AMERICAN BANKRUPTCY INSTITUTE

2017 Alexander L. Paskay Memorial Bankruptcy Seminar

# Hot Topics in Chapter 11

BUSINESS SESSION


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2017

# BEST PRACTICES FOR ACTING PROFESSIONALLY AND ETHICALLY BEFORE THE COURT

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**Ten "Best Practices" for Acting Professionally and Ethically Before the Court .... and in Life...**

I. Your personal character establishes your credibility.

A.

**The Tragedy of Othello, The Moor of Venice[1]**
**Act III, Scene iii**

Iago: Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
Who steals my purse steals trash—'tis something, nothing,
'Twas mine, 'tis his, and has been slave to thousands—
but he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.

B. From Dominic J. Gianna & Alfred Julien, *Opening Statements 2d: Winning in the Beginning by Winning the Beginning*, §10:1 (2004):

The first great advocacy teachers were Aristotle and Quintillian. Here, in a nutshell, is the essence of the teachings of Aristotle and Quintillian on the art of advocacy:

Aristotle's concept of "ethos" meant, to him, the manifest character of a person, group or culture. The "ethos" of the speaker, he said, must be "good." The audience will not side with an advocate they do not trust. He stressed that, if there is one characteristic common to successful advocates, it is the ability to project sincerity.

Quintillian taught that persuasive speech must evoke the right character, the "ethos" of the speaker and bring the audience into the right state of feeling. The speech must show the speaker to be a person of intelligence, virtue and goodwill.

[1] William Shakespeare.

Such a speaker, according to Quintillian, will always win the confidence of his audience.

II. Be professional, prepared and punctual.

A. Professionalism

1. The Zealousness Trap[2]

. . . As a result of the pressures of practice some never make the proper course correction and their careers are burdened by a false conflict between their duty to their client and duty to the justice system. I refer to the issues concerning 'zealous representation' and the use of that phrase as a free pass to unprofessional behavior, incivility and a jingoistic disregard for the dictates of judicial guidance.

2. Pit-bull or professional?

". . . Pit bull dogs possess both the capacity for extraordinarily savage behavior and physical capabilities in excess of those possessed by many other breeds of dogs. Moreover, this capacity for uniquely vicious attacks is coupled with an unpredictable nature." Harn v. City of Overland Park, 244 Kan. 638, 772 P.2d 758, 768 (1989) quoted in Pape, 918 So.2d 245.

"An offended brother is more unyielding than a fortified city,
and disputes are like the barred gates of a citadel."
Proverbs 18:19

"A soft answer turns away wrath,
but harsh words stir up anger."
Proverbs 15:1

B. Preparation

"Preparation is the be-all of good legal work. Everything else—felicity of expression, improvisational brilliance—is a satellite around the sun. Thorough preparation is that sun." Louis Nizer.

[2] From *The Professional*, Summer 2006, Volume VI, No. 4.

III. Analyze your case from the judge's perspective.

A. Start with your strongest argument and sell it.

B. From Benjamin R. Civiletti, Venable, Baetjer & Howard, LLP, Baltimore, Md.:

With regard to opening statements, I have two quick comments.

One, make sure that justice, the justice of your cause is in the opening statement. For example, I had a case in which a relevant point to make in the opening statement was, this grandmother, who was a bus driver, was fired abruptly, without notice, and that was terribly wrong.

The second point is, pull the teeth. If you've got a weakness in your key witness or a part of your case in a document, pull the teeth out of it in opening statement. For example, my client may not be perfect. He's had a troubled life; but he's not a murderer. And there will be no evidence to prove that he is to your satisfaction.

C. Address the Court, not opposing counsel, during argument.

D. Answer questions directly...don't tap dance....

E. The preparation process for an oral argument must go beyond your own understanding of the controlling case law and the relevant facts. When preparing for an argument, it is important to look beyond the advocate's perspective and take stock of your case with the objective eyes of the judges who will hear your argument. ..Switch places with the court and consider what the judges hearing your case will need and want to know. The Honorable Karen J. Williams, Comment, *Help Us Help You: A Fourth Circuit Primer on Effective Appellate Oral Arguments,* 50 S.C.L. REV 591 (1999).

IV. Be concise.

A. Joseph Story, Memorandum book of arguments before the Supreme Court, 1831-32, in *Life and Letters of Joseph Story* 2:90 (William W. Story ed. 1851)

Who's a great lawyer? He, who aims to say
The least his cause requires, not all he may.

B. Apply the 3-3-3 rule (3 points, 3 cases, 3 minutes)

V. Know when to quit.

A. "Advice to a Young Lawyer," Joseph Story, 1831.
Be brief, be pointed; let your matter stand
Lucid in order, solid, and at hand;
Spend not your words on trifles, but condense;
Strike with the mass of thought, not drops of sense;
Press to the close with vigor, once begun,
*And leave, (how hard the task!) leave off, when done.*
...Victory in law is gain'd, as battles fought,
Not by the numbers, but the forces brought.

B. ...An Advocate must not squander a tentative persuasive advantage by continuing to talk; do not open new doubts in the minds of your audience. Michael J. Hirrel, *Winning On Appeal: Better Briefs and Oral Argument.* 46 Fed. Comm. L.J. 289, 291 (March 1994).

C. From Edward Bennett Williams, "You in Trial Law," in *Listen to Leaders in Law* 97. 124-125 (Albert Love & James S. Childers eds. 1963):

> The classic story about the extra question has to do with the man who was charged with mayhem. The allegation was that he was in a fight and the fight got rough and he bit the complainant's ear off...
>
> So the case went to trial. A witness was on the stand and the defense lawyer took him over on cross-examination. "Now, you saw this fight, did you?"
> "Well," he said, "I didn't see all of it."
> "As a matter of fact, you didn't see very much of it, did you?"
> "I didn't see very much of it, no."
> The lawyer said, "As a matter of fact, you never saw the defendant bite the complainant's ear, did you?"
> And the witness said, "No, I didn't."
> ...But this lawyer could not stop. He had to go on and he said, "But you testified that he bit it off, didn't you?"
> "Yes."
> "Well, how did you know that the defendant bit the complainant's ear off?"
> "Because I saw him spit it out."

VI. Listen carefully.

Warren D. Wolfson, Comment, *Oral Arguments: Does It Matter?* 35 Ind. L. Rev. 451 (2002).

Lawyers giving oral arguments must abide by certain standards. First, they must not be boring. Specifically, they should not just read and repeat their briefs. Second, they must not argue weak or frivolous issues. Third, lawyers must be intimately familiar with the record and cases that they cite. Fourth, lawyers must listen carefully and respond to the judges' questions.

VII. Be courteous

A. Always allow opposing counsel to complete his argument.

B. Lorelie S. Masters, Beveridge & Diamond, PC, Washington, D.C. –

I have one simple rule when people ask me about cooperating with other counsel. And that is, remember that you may be on the other side of the issue at some point. So, I think in most circumstances, courtesy always pays. What goes around, comes around in litigation. You may have a time in the future where you need that extension, so remember to treat your clients and your adversaries with respect. I think everyone understands that there are times when you need to take a hard and fast position, and perhaps be adversarial. But, if over time, your opposing counsel understands that you do things that are necessitated by the case and not out of other motivations, perhaps petty motivations. Then, that will establish a better relationship for resolving the case in the most effective manner for your client.

VIII. Have a plan, but be flexible.

> Laura Ariane Miller, Nixon Peabody, LLP, Washington D.C. (*73 Ways to Win: A Treasury of Litigation Tactics and Strategies*) –
>
> I'd like to give you a lesson from the courtroom on opening statements. One of my very first trials as a young lawyer was a very complex securities fraud case that I was the first chair on, or frankly, I was the only chair on. There were a number of lawyers from a much larger firm in Washington, D.C. sitting at opposing counsel's table. I had labored for hours over my opening statement and tried to capture all of the complexities of the case. But fortunately for me, the other counsel went first. And the other counsel similarly had prepared. And he went on and on and on. And I saw the jury glazing over, and I saw that there were ten, twenty, thirty, forty, fifty points that he was asking them to listen for during the trial.
>
> It was at that point that I realized it was important to rely on my own instincts, and to be flexible in the courtroom. As much as my stomach turned upside-down to put my prepared remarks aside, I knew I had no choice, and I had the advantage of going second. Because I knew that the remarks that I had prepared would have had the jury glazing over as well. As a result, I realized I needed to focus on the three central themes of my case. I focused on those themes, and throughout the rest of the trial, those became almost my mantras. With every witness, I talked about those three issues, the jury was with me; they knew what they were listening for, and in some ways, I even felt as if they were rooting for me, to make sure those three points were covered. So really, what I learned was to keep it simple, but also to be flexible, and to recognize that sometimes in the courtroom, it's best just to rely on your instincts.

IX. Modulate yourself.

A. Pace yourself: Don't Talk Too Fast.

B. No non-verbal gesticulations.

X. Be candid with the court.

A. False Statements

1. A lawyer shall not make a false statement of material fact.

a. Florida Rule of Professional Conduct 4-4.1(a) Truthfulness in Statements to Others. In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person…

b. Comment – Misrepresentation. A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.

c. Comment – Statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category…

2. Artful Deception?

--Ambiguous questions cannot produce perjurious answers

--Nonresponsive, misleading, and literally true testimony

--Requirement of literal falsity, distinction between lying and misleading

3. "Caveat Auditor"--distinction between lying and misleading--a listener is responsible for ascertaining that a statement is true before believing it.

4. Examples:

a. "Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements," Hastings Law Journal, November, 2001, Green, Stuart P.--View of Stuart Green, professor of law at Louisiana State University--"Although Clinton surely did make a handful of literally false statements under oath, it appears that most of his testimony consisted of statements that, though misleading, were literally true. As 'legalistic' as many of Clinton's responses undoubtedly were, the public seems to have understood – and accepted – the fact that they were neither lies nor perjurious."

b. Bronston v. United States, 409 U.S. 352 (1973). Facts: At a creditors meeting in a Chapter 11 case, Bronston was asked "Do you have any bank accounts in Swiss banks?" and he answered "No, sir." He was then asked, "Have you ever?" to which he answered "The Company had an account there for about six months, in Zurich." It was undisputed that Mr. Bronston's answers were literally truthful. Although at the time of questioning he did not have a Swiss bank account, he had a personal Swiss bank account for approximately five years. The government contended that the negative implication of his response to the second question was misleading and perjurious. Id. at 354-5.

In overturning the perjury conviction, the Supreme Court stated, "It may well be that petitioner's answers were not guileless but were shrewdly calculated to evade. Nevertheless … any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." Id. at 362.

B. What is an "officer of the court"?

1. "An attorney is more than a mere agent or servant of his or her client; within the attorney's sphere, he or she is as independent as a judge, has duties and obligations to the court as well as to his or her client, and has powers entirely different from and superior to those of an ordinary agent. (footnote omitted) In a limited sense an attorney is a public officer, (footnote omitted) although an attorney is not generally considered a "public officer," "civil officer," or the like, as used in statutory or constitutional provisions. (footnote omitted) The attorney occupies what may be termed a "quasi-judicial office" (footnote omitted) and is, in fact, an officer of the court. (footnote omitted)" 7 Am.Jur. 2d Attorneys at Law §3.

2. In re Bergeron, 220 Mass. 472, 476-7 (1915). The Massachusetts Supreme Court stated:

> …On that point it becomes necessary to consider somewhat closely the duties of an attorney at law. He is in a sense an officer of the state. From early days he has been required to take and subscribe an 'oath of office' which forbids him from promoting and even from wittingly consenting to any false, groundless or unlawful suit, from doing or permitting to be done [by] falsehood in court, and which binds him to the highest fidelity to the courts as well as to his clients. The courts being a department of government, this is but another way of saying that his obligation to the public is no less significant than that to the client. He is held out by the commonwealth as one worthy of trust and confidence in matters pertaining to the law….Manifestly the practice of the law is not a craft, nor trade, nor commerce. It is a profession whose main purpose is to aid in the doing of justice according to law between the state and the individual, and between man and man. Its members are not and ought not to be hired servants of their clients. They are independent officers of the court, owing a duty as well to the public as to private interests.

3. Langen v. Borkowski, 206 N.W. 181, 190 (Wis. 1925). The Wisconsin Supreme Court stated:

> An attorney at law is an officer of the court. The nature of his obligations is both public and private. His public duty consists in his obligation to aid the administration of justice; his private duty, to faithfully, honestly, and conscientiously represent the interest of his client. In every case that comes to him in his professional capacity, he must determine wherein lies his obligations of the public and his obligations to his client, and to discharge this duty properly requires the exercise of a keen discrimination, and wherever the duties to his client conflict with those he owes to the public as an officer of the court in the administration of justice, the former must yield to the latter.

C. With the Court

1. Florida Rule of Professional Conduct 4-3.3 False Evidence; Duty to Disclose. A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (4) permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyers knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and

thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.

2. Representations of facts; proffers of testimony

3. Arguments of law

i. Statements of the law and cases

ii. Acknowledge and address the difficult issues. Show the judge how and why he or she should decide for your client—address the difficult issues and explain how and why the issue should be decided

4. Federal Rule of Bankruptcy Procedure Rule 9011(b). Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

. . . an attorney is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) it is not being presented for any improper purpose, . . . (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law; (3) the allegations . . . have evidentiary support; and (4) the denials . . . are warranted . . . .

In closing: Is there such a thing as too much candor with the court?

Mae West as Flower Belle Lee in "My Little Chickadee" in answer to the judge's question, "Are you trying to show contempt for the court?" West retorted, "No, I'm doing my best to hide it."

A traditional story of Marshal Wright's was that when Jeremiah – otherwise "Jerry" – Wilson began an elaborate opening by citing many of the fundamental authorities, he was interrupted by an Associate Justice who said that Mr. Wilson ought to take it for granted that the Court knew some elementary law. To this "Jerry" Wilson replied: "Your Honors, that was the mistake I made in the Court below." Charles Henry Butler, *A Century at the Bar of the Supreme Court of the United States* 88-89 (1942).

"I have gathered a posie [sic] of other men's flowers, and nothing but the thread that binds them is mine own..." John Bartlett, Bartlett's Quotations

*Many quotes in this presentation were taken from Fred R. Shapiro, The Oxford Dictionary of American Legal Quotations (1993).*