanation why the order was issued without notice; (iv) be promptly filed with the clerk's office and entered into the record. Finally, section (b) provides for expiration of the temporary restraining order as set by the court (not to exceed 14 days) unless extended for good cause or by consent of the adverse party. Section (d) (1) requires that any order granting an injunction or restraining order: (i) state why it was issued; (ii) state its terms specifically; and (iii) describe in reasonable detail the acts restrained or required. Section (d)(2) requires that the injunction or restraining order only binds the parties, the parties' officers, agents, servants, employees, and attorneys, and anyone acting in concert with them who receive actual notice of the injunction or restraining order by personal service or otherwise. Fed. R. Civ. P. 65.

C. The Standard

The Supreme Court set forth the appropriate standard for the issuance of a preliminary injunction in *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008). A plaintiff must establish (i) he is likely to succeed on the merits; (ii) he is likely to suffer irreparable harm in the absence of preliminary relief; (iii) the balance of the equities tips in his favor; and (iv) an injunction is in the public interest. *Winter*, 555 U.S. at 20, 129 S.Ct. at 374. Courts require a movant to independently satisfy each of the four factors articulated in *Winter*. *See Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2014)(citations omitted), *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003).

With respect to the first requirement of showing a likelihood of success on the merits, plaintiffs must provide a clear showing they are likely to succeed at trial, but are not required to a certainty of success. *Pashby* at 321.

With respect to the second requirement regarding irreparable harm, the Supreme Court in *Winter* ruled that the mere possibility of irreparable harm was insufficient to satisfied the requirement. *Winter*, 555 U.S. at 22, 129 S.Ct. at 376. Instead, the threat of irreparable harm must be actual and imminent. *See Siegel v. LePore*, 234F.3d 1163, 1176-1177, (11th Cir. 2000).

In analyzing the third requirement of balancing the equities, the Supreme Court in *Winter* ruled that courts must have carefully considered the impacts of the injunction on both parties and not in a cursory fashion. *Winter*, 555 U.S. at 24-25, 129 S.Ct. at 376-377.

With respect to the fourth requirement, the Supreme Court ruled that courts must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24, 129 S.Ct. at 376-77. In *Winter*, the Supreme Court stressed that courts couldn't stop their analysis at likelihood of success on the merits and irreparable harm and ignore the balance of eth equities and impact on the public interest. *Id.*

D. Evidentiary Issues

Typically a party seeking a temporary restraining order without notice will provide a verified complaint or affidavit in support of its request which may serve as the basis for a court to enter the initial order, but parties should always be prepared to put on live witness testimony.

Some courts have ruled that in some circumstances such as when there is no dispute of material fact, a court may enter a preliminary injunction without hearing witness testimony. *See Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 256 (2nd Cir. 1989); *McDonalds Corp. v. Robertson*, 147 F.3d 1301, 1310-1313 (11th Cir. 1998).

Often parties will have to seek expedited discovery in conjunction with a preliminary injunction hearing. Courts have applied two different standards in analyzing those requests. The first approach closely follows the preliminary injunction standard and requires the moving party to demonstrate: (i) irreparable injury; (ii) some probability of success on the merits; (iii) some connection between the expedited discovery and the avoidance of the irreparable injury; and (iv) some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted. *Notaro v. Koch*, 95 F.R.D. 403, 405 (S.D.N.Y. 1982). Other courts have developed a separate test referred to as the "good cause" or "reasonableness" test after considering the totality of the circumstances. *See Dimension Data North America, Inc. v. NetStar-1, Inc.,* 226 F.R.D. 528, 531 (E.D.N.C. 2005). In applying this test, courts have applied varied factors. In *Chryso, Inc. v. Innovative Concrete Solutions of the Carolinas, LLC*, the Court applied the following factors: (i) the procedural posture of the case;

(ii) whether the discovery at issue is narrowly tailored to obtain information that is probative to the preliminary injunction analysis; (iii) whether the requesting party would be irreparably harmed by waiting until after the parties conduct their Rule 26(f) conference; and (iv) whether the documents or information sought through discovery will be unavailable in the future or are subject to destruction. 2015 WL 12600175 (E.D.N.C. 2015). Other courts have applied a variation of these factors such as: (i) whether a motion for preliminary injunction is pending; (ii) the breadth of the requested discovery; (iii) the reasons for requesting expedited discovery; (iv) the burden on the opponent to comply with the request for discovery; and (v) how far in advance of the typical discovery process the request is made. *Thyssenkrupp Elevator Corp. v. Hubbard*, 2013 WL 1953346 (M.D.Fla. 2013).

E. Strategic Considerations

As a plaintiff be mindful of whether you want the judge in your case to develop an initial impression about you and your case at a preliminary injunction hearing. The standard to grant a preliminary injunction is difficult and unless you have a compelling reason for the injunction, your client may be better served by not overreaching.

As a defendant consider the impact of the requested relief and whether it is advantageous to simply consent to the relief in order to give you adequate time to prepare your case.

IV. Motion to Dismiss.

The importance of a motion to dismiss cannot be understated. At bottom it is a ruling which turns on sound pleading practice. A Plaintiff can avoid defending such motions if proper care and time is taken in drafting a solid complaint, which follows the basic guidelines set forth in Rules 4, 8, 9, and 10 of the Federal Rules of Civil Procedure, as made applicable to bankruptcy cases by the Federal Rules of Bankruptcy Procedure. Conversely, knowing what to look for, and attacking weaknesses in a complaint, can mean the difference between a defendant quickly extracting itself from a lawsuit, or suffering through costly discovery, further dispositive motions and trial.

A. *The Federal Rule.*

Rule 12(b) identifies seven grounds for dismissal of a pleading by motion as follows: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19. F.R.Civ.Pro. 12(b).

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. A party may assert any one or more of these defenses

in one motion, and asserting multiple grounds does not waive any of the other grounds asserted. F.R.Civ.Pro. 12(b). Indeed, failing to move under all available grounds at one time in a motion to dismiss may effectively waive the defense not asserted, as no further motion under Rule 12(b) can be made. F.R.Civ.Pro. 12(g)(2) and (h)(1). Of course, like all rules, there are exceptions to this consolidation rule. A party may raise a lack of subject matter jurisdiction, Rule 12(b)(1), at any time, and may raise a failure to state a claim, Rule 12(b)(6), and failure to join a party, Rule 12(b)(7), in any pleading, in a motion for judgment on the pleadings, or at trial. F.R.Civ.Pro. 12(h)(2) and (3). Best practice is to file a motion to dismiss, asserting any and all grounds upon which the complaint is defective before filing an answer or incorporated into an answer.

Federal Rule of Bankruptcy Procedure 7012(b), which makes Rule 12 applicable to bankruptcy proceedings, includes an additional requirement. It requires a responsive pleading to include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court. F.R.B.P. 7012(b).

Far and away the most frequently utilized ground for a motion to dismiss is Rule 12(b)(6), failure to state a claim upon which relief can be granted. This is an important tool for practitioners, as it rids the court system of litigation which is abusive, meritless, or facially defective in pleading, rather than let it proceed towards costly discovery and waste limited court resources.

B. The Basics – Pleading Standards under Rules 8(a)(2), 9(b) and 10.

The Rule 12(b)(6) motion rests on the failure of a party to follow the basic tenets of sound pleading practice. Sound pleading practice starts with Rule 8(a). It is really pretty simple. A pleading stating a claim for relief must contain a short and plain statement of the grounds for the court's jurisdiction, a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for the relief sought by the pleader. F.R.Civ.Pro. 8(a)(1) – (3). A party alleging fraud or mistake, must state with particularity the circumstances constituting fraud or mistake. F.R.Civ.Pro. 9(b).

The pleading must contain a caption identifying the court's name, a title, a file number and the type of pleading it is (complaint, answer, counterclaim, crossclaim, third-party complaint, answer to counterclaim, crossclaim or third-party complaint, or reply). F.R.Civ.Pro. 10(a). Some courts have local rules which require other information be included in the caption, such as the name and contact information of the counsel filing the pleading, or the accepted form of the caption. Always check the local rules of court before filing a motion to ensure rules of proper form and content are followed.

A party must state its claims in numbered paragraphs, each limited as far as practicable to a single set of circumstances. F.R.Civ.Pro. 10(b). This Rule is perhaps

the most violated of all the rules of proper pleading. Sloppy pleading containing multiple statements of fact in one paragraph leads to unnecessary denials in responsive pleadings and additional work for the drafter down the road. In addition, a shotgun style to drafting the claims makes it difficult to determine the factual basis for each claim. Each allegation merits its own paragraph and should include but one statement of fact that can be either admitted or denied.

Exhibits attached to a pleading are considered a part of the pleading for all purposes. F.R.Civ.Pro. 10(c). This Rule is perhaps the most unused of all the rules of proper pleading. Any writing which supports the short plain statement of the claim should be included as an exhibit to the pleading, and identified therein as a true and accurate copy offered in support of such statement of the facts.

C. Standard of Review – Shift from Notice Pleading to a Plausibility Standard.

For decades, the federal standard of review for a Rule 12(b)(6) motion was the "notice pleading" standard as described by the U.S. Supreme Court in *Conley v. Gibson*, 355 U.S. 41 (1957). Justice Black followed the "accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46. Under the notice pleading standard, a claim could withstand a motion to dismiss so long as it was possible for the plaintiff to prove facts that would support the claim. Conley set a low bar for plaintiffs in pleading their cases, and unless a case was plainly abusive or absurd on its face, defendants had an uphill battle in moving for dismissal of a case under Rule 12(b)(6).

Fifty years after the decision in *Conley v. Gibson*, the U.S. Supreme Court adopted a new federal standard of review for a motion to dismiss under Rule 12(b)(6) in antitrust litigation. That standard of review has been described as the "plausibility standard." *Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) involved a class action alleging conspiracy to restrain trade under the Sherman Antitrust Act. In a majority opinion by Justice Souter, the court held "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . . Factual allegations must be enough to raise a right to relief above the speculative level." 550 U.S. at 555. In other words, there must be enough facts to state a claim for relief so that it is plausible on its face. 550 U.S. at 570. The facts must nudge the claims "across the line from conceivable to plausible." *Id.*

Two years later in a civil rights action brought by a 9/11 detainee, Justice Kennedy writing for the U.S. Supreme Court extended the *Twombly* plausibility standard to all civil actions filed in federal court. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the court stated "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face . . . . A claim has facial plausibility when the plaintiff pleads factual content that

allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678. "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

Iqbal and *Twombly* established a two-prong test for considering the sufficiency of a pleading under Rule 12(b)(6). First, the court must identify allegations in the pleading that are mere conclusions. Those must be tossed aside and are not entitled to the assumption of truth. Second, the court must review what remains and if there are well-pleaded facts, taken as true, determine if such facts plausibly entitle the pleader to the relief requested. Plausibility fall somewhere between possibility and probability. *Iqbal* and *Twombly* establish that mere possibility is not enough, but actual probability is not required. Courts are charged with finding plausibility by drawing on their judicial experience and common sense. Finding that sweet spot of plausibility is aided by sound basic pleading drafting.

D. Plaintiff's Perspective: How to Avoid a Motion to Dismiss.

1. Make an Outline. Start with a section called "Parties," then move to "Jurisdiction," "Factual Allegations," "Count I – Cause of Action," "Count II – Cause of Action," and so on. An outline will ensure all necessary parts of the pleading are filled in and addressed. If the case has a particularly lengthy or difficult factual pattern, further outline the facts section with sub-headings to make the flow of the factual allegations easier to read and refer back upon.

2. Identify the Claims. Determine all the claims for relief or causes of action. Each cause of action should have its own heading in the outline.

3. Identify the Elements. Determine each of the elements required to prove the claims or causes of action. Under each cause of action in the outline, list the elements. Be careful, while it is important to list the elements in the outline to ensure the cause of action will be properly pled, the elements are just place holders until you add your facts. Don't just recite the elements or paraphrase them. Each element must be supported by the facts of the case.

4. Identify the Facts. Determine the specific facts in the case which support each element and recite them. Tell a story. Make it easy to follow. Add color and support with exhibits of written documentation.

5. Separate Paragraphs. Use a separate paragraph for each factual allegation. This bears repeating. Use a separate paragraph for each factual allegation. Don't conflate facts, and don't recite two or more facts in one paragraph.

Such sloppy pleading makes it easier for an opposing party to deny the entire allegation, if one small part of the factual statement is not true. Each fact deserves its own admission or denial.

6. Facts, not Conclusions. Only assert facts, not conclusions of law. Unsupported legal conclusions and factual conclusions will be disregarded by the court and will not be taken as true.

7. Careful, Conservative Writing. Avoid using legalese, highly technical language, adjectives and adverbs and words that reflect a conclusion of law (such as fraudulently, negligently, antecedent debt, insolvent, insider). Instead, recite the facts which establish negligence, insider status, fraud, insolvency.

8. Keep it Simple. Write clearly and efficiently. Simple is more effective than complex. Short sentences are better than longer ones.

9. Refrain from Judgment. Facts are facts, they do not in themselves express moral outrage, or tend towards hyperbole. Keep them simple and to the point without editorializing them.

10. Edit the Work. Go back and review the complaint to evaluate whether each factual statement is a well pleaded factual allegation or a mere conclusory statement.

11. Use Exhibits. Attach documents which support the factual allegations (such as purchase orders, invoices, checks, account payable records, loan documents, demand letters, etc.).

12. Leave to Amend. Always move for leave to amend under Rule 15(a), if caught in a defective pleading scenario.

E. Defendant's Perspective: When to File a Motion to Dismiss.

1. Reverse Engineer the Complaint. Apply reverse engineering to the complaint to find weaknesses and grounds for dismissal.

2. Identify the Causes of Action. Identify the claims for relief and causes of action.

3. Identify the Elements. Identify each of the elements required to prove the claims or causes of action.

4. Assess the Facts. Assess the facts stated in support to see if they merit assumption of the truth. Obvious examples of unbelievable or implausible facts, or mere conclusory statement which are legal conclusions or factual conclusions without support should be highlighted and discarded.

5. Assess Plausibility. Do the facts which are left provide enough color to "nudge the claims across the line from conceivable to plausible?"

6. Assumptions. Does the pleading contain too many "information and belief" allegations?

7. Find the Weakness. Determine the weakness and attach it. Is there a missing element to a cause of action? Is the complaint full of legal conclusions?

8. Refrain from Judgment. Drafting the motion to dismiss provides even greater opportunity to utilize extreme adjectives and adverbs, overstatements and hyperbole. Don't do it. Words like "brazenly," "inexcusable," "incredibly," "disingenuous," "blatant," "absurd," "specious," "ridiculous," "egregious," go too far and are often non-starters for the court. The facts should speak for themselves. If they are extreme, and indeed warrant an extreme modifier, best to let the judge reach that conclusion.

9. Less is More. Be succinct and to the point. Be brief. Less is more in a motion to dismiss.

F. Rule 12(d) – Conversion to a Motion for Summary Judgment.

A motion to dismiss focuses on the deficiency of the facts as alleged in the four corners of the pleading. If facts outside the pleading are relied upon in seeking dismissal of the pleading, Rule 12(d) converts the motion to dismiss into a motion for summary judgment under Rule 56. F.R.Civ.Pro. 12(d). A motion to dismiss is meant to tests the legal sufficiency of the pleading. It does not address the merits of the case, or affirmative defenses which might bar recovery. If those are pled in a motion to dismiss, or things outside the facts alleged in the pleading are pled, then the motion will be treated as one for summary judgment. This sometimes happens if a party tries to assert a defense or wants to introduce a document or some fact which would bar the claim.

When a motion to dismiss is converted under Rule 12(d) to a motion for summary judgment, new procedures are implicated, and notice must be provided to all parties to ensure each is given a reasonable opportunity to present its factual case. Generally when a court invokes Rule 12(d) it will adjourn the hearing and set a new briefing schedule and hearing on the motion under Rule 56.

V. MOTION FOR SUMMARY JUDGMENT.

A. The Federal Rule.

Motions for summary judgment under Rule 56 accomplish two separate functions. First, the motion for summary judgment acts as a dispositive motion resolving the case before trial when the material factual issues are not disputed and as a matter of

law the moving party is entitled to judgment. Second, the motion for summary judgment acts to narrow the number of issues to be tried by the fact finder at a trial of the case. Often partial summary judgment will be granted by the court making the trial a more efficient process by weeding out those issues or claims not supported by the material facts of the case. Consider filing a motion for partial summary judgment for this very reason, even if summary judgment on all issues is not possible, in order to narrow the issues for trial, and the related costs associated with trying issues which can, and should be disposed of early in the case.

B. Standard of Review.

A trio of cases decided in 1986 by the U.S. Supreme Court established the modern standard for summary judgment under Rule 56. The first of these cases was *Matshusita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In that case, the court addressed the issue of an alleged violation of the Sherman Antitrust Act by Japanese television manufacturers. The court held "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" 475 U.S. at 587. "[O]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." Id.

Several months later, and on the same day, the U.S. Supreme Court decided *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). *Anderson* instructed on the genuineness and materiality of the alleged facts necessary to defeat a motion for summary judgment. There the court explained, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. As to materiality, the substantive law will identify which facts are material. Only facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." 477 U.S. at 247-48. As to genuineness, "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 477 U.S. at 248. "[A]t the summary judgment stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial . . . [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." 477 U.S. at 249.

Finally, *Celotex* dealt with the issue of whether a moving party must support its motion by affidavit, or other evidence, when the nonmoving party bears the burden of proof and has not put forward sufficient facts to support a claim. Here the court held, "where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on

file.'" Then, "the nonmoving party [must] go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" 477 U.S. at 324.

C. Timing of the Motion for Summary Judgment.

Timing is everything, or so they say. Care should be taken when planning to file a motion for summary judgment. Generally, the motion will be filed at the conclusion of all discovery. Courts favor hearing such motions after all parties have had ample time to fully develop the facts of the case. Best practice is to keep a calendar of deadlines, including those deadlines which affect the timing of filing a motion for summary judgment.

Rule 56 provides that a motion for summary judgment must be filed no later than 30 days after the close of all discovery, unless the court orders otherwise or a local rule varies such timing. F.R.Civ.Pro 56(b). Bankruptcy Rule 7056 states that a summary judgment motion must be made at least 30 days before the initial date set for an evidentiary hearing on any issue summary judgment is sought, unless the court orders otherwise or a local rule varies such timing. F.R.Bankr.Pro. 7056. A movant should always consult local rules to ensure the court does not proscribe additional timing requirements. Layered onto the complexity of determining a date compliant and within these two parameters is the scheduling order most federal courts require. The scheduling order sets out the relative dates on the litigation timeline for designating the last day to amend, joining parties, completing discovery, disclosing experts, filing dispositive motions, and making final pre-trial disclosures. A litigation calendar will help ensure a party meets the requirements and deadlines established in the rules, local rules and the scheduling order.

While it makes sense in most cases to file a summary judgment motion after the close of discovery, filing of a motion for summary judgment early on in a case may be appropriate, and preferable. Circumstances warranting an early filing of a motion for summary judgment include an admission in a pleading, or in early discovery responses which eliminates a claim or defense, an affirmative defense to a claim under Rule 8(c)(1) which bars recovery, or when a claim on its face is not proper or justiciable, and early disposition will narrow the scope of discovery. Unlike Rule 12, Rule 56 does not include a "one bite" rule with respect to filing a motion for summary judgment. Accordingly, it may be permissible for a party to file an early dispositive motion to eliminate issues prior to discovery, and still file a later summary judgment motion once the facts are fully developed. Nevertheless, if an early motion for summary judgment is filed, best practice is to reserve the right to file a subsequent motion, or seek an order of the court preserving a right to do so.

D. Know the Rules and Know the Judge.

1. Read Rule 56 at the beginning of every case. Know the rule and plan the case around it. Identify responses in pleadings and tease out the issues to attack. Plan discovery around those weaknesses with an eye towards a motion for summary judgment. Knowing Rule 56 will help a party prepare the case. Similarly understand the local rules and check for standing orders which might provide instruction on filing of motions, timing of motions, briefing, font type and size, page length, etc. Reviewing these rules and orders early in the case can save time, and perhaps embarrassment when it comes time to file the motion for summary judgment.

2. It is also important to know the judge. In this day of electronic filings and computer research, it is often quite easy to find not only published, but unpublished orders and memorandum opinions by a judge addressing very similar issues. A movant should take advantage of the access to these materials to understand how the judge might approach the issues in the case. In addition, if unfamiliar with a particular judge, ask colleagues if the judge has certain preferences as to presentation, use of courtroom technology, argument, or use of exhibits. Every little item that makes it easier for the judge to understand the case, or makes the presentation more appealing is to a movant's advantage.

E. Support the Motion for Summary Judgment with a Brief.

1. Always support a motion for summary judgment with a memorandum of law or brief. A memorandum of law is often used to describe the briefing process in the trial court, with the term brief reserved for appellate cases. Regardless of what the movant calls it, there are certain ground rules and techniques which will make the presentation of the undisputed facts and the law more persuasive and effective.

2. Appearance Counts. Take as much pride in presentation as in authorship. A clean, organized and well-presented brief demonstrates a certain quality of advocacy and lends an air of professionalism to the endeavor. Font type and size is no small matter. Many courts have turned away from using Times New Roman or Courier fonts to Century Schoolbook. It has been touted as typographically superior and a font which enhances the readability and retention of the written word. U.S. Court of Appeals for the 7th Circuit, Practitioner's Handbook for Appeals §23, at 131. Century Schoolbook is the required font for the U.S. Supreme Court and all of its opinions have been written in this font for years. Rule 33(1)(B) Rules of the Supreme Court. As for font size, local rules should be consulted to make sure the brief meets the requirement for font size. While most courts permit a standard 12-point type, some require 13 and even 14 point-type. If a court has established rules on font size and type, the brief will be well received if such parameters are met.

3. Every brief, no matter the length should have the following parts:

a) Cover Sheet. The cover sheet should include the case caption, title of the motion, counsel contact information and any other information required by local rule.

b) Table of Contents. The table of contents is really just the outline developed for presentation of the facts and legal arguments. It should be prepared first, and used to establish the separate sections of the brief identified by headings and sub-headings. The outline will assist with breaking up the brief into logical points making it easier for the judge to follow along.

c) Table of Authorities. Listing the legal authorities relied upon in the brief is helpful to the judge. It also helps to assure good citation practice.

d) Preliminary Statement. After the introductory sentence, the brief should contain a short preliminary statement containing a few paragraphs that explains who the parties are and why they are before the court. This should be a summary, not a detailed analysis of the case. This is an opportunity to encapsulate the details of the case into a short narrative of the story and why the movant should prevail.

e) Statement of Facts. Each material fact must be identified and tied to the record. Each fact must be separated into one sentence, and each sentence supported by the corresponding statements in pleadings, discovery responses, affidavits, or documents. References to the record must be precisely accurate. Care should be taken not to embellish at all nor paraphrase statement in the record too freely. A good practice is to build the Statement of Facts contemporaneous with a review of the record, rather than drafting the Statement of Facts and "filling in" the citation to the record later. A contemporaneous review will ensure accurate reference to the record, and provide the additional benefit of a deeper review of and familiarity with discovery responses and deposition transcripts. Eliminate immaterial facts and details that distract rather than explain. Do not omit or ignore negative facts. Point them out and explain why they are not material or downplay them. Make sure the Statement of Facts is arranged in a logical order that feed into the legal argument to be made in the remainder of the brief. To that end, the Statement of Facts may need to be broken down into sub-headings. A good rule of thumb to keep the reader focused on the topic is to never write more than a few pages that are not broken up by headings and subheadings. Use active voice.

Some courts require a separate Statement of Facts apart from the brief, so local rules should be checked for such requirements.

f) Argument. The Statement of Facts should leave the judge wanting to rule in the movant's favor. The Argument provides the persuasion and basis for the court to do so. Like the Statement of Facts, a movant may need to break the argument into various sub-headings, especially if there are multiple legal arguments being

presented. Generally, the Argument will start with the Legal Standard. If local rules do not require a statement of the legal standard, this might be one section to skip, to save room for the meaningful case law supporting the position. Always make the strongest legal argument first, followed by the less persuasive ones. Don't let numerous arguments detract from the strongest argument. In some cases, going with the one strong argument is the better call.

In making the case, provide structure to the argument. Start with a simple statement of the governing statute or controlling case citation. Describe the strongest case and the relevant rulings. Use of quotations is suggested, since it provides the judge with the actual text in support of the movant's case. It also demonstrates to the judge that movant had not taken liberties with paraphrasing the case or interpreting the holding. Next discuss how the movant's case and the facts described in the Statement of Facts are similar to or correspond to the strongest case. This is where the movant can paraphrase the case law and persuade the judge with a strong argument.

Do not avoid negative cases or treatment of the case. Cite to and distinguish such cases in the brief. Not only is it a lawyer's ethical obligation and duty to the court, it also provides an opportunity to discount such authority before an opponent has the opportunity to laud it. Use Blue Book citation format, rather than footnotes or endnotes in briefs. Use string citations sparingly, as much is lost and glossed over by cites that just say the same thing three or four times. Again, use active voice.

g) Conclusion. The conclusion should be short and simply tell the judge exactly how to rule and briefly why. It is not a place to rehash all of the facts and argument again.

4. Use Names. Courts like to keep the players straight when reading a brief. Use the names of the parties instead of titles like Plaintiff, Defendant, Debtor, Appellee, and the like. It is easier to follow the story being told and makes the parties real for the judge.

5. Careful, Conservative Writing. Avoid using legalese, highly technical language, overuse of adjectives and adverbs. Use of words like "clearly," "undoubtedly," and the like should also be avoided.

6. Keep it simple. Write clearly and efficiently. Simple is more effective than complex. Short sentences are better than longer ones.

7. Refrain from Being Argumentative. Don't express moral outrage, make ad hominem attacks, or engage in hyperbole. Engaging in theatrics and being belligerent do not advance the motion or the client's cause. Use of words like Words like "brazenly," "inexcusable," "incredibly," "disingenuous," "blatant," "absurd," "specious," "ridiculous," "egregious," and the like should be avoided.

8. Edit the Brief. Go back and review the work. Have someone else review the work and check it not only for content and persuasiveness, but also for grammar, typos, and other sloppy errors that reflect badly on the writer and may affect overall credibility of the brief.

9. Be Brief. It is a brief after all. Local rules should be checked for briefing requirements, such as page length, font size, spacing and margins. Take care to format the brief to the exact specifications of the local rules. If at all possible keep the brief to 10 pages or less. This is often hard to do with long or complicated fact patterns, but Judges don't like reading more than 10 - 15 pages. Break up large sections of writing with sub-headings to guide the judge on the logical progression of the argument.

F. Arguing the Motion.

A well organized and tightly written brief provides a solid foundation upon which to build the oral argument. Read the brief, cases and other materials to help prepare for argument.

1. Develop a Theme. The brief discloses the factual record and identifies the controlling legal principles and cases. The oral argument requires weaving these elements into a compelling narrative which persuades the judge to rule a certain way. Remain focused on that theme, the most important element of the case, and avoid a scatter gun effect of arguing a number of issues.

2. Prepare an Outline. Outline the arguments to be made and practice the presentation of them. An organized argument in outline form will enable the lawyer to return to a specific issue for argument if interrupted by the court with questions. Remember to answer questions from the court directly, then circle the question back around to the argument being made. In addition, an outline enables the lawyer to keep the argument to a simple form. The argument should tell the judge what the movant wants, why the movant deserves to have it, and again what the movant wants. Preparing an outline also assists with keeping the argument to the point and as short as possible.

3. Use of Exhibits. Exhibits are critical to the motion for summary judgment and smart use of them will advance the cause. If more than 5 exhibits are expected to be introduced into evidence in support of the summary judgment motion, an exhibit book should be prepared. The exhibit book should organize the exhibits in the order of their introduction to the court, be tabbed for ease of reference, and any important language in documents should be highlighted for the court to draw the judge's attention to the important provisions. A separate exhibit book should be prepared for the judge's law clerk, and all opposing counsel.

Exhibits should be marked in advance of court, where possible, and original exhibits tendered to the clerk. Always ask permission to approach the bench or the clerk for purposes of tendering exhibits.

At the conclusion of the argument do not forget to move for the exhibits to be admitted into evidence. If necessary, type this in big bold red letters at the end of your argument outline.

Many courtrooms are equipped with sophisticated technology which allows the judge, counsel and even the courtroom to view documents electronically as they are presented and discussed. Prior to hearing consult with the courtroom deputy clerk on the availability and use of courtroom technology, and the judge's preference in the use of such technology. If unfamiliar with use of the technology, make an appointment with the clerk of court to come to the courtroom one day prior to the hearing and learn to use the system.

4. Be Brief. Remember that the average attention span for any given topic is 7 – 10 minutes. With that in mind, practice the argument, time it and try to keep it to within 10 minutes. Of course, there will be very complicated multiple issue cases where this is impossible. Nonetheless, being clear, succinct and to the point in the argument will be appreciated by the court.

VI. Discovery Motions.

You have timely filed your interrogatories and requests for production, but the deadline for your opponent to respond has come and gone, with no response. Or, you received a response, but it is not complete. What should you do?

Before preparing a motion to compel, you should always contact opposing counsel to try to resolve the issue. Rule 37(a)(1), FRCP, requires a certification with a motion to compel certifying "that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Note that it is probably not sufficient to simply send an email in the morning in an "attempt to confer" and then file the motion in the afternoon after no response. You must actually make a "good faith" attempt to confer with opposing counsel.

Be aware of local rules regarding timing of discovery motions. For example, in the District of South Carolina, there is a local rule requiring that discovery motions be filed within 14 days following the deadline for the discovery response. SC LBR 7026-1. In any event, if there is a discovery dispute, you should attempt to resolve it right away, and then seek court intervention in a timely fashion if necessary.

If you have been served with discovery that you find objectionable, you should likewise attempt to resolve the issue with opposing counsel before simply serving a blanket objection. In most cases, especially when the objection has to do with a

broadly worded request, the attorneys are able to agree to narrow the scope. Keep in mind that Rule 26(b)(1), FRCP, was recently amended to remove the language "reasonably calculated to lead to the discovery of admissible evidence." Now, the focus is on whether the information sought is "relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Rule 26(b)(1), FRCP. The proportionality requirement, in theory, should prevent overburdensome discovery that is excessive in proportion to the needs of the case.

VII. MOTIONS *IN LIMINE*.

A motion *in limine* refers to a pretrial motion requesting that certain evidence be excluded from trial. It is often used to prevent a jury from hearing highly prejudicial evidence, but a motion *in limine* can be a useful tool in non-jury bankruptcy trials, too. A common reason to request the exclusion of evidence in a bankruptcy context is that the evidence does not comply with the Federal Rules of Evidence. Relevance is usually the primary reason in a civil trial. There also might be issues with authentication of documents that can be resolved in a motion *in limine*.

While a motion in limine can help streamline a trial by excluding inadmissible evidence in advance of trial, counsel should not use it as a tool to obtain a ruling on substantive issues. Such practice should be avoided, as it is an impermissible attempt to turn the motion *in limine* into a disguised motion for summary judgment. *See Louzon v. Ford Motor Co.*, 718 F.3d 556, 563 (6th Cir. 2013) ("Where, as here, the motion in limine is no more than a rephrased summary-judgment motion, the motion should not be considered."); *C&E Servs. Inc. v. Ashland Inc.*, 539 F.Supp.2d 316, 323 (D.C. 2008) ("a motion *in limine* should not be used to resolve factual disputes or weigh evidence"); *Azco Biotech, Inc. v. Qiagen, N.V.*, 2015WL12516204 (S.D. Cal. Nov. 12, 2015) ("where a motion *in limine* calls for a decision on the merits, courts should decline to consider it").

Counsel should save appropriate objections for trial and use a motion *in limine* for evidence that is clearly inadmissible.

In cases where an expert will testify, it is common for the opposing counsel to object to testimony that includes opinions on the ultimate issues to be decided by the trier of fact. However, "[a]n opinion is not objectionable just because it embraces an ultimate issue." Rule 704, Fed. R Evid. The Fourth Circuit has clarified that whether such evidence is excludable depends on whether it aids the jury, and evidence that will assist the jury should be allowed. *United States v. Barile*, 286 F.3d 749, 760 (4th Cir. 2002). If the testimony amounts to nothing more than a legal conclusion, then it is likely unhelpful. This should be distinguished from opinion which embraces an

ultimate issue and gives the trier of fact "insight into the bases for the expert's conclusion." *See id.* at 760-61. As noted by the Fourth Circuit, this is not an easy distinction to make, and "[i]n many circumstances, a problematic question can be more carefully phrased to elicit similar information yet avoid a response that constitutes a mere legal conclusion." *Id.* at 760.

VIII. DAUBERT MOTIONS.[2]

Opinion testimony arises in bankruptcy courts in numerous circumstances ranging from a chapter 13 debtor's testimony on the value of the debtor's furniture and appliances in a contested plan confirmation hearing[3] to an accountant's testimony on the sufficiency of a fund to cover future personal injury claims in the context of confirmation of a chapter 11 plan of reorganization resolving mass tort claims.[4] One of the most important tools available to bankruptcy practitioners faced with the introduction of such opinion testimony is an objection under *Daubert,*[5] as implemented through the amendments to Rule 702[6] of the Federal Rules of Evidence.[7] Unfortunately, this tool is often neglected based on a misconception that it has little application to the routine types of opinion testimony that regularly occur within the context of a bankruptcy case.

Daubert rejected the notion that the Federal Rules of Evidence placed "no limits on the admissibility of purportedly scientific evidence."[8] It established the trial judge as the "gatekeeper" in determining whether the expert is proposing to testify about scientific knowledge that will assist the trier of fact to understand the issue.[9] As a gatekeeper, the trial court's inquiry must be "solely on principles and methodology, not on the conclusions they generate."[10]

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[2] This portion of the materials is an excerpt from Judge Williamson's Practical Evidence Manual, available at his court's website: http://www.flmb.uscourts.gov/judges/tampa/williamson/practical_evidence.pdf.

[3] *E.g., In re* Brown, 244 B.R. 603 (Bankr. W.D. Va. 2000).

[4] *E.g., In re* Dow Corning Corp., 237 B.R. 364 (Bankr. E.D. Mich. 1999).

[5] *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 113 S. Ct. 2786 (1993).

[6] Rule 702 provides as follows (the amendments effective December 1, 2000, are italicized):

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, *if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*

[7] Hereafter, references to "Rule" are to the Federal Rules of Evidence unless otherwise indicated.

[8] *Daubert*, 509 U.S. at 589.

[9] *Id.* at 597.

[10] *Id.* at 595.

A. Daubert Made Easy -- the Rule 702 Amendments

Rule 702, as amended effective December 1, 2000, now requires that a witness who is qualified as an expert by knowledge, skill, experience, training or education may give opinion testimony provided the testimony satisfies three criteria. These criteria are:

1. The testimony must be based on sufficient facts or data.[11] This is a quantitative rather than qualitative test -- i.e., the issue is sufficiency of data relied upon by the expert. For example, what data in the form of comparable sales did the automobile appraiser rely upon?

2. The testimony must be the product of reliable principles and methods.[12] This is a qualitative analysis. The principles must be reliable. Turning to the common example of an automobile appraiser -- the principle generally relied upon by such appraisers is that comparable sales are a good predictor of what a willing buyer will pay a willing seller, thereby indicating the fair market value of an automobile.

3. Finally, the witness must have applied the principles and methods reliably to the facts of the case. This is also a qualitative analysis. That is, the principles must not only be reliable, but also they must have been reliably applied to the particular facts relied upon by the expert.[13] For example, just because the witness has reviewed numerous other sales in determining the value does not mean the principle has been reliably applied. For example, are the other sales really comparable? What were the dates of the other sales? Is the condition of the subject automobile similar to the comparables? What market changes have occurred post-petition that make recent comparables invalid as predictors of value as of the date of the petition?

B. Qualification of the Expert Witness Is Not the Focus of Daubert

My experience years ago as a trial lawyer in the state courts was that if you could qualify the witness, something that was usually easy to do, then whatever the witness said in form of an opinion would come into evidence. Any questions as to reliability of the opinion went to weight, not admissibility.

That is changed with *Daubert* with the concept of the judge as a gatekeeper -– not as a gatekeeper to the witness -- but as to the opinion. As aptly put by the Seventh Circuit in *Rosen v. Ciba-Geigy Corp.,*[14] "Under the regime of *Daubert* ... a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a

[11] Fed. R. Evid. 702(1).
[12] Fed. R. Evid. 702(2).
[13] Fed. R. Evid. 702(3).
[14] *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316 (7th Cir. 1996).

genuine scientist."[15] Put another way, "Judges should not be buffaloed by unreasoned expert opinions"[16] even from the most qualified of experts.

In fact, the qualification of the experts in *Daubert* and *Kumho* was not at issue. In *Daubert,* the Supreme Court noted that all the experts "possessed impressive credentials."[17] In *Kumho,* the Supreme Court noted that the district court, which excluded the expert's testimony, "did not doubt [the expert's] qualifications...."[18]

A case particularly illustrative of this point is *In re Brand Name Prescription Drugs Antitrust Litigation.*[19] At trial, the plaintiffs called as their expert a witness who had "eminent and distinguished credentials," who was a past recipient of the Nobel Prize in Economics, "an award without equal in recognition of scholarship and contributions in his chosen discipline," and who was affiliated with "indisputably one of the finest educational institutions in the world."[20] However, as the court noted, the expert's "eminent credentials cannot serve to lessen or eliminate that settled requirement of admissibility."[21]

In concluding that the expert's opinions "failed every test of admissibility"[22] the court found that the witness was ignorant of material testimony and other evidence and that his opinions were offered without any scientific basis or having been the subject of economic methodological testing.[23] The court directed a judgment in favor of the defendants at the conclusion of the plaintiffs' case.[24]

Similarly, at the hearing on confirmation in the Chapter 11 case of *Dow Corning Corp.*,[25] certain claimants offered the expert testimony of a certified public accountant on the issue of the sufficiency of a fund to satisfy anticipated claims against the debtor. The bankruptcy court noted that accountants routinely estimate expenses that are expected to occur in the future so reserve funds can be established. In fact, the expert had performed such estimations in the past. If permitted to testify he would have opined that $400 million was "clearly insufficient to satisfy all claims against the Litigation Facility."[26]

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[15] *Id.* at 318.
[16] *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1340 (7th Cir. 1989)(citing Paul Meier, *Damned Liars and Expert Witnesses,* 81 J. Am. Statistical Ass'n 269 (1986)).
[17] *Daubert*, 509 U.S. at 583.
[18] *Kumho,* 526 U.S. at 153.
[19] 1999 U.S. Dist. Lexis 550 (N.D. Ill. 1999). In Brand Names, the plaintiff alleged a price-fixing conspiracy in which the defendants agreed to eliminate price competition and to keep prices of brand name prescription drugs artificially high to retail pharmacies, in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.
[20] 1999 U.S. Dist. Lexis 550, at *28.
[21] *Id.* at *33.
[22] *Id.* at *34.
[23] *Id.* at *29.
[24] *Id.* at *48.
[25] *Dow*, 237 B.R. 364.
[26] *Id.* at 368.

In response to the *Dow Corning* proponents' *Daubert* objection, the bankruptcy court noted that the accountant's "expertise in the field of accountancy is not disputed."[27] Rather, as an expert, his opinions "must be supported by reliable data and methodology."[28] In this regard, the party seeking to elicit the expert testimony bears the burden of establishing the testimony's admissibility by a preponderance of the evidence. Accordingly, because the party offering the expert testimony had failed to establish that the expert's opinions were based on reliable data and methodology, the evidence was not admitted.[29]

1. Daubert In Practice.

The following is an all too common example of the direct examination of an expert on automobile value. (The context is the debtor's motion to determine the secured status of a creditor's claim that is secured by a lien on the debtor's automobile.) Here's how the testimony goes:

> *Debtor's Counsel: "Your Honor, I call Joseph Perrilli to the witness stand."*
>
> *Debtor's Counsel: "Mr. Perrilli, what experience do you have in the valuation of automobiles?"*
>
> *Witness: "I've been in the car business for 40 years. During that time, I've bought and sold in the neighborhood of 10,000 cars."*
>
> *Debtor's Counsel: "At my request, did you perform an appraisal of the Debtor's 1997 Ford Taurus?"*
>
> *Witness: "Yes, I did."*
>
> *Debtor's Counsel: "Based on your years of experience in buying and selling automobiles, were you able to form an opinion as to its value?"*
>
> *Witness: "Yes, I was. In my opinion it has a fair market value of $9,700."*
>
> *Debtor's Counsel: "Thank you, Mr. Pirrelli. Your Honor, no further questions."*

This scenario unfortunately arises frequently in bankruptcy courts. It is clear, however, that no matter how qualified Mr. Perrilli is, the testimony he has given fails to meet the criteria of Rule 702. Specifically, there is no evidence as to the types of data Mr. Perrilli relied upon for his opinion. Examples of such data may include: anecdotal experience of the witness or others that the witness has consulted with concerning sales of similar automobiles,[30] market reports and commercial

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[27] *Id.*
[28] *Id.* at 373.
[29] *Id.*
[30] These examples may be derived by the expert from discussions with other dealers. See Fed. R. Evid. 703, which states in relevant part:

publications generally used and relied upon by the persons in the business of buying and selling used cars,[31] local auto auction reports, and advertisements.

2. Daubert and the Owner's Opinion.

In bankruptcy court, oftentimes, it is the owner that gives the opinion of value. It is generally accepted that an owner is competent to give opinion testimony about the value of the owner's property.[32] The advisory committee note to Rule 702 references that the types of witnesses who may provide expert testimony under Rule 702 are not limited to experts in the "strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values."[33] Alternatively, an owner may testify as to value as a lay witness under Rule 701.[34] As discussed in Russell,[35] if testifying under Rule 701, the owner "may merely give his opinion based on his personal familiarity of the property, often based to a great extent on what he paid for the property."[36] Such testimony will be given little, if any, weight.[37]

On the other hand, if the owner truly has "knowledge, skill, experience, training or education" that would qualify the owner as an expert, then it is appropriate to require that the owner's testimony otherwise comply with Rule 702 and be based on reliable principles applied to sufficient data. As noted in the *Brown* case regarding such testimony, "Even though [the debtor's] testimony as to valuation is admissible, it should be subject to the same type of critical analysis as would the testimony of an independent 'expert.'"[38] In *Brown,* the owner did not testify as to any specific values that she had found at "yard sales" for items similar in quality and

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> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted . . . .

[31] Fed. R. Evid. 803(17) excludes from the hearsay rule market reports and commercial publications generally used and relied upon by the public or by persons in particular occupations (e.g., N.A.D.A., Kelley Blue Book, Edmunds.com).

[32] *Brown,* 244 B.R. at 611; Russell, Bankruptcy Evidence Manual, 2001 Ed., § 701.2 at 819.

[33] Advisory Committee Note to Fed. R. Evid. 702.

[34] *Russell, supra,* n. 50, § 701.2. Rule 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Brown,* 244 B.R. at 612.

condition to her property. In the court's view, her conclusion that her personal property had a value of $1,500 "was a figure just pulled out of the air."[39]

In light of Rule 702, it appears appropriate to determine whether the testimony of an owner is being offered as the opinion testimony of a lay witness or is being offered as a "skilled witness"[40] under Rule 702. In the first instance, the testimony would be admissible but may receive little weight.[41] In the latter instance, where the owner is testifying as an expert and given greater weight, the plain meaning of Rule 702 requires that the testimony should be subject to the rigors of a showing of reliability under Rule 702.

C. *Gatekeeping Function Is Not Limited to Jury Trials*

The gatekeeper function of a trial court does not depend on whether the case will be tried before a jury. In many instances, the issue may arise in a pre-trial procedural posture. In fact, the *Daubert* case itself was decided on summary judgment. The plaintiffs sought damages for birth defects allegedly caused by Bendectin, a prescription antinausea drug marketed by the defendant. The defendant moved for summary judgment supported by an affidavit of "a well credentialed expert on the risks from exposure to various chemical substances."[42] The plaintiffs responded with the deposition testimony of eight equally credentialed experts of their own. The district court concluded that the plaintiff's scientific evidence was not admissible, and in the absence of such evidence, entered summary judgment for the defendant.[43]
IX. Similarly, *Kumho* was decided on summary judgment.[44] The trial judge excluded, because of a lack of reliability, the expert's testimony of the plaintiff in a deposition filed in opposition to a motion for summary judgment. The court then granted the defendant's motion for summary judgment in the absence of evidence supporting the plaintiff's case.[45]

The trial court's gatekeeping function under *Daubert* and Rule 702 has contributed to an effective litigation technique useful against a party whose case depends on expert testimony. The case of *Downs v. Perstorp Components, Inc.*[46] is an example of this technique. Following the exchange of expert witness reports as

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[39] *Id.*
[40] Advisory Committee Note to Rule 702.
[41] *Russell*, *supra*, n. 50, § 701.2 at 819 ("if [the owner] has very little or no real expertise, the testimony will be given little if any weight").
[42] *Daubert,* 509 U.S. at 583.
[43] The Supreme Court vacated the district court's decision because it relied on the "general acceptance" standard established by Frye v. United States*,* 54 App. D.C. 46, 47, 293 F. 1013, 1014 (1923). The Court held that Rule 702 assigned the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. *Daubert,* 509 U.S. at 597. The case was remanded for further proceedings consistent with the court's holding as to the standard to be applied in determining whether the expert's testimony would be admissible.
[44] *Kumho,* 526 U.S. at 137.
[45] *Id.* at 146.
[46] *Downs v. Perstorp Components, Inc.*, 2002 WL 22000 (6th Cir. Tenn.)(unpublished opinion).

required by Federal Rule of Civil Procedure 26(a)(2)[47] and the passing of the deadline for such reports to be obtained and furnished, the defendant moved to exclude the plaintiff's expert testimony under *Daubert.* The defendant also moved for summary judgment on the basis that once the expert witness's opinion was excluded, the plaintiff lacked evidence of a material element of its claim for relief.[48] The district court granted both motions and entered judgment for the defendant. The Sixth Circuit affirmed on appeal.[49]

This approach -- where the trial judge enters summary judgment based on the exclusion of an expert opinion essential to a party's case -- has been upheld in at least one case by every circuit court of appeals considering the issue over approximately the last three years.[50] Thus, it is no less applicable to a bankruptcy court -- whether it be on summary judgment or in the conduct of a contested evidentiary hearing (such as in *Dow Corning*[51] where a "*Daubert*" objection was made to the introduction of expert testimony in the context of an objection to confirmation under the "best interest" requirement of section 1129(a)(7) of the Bankruptcy Code).

D. Appellate Courts Give Trial Judges Considerable Leeway on Daubert Objections

Practitioners should make *Daubert* objections, seeking the outright exclusion of the testimony. If successful, there is then no evidence in the record whatsoever on the issue for which the opinion testimony is offered. While a party may certainly appeal the ruling on admissibility of the opinion under *Daubert* -- the burden for an appellant in such an appeal is a high one. As the Supreme Court stated in *Kumho,* the "law grants the trial judge broad latitude to determine" whether the *Daubert* factors are, or are not, reasonable measures of reliability in a particular case.[52] In applying an abuse of discretion standard on appeal, appellate courts give trial courts

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[47] Effective December 1, 2000, bankruptcy courts may no longer opt out of the applicability of the disclosure requirements set forth in Federal Civil Procedure Rule 26 in adversary proceedings. Rule 26 is also applicable to contested matters "unless the court orders otherwise." Fed. R. Bankr. P. 9014.
[48] *Downs,* 2002 WL 22000, *1.
[49] *Id.*
[50] *See Downs,* 2002 WL 22000; *Provident Life & Accident Ins. Co.*, 18 Fed. Appx. 554 (9th Cir. 2001); *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194 (4th Cir. 2001); *Glastetter v. Novartis Pharm. Corp.*, 252 F.3d 986 (8th Cir. 2001); *Pride v. BIC Corp.*, 218 F.3d 566 (6th Cir. 2000); *Washburn v. Merck & Co., Inc.*, 213 F.3d 627 (2nd Cir. 2000); *Cipollone v. Yale Indus. Products, Inc.*, 202 F.3d 376 (5th Cir. 2000); *Nat'l Bank of Commerce v. Associated Milk Producers, Inc.*, 191 F.3d 858 (8th Cir. 1999); *Jaurequi v. Carter Mfg. Co., Inc.*, 173 F.3d 1076 (8th Cir. 1999); *Heller v. Shaw Indus., Inc.*, 167 F.3d 146 (3d Cir. 1999); *Mitchell v. Gencorp, Inc.*, 165 F.3d 778 (10th Cir. 1999).
[51] S*upra*, n. 5.
[52] *Kumho,* 526 U.S. at 153.

"considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."[53]

Abuse of discretion was first definitively held to be the proper standard by which to review a trial court's decision to admit or exclude scientific evidence in the Supreme Court case of *General Electric Company v. Joiner.*[54] In *Joiner,* the Supreme Court disagreed with the Eleventh Circuit's conclusion that a trial court should limit its role to determining the legal reliability of proffered expert testimony, leaving the jury to decide the correctness of competing, expert opinions.[55]

In the context of a *Daubert* objection, the Supreme Court referred to long-standing precedent for the proposition that an appellate court should not reverse a trial court's exercise of this discretion unless the ruling is "manifestly erroneous."[56] The Eleventh Circuit had erred in *Joiner* when it applied an "overly 'stringent' review to that ruling [and] failed to give the trial court the deference that is the hallmark of abuse-of-discretion review."[57] The Court went on to state that:

> [N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit*[58] of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.[59]

Consistent with this mandate from the Supreme Court, a review of the approximately 43 circuit courts decisions over the last three years reviewing a trial court's exclusion of opinion testimony based on a *Daubert* analysis reflects great deference being given to trial courts on this issue. In these cases, the affirmance rate

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[53] *Id. See also Wilson v. Woods,* 163 F.3d 935, 936 (5th Cir. 1999)(district courts are given wide latitude in determining the admissibility of expert testimony, and the discretion of the trial judge will not be disturbed on appeal unless manifestly erroneous).
[54] *General Electric Company v. Joiner,* 522 U.S. 136, 146 (1997).
[55] *Id.* at 141.
[56] *Id.* at 142 (citing Spring Co. v. Edgar*,* 99 U.S. 645, 658 (1879)).
[57] *Id.* at 143 (citing Koon v. United States*,* 518 U.S. 81, 98-99).
[58] The term "i*pse dixit"* is latin for "he himself said it." It means something asserted but not proved. Black's Law Dictionary 833 (7th ed. 1999).
[59] *Joiner,* 522 U.S. at 146 (citing *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1360 (6th Cir. 1992) *cert. denied*, 506 U.S. 826 (1992)).

was approximately 74 percent,[60] with reversal occurring in 26 percent[61] of the cases reviewed.

E. Conclusion

Since its amendment, effective December 1, 2000, Rule 702 makes clear that expert opinion testimony is admissible only if it is based upon reliable principles applied to sufficient data. In light of *Daubert* and this change to Rule 702, counsel can no longer sit idly back and allow witnesses, even imminently qualified expert witnesses, to give opinion testimony without objection, where appropriate.

While there is often a tendency in a bench trial for the judge to let in the evidence and give it such weight as is appropriate, a thoughtful, focused objection by counsel conversant with *Daubert* may result in the outright exclusion of such testimony. Moreover, the appellate courts that may have previously been inclined to reverse a trial court's exclusion of such evidence are now constrained to affirm the trial court's discretion in light of *Daubert* and subsequent Supreme Court cases.

XIII. TRIAL ADVOCACY TIPS.

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[60] *Downs,* 2002 WL 22000; *Black v. M & W Gear Co.*, 269 F.3d 1220 (10th Cir. 2001); *Dhillon v. Crown Controls Corp.*, 269 F.3d 865 (7th Cir. 2001); U.*S. v. Langan,* 263 F.3d 613 (6th Cir. 2001); *Provident, 18 Fed. Appx. 554; Saldana v. Kmart Corp.*, 260 F.3d 228 (3d Cir. 2001); *Glastetter,* 252 F.3d 986; *J.B. Hunt Transp., Inc. v. Gen. Motors Corp.*, 243 F.3d 441 (8th Cir. 2001); *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244 (6th Cir. 2001*); Oddi v. Ford Motor Co.*, 234 F.3d 136 (3rd Cir. 2000); *Bowe v. Consol. Rail Corp.*, 230 F.3d 1357 (6th Cir. 2000); *U.S. v. Allerheiligen*, 221 F.3d 1353 (10th Cir. 2000); *Pride,* 218 F.3d 566; *Washburn*, 213 F.3d 627; *Gates v. City of Memphis,* 210 F.3d 371 (6th Cir. 2000); *Cipollone,* 202 F.3d 376; *Moisenko v. Volkswagenwerk Aktiengesellschaft,* 198 F.3d 246 (6th Cir. 1999); *In re* TMI Litigation, 193 F.3d 613 (3rd Cir. 1999); *Nat'l Bank of Commerce v. Associated Milk Producers, Inc.,* 191 F.3d 858; *Allison v. McGhan Medical Corp.*, 184 F.3d 1300 (11th Cir. 1999)*; Thomas v. Washington Indus. Med. Ctr., Inc.*, 187 F.3d 631 (4th Cir. 1999); *U.S. v. Salimonu,* 182 F.3d 63 (1st Cir. 1999); *Norris v. Ford Motor Co.*, 182 F.3d 909 (4th Cir. 1999); *U.S. v. Paul,* 175 F.3d 906 (11th Cir. 1999); *Jaurequi,* 173 F.3d 1076; *In re* Unisys Sav. Plan Litig., 173 F.3d 145 (3rd Cir. 1999); Heller, 167 F.3d 146; *U.S. v. Hall,* 165 F.3d 1095 (7th Cir. 1999); *Wilson v. Woods*, 163 F.3d 935 (5th Cir. 1999); *Mitchell,* 165 F.3d 778; *In re* Barnes, 266 B.R. 397 (8th Cir. 2001).

[61] *Lauzon v. Senco Prod., Inc.,* 270 F.3d 681 (8th Cir. 2001); *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832 (9th Cir. 2001); *U.S. v. Mathis*, 264 F.3d 321 (3rd Cir. 2001); *Alfred v. Caterpillar, Inc.,* 262 F.3d 1083 (10th Cir. 2001); *Hardyman v. Norfolk & Western Ry. Co.,* 243 F.3d 255 (6th Cir. 2001); *U.S. v. Vallejo*, 237 F.3d 1008 (9th Cir. 2001); *Jahn v. Equine Services, PSC.,* 233 F.3d 382 (6th Cir. 2000); *Smith v. Ford Motor Co.,* 215 F.3d 713 (7th Cir. 2000); *Walker v. Soo Line R.R. Co.*, 208 F.3d 581 (7th Cir. 2000); *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661 (5th Cir. 1999); *Nemir v. Mitsubishi Motor Sales of Am.*, 6 Fed. Appx. 266 (6th Cir. 2001).

A. General Trial Preparation.

1. Review the Pleadings. Pull the Complaint and Answer. List out on a pad of paper the causes of action that are at issue. Below each, list the elements of each cause of action. Do the same for the affirmative defenses contained in the answer.

2. List Witnesses. Next to each element of each cause of action list the names of the witnesses who will be called to give evidence relevant to each element.

3. List Documents. Next to each element of each cause of action, list the documents that will be introduced to support the element and, if necessary, the witness that will be used to authenticate the document.

4. Order of Witnesses. Once you have listed the elements that you need to prove in the witnesses and documents that would support your proof, decide on the order of the witnesses that you will call. Consider calling the opposing party as your first witness to establish facts that are undisputed or that have been established in the party's deposition.

5. Order of Documents. Put the documents in the general order in which you plan to introduce them. Make sure that you and your paralegal are familiar with the judge's particular practice when it comes to exhibits. Typically, an exhibit list should be prepared. Exhibits should each have a cover page or exhibit tag. If there are more than 10 exhibits, the exhibits should be put into binders for ease of access. Binders should be available for the witness on the stand, opposing counsel, the courtroom deputy, and the judge as well as for you and your client. Don't use oversized binders as they are difficult to manage in the courtroom. Label each binder both on the front cover and on the bookend with the designation of plaintiff or defendant and the numbered exhibits contained within that binder.

B. Witness Preparation.

1. Preparing and Reviewing Direct Examination. Go through direct testimony prior to trial as if your client were on the stand. Ask the questions the way you plan to at trial. Have the witness answer them. Listen to the answers.

2. Review of Deposition Testimony. Have your client read his or her deposition before coming to your office for the pre-trial preparation. You should also review your client's deposition before trial and highlight the areas that you can anticipate some cross-examination on. Review these areas with your client and role-play how the questions from the opposing side might be framed and have the client answer the questions.

C. Develop a Theme.

1. Concept—Presenting your case in a thematic package is more effective than any other approach. It gets your message across in 30 seconds. It takes a complicated case and by relating it to a recognizable theme, you make your position instantly recognizable.

2. Examples:

a) "This is a case about a debtor who bought a car two and a half months before the petition date and now says he could have bought the same car on the petition date for three thousand dollars less."

b) Cash collateral hearing representing the Bank: "This case is about our collateral being rapidly depleted by a hopelessly insolvent debtor that is still losing money and has no game plan to turn things around."

c) Cash collateral hearing representing the Debtor: "This is a case about what Chapter 11 was meant to be—a place where temporarily distressed but fundamentally strong companies can save their business to the benefit of hundreds of employees, a local community, and numerous trade creditors that continue to do business with the debtor."

D. Try Your Case.

Don't fall into the trap of trying the other person's case. Many times I've seen all of the energy in trying the weaker side's case. Then if they prove that case, they win. Counter a theme with a theme and try that case.

E. Things to Avoid.

1. Don't make disparaging remarks about opposing counsel or the opposing party. If the opposing counsel makes disparaging remarks about you or your client avoid responding in kind. Keep the high road. Two wrongs do not make a right. Avoid the word "disingenuous." It is almost always used in a disparaging manner.

2. Don't say, "With all due respect" to the judge. What the judge hears is, "With all due contempt."

3. Avoid expressions such as, "To tell you the truth" or "In all candor." It may raise the inference that the evidence that preceded was less than truthful.

4. Don't turn around and engage in a whispered conversation with co-counsel or your client while the judge or opposing counsel is speaking. It is rude. You also may miss something that's important. If you need to speak with co-counsel or your client, ask for permission.

5. Be careful about using such terms as, “My client’s position is….” The judge may infer that you don’t really believe competent substantial evidence supports your client’s position or believe that your client’s position is reasonable.

6. Don’t say, “We would argue….” Just make your argument.

7. Don’t use acronyms. Using acronyms sometimes conveys a sense of superiority by the attorney using the acronyms. More often than not, the witness, opposing counsel, or the judge will not know what the acronym means. This then puts the judge in a position of having to admit openly his or her lack of "in the know" status by asking counsel to explain what the acronym means.

8. Don’t use pronouns. Remember: a courtroom is a Pronoun Free Zone. Pronouns are often confusing to the listener and their use often results in misunderstandings.

9. Don’t cross-examine. At least don’t cross examine unless you have some clearly achievable objectives such as bringing out a prior inconsistent statement or showing the witness’s bias. Explain this to your client because your client has seen lawyers on television and they always cross examine the witness.