AMERICAN BANKRUPTCY INSTITUTE

2019 Delaware Views from the Bench

Young Lawyers Track

How to Prepare for Oral Argument and How to Seek Out Opportunities for the Same

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Panelists:

The Honorable Laurie Selber Silverstein
United States Bankruptcy Judge
United States Bankruptcy Court for the District of Delaware

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Moderator:

Justin R. Alberto
Bayard, P.A.
Wilmington, Delaware

October 17, 2019

A. TOP TIPS TO PREPARE FOR ORAL ARGUMENT

1. Know the Rules and Procedures

   - Federal Rules, Local Rules, Chambers Procedures, etc.
   - Bring a copy of the Bankruptcy Code, Bankruptcy Rules, Local Rules, and relevant procedures to the hearing

2. Reread the Pleadings and Key Authorities

   - Start with rereading the court papers
   - This includes the motion or complaint, responses, objections, replies, briefs, and, relevant prior rulings or transcripts
   - Review the docket and procedural history relevant to the case
   - Know what is and is not in the record, and consider whether a declaration, proffer, or live testimony is needed
   - If arguing on appeal, review the court's ruling below in detail and focus on where you think the court went wrong

3. Make an Outline (NOT A SCRIPT)

   - Preparing an outline helps organize your thoughts and decide the issues that are most important
   - An effective outline is a summary of your most important points in the order you will make them
   - Even if you don't use the outline, the act of preparing it will help you focus and feel prepared and confident

4. Have the Important Facts and the Law Readily Available

   - Become an expert on the best facts and law that support your position—be ready to speak and answer questions about them
   - On one page, write down the 5-10 best facts for your case and the top 3-5 legal authorities. Include pin cites and short, verbatim quotations of particularly helpful language.
   - Having the key facts and law at your fingertips can build great credibility if you are blindsided by a question from the court

- Even if you don't use this "cheat sheet" at the hearing, preparing and returning to this list will help focus your preparation on what matters the most

5. Review and Update Your Most Important Authority

- Know the law – key cases, statutes, and rules
- You don't have to read every case, but it is a good idea to read the most important 4-5 from start to finish
- Keycite and update the key cases if necessary—there is nothing worse than to have your opponent point out that a key case has been overruled or superseded by new authority
- Review (and distinguish) key cases in opposition papers

6. Know Your Audience

- Know the Judge's preferences and the Court's customs and protocol
- Know the Judge's customary level of pre-hearing preparation
- Consider reading transcripts of similar hearings before the same Judge to get a feel for how the Judge handles arguments

7. Know Your Opposition

- Do not interrupt opposing counsel
- Do not engage in argument with opposing counsel

8. Maintain a Professional Demeanor with the Judge (be deferential) and with Your Adversary

- Do not interrupt or speak over the Judge
- Listen carefully to the Judge and opposing counsel
- Wait for the Judge to complete a question before answering
- Know how to address the Judge—consider practicing out loud until it feels natural
- Do not ignore or dodge questions

- Do not whine or display frustration and do not use sarcasm
- Be aware of your posture and body language
- Refer to opposing counsel respectfully

9. The Argument

- Be prepared to commence argument, including having your materials organized, when the Judge takes the bench
- Introduce yourself and identify the party you represent
- If it is a timed argument, reserve rebuttal time (if applicable) and beware of the clock

10. Primacy and Recency

- Take advantage of your first and last minute of argument (do not waste it on procedural history or minor points)
- Convey an easy roadmap for the Judge—explain briefly why your client should prevail and the legal path to that result
- Convey your points succinctly and directly; use plain language and a conversational tone
- Incorporate a persuasive theme that is short, easy to understand, catchy and tells a story and then organize around your theme
- Use facts, not conclusions; use specifics, not generalities
- Tailor your argument to the Judge's questions and prioritize the Judge's questions over the pre-planned argument
- Concede what must be conceded and confront weaknesses in your argument

11. Exhibits and Evidence

- Know the Court's procedures for presenting evidence (In Delaware, for example, you should prepare pre-marked exhibit binders for the Judge, Witness, Law Clerk, and opposing counsel)
- Have extra pre-marked exhibits available in the event additional copies are required

- Do not approach the bench or the witness with Exhibits without requesting Court approval
- Understand how to formally introduce exhibits and request exhibits be admitted into evidence
- Do not forget to move exhibits into evidence—keep track of which exhibits are admitted so that none are overlooked

12. Demonstrative and Visual Aids

- Consider use of visual aids or demonstrative exhibits, such as graphs, diagrams, charts, sound bites, or video testimony
- Use visual aids or demonstrative exhibits sparingly and with meticulous planning—avoid overuse or misuse
- Comply with the Court's requirements for use of courtroom technology
- Arrive early and test all equipment prior to the hearing

13. Proffers, Declarations, and Witness Presentation

- When presenting argument on a motion, proper evidence may be required to support the relief sought in the motion
- In lieu of direct examination of a live witness counsel may, with Court approval, use a proffer
    - A proffer is the direct testimony of a witness that is stated in open Court on the record by counsel in lieu of the direct examination of the witness
    - The witness must be available for cross-examination
- Some Courts allow testimony in writing in the form of a declaration, which is typically prepared and submitted in advance of hearing
    - Declarations must comply with all applicable rules of evidence (*e.g.,* declaration must be based on personal knowledge, state admissible facts, and demonstrate declarant's competence to testify regarding the facts set forth in the declaration)
- Testimonial evidence by a witness under oath may be presented orally in Court

- Carefully consider the impact of presenting a proffer or declaration as opposed to a live witness

14. Prepare, Prepare, Prepare!

- Prepare a question and answer
    - Anticipate the Judge's questions
- Practice the argument to build confidence
- Avoid reading a script
- Take a step back from the case you know so well and preview the argument with people who are not familiar with the facts

B. TOP 10 THINGS TO AVOID FOR ORAL ARGUMENT

1. Not being prepared—not knowing the case, the law, the rules, the Judge, or the opponent

2. Failure to anticipate the Judge's questions and failure to answer the Judge's questions

3. Interrupting or arguing with the Judge

4. Overstating the law or the facts

5. Failure to bring a witness to a hearing (whether the matter is contested or uncontested) and/or failure to prepare a proffer for presentation or present direct testimony through a live witness

6. Making personal attacks on opposing counsel or the adversary

7. Reading a prepared speech

8. Making unnecessary evidentiary objections

9. Making inadvertent admissions or stipulations

10. Assuming the Court will entertain telephonic oral argument

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Feature

Andrew S. Pollis [a1]

TEN TIPS FOR PERSUASIVE ORAL ARGUMENT

WESTLAW LAWPRAC INDEX

MID--Small to Moderate Firm Issues

SOL--Sole Practitioner Issues

***33** When Andy Warhol observed, “In the future, everyone will be world-famous for 15 minutes,” he probably didn't have appellate arguments in mind. But in the insular world of appellate litigation--where we spend so much time holed up by ourselves researching and writing--a 15-minute oral argument is sometimes our best opportunity to get out and show our stuff. And when you finally get a chance to take to the stage for your big moment, you want to perform at your best. To that end, I offer ten tips designed to elicit rave reviews from your colleagues, your clients, and--most importantly--the judges.

TIP 1: WRITE THE BRIEF

The first and best way to prepare for oral argument is actually to author the appellate brief yourself. It may sound like an obvious point, but it's not one that appellate lawyers consistently honor. In large firms, high-powered partners may swoop in for the argument after “the team” has written the brief. In solo shops, it's not unusual for lawyers to hire law clerks (often students) to do the “mundane stuff” like brief writing.

Anyone who has not played an active role in briefing will never understand the case as well as those who lived with it from draft to draft to draft to final product. This is not to say that the brief can't be a team effort. But the person who argues the case needs to be an integral part of that team if he or she has any realistic expectation of arguing the case effectively.

TIP 2: DOUBLE-CHECK JURISDICTION

Appellate courts have limited jurisdiction, usually prescribed by an interconnected system of statutes and rules. They will use a jurisdictional defect to avoid hearing your case on the merits if they possibly can--sometimes surprising counsel at oral argument with questions about jurisdiction. Jurisdictional dismissals occur without the issue even having come up at oral argument.

You can guard against improper dismissal by anticipating jurisdictional problems and being prepared to address them at oral argument. Make sure you can articulate the jurisdictional basis of your appeal in a single sentence, especially if your case has not yet reached final judgment in the trial court. And if jurisdiction is uncertain--say, for example, the trial court issued a questionable certification of partial final judgment under Federal Rule of Civil Procedure 54(b)--be as prepared to address the jurisdictional issues as you are prepared to address the merits.

***34 TIP 3: UPDATE YOUR RESEARCH--BUT JUDICIOUSLY**

Time doesn't stop just because you have fled your brief. Between the time you file your brief and the date of oral argument, courts may decide other cases that bear on yours. Part of preparing for oral argument is making sure you monitor those decisions and keep your research current. One good system for doing so is to program LEXIS or Westlaw to run periodic research queries on the key cases, statutes, rules, and issues in your case.

Most jurisdictions allow parties to advise the appellate court of new authorities. In federal appeals, Federal Rule of Appellate Procedure 28(j) permits parties to file a 350-word letter that explains the significance of supplemental authority (and permits the opposing party to respond). Some state court rules permit disclosure of new authorities but without the accompanying argument. Whatever your jurisdiction permits, take advantage of the opportunity to make sure the court is working with the current state of the law by the time it decides your case. And be prepared to address these authorities at argument, especially if you have not had an opportunity to address them in writing beforehand.

But there's an important caveat here: Don't over-supplement. A new case may touch on an issue in your appeal, but that doesn't necessarily mean you have to run and tell the court about it if it adds nothing new. Remember that every piece of paper you file adds to the judges' burden--so make sure your new authority is worth their time. And never use a notice of supplemental authority to disclose material that already existed (but that you somehow failed to discover) when you wrote your brief.

TIP 4: PREPARE A DETAILED OUTLINE--AND THEN CHUCK IT

One of the most effective ways of preparing for oral argument hearkens back to our law school days, when we would outline our courses. I always found that the *process* of crafting the outline was a more helpful study technique than actually *having* the outline. It is equally so with oral argument preparation; studying the record and the law carefully enough to prepare your detailed outline is the heart of preparation, even more than studying the outline once you have it.

And, for that very reason, you should dispense with all the papers by the time you take that fateful walk from counsel table to the podium. Go up with nothing but your brain and your charm. I say this for two reasons: First, knowing ahead of time that you will have no notes will require you to absorb the material all the better, thus ensuring that your preparation will be complete. Second, the quality of your presentation will, perforce, be immeasurably better if you have nothing to look at but the judges' eyes.

The idea of paperless argument strikes some of us at the core of our insecurities. What if I blank out? What if I can't remember that case name? If you have prepared adequately--and memorized your first sentence (see Tip 5, below)--it simply won't happen. But for those who remain unconvinced, one simple trick is to have your notes sitting on the corner of the counsel table so that, in the worst-case scenario, you can go retrieve them. For the truly faint of heart, you can bring them to the podium in a closed folder that you don't dare open unless catastrophe strikes.

TIP 5: CAREFULLY SCRIPT--AND MEMORIZE--YOUR OPENING SENTENCE

One of the most successful advertising campaigns for dandruff shampoo told us that we “never get a second chance to make a first impression.” This is even truer in oral argument. Research shows that important judgments materialize in a matter of seconds. Yet some oralists fail to exploit that crucial moment when the mouth first opens and the pearls of wisdom start to drip out. This is your moment to grab your audience. And it doesn't matter how dry the issue may be; there is always *something* you can say from the outset to make the case--and your side of it in particular--sound compelling.

That opening sentence goes by many names, from the mundane (“introduction”) to the strategic (“core theory”) to the vernacular (“elevator speech”). But the purpose is the same, no matter what you call it: to distill your entire argument into a crisp and compelling statement that any listener will understand--and that will leave your listener with no doubt about what side of the

issue you come down on. It's not an easy task. Sometimes writing that opening sentence is harder and more time consuming than all your other preparation combined. But getting it right is crucial and rewarding.

An interesting anecdote on this score: In 2010 I had the honor of working alongside Cleveland attorneys David E. Mills and Chris Grostic in preparing Mills for his Supreme Court oral argument in *Ortiz v. Jordan*, 526 U.S. 1 (2011). The issue in *Ortiz* was whether the defendants could appeal the denial of their fact-based summary judgment motion, even though they had not reasserted their arguments in a post-trial motion. The three of us pored over Mills' intended first sentence, until finally we settled on:

> Denial of summary judgment is not reviewable on appeal after trial, particularly where the decision depends on whether the evidence on the merits of the claim is sufficient to cross the legal line for liability.

The weekend before the argument, I started to worry that "particularly" was a hard word to enunciate, especially when nerves are jumbled and the mouth is dry. So I counseled Mills to substitute "particularly" with "especially." At the argument, no sooner did he eke out that first sentence (with my suggested revision) than Chief Justice John Roberts interrupted him and seized on my suggested word:

> I'm sorry to interrupt so quickly, but that "especially," I take it--I take it, is a concession that there's a difference between claims for qualified immunity based on evidence and claims that are based on law.

***35** It was good for a laugh afterward, of course. But it also demonstrates that we were correct to obsess about the wording because it inspired Chief Justice Roberts to zero in on one of the most important aspects of the case. (In the end, we won, 9-0.)

TIP 6: ROAD MAP YOUR ARGUMENT

Medical studies tell us that people are much more comfortable in the doctor's office if they know what's coming. If the doctor says, "I'm going to listen to your heart with my stethoscope, and then I'm going to palpate your neck to feel your arteries," we are much more relaxed than if the doctor simply starts to do these things without warning.

Judges aren't usually worried about being palpated, but the same principle applies. Everything goes down more easily if we expect it. It's simply less taxing to follow. So warn your judges what path your argument will take. It's easy to do, and it will help ensure that you structure your argument logically. Here are three important considerations to keep in mind as you craft your road map:

1. Disclose the ultimate destination. The best road map starts off with a general statement, which is usually the major proposition in the case. A generic example for the appellant might be: "We ask that the court reverse the erroneous trial court judgment."

2. Disclose the distance. To fill out your road map, tell the court how many arguments you're going to make in support of that statement (e.g., "for three reasons"). Three is a good number; you're unlikely to be able to cover more than that in only 15 minutes.

3. Disclose the route. *Briefly* list each of your arguments, using ordinal numbers. *"First*, the trial court erred in letting the case go to the jury; *second*, the trial court wrongly excluded evidence; and *third*, the trial court gave the jury an erroneous legal instruction." Don't give detail here; that will come later (or not, depending on how much of your prepared argument you get a chance to deliver).

You'll notice that for each of these elements, I used the word “disclose.” Lawyers are sometimes inclined to keep information to themselves, not to reveal their work product or their thinking for fear of giving away strategy. This might be an important concern when dealing with opposing counsel in the throes of discovery or trial, but the opposite instinct should kick in when talking to a judge. This is the time for *full* disclosure. This is the moment that all the strategizing has led to. You've worked carefully to build the best hand, so feel free to tip it at the beginning of your argument!

Also remember that road maps aren't just for your opening. You can use them even in answering judges' questions. If a judge asks a question to which you have multiple responses, tell the judge so before you start listing them (e.g., “There are three answers to that question, Your Honor”).

TIP 7: AIM FOR A REAL CONVERSATION

The goal of oral argument is, of course, to convince the court that your argument is more persuasive than your opponent's. So ask yourself: Are you generally easier to persuade when someone is talking *at* you or *with* you? Most of us would agree that the latter approach--the conversation, rather than the lecture--is a better way to convince us of the merits of an argument. It's no different with judges.

If you buy the premise that a conversational argument is more effective, it becomes important to appreciate the most effective components of conversation and to fold them into our presentation. It comes down to four basic points.

First, like any other conversation, listening is at least as important as talking. When judges ask questions or raise concerns, they are giving you important windows into their thinking. Only if you listen carefully to what they say can you respond and tailor your presentation to meet their concerns. Then, answer those questions as directly as you can. If they ask a “yes or no” question, give them a “yes” or “no” answer--and then, if necessary, elaborate to make that answer fit into your overall argument.

Second, it's a group conversation. Make sure you engage the whole group, not just a single judge. Of course, you sometimes can intuit which judges may be your primary targets. For example, if you know from past experience that one of the judges on a three-judge panel is already likely to come out your way, the main focus of your energies should be on the other two. Similarly, if you know you have no hope of winning over a particular judge, engaging him or her at length may not be the best use of your time. But aside from these strategic considerations, you should strive as much as possible to give each judge equal time.

Third, as with any other conversation, relate what you say to what others have said. This is especially important in rebuttal, where the appellant gets a chance to respond to the appellee's argument; do whatever you can to connect your rebuttal to a judge's question or comment to your opponent. Doing so not only helps you emphasize the point in question, it also makes the judge feel good, as if you were actually listening to what he or she said. Never pass up ***36** an opportunity to make someone feel heard, even an appellate judge!

Fourth, anticipate the tough questions. Talk the case over ahead of time with smart people who will find the holes in your argument. Craft answers to fill every one of these holes or, if appropriate, concede them (see Tip 8, below). Anticipating questions will also allow you to create pathways from your answers back into your prepared argument, thus increasing the likelihood that questions will enhance your flow rather than disrupt it.

TIP 8: CONCEDE WHAT YOU CAN

Lawyers tend to be reluctant to concede anything--even points that we don't really need to win. It's ingrained in us not to give any ground unless we absolutely must. Instead of conceding outright, some lawyers use that awful word, “arguendo”--as in, “even assuming arguendo I'm wrong on Point X, I'm still right on Point Y.”

But, to borrow from *Ecclesiastes,* to everything there is a season. A time to refute, a time to concede. And oral argument is the time to concede weak points, so long as the concession causes no disruption to the integrity of your argument. Refusing to concede points that you cannot win comes across as defensive and suggests that you are unwilling to evaluate your case objectively. This defensiveness, in turn, undercuts your persuasiveness.

By contrast, conceding points you don't ultimately need to win accomplishes two important goals: establishing your personal integrity with the court and emphasizing your confidence in the strength of your overall argument. A good example might be an appellate decision from another jurisdiction that goes against you. If it doesn't control your court, you might be better off conceding that it goes against you rather than trying to concoct a weak way to distinguish it. You can forcefully argue that your court should not follow the erroneous decision of the other court, and your argument is all the more forceful if you don't shy away from what the other court held.

TIP 9: MAKE IT LOOK FUN

In *The Adventures of Tom Sawyer*, Tom famously got out of whitewashing Aunt Polly's fence by making the task look like a treat. “Like it?” he said. “Well, I don't see why I oughtn't to like it. Does a boy get a chance to whitewash a fence every day?”

These days, kids get precious little opportunity to whitewash fences. But lawyers still get the chance to deliver oral arguments. And the more fun you show the court you're having, the more confidence you exude--which is precisely the way to convince the court that you have the better side.

Fun is contagious. People who see other people having fun want to have fun, too. Especially in the drudgery of the law, where fun is sometimes the very thing we're missing, a lawyer who can stand up and make a joyful noise is naturally going to attract a more favorable response from the other participants in the conversation.

And the best part is this: When you behave as if you're having fun, most of the time you actually do.

TIP 10: MOOT YOUR ARGUMENT WITH A MIXED AUDIENCE

In a famous vaudeville joke, the straight man asks the question, “How do you get to Carnegie Hall?” The answer, of course, is “Practice, practice, practice!” That's also the best way to get to the court of appeals. There is not a single appellate argument that cannot be improved by testing it in front of an actual audience. The more you practice, the more comfortable you will feel in your paperless walk up to the podium (see Tip 4, above).

Picking the audience should be a thoughtful exercise. Yes, colleagues in your firm are good choices, but be careful about choosing people who are already biased in your favor or--just as dangerous--eager to show you how smart they are by giving you an unnecessarily hard time.

And lawyers are not the only folks who can give you good feedback. Do a few moot courts with laypeople. There is a value in getting reaction from people who don't know the law--they can help you identify things about your case that just don't make sense or just feel wrong. And because they don't necessarily understand legal doctrine and authorities, they'll give you more thoughtful feedback on presentation style that your lawyer colleagues may miss.

MAKE THE MOST OF YOUR 15 MINUTES

The universal consensus about your 15-minute oral argument is that, like a reality celebrity's 15 minutes of fame, it goes by too fast. So make the most of it, and then savor those moments as they slowly fade into memory. With any luck, you'll get a

decision down the road that will serve as a happy reminder of your glorious time at center stage. And if not, your next argument is just around the corner, offering you an opportunity for a triumphant comeback.

Footnotes

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DRI For the Defense
February, 2018

Appellate Advocacy

THE ART OF ARGUMENT
Ben Franklin's Advice Put to Use

Mary Massaron [a1]

"**By** failing to prepare, you are preparing to fail."

Benjamin Franklin

One of the great joys of appellate advocacy is the opportunity to engage in the back and forth of oral argument in a way that allows you to drive home the key points of your argument in a persuasive and compelling manner. One of the great fears is that you will be caught at the podium unable to answer a question from the bench, or worse still, you will offer an answer that results in defeat instead of victory. The best way to avoid that moment is to prepare. But learning how to prepare for oral argument is difficult, and not always a focus of law school classes. Many of us stumble along until we find some method that seems to work for us. Still, guidelines exist that can offer help with preparing. No one wants to fail at oral argument. The more you learn to prepare effectively and efficiently, the more the judges or justices on the court and your clients will be impressed with your advocacy, and the more likely you will get a good result.

Develop a Schedule to Prepare for Argument with Discrete, Identified Tasks

The initial step in my preparation is to develop both a list of tasks and a schedule for their completion. Some tasks can be delegated to a paralegal or legal assistant. For example, as soon as an argument notice arrives in my office, my assistant books a hotel room and flight if the argument requires travel. In addition, she works with a paralegal to prepare information that I will need and to upload it onto an iPad. For many years, I used binders for this material. But now, unless I am appearing in a court that does not allow use of an iPad, I have a folder dedicated to the case. It has sub-folders that include copies of all the cases in alphabetical order, copies of all briefs filed in the appellate court, including any amicus curiae briefs, and copies of the lower court record or key portions of it, in a logical order. The program that I use, Trial Pad, provides an index to the items in a subfolder. So I can easily locate anything I need quickly. This folder is prepared right away so that I have it available and can use it for my argument preparation. An important part of this preparation is to check the authorities cited in the briefs to see if they have been overruled or modified or if any new authorities have been issued that are important to the appeal. These steps can readily be accomplished by my legal assistant and paralegal, which saves time and expense.

Learn About the Court and the Judges or Justices Who Will Decide Your Appeal

Early preparation also includes finding out as much as possible about the appellate court before which you will argue. This can entail a visit to the court's website for helpful information for practitioners. Many courts have on-line guides, such as the Seventh Circuit's "Practitioner's Handbook for Appeals," or the Michigan Supreme Court's "Guide for Counsel in Cases to be Argued in the Michigan Supreme Court." Often, courts will have a set of internal operating procedures that can provide valuable insight as well. The court website will often provide basic information about where the court is located, the length of time for

argument, the place to check in, the layout of the courtroom, and any rules concerning use of electronic equipment such as iPads or cell phones. You may also want to contact the clerk's office to confirm information about the argument or to ask questions about procedures that are not set out on the website.

If you have not appeared in that court before, it can be useful to visit in person or to observe arguments through video archives that may be available. Only through watching arguments can you truly get a sense of the culture of the court. Some courts are very formal while others have a more relaxed atmosphere. In addition, you can generally figure out whether it is a hot or cold bench, that is, whether the judges arrive for argument well prepared and having read the briefs and record and authorities, or whether they arrive with only a general sense of the case. If you know attorneys who regularly practice before that court, you may want to contact them to gather additional information about the court's culture and informal practices.

You will know the justices on a court of last resort from the inception of the appeal. For intermediate appellate courts, learning about your judges may be more difficult. In many appellate courts, the names of the panel of judges assigned to your appeal are provided along with the oral argument notice. In other courts, they are released closer to the argument date. The Seventh Circuit posts the names of the judges on the morning of the argument. Researching information about the judges is helpful. Learning about their legal experience can give insight into how they will approach a case. A former prosecutor is likely to view a criminal case differently than a lawyer whose pre-judicial career involved trusts and estates or banking law. A former trial judge may view discretionary calls by the trial court more favorably than someone without that experience. Often the internet will provide other information about their interests, hobbies, charitable activities, and perspectives on particular issues.

In addition to their legal background and experience, research into decisions that they have written on the issues in the appeal is important. You will want to know each judge or justice's views on the issues as revealed in their prior opinions. Read the opinions not only for the result that they reach but to learn the tools of judicial reasoning that they have employed. This can be extremely helpful in framing your arguments to them. A Chicago-school-of-economics pragmatist will approach a common law rule of negligence differently than a Federalist-Society-limited-judicial-policy-making judge. These threads can be discerned in judicial opinions if you read them carefully. The more you know about a judge or justice, "the more likely it is that you can touch a responsive chord." Samuel E. Gates, *Hot Bench or Cold Bench: When the Court Has Not Read the Brief Before Oral Argument*, in Counsel on Appeal, 107, 112 (Arthur A. Charpentier ed., 1968).

Study the Record to Identify the Key Issues, Legal and Factual

Every article or speech that I have ever read or heard on oral advocacy speaks first about mastering the record. This is imperative. But as David Frederick pointed out, some "records are staggering, running to thousands of pages (or more) of factual material." David C. Frederick, *Supreme Court and Appellate Advocacy* 54. A "typical Supreme Court case requires mastery of as many as 250 pages of legal briefs and perhaps the same number of appendix material." *Id.* And this does not include the many pages of "authorities, including cases, statutes, regulations, treatises, and law review articles." *Id.* Not every case warrants the weeks of full-time study and multiple moot courts that a bet-the-company appeal in the United States Supreme Court calls for. Efficiently focusing the preparation on the key points is even more important in cases in which the amount at stake does not warrant such extensive time and expense or when the client cannot afford it.

To master the record, you will need to consider and decide carefully the scope of what to study and prepare. This requires reviewing the briefs and record to determine the linchpin of the case, that is, the key issue on which the argument depends and on which the judges or justices will most likely focus their attention. Over and over again, I see lawyers spending valuable time at argument discussing tangential issues or reviewing facts that are not critical to the outcome. This is not helpful to the appellate court. Aimlessly reading the record or the authorities cited in the briefs is not likely to result in a focused presentation; rather, you must identify the most difficult points that are essential to your client's position and focus on those.

My own record review typically begins with reading all the briefs, stopping to read the cases and authorities cited, and to look up record portions, as I go. This allows me to test the support for legal and factual arguments and to take note of problem areas

or gaps in either side's analysis or support. It also enables me to make a list of potential questions that may be directed at either side during the argument. As I read, I try to identify the key point or points that I may want to make affirmatively and those that I anticipate that my opponent will advance. I look for my opponent's best case and best facts. Weak points often can be deliberately obscured or glossed over in the briefing process. As I review the opposing party's briefs, I look for any aspect of the legal or factual issues that my opponent has not addressed or has glossed over. This is often a clue to the weak point in an opponent's case that can be exploited during argument. Former Chief Justice William Rehnquist warned that advocates who fail to go beneath the surface of the briefs to understand the argument in-depth will find argument difficult:

> The questions you get at oral argument are often the ones that are not squarely covered in the brief--indeed that is probably the reason for the question from the bench. So an advocate who has not gone beneath the surface of the brief to understand how its parts fit into a coherent argument will be at a considerable disadvantage.

Hon. William A. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. App. Prac. & Proc. 1, 5 (1999). Justice Rehnquist's point cannot be overemphasized as a basis for approaching your argument preparation. It is these glossed over questions that are likely to arise--and that can take an argument completely off track if the advocate is not prepared.

Distill the Argument into Key Points

Once you have completed this review, you will need to distill the argument into the two or three key points that you must make. As you think about this, consider which points to make. You do not need to stress points that your opponent concedes or points that are in dispute but that are relatively unimportant to the outcome. You may want to amplify points that were given insufficient attention in the briefs but are important to the outcome. The outline of your argument should be relatively simple and focused on one or two key issues or else it will leave a hazy impression with the court. This distillation process is a matter of judgment, and even though you may find it hard to decide what to leave to the briefs, your presentation will be substantially stronger if you are able to get to the heart of the matter: “[T]he most important single element of successful oral argument is the ability to select the heart of your case--the hub--the core, upon which all else depends.” H. Graham Morrison, *Oral Argument of Appeals*, 10 Wash & Lee L Rev 1, 6 (1953). Failing to do this means that your critical points may become buried under a mass of marginally relevant details. As Judge E. Barrett Prettyman explained, “[i]n oral argument[,] stern, courageous selectivity is a necessity, diffusion is fatal.” Hon. E. Barrett Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 Va. L. Rev. 285, 294 (1953).

As you decide on the key points, organize them logically so that they can be presented in an orderly flow. Think about how to connect one with another so that you can get back to points that you need to make if questions divert you from the outline that you prepare. Take the time to summarize these points in as few words as possible while still maintaining clarity.

Include an Opinion Kernel or Statement of the Rule You Seek

Karl Llewellyn urges appellate advocates to include an “opinion kernel” in their appellate briefs. This is a statement of the holding, which the court can adopt and use to rule in your favor. If you have carefully done this in your brief, you simply need to be sure that it is included in your argument outline. If you have not, you need to consider the breadth of the rule that you urge. Sometimes, you may want to offer more than one version. If your client would love to get a broad rule that would help in other future litigation, you can frame the rule broadly. But you will then want to figure out what is the narrowest iteration of the rule that would still allow your client to win. Tell the court that you believe that the broader rule is best jurisprudentially and why. But then explain that the court need not adopt this broad rule for your client to win; the court could adopt a particular

narrower formulation if the court does not want to go that far. Such a concession will earn you credibility points and may save you from a loss if your opponent's policy arguments against the rule have force.

Review and Revise, Following a Few Principles

Take the time to revise your key points so that you can present them in a lively and attention-getting way that is consistent with the decorum of the court and your own personality. At the same time, think about how to articulate your points in a manner that is lively and interesting. All advocates develop a style of argument over time. Some are professorial, some are bombastic, some are pedantic and dull, and some are conversational. What we all want is to be lively and focused in an energetic way that is both consistent with the decorum of the court and with who we are as people. The ability to develop a style that makes us likeable to the judges or justices and grabs their favorable attention to our legal argument is the mark of a great advocate. This is not easy, but there are some pointers to consider.

As you prepare your outline, think about catchy phrases, vivid language, illuminating metaphors, and ways in which you can encapsulate points concisely and concretely for the court. Making this a separate step in your preparation will enable you to focus on the word choice and images that you want to use, and not just the legal or factual concepts that you want to convey. Consider that "general propositions are generally dull. A catchy restatement in the form of an aphorism, epigram, or slogan wins attention and helps to ensure recollection of the speaker's points." Wayne C. Minnock, *The Art of Persuasion* 65 (2d ed. 1968). Nothing is more tedious than to listen to an advocate read or reiterate from memory lengthy boilerplate language about the issue in the case or the standard of review. Think about a better way to convey these points.

Use of a pithy quotation from a prior judicial opinion, or a "dignified slogan," can catch the judges' attention. Frederick Bernays Wiener, *Briefing and Arguing Federal Appeals* §122, at 328 (2d ed. 1967). During one of my first arguments to the Michigan Supreme Court, I was urging the court to retain a common law "two-inch rule" that disallowed liability for failure to maintain a sidewalk if the gap in it was two inches or less. I argued that municipalities were not obligated to keep sidewalks "as smooth as glass" to avoid liability. A sidewalk need not be the same as a polished dance floor. The idea was to convey the real issue about the two-inch rule without reiterating over and over that phrase from old case law, and to use a phrase that was consistent with my theme and theory of the case.

When working with my partner to prepare an argument to the Michigan Supreme Court regarding the attorney-judgment rule, we tried to find a way to persuade the court that a jury was ill-suited to secondguessing matters of attorney judgment. I suggested analogizing to art and discussing the story of Ruskin's criticism of Whistler's painting, *Nocturne in Black and White*, a painting now housed in the Detroit Institute of Arts. Ruskin said that the painting was "like flinging a pot of pain in the public's face." Whistler sued him, winning a technical victory but no damages. Today, that painting is universally acclaimed as a masterpiece and is one of the most important paintings in the Detroit Institute of Arts' collection. The point was that the attorney's judgment in trial, similar to an art critic's judgment of a painting, is so varied that whether the judgment was correct ought not to be the subject of a jury trial. *See Simko v. Blake*, 448 Mich. 648, 532 NW2d 842 (Mich. 1995) (no liability for acts and omissions by an attorney that are mere errors of judgment when the attorney acts in good faith and in the honest belief that his acts and omissions are in the best interests of his client).

Finding colorful and lively ways to present your points will enhance the judges' attention to your argument. You must use your best judgment to draw the line between what will come across as overly colloquial or informal or distracting, and what will drive home your points. And of course, you want to be sure that your points are appellate legal points--and not a blatant jury argument, which will undercut your credibility and annoy the court.

Develop a Theme or Theory of Your Case

Once I finish this review, I try to develop a theme or theory of the appeal.

The image of the two billboards (see following page) reveal conflicting themes that might be used for an argument about fast food and whether a retailer can be sued for childhood obesity, or whether a "healthy food ordinance" can be upheld against a constitutional challenge. *See generally* Alexis M. Etow, *No Toy for You! The Healthy Food Incentives Ordinance Paternalism or Consumer Protection*, 61 Am. U. L. Rev. 1503 (2012); Courtney Price, *The Real Toy Story: The San Francisco Board of Supervisors Healthy Food Incentives Ordinance,* 8 J. Food L. & Policy 347 (2012). Sometimes the theme can be as simple as that the trial was prejudicially tainted by attorney misconduct and junk science, which confused the jury and heightened their emotions against the defendant unfairly.

The theory of the case can also be useful in fielding hypothetical questions. As former Justice Scalia and Bryan A. Garner explained in their lively and useful book, *Making Your Case: The Art of Persuading Judges*, "[j]udges are concerned not only with the outcome of your case but also with the outcome of many future cases that will be governed by the rule you are urging the court to adopt." Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 155 (Thomson/West 2008). If you know your theory, you should be able to field these questions. And knowing your theory will help you announce limiting principles or explain why a harsh result in rare cases is nevertheless appropriate.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Anticipate Questions and Figure Out the Best Answers

The most difficult part of the argument is fielding questions. Preparation can help you turn the questions into opportunities to make your strongest points. Critical to this is anticipating as many potential questions as possible and then thinking through the best way to tie the answers to a coherent legal theory and develop your theme. Questions may focus on background facts that are unclear to the court, the rule being urged and its limiting principles, precedent that the parties have relied on, and a host of other aspects of the appeal. David Frederick has developed a comprehensive discussion of potential questions that is exceedingly useful in his book, *Supreme Court and Appellate Advocacy* (Thomson/West 2003). Frederick groups questions into four categories: (1) background questions; (2) questions about the scope of the rule being advocated; (3) questions about the implications of the rule being advocated; and (4) questions reflecting judicial idiosyncrasies. David C. Frederick, *Supreme Court and Appellate Advocacy* 75-118 (Thomson/West 2002). He elaborates on each of these categories, listing dozens of potential questions that might trip you up if you have not thought out your responses. I urge you to get a copy of his book. I have used it for years to try to anticipate likely questions. Eventually, you won't need to pull his book out and go through the list; it will become second nature to think about them as you review the record.

As you consider questions, think longest about those that you most hope to avoid. These can often be found by looking for the strongest points in your opponent's brief. And these are the most important to force yourself to answer, even if your answer is a concession that the rule is harsh in a particular situation, or the precedent is unclear, or a defense such as expiration of the statute of limitations or sovereign immunity means that the plaintiff will lack a remedy despite injury.

Anticipating the questions gives you time to figure out the best answers, which will be concise, consistent with the theory of your appeal, and worded in a manner that hearkens back to the theme. As you prepare the answers, make note of key record facts and where they can be found in the record. Also, make note of key authorities that support the points that you will make in response to the question. These will be important for preparing your final outline. As you do this, you will also be gaining greater and greater mastery of the record.

Write a Strong Opening and Closing

As part of the preparation, the advocate needs to think about and prepare for the opening. This is often a missed opportunity at argument; attorneys get up and stumble around, giving of-the-cuff statements about the facts or the case's importance to their client or its procedural history. A far better approach is to write and hone an opening statement that provides the court with

a succinct statement of the issue, framed in terms that develop the overarching theme. The opening should be short; one or two minutes are all that you normally have to catch the court's attention and tell your story. If you are the appellant, you can carefully write your opening, including your opening use of "may it please the court," your reservation of rebuttal time, and the basis issue. Here is an example:

> May it please the court, Mary Massaron, on behalf of the appellant, ABC Corporation. I would like to reserve five minutes for rebuttal. ABC Corporation requests this court to reverse the judgment because the jury's verdict was tainted by the trial court's allowance of unreliable testimony from the plaintiff's toxic exposure expert and by the trial court's failure to sustain objections to the plaintiff's counsel's repeated references to ABC Corporation's corporate status, wealth, and past litigation, all demonstrating a studied purpose to divert the jury from the real issues in the case and the actual evidence relating to the brief release of a small amount of chemicals into the air during a single day in 2015.

This introduction tells the court who the defendant appellant is, the issues on appeal, the relief sought, and why the defendant appellant is entitled to win. It also foreshadows the theme.

Writing the introduction for the appellee is somewhat more difficult because the response strategy may change based on what the appellant argues and what the court asks about. Generally, there is no need to reiterate the issue unless the appellant has misstated it. Instead, the statement will typically focus on a quick summary of why the trial court got it right. An example might be this:

> May it please the court, Mary Massaron, on behalf of the appellee, ABC Corporation. ABC Corporation requests an affirmance of the trial court's ruling granting judgment as a matter of law and overturning the jury's verdict for two reasons. First, the trial court correctly concluded that the plaintiff's expert's testimony in support of this product liability designdefect claim should have been excluded because he failed to offer a reasonable alternative design that would have prevented the accident. Second, the trial court correctly concluded that without that testimony, the plaintiff failed to establish a necessary element of a designdefect claim under Michigan law.

Of course, the advocate arguing second should be ready to improvise. Sometimes a better opening is to remind the court of questions that various judges or justices asked of opposing counsel and then to provide answers.

In any case, it is important to deliver a strong opening that lets the court know that you know your case, that you know the linchpin issue, and that your discussion will enlighten the court on that key point. Attention and credibility can be quickly lost if you fail to do so.

Prepare an Argument Outline with Key Points

Once you have honed what you want to say, prepare an argument outline with key points, including record and case citations, and prepare a corresponding podium binder with your outline, key documents or portions of the record, and any cases or statutory language or contract that you think you may want to refer to during the argument. I use a three-ring binder with numbered tabs. The kind that I use has an index page with the numbers of the tabs so that I can readily find items without fumbling during argument.

I have altered my style of outline over the years. At one time, I used key words in large type in bullet list, to remind myself of key points, and then organized them in a logical flow within the numbered tabs. Behind the first tab, I would include my introduction. Behind the second, I included the key points on the first issue that I planned to address. Behind the third, I would place the key points on the next issue. Later, I included tabs with a refutation of my opponent's key points and tabs with summaries of key cases or statutes.

Today, I still use the binder approach, but I have added a two-page summary of all my key points. I put these two pages in the binder so that they can be opened facing each other and I can see every key point, record citation, or case or statutory authority that I am likely to need to discuss during oral argument. To fit the points on two facing pages, I distill down the points into key words, using my own system of abbreviations. Here is an example of what one point might look like:

When was occurrence under policy?
• Occurrence = discharge by 'er -- 2/2/14 [p's cp P 15; pl's dep p 45-48] Smith [230 F3d 123]

• Notice NOT = to occurrence -- lang of policy pp 14-15 Jones [210 F3d 453]

You get the idea from these two lines. I have enough of an abbreviation to remind me of the point, along with the key factual and legal support. Sometimes, if I can't fit the key points on two pages, I include the introduction on a single page separately and then use the next two pages facing each other for the points. The goal is to make it all visible without needing to flip pages to find something. Of course, by the time that I have done this work, I ordinarily know the material so well that I rarely must do more than glance at anything in my podium binder. But it is there if I need it.

The only parts of my outline that are written in close to a complete sentence are the opening and the closing sentences. It is universally agreed that the advocate should never simply read an argument. And one way to be sure that you avoid that--even if you are nervous--is to use an outline and not a narrative with full sentences. Then you can practice saying the words or making the points out loud, but you will not be tempted simply to look down and read.

Work to Develop Your Abilities as a Public Speaker

Oral argument depends on the advocate's ability to speak in a clear, commanding, and likeable way. Learning how to do this can take a lifetime. But part of your preparation may be practicing speaking in a conversational tone, with energy, and loudly enough to be heard. Practice speaking distinctly, using pauses and vocal range for emphasis and clarity. I practice standing, taking a deep breath to collect my thoughts and to have the air to speak with energy. You can do this in front of a friend or family member. Tape record your presentation, and then listen for distractions and eliminate them. When you say the points in your outline out loud, you will often notice wording that is awkward when spoken, even if it reads well. Taking this step allows you to fix the wording so that it is easy to say out loud.

Go to Court Confident in Your Preparation

Once you have completed this preparation, you can leave for court with the confidence that comes from having carefully and thoughtfully prepared for the intense experience of oral argument. And win, lose, or draw, you will finish the argument with the sense that you have done your best to present your client's position, forcefully and persuasively. Of course, if you are like me, you may spend hours second-guessing one or two answers to the questions that you receive and honing the answers that you provided even though it's too late. I don't enjoy second-guessing my answers, and I often find that the intensity of my concern bears no relation to the outcome on appeal. But I have learned that it is part of my process, and this post-argument thinking has allowed me to hone my presentations over many years.

Footnotes

a1 Mary Massaron is a partner of Plunkett Cooney PC in Bloomfield Hills, Michigan. She is a past president of DRI; and currently serves as vice chair of the Lawyers for Civil Justice, chairing its Class Action Reform Committee. Ms. Massaron is a fellow in the American Academy of Appellate Lawyers; a member of the ALI; and has served as chair of the ABA Council of Appellate Lawyers, the ABA TIPS Appellate Advocacy Committee, and the Appellate Practice Section of the State Bar of Michigan. She has handled significant appeals in state and federal appellate courts for governmental and private clients, including representing property owners to overturn decades-old precedent involving condemnation, establishing the retroactivity of dealer statute amendments before the Michigan Supreme Court, and overturning multi-million dollar judgments on appeal.

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Don't Have Egg on Your Face: Breakfast with the Judges

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Don't Have Egg on Your Face: Breakfast with the Judges

Hon. Laurel Myerson Isicoff Moderator
U.S. Bankruptcy Court (S.D. Fla.); Miami
Hon. Mary Grace Diehl
U.S. Bankruptcy Court (N.D. Ga.); Atlanta
Hon. Benjamin A. Kahn
U.S. Bankruptcy Court (M.D.N.C.); Greensboro
Hon. C. Ray Mullins
U.S. Bankruptcy Court (N.D. Ga.); Atlanta
Hon. James J. Robinson
U.S. Bankruptcy Court (N.D. Ala.); Anniston
Hon. Gregory R. Schaaf
U.S. Bankruptcy Court (E.D. Ky.); Lexington
Hon. John E. Waites
U.S. Bankruptcy Court (D. S.C.); Columbia

DON'T HAVE EGG ON YOUR FACE: BREAKFAST WITH THE JUDGES

AMERICAN BANKRUPTCY INSTITUTE

2015 SOUTHEAST BANKRUPTCY WORKSHOP

Hon. Laurel M. Isicoff, Moderator

Hon. Mary Grace Diehl

Hon. Benjamin A. Kahn

Hon. C. Ray Mullins

Hon. James J. Robinson

Hon. Gregory R. Schaaf

Hon. John E. Waites

Oral Argument Dos and Don'ts

Hon. Mary Grace Diehl

DOS

1. Be flexible. The advantage to be gained in oral advocacy is the ability to respond to any issues that the Court may have concern with. Thus, it is important to be able to "go with the flow" in the argument. This is not about giving a speech. It is about persuading a court to adopt your position.
2. Answer immediately any question asked by the judge. I suggest that when you have finished your answer or the dialogue that may follow you ask: "Did that address your concerns, your honor?" You don't want to leave the issue until the judge is satisfied. Don't ever say "I'll get to that later, Judge."
3. Be a little passionate about your position. If you don't sound like you believe your argument, I am not likely to believe it either.
4. Know the record. This is particularly important on summary judgment motions since the court will often want to know "Where is that in the record" both to support an undisputed fact of to provide a reference for a disputed fact.
5. Have copies of your most important/persuasive cases available for the court. Even in this electronic age, it is helpful to give the court what you want them to read.
6. Make your argument interesting and engaging. Be a good story teller.

DON'TS

1. Do not read your argument or rely too heavily on a written form. While this is not a jury, it is important that you be able to focus on the judge's reaction to your argument.
2. Do not interrupt the court or your opponent. It is not only rude but it derails the court's concentration and it makes it very difficult for the court to have an accurate audio record if reference will be needed in the future.
3. Don't be afraid to concede the obvious - it helps your credibility and streamlines the argument.
4. Do not repeat everything that is in your papers. Assume (unless you know to the contrary) that the judge has read the papers. It is fine to summarize the basic facts so the court can ask questions if clarification or augmentation is desired. If you are tracking your motion/brief, the court will be tempted to follow along rather than listen to your argument.
5. Don't continue to argue a point where the court has indicated its agreement with your position. When you are winning, sit down!
6. Do not avoid addressing any weaknesses in your case. These are really the most important areas to prepare for and argue. Know what argument you can't afford to lose and make sure you nail it down.

TEN THINGS I LIKE ABOUT YOU

PRACTICE TIPS FROM JUDGE ISICOFF

ONE

I LIKE THAT YOU AND YOUR STAFF REVIEW LOCAL RULES AND MY PROCEDURES RATHER THAN CALL MY JA OR LAW CLERK TO FIND OUT THE PROPER WAY TO DO SOMETHING, OR TO FIND OUT WHAT I DO AND DO NOT EXPECT OR ALLOW WITH RESPECT TO CERTAIN MOTIONS OR HEARINGS.

All the judges have taken the time to write and post procedural preferences and guidelines on their individual webpages. Moreover, the judges and the clerk have spent a great deal of time putting together local rules and local forms with a detailed index to make it easy for you to find information. You need to make sure your staff are aware of these resources and use them.

TWO

I LIKE THAT, IF YOU ARE NOT OPPOSING A MOTION, YOU PICK UP THE PHONE OR SEND AN EMAIL, ADVISING OPPOSING COUNSEL THAT YOU ARE NOT OPPOSING, RATHER THAN JUST NOT SHOWING UP FOR A HEARING.

If you are not opposing a motion, or you are agreeing to relief, let the movant know so that the movant can come up at the beginning of motion calendar, OR even avoid coming to court. **Don't just NOT show up.** That will mean that you have caused opposing counsel unnecessary time and expense and second, that you have used up valuable court time on a motion that could have been resolved easily. Moreover, if you don't show up, I will assume you missed the hearing by accident or carelessness,

and I will issue an order to show cause requiring you to respond, and, perhaps, show up and explain to me in person why you missed the hearing.

THREE

I LIKE THAT YOU REMEMBER TO REACH OUT TO OPPOSING COUNSEL BEFORE YOU FILE A MOTION IN ORDER TO SAVE TIME AND COST.

Local Rule 9073-l(D) states *"**Conference With Opposing Attorneys Required. If a motion seeks relief involving a debtor that is represented by an attorney, the trustee, or another particular adverse party that is represented by an attorney, the certificate of service for the notice of hearing shall include a certification that movant's attorney has contacted counsel for all adverse parties to attempt to resolve the matter without hearing**."* (NOTE: this is in addition to the meet and confer requirements of Fed.R.Bankr.P. 7037 relating to discovery disputes). If possible you must try to resolve matters without filing a motion. This will save you and your client time and money. It will also save court time.

FOUR

I LIKE THAT YOU DO NOT FILE AN EX PARTE MOTION TO CONTINUE A HEARING OR A DEADLINE WITHOUT GETTING AGREEMENT FROM THE OTHER SIDE AND REPRESENTING IN THE MOTION THAT THE EXTENSION OR CONTINUANCE IS AGREED.

In the absence of a true emergency that does not allow time to confer with the other side (and long planned family vacations, or hearings or trials in other courts that have been previously set are NOT emergencies), I will not continue a matter without a hearing, unless 1) the basis for the continuance is set out in the motion; 2) it is not requested at the last minute; and 3) the motion reflects that you have conferred with the other side before filing a motion that is not agreed. If the matter IS agreed, please call the Courtroom Deputy to get the new hearing date and include that date in the proposed order (uploaded with the motion).

FIVE

I LIKE THAT THE MOTIONS AND ORDERS YOU SUBMIT HAVE BEEN REVIEWED FOR ACCURACY, TYPOS, GRAMMAR AND PUNCTUATION ERRORS, PERSONALLY IDENTIFIABLE INFORMATION AND COMPLETENESS.

Please read everything you submit. Please make sure all of your motions have the required exhibits, the proper titles, the proper party names, are in English (as opposed to incomplete sentences that sound like gibberish), and otherwise look professional. If the motions are ex-parte motions, please make sure that you submit orders with the motions and that the orders match the motions.

Please make sure you upload orders that include any exhibits that are referred to in the order, and also contain full sentences, make sense, match the relief requested in the motion, and otherwise look professional. If the orders stem from ex-parte motions make sure that you file the CNR before uploading the order and make sure the word "Proposed" or "Exhibit __" has been taken off the order you want me to sign. If there is a form order - USE IT (but modify it if necessary).

SIX

I LIKE IT WHEN YOU MAKE SURE THAT YOU PROPERLY SERVE ANY MOTION OR COMPLAINT THAT YOU FILE (COMPLYING WITH RULE 7004 SERVICE WHEN NECESSARY, SERVING OBJECTIONS TO CLAIM IN ACCORDANCE WITH THE ADDRESS INDICATED ON THE PROOF OF CLAIM, AND SERVING ALL THE PARTIES REQUIRED BY RULE 2002 TO BE SERVED WITH A PARTICULAR PLEADING). I ALSO LIKE IT WHEN YOU TIMELY FILE A CERTIFICATE OF SERVICE THAT SHOWS THAT THE PLEADING AND NOTICE OF HEARING, IF APPLICABLE, WERE PROPERLY SERVED.

Service of motions is governed primarily by Bankruptcy Rules 2002 and 7004. Make sure you serve everyone who needs to be served in the manner that they are required to be served in the timeframe they are required to be served. If you don't have enough time, then file a motion seeking to shorten the required time periods. Our Local Rules require that you serve any order

or notice of hearing within two days after receiving the order or notice of hearing from the court, and that you immediately file a certificate of service reflecting who you served and how you served them.

SEVEN

I LIKE THAT YOU AND YOUR STAFF TAKE THE TIME TO READ THE EMAIL FROM CM/ECF (WHICH IS ACTUALLY SENT BY CHAMBER'S STAFF) EXPLAINING WHY AN ORDER HAS BEEN RETURNED TO YOU.

There is absolutely no reason whatsoever to call my JA or law clerk and ask WHY an order was returned. Every order returned includes an email WHY the order was returned. READ IT. This is one of the many reasons why it is important that your email is correct on any order you submit.

(You should, by the way, always remember to keep current in the court's case management system (CM/ECF), your primary and secondary email addresses. Additionally, if you are changing your U.S. Mail address you must also file a Notice of Change of Address in each case or proceeding in which the change is to be effected [See Local Rule 2002-l(G)(1).We had one lawyer who failed to provide a notice of change of address and he had to respond to an order of contempt for failing to appear at several hearings that he didn't know about because he forgot to update his information with the clerk.)

EIGHT

I LIKE THAT YOU MAKE SURE YOUR CLIENTS KNOW WELL IN ADVANCE WHEN THEY DO OR DO NOT NEED TO SHOW UP FOR SOMETHING AND WHEN A MATTER HAS BEEN RESOLVED.

Something special about our bar is that so many disputes can be resolved amicably. However, many times clients show up for a hearing (a) which hearing the debtor did not need to attend even if there was no agreement or (b) that has been resolved by agreement ahead of time but without the client knowing the hearing has been canceled. Your client's time is as valuable as your time. Please make sure your client always understands when he or she needs to show up and if you do resolve something in advance of a hearing let your client know so he or she doesn't have to come to court for nothing.

NINE

I LIKE THAT YOU PROPERLY PREPARE FOR EVIDENTIARY HEARINGS AND BRING THE APPRORIATE EXHIBITS, PROPERLY TABBED AND MARKED WITH THE CORRECT FORM OF EXHIBIT REGISTER, AND THAT YOU BRING ENOUGH COPIES, AND THAT YOUR WITNESSES KNOW WAY IN ADVANCE THEY NEED TO BE AT A HEARING.

Every adversary proceeding and evidentiary hearing has a procedures order that sets forth what the parties must do prior to the scheduled trial or hearing and what must be brought to the trial or hearing. Calendar these deadlines as soon as you get the order! And make sure any witnesses you need, including your client, know the hearing or trial date as soon as you do. That includes appraisers. YOU may know that something has been scheduled and put it on your calendar. Everyone else needs to get it on their calendar as well. In this way, if a necessary witness or your client will be unavailable on a scheduled trial or hearing date, you will know well in advance and can file a motion to reschedule, giving opposing counsel, and the court, plenty of time to adjust their schedules as well. And whatever you do DON'T show up for a trial or evidentiary hearing unprepared.

TEN

I LIKE THE FACT THAT YOU ALWAYS REMEMBER THAT LAW IS A PROFESSION, NOT A JOB. EVERYTHING I LIKE ABOUT YOU REFLECTS YOUR RECOGNITION OF THAT IMPORTANT DISTINCTION.

Tips on Practicing Before the Courts

Shared by Hon. Ray Mullins

I. PRACTICE POINTS IN DRAFTING AND GENERAL PROCESS ISSUES

• Check the Court's website for most up-to-date forms and familiarize yourself with the particular Court's filing system

• Prose should be clean and short

• Is the pleading or court intervention necessary or can you work with the counter party to resolve the issue consensually?

• Relief requested should be front and center; do not make the Judge wait until the middle of the motion until s/he understands what relief you are requesting

o Use preliminary statements to outline for the Judge the direction of the argument

• Avoid hyperbole, drama and outrage in your pleadings unless it is warranted; the Court is not as invested emotionally as you are in the issues

• Do not be over-zealous about string cites

• Ask yourself: Does the motion explain your story and how you arrived at the relief you are requesting? Does the motion explain the business reasons behind your decisions?

o If you are asking to pay $5 million in critical vendor payments, does the motion explain how you arrived at the $5 million number?

o Have you considered what needs to be paid in the interim period versus the final period?

o If you are assuming a contract, have you explained why it makes sense from the perspective of the business, and not just that it is in the "best interests of the estate"?

• Know your cases and know your precedent: do not pull quotes from cases where the holding stands for the opposite proposition of what you want to argue and be sure to read the entire case

• Cite to and distinguish precedential cases that do not support your position

• Subject to the rules of the Court, make use of the opportunity to submit a reply brief to tie everything together

• If any objection is filed, contact the objector to try to resolve the objection

II. MAKING THE BEST CASE IN COURT

• Create a narrative of the case to tell your story to the Court in the most compelling terms possible

• Know your facts and issues: be prepared to answer questions beyond what is stated in your motions

• Do not read your notes, consider preparing an outline so that you are not inclined to read

• Practice out loud in advance of the hearing

• Talk with colleagues who have appeared before your Judge

• Tie your relief to the Bankruptcy Code, and recite the applicable standard as well as how you plan to meet the standard

• Speak with your adversaries in advance of the hearing to map out the course of the hearing

o Try to agree on exhibits and order of witnesses

• Tenor of Court

o Listen to the Judge and consider the tone of the discussion

o Listen to the Judge's questions of counsel for the other parties and be prepared to answer those questions with respect to your client

o Do not be so focused on what you think you should say ahead of the hearing; go in to the hearing with a plan, but be prepared to depart from that plan

o Offer the Judge the opportunity to go straight to the issue at hand, without reciting what's in your pleading: ("I'm prepared to give the court a brief background, or I can just go straight to the issue at hand")

• Make your remarks into the microphone and to the Court, not to your adversary

• Avoid ad hominem attacks and open hostility with your adversary; avoid interrupting your adversary's presentation, unless it is necessary

III. BANKRUPTCY FUNDAMENTALS

• Work closely with the Judge's clerks to understand how the Judge likes things done

• Coordinate efforts with all professionals in the case or cases to insure the process runs smoothly for the Court and the parties

A. RETENTION APPLICATIONS/ ENGAGEMENT AGREEMENTS/CONFLICTS

• Retention/Engagement Issues

o Consider roles of key professionals (such as financial advisors, accountants, experts, etc.); think creatively about the various roles that can be played by financial advisors beyond the traditional valuation role

o Provide a clear presentation of current and prospective billing rates

o Consider whether transaction fees (consummation fees, sale transaction fees, restructuring fees, etc.) are reasonably tailored to the scope of the services being performed and tied to certain performance metrics

o Credibility of financial advisor should be considered at retention stage and consider how terms of the financial advisor's engagement may impact credibility

• Conflicts Issues

o Report ALL connections and conflicts of interest

o Update conflicts checks on regular basis and based on case developments

o Consider having a team member in charge of overseeing the entire process and keeping a master list so that the process is streamlined

B. TESTIFYING IN COURT

• Identify and pick the right people to testify - who knows the subject matter best?

• Be clear on the point of the testimony - what is the purpose and what information needs to be conveyed to the Court?

• Witnesses should be prepared - know the facts and what needs to be said

• Be focused - witnesses should stay on point and speak in accessible and user-friendly terms

• Demeanor counts - speak loudly and clearly, be polite to the Court and don't come across as a know-it-all

C. NOTICE ISSUES

• Judges pay attention to process and notice requirements; requires heightened sensitivity by counsel

• Consider having a team member in charge of coordinating with the claims agent for the case so that the process is streamlined

• Constantly ensure that all relevant parties are receiving notice

• Be sensitive to the addition of new parties to the Master Service List

• Consider circumstances in which broadest notice is best

• Serious implications for failing to meet these requirements: consider 363 sale scenario where all contract counter-parties are not noticed: result could be that certain contracts might be rendered unassumable or unassignable

D. VALUATION

• Primary responsibility of financial advisor

• Judges are not experts in valuation

• Financial advisors and counsel have to explain valuation conclusions

• Make sure to explain the bases underlying valuation conclusions

• Demonstrate to Judge that a rigorous and balanced approach was utilized to arrive at valuation conclusions

E. DIP FINANCING/363 SALES/ CHAPTER 11 PLANS

• Consider the dynamics of the situation before you ask the Judge to push the edges

• Contemplate the burden you will need to meet in order to receive the relief you are requesting; are you going to be able to make a strong enough showing in Court?

• Know the recent case law - both in the relevant circuit and in the specific jurisdiction - because these key issues have been dealt with in many cases in the recent years:

o Roll-ups, cross-collateralization, etc.
o *Lyondell, GM,* etc.

F. BANKRUPTCY LITIGATION

• Procedure and process is imperative

• Know your rules of evidence and rules of adversary procedures

• Know when to involve litigators

• Do not lose the forest for the trees; showing the Judge a nasty email from counsel to the other side is not going to win your case

IV. SEPARATING YOURSELF FROM THE PACK

• Be up to date on recent case law on key bankruptcy topics

• Know your local rules

• Listen to the Judge during hearings

• Ask the partners to let you present in court, ask to start first with procedural motions

• Utilize your resources:

o Discuss the issues in your cases with experienced practitioners
o Attend hearings and review related pleadings from other cases covering similar issues arising in your case
o Review daily and weekly bankruptcy journals and blogs for updated news and outcomes of key hearings

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY CENTRAL DIVISION (at Lexington)

ROBERT ALLEN O'HAIR,	)	
Plaintiff,	)	Civil Action No. 5: 15-097-DCR
	)	
V.	)	
	)	
WINCHESTER POLICE	)	**ORDER RE: COURTROOM**
DEPARTMENT, et al.,	)	**DECORUM AND TRIAL**
	)	**PROCEDURES**
Defendants.	)	

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To promote efficiency and professionalism, it is hereby

ORDERED as follows:

1. Counsel and the parties shall strictly adhere to the Court's trial and hearing schedules and shall be present at the time set for the beginning of any proceeding, as well as the resumption of any proceeding, following any recess. Preparation for any proceeding should be completed prior to the matter being called.

2. Counsel shall refrain from engaging in or employing dilatory tactics or tactics that are intended or designed, directly or indirectly, to cause unnecessary expense or prevent the orderly administration of justice.

3. Counsel shall stand when Court sessions are opened, recessed or adjourned. Likewise, counsel shall stand when addressing, or being addressed by, the Court. Absent leave of Court, counsel shall stand at the lectern/podium while examining witnesses or while making opening statements, closing arguments, or questioning potential jurors during voir dire proceedings.

4. Counsel shall refrain from assuming an undignified posture in the Courtroom. Counsel should be properly attired in a proper and dignified manner and should abstain from any apparel or ornament calculated to attract attention to himself or herself.

5. No food or drinks may be brought into the Courtroom by parties, witnesses or attorneys. Likewise, counsel and parties may not chew gum or use any type of tobacco product during proceedings and may not have such items present in the Courtroom.

6. Counsel, parties, and witnesses shall avoid unnecessary talking and conversation during proceedings. This includes discussions occurring prior to or following proceedings in which counsel, parties and witnesses are present in, or adjacent to, the Courtroom in which proceedings are occurring.

7. Counsel shall address all remarks to the Court, rather than to opposing counsel.

8. Counsel shall avoid disparaging personal remarks or acrimony toward opposing counsel and shall remain wholly detached from harboring ill feelings toward the litigants or witnesses.

9. Counsel shall refer to all persons, including witnesses, parties, and opposing counsel by surnames only.

10. Only one attorney for each party may examine or cross-examine each witness. The attorney stating objections during direct examination shall be the only attorney recognized for cross-examination.

11. Counsel must receive permission before approaching any witness during his or her testimony. Likewise, counsel must receive permission before approaching the bench.

12. Counsel shall not publish any exhibit to the jury prior to that exhibit being admitted into evidence by the Court. Any paper, item or exhibit not previously marked for identification must first be handed to the Deputy Clerk of the Court to be marked for identification before being tendered to a witness for his or her examination. Likewise, any paper, item, or exhibit to be shown to a witness for identification and/or offered into evidence must first be presented to opposing counsel for examination.

13. Counsel shall state only the legal grounds for objections and must withhold further comment or elaboration unless directed by the Court. While the jury is present in the Courtroom, all argument and discussion regarding objections shall occur at the bench unless otherwise directed by the Court.

14. Offers of or requests for stipulations must be made at the bench.

15. During opening statements, closing arguments and other matters during which a jury is present, counsel shall not express personal knowledge of or opinions concerning any matter in issue. In this regard, attorneys shall absolutely refrain from stating personal beliefs regarding the truthfulness or falsity of any testimony. Further, counsel shall absolutely refrain from vouching for the credibility of witnesses. In criminal proceedings, counsel may not express personal opinions regarding the guilt or innocence of the accused or personal opinions regarding the merits of the case or evidence presented.

16. Counsel shall refrain from making gestures, facial expressions, audible comments, or similar expressions which could be construed as manifestations of approval or disapproval during the testimony of witnesses or arguments of opposing counsel. This directive also applies to all persons seated at or adjacent to counsel table.

17. Any witness called by a party is deemed to be under the control of that party and the witness may be excused if said calling party so desires or announces. Should opposing counsel desire the witness to be available for testimony at a later time during the proceeding, counsel must so state and shall be responsible for securing the subsequent attendance of the witness.

18. Counsel who calls a witness may confer with the witness during recesses of Court proceedings during direct (or re-direct) examination only. This does not apply to a defendant who testifies in his or her own behalf, nor shall it apply to the government's designated case agent.

19. Prior to, during, and following trials and other proceedings, neither counsel, parties, nor witnesses may speak to nor associate with jurors.

20. All counsel shall assist the Court in protecting the sanctity and security of the jury and shall not disclose in the presence of the jury any information or material extraneous to the evidence admitted into the record. Disclosure before the jury of significant information extraneous to the evidence admitted will be considered misconduct which obstructs the Court in the performance of its judicial duties and shall be subject to contempt under Rule 42 of the Federal Rules of Criminal Procedure. Counsel shall cooperate in seeking to secure jurors from contact with the lawyers in the case, defendants, case agents, and other trial participants.

21. Should any party invoke Rule 615 of the Federal Rules of Evidence regarding exclusion of witnesses, counsel and all parties shall assist the Court, the Deputy United States Marshals, the Courtroom Security Officers, and the Deputy Clerk of the Court, in keeping any witness who is expected to testify outside the Courtroom during the subject trial, hearing, or proceeding in which the rule is invoked.

22. Counsel should avoid unnecessary bench conferences to the extent possible. In this regard, counsel should exercise professional judgment in anticipating disputed issues or questions which might likely arise during trial and address those issues or questions with opposing counsel and, if necessary, with the Court, outside the presence of the jury.

23. All persons, including but not limited to counsel for the parties, are expected to strictly and absolutely comply with all orders or directives of Deputy United States Marshals and Court Security Officers prior to, during, and following all Court proceedings.

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Failure to comply with any of the aforementioned rules and procedures may result in the imposition of sanctions, monetary or otherwise.

This 1st day of June, 2015.

Signed By:

Danny C. Reeves

United States District Judge

Practice Pointers for Debtors' Counsel

James J. Robinson, Bankruptcy Judge

Northern District of Alabama - Eastern Division [FN1]

Debtors' attorneys face the daunting task of walking their clients through the bankruptcy process, with all of its attendant twists and turns. The goal at the end of the journey, with very few exceptions, is to gain for their clients a discharge from their debts. Both the Supreme Court and the Eleventh Circuit have spoken to the overarching importance of the discharge in bankruptcy: "To begin with, the [Supreme] Court provided guidance by setting forth the three *critical* in rem functions of bankruptcy courts: '[1] the exercise of exclusive jurisdiction over all of the debtor's property, [2] the equitable distribution of that property among the debtor's creditors, and [3] the ultimate discharge that gives the debtor a "fresh start" by releasing him, her, or it from further liability for old debt.=@ *State of Florida v. Diaz (In re Diaz)*, 647 F.3d 1073, 1084 (11th Cir. 2011) (quoting *Central Virginia Community College v. Katz*, 546 U.S. 356, 363-64 (2006) (emphasis added)). *See also In re Wald*, 208 B.R. 516, 561 (Bankr. N.D. Ala. 1997) ("Bankruptcy courts must jealously guard the debtor's right to a discharge which, in the final analysis, is the primary purpose of bankruptcy.").

Implicit in an attorney's duty to represent a debtor competently in the quest for a discharge is the obligation to ensure that you are diligently providing your client as much benefit from the bankruptcy case as possible. In other words, you need to make sure the bankruptcy strategy you are advocating and advancing is in your debtor's best interest and is moving your client closer to a discharge whenever possible. While by no means exhaustive, the following is a list based upon my observation of some recurring situations in which debtor attorneys could do their clients a favor, and better improve the benefits of bankruptcy for their clients.

(1) Know your client, and know when to bring your client to court. It goes without saying that you, as the attorney, should be doing the legal work in your office, including meeting with your client and examining the relevant facts, prior to the case ever being filed. However, it is also the case that in many firms, one lawyer may conduct the initial consultation and handle the signing and filing matters, another lawyer may cover the 341 meeting, and yet another lawyer may attend hearings on particular contested matters. The result: a lawyer who spends an hour sitting through an entire docket call, three feet away from his client, which client came into the courtroom a few minutes after his case was called and has no clue he is three feet away from his lawyer. Aside from the real cost and inconvenience to the client who may be missing work already to be in court, this situation just does not look good. Consider keeping a photocopy of your client's photo ID with your file, and refer to it as needed.

On a related note, there are times when you know the court will want to hear from your client. In those instances, bring your debtor to court at the first hearing on the matter (e.g. confirmation) and have him or her prepared to testify or support your proffer. Notify the trustee and any opposing parties that you will be prepared to prosecute your position, including with testimony from the debtor. Such notification may counter any request by the opposition that they were surprised and need a continuance to rebut your debtor's testimony. A plea to the judge that a continuance will require your hard working debtor to take another day off work may be sufficient to overcome your opposition's request for a continuance. Having your client present will also demonstrate you are prepared, and cause any opposition to rethink their position. Perhaps most important, it will make your judge happy, and with a happy judge you are more likely to achieve the result you want.

(2) Check for prior cases. Competent representation begins before the bankruptcy case is even filed. Regardless of which chapter of the Code your client may file under, the existence and timing of prior cases can have enormous ramifications. Always check the national PACER directory for prior filings. If your client is a repeat filer, you must discuss with your client BEFORE filing the case whether the client is eligible for discharge, and whether an extend- or impose-stay motion will be needed. It is unfortunately common that discharge eligibility issues are overlooked until after the case is filed. When a chapter 7 case is filed where the debtor is not eligible for a discharge, it is standard practice in the Northern District for the court to order the attorney to reimburse any fees received for the case and refund the debtor's filing fees. If the existence or duration of the stay is at issue due to repeat filings, remember that a thirty-day clock is ticking. Extend- or impose-stay motions should be filed immediately upon commencement of the case.

(3) Schedules are more important that credit reports. If your firm uses a credit report as the starting point for completing the schedules, *always* review that information with your client for accuracy and relevancy. This issue looms particularly large in extend- and impose-stay cases, and in chapter 13 cases where no discharge is available under 1328(f), in which cases the dates debts were incurred may be examined by the Court very closely in determining whether a change in circumstances exists, and whether the debtor is acting in good faith in invoking bankruptcy protection. As explained in *In re Beasley*, 2011 WL 4498942 (Bankr. N.D. Ala. 2011), "When presented with a chapter 13 case . . . in which no discharge is attainable, a critical element of the § 1325(a)(7) good faith analysis is consideration of whether the case furthers the intended, legitimate functions of the bankruptcy system. In a case that cannot provide the debtors with a financial fresh start, perhaps the most critical function of bankruptcy for individual debtors, because a discharge is statutorily prohibited, the reasons for nonetheless invoking the court's jurisdiction and protection under the Code must be closely examined."

In particular, remember that the date a debt was sold to a servicer or collector was not the date the debt was incurred by the debtor. Sloppy schedules can make things much worse for your debtor, when the dates used make it appear that debts are recent, and possibly even purchase money secured. Similar logic applies to refinance situations: you may show the most recent refinance date, but do so in a way that indicates it was a refinance and not a new obligation. Also, avoid "notice only" items on the schedules. Failure to list an actual creditor as such, instead showing them as only a "notice" recipient, could possibly deprive the debtor of discharge as to that creditor. (Does such a "notice only" listing equate to being "provided for by the plan" for purposes of Code § 1328(a)? - probably not).

(4) Keep your eye on the goal: discharge. It bears repeating: one of the critical purposes of bankruptcy relief is to attain for the debtor a discharge of debts. The "breathing room" provided by the automatic stay and the sense of relief when the collectors stop calling will be respite without result if the debtor cannot stay the course and achieve a discharge (with a few rare exceptions). This focus must be particularly intense in chapter 13 cases. Section 1322(d)(2) provides that for below-median debtors, "the plan may not provide for payments over a period that is longer than 3 years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than 5 years." Rather than automatically put every debtor into a 5-year plan on the theory that payments being lower will make it easier to complete the plan, discuss with your client a shorter plan commitment when at all possible. This means more than saying "do you want to pay $50 a week or do you want to pay $65 a week." This means spending some time analyzing what can be done to shorten the plan life and get the debtor to discharge as expeditiously as possible, including surrendering unnecessary collateral to secured creditors.

That will lead, inevitably, to a hard discussion on what the word "unnecessary" means. You should explain to your clients that being *in* bankruptcy is not as advantageous to them as being *out of* bankruptcy with a discharge and fresh start in hand. A

less-than-five-year plan may mean a lower percentage to unsecured creditors. Some debtors may honestly be motivated by a desire to pay as much as possible to their unsecured creditors, and may want to stay in the case longer in order to accomplish that goal. Remind your clients that they can repay their debts voluntarily at any time, notwithstanding the discharge, if that truly is a concern. Section 524(f) of the Bankruptcy Code explicitly provides, "Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt." Saddling a debtor with a 5-year plan when a 3-year plan will do is simply not in your client's best interest and delays, by years, the discharge.

The same can be said of invoking chapter 13 when chapter 7 relief better serves your client's needs. Strongly consider chapter 7 for below-median debtors. This consideration may require you to call secured creditors prior to filing and see if they would be willing to reaffirm, and on what terms. When your client is below median income, has little or no equity to protect, has no secured debt, and is chapter 7 eligible, is it in your client's best interest to nonetheless commit to a 3-year minimum sentence in chapter 13 as a means of paying your attorney fees? This is a difficult question that requires consideration of the totality of the circumstances, and which leads to my next point.

(5) Your client's best interest must come first. You practice law to make money. That is reality. It is also reality that a constant tension exists between your need to get paid, and the obligation you have to put your client's need for a discharge (not just stopping collection calls and letters during a temporary respite in a doomed chapter 13 case) ahead of your need to get paid. Rarely will a "fee only" chapter 13 case, in which the primary purpose is to finance attorney fees rather than accomplish a meaningful adjustment of debt or protection of assets, satisfy the good faith requirements for confirmation. The majority of courts to address the issue of such "fee only" plans have agreed that in most circumstances, they abuse the purpose and spirit of Chapter 13 and do not satisfy the good faith standard. *See, e.g.,* *Brown v. Gore (In re Brown),* 742 F.3d 1309 (11th Cir. 2014) (no error in finding lack of good faith in a chapter 13 plan and case filed strictly to finance attorney fees when the debtor would have been much better served in chapter 7 but-for the inability to finance attorney fees in chapter 7); *In re Puffer,* 453 B.R. 14 (D. Mass. 2011), *rev'd and remanded,* 674 F.3d 78, 2012 WL 954860 at 83 (1st Cir. 2012) (reversing on grounds that a *per se* rule against fee only plans was inappropriate; but confirming that such plans must be analyzed in light of the totality of the circumstances on a case-by-case basis for good faith, that the "fundamental purpose" of chapter 13 is to pay creditors over time, and that fee only plans should be considered only in "special circumstances, albeit relatively rare, in which this type of odd arrangement is justified"). On remand, the Bankruptcy Court in *Puffer* considered the totality of the circumstances and found that harassing phone calls and letters from creditors, the resulting stress on the debtor, and the inability of the debtor to pay an attorney to file chapter 7 did not amount to rare or special circumstances, and therefore did not justify a "fee only" chapter 13 under the facts of that case. *In re Puffer*, 478 B.R. 101, (Bankr. D. Mass. 2012); *aff'd in part and rev'd in part*, 494 B.R. 1 (D. Mass. 2013) (affirming that there were no special circumstances to justify a fee-only chapter 13 case, but reversing bankruptcy court's denial of debtor's attorney's fee). *See also* *In re Buck*, 432 B.R. 13 (Bankr. D. Mass. 2010) (collecting cases); *In re Jackson*, 2012 WL 909782 (Bankr. N.D. Ala. 2012), *In re Nelson*, 2009 WL 2241567 (Bankr. M.D. Ala. 2009); *but see* *In re Crager*, 691 F.3d 671, 2012 WL 3518473 (5th Cir. 2012) (upholding as not clear error bankruptcy court's finding of good faith in "fee only" case).

Sometimes your would-be debtor's best interest is served when you just say no, come back when you have the money to file chapter 7, because chapter 13 does nothing for you but temporarily stop the phone calls, and needlessly delay the discharge. The respite provided by chapter 13 is too often a brief one for debtors under those circumstances, who will, upon dismissal, be right back in the pay-day lender, title-loan whirlwind having accomplished nothing in terms of debt adjustment but to get further behind. Perpetuating that cycle with ill-advised fee only chapter 13 cases is not in your client's best interest.

(6) Examine the claims filed and object when necessary and appropriate. An effective chapter 13 practice requires debtors' counsel to examine the claims filed in your client's case and file objections and lien avoidance motions early. Also consider checking the probate office for recorded certificates of judgment. If you see perfection issues that could give rise to avoidance actions, flag those for the trustee. *See In re Mitrano*, 486 B.R. 795 (E.D. Va. 2012) (discussing lines of cases and finding that the majority of cases, as well as the cases decided by higher courts, find that debtors do not have access to the trustee's avoidance powers, as such powers are not included within Code § 1303). Avoid judgment liens while the case is open--the first time. Reopening a case in order to file a lien avoidance motion will cost your client more money, and may not be successful in any

event if the judge is not sympathetic to omitted lien avoidance motions that should have been filed when the case was open the first time.

Early in a case, review claim attachments and your client's own records. For example, examine mortgages, security agreements, financing statements (UCC-1's), promissory notes, deeds, certificates of title (for autos and mobile homes), deferred deposit agreements (pay-day lenders' contracts), title pawn documents, etc. From time to time you will discover defects, anomalies, and other flaws that may open the door to voiding or reducing a claim, or defeat a secured position. Better yet, it may give your debtor an affirmative cause of action or set-off, or at a minimum, give you leverage in negotiating with a creditor.

(7) File claim objections prudently. Notwithstanding the preceding paragraph, do not waste the court's time or your client's by objecting to claims that the debtor does not dispute owing, simply on grounds that the claimant did not attach sufficient supporting documents. If your client has scheduled the debt as undisputed, no other creditor has filed a claim for that debt, your client has no evidence to dispute the ownership of the debt, and the claim has enough information for you to match the claim with your client's schedules, an objection to that claim is not only inappropriate, but may lead to sanctions under Bankr. Rule 9011. This scenario was recently analyzed in detail in *In re Velez*, 465 B.R. 912 (Bankr. S.D. Fla. 2012) (sanctioning attorney for filing claim objections on technical grounds when the debtor had admitted owing the debts under penalty of perjury.) *See also In re Reynolds*, 470 B.R. 138 (Bankr. D. Colo. 2012) (allowing claims over debtors' objection despite noncompliance with revised Bankr. Rule 3001(c)(1) based on remedy of disallowance not being authorized by the Rule, and alternatively on judicial estoppels grounds based upon debtors' scheduling the claims as being undisputed).

(8) File claims yourself. Although it may sound counterintuitive, sometimes the best thing you can do for your debtor is to file a claim for a creditor that fails to do so on its own behalf. Bankr. Rule 3004 provides in relevant part, "If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), the debtor or trustee may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable." We all know this is the case with secured collateral that the debtor wants to pay for and keep, but far fewer seem to take that step for nondischargeable unsecured claimants. You may not be acting in your client's best interest if you fail to file claims for student loan claimants, tax claimants and long-term mortgage claimants, for instance, which will not be discharged. In a related vein, do not offer interest on mortgage arrears unless you are certain the underlying contract allows for interest on amounts in default.

Mortgages entered into after October 22, 1994 (the effective date of the Bankruptcy Reform Act of 1994) [FN2] are governed by Code § 1322(e), which provides in relevant part that "if it is proposed in a plan to cure a default, the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable non-bankruptcy law." Most courts analyzing whether interest is required to be paid on mortgage arrears being cured over the life of the plan look to the language of the contract and state law, and require something more specific than simply saying "interest continues to accrue until paid in full." *See, e.g., In re Trabal*, 254 B.R. 99 (D.N.J. 2000) (discussing timing and effect of § 1322(e), and Congressional intent to overrule the result in *Rake*, 508 U.S. 464).

In practical experience, that will rarely be the case in most residential real estate note and mortgage forms. Treat lease-to-own or installment land sale contracts on residential real estate as secured mortgage debt when you can. Use the chapter 13 plan to cure arrears and maintain ongoing payments. Unless and until you are faced with a ruling to the contrary, your debtor's best interest is served by the binding effect of confirmation of a plan that treats those arrangements as long-term debt when applicable.

(9) Represent your client in negotiating reaffirmations. As the debtor's attorney in chapter 7, you have a duty to advise your client about the consequences of reaffirming versus not reaffirming, and the math behind the reaffirmation decision. The statement of intent cannot be completed without your having that conversation. Even if you cannot sign the form reaffirmation agreement certifying that you believe the debtor can make the required payments, you should nonetheless represent the debtor in the negotiations and at the hearing on court approval, where such hearing is required. Consider the following recitation of the duties that should be performed by attorneys in chapter 7 cases, quoted from *In re DeSantis*, 395 B.R. 162, 169 (Bankr. M.D. Fla. 2008):

Attorneys representing individual debtors in consumer cases filed under Chapter 7 of the Bankruptcy Code have certain essential duties they must perform. They must help debtors file the necessary petition, schedules, statements, and pleadings. They must attend the scheduled meeting of creditors. Most relevant here, attorneys representing consumer debtors must advise and assist their clients in complying with their responsibilities assigned by Section 521 of the Bankruptcy Code, including helping their clients decide whether to surrender collateral or instead to reaffirm or to redeem secured debts. This obligation is one of a debtor's attorney's primary and essential responsibilities, particularly after the passage of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act, which made the decision more difficult and more complicated. If a hearing is scheduled on a reaffirmation agreement, the attorney must attend the hearing with his or her clients. If an attorney cannot perform these necessary duties, the attorney should not accept bankruptcy cases.

(10) File for fee waivers. Remember to move for in forma pauperis waivers of the filing fee and other fees in chapter 7 when the debtor qualifies. 28 U.S.C. § 1930 establishes the formula for such waivers. The limits change annually, and a chart of household size and income levels may be found at www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyResources under the ""Poverty Guidelines" section.

(11) Prepare, proffer and protect. There are certain scenarios, usually in routine matters such as claim objection, valuation, and extend stay hearings in my court, under which attorneys regularly proffer their client's would-be testimony. The proffer serves an important function in saving time while establishing a record of matters not in dispute. However, the proffer can be a problem when it becomes evident that the information proffered was false. Alabama Rule of Professional Conduct 3.3, Candor Toward the Tribunal, requires the bankruptcy attorney to persuade the client to immediately disclose the false nature of the evidence to the court. If the client refuses, the attorney must disclose the false nature of the evidence to the court and avoid being a party to a fraud upon the court.

Preparation can prevent such predicaments. Review with your client, before the hearing, what the client's testimony will be and have your client confirm for you (ideally in writing, and not just in quick whispers at the podium) that the facts you are going to proffer are indeed what your client would testify to under oath. This not only protects you from offering information that is inaccurate, it also forces the client to consider the relevant information and get it straight for you before you are put on the record. [FN3]

(12) Strip off underwater inferior mortgages before signing off on a first mortgage modification. If your client has an underwater second mortgage, subject to strip off, the balance owing on the first mortgage is an important part of your case-in-chief in the strip off adversary proceeding. Be aware that some mortgage modifications may reduce principal amounts owing on the modified first mortgage, and could thereby prove fatal to a strip off if the reduction is enough to leave any amount of equity for the second mortgage. The better practice is to file and prosecute the strip-off adversary proceeding to its conclusion before modifying the first mortgage, to avoid this potential pitfall.

(13) Read stay relief motions. It may appear to be a waste of time to read a three- or four-page stay relief motion when you know your client is surrendering the collateral at issue, and you have no objection to the lifting of the automatic stay. Be aware, however, that some creditors also include Rule 3002.1 compliance "waivers" as well as proof of claim allowance language in their motions for relief. Announcing "no objection" and receiving an order that simply "grants" the motion will arguably accomplish the waiver and allowance relief requested in addition to the stay relief. Avoid those arguments down the road by reading the motions before agreeing to the relief requested therein, and insist upon an agreed order that will spell out how long the creditor may have to file a deficiency claim, for example, when the creditor seeks ancillary relief in conjunction with relief from the automatic stay. While I appreciate your courtesy in informing the court when you have no objection to stay relief, be diligent in reading those motions before you express lack of objection or consent.

(14) Proofread before you proceed with filing. Everyone makes mistakes. Judges and lawyers are certainly not exceptions to that rule. Unfortunately, conspicuous mistakes in your documents do not inspire confidence in the quality of your position. Repeat offenders in particular lose credibility quickly. If you have been made aware of a problem with a "form" you are using, make sure the word processor gets the message. If your staff has great independence in generating and filing documents with the court, you should nevertheless proofread those documents before filing--even if it is only a quick once-over. Some mistakes are so painfully obvious, it is apparent that no lawyer even looked at the document before it was filed. Nothing speaks to a

lawyer's diligence more directly than the quality of the work bearing that lawyer's signature. If your name is going on it, please make sure your eyes have reviewed it before it is filed. Take responsibility for the quality of your written work.

10 THINGS I DO NOT WANT TO HEAR

Hon. Gregory Schaaf

1. "WITH ALL DUE RESPECT ..."
a. MIGHT AS WELL SAY, "JUDGE, YOU'RE AN IDIOT."
b. TRY: "I DISAGREE IN THIS REGARD ..."
c. OR "I UNDERSTAND YOUR REASONING, BUT CONSIDER A DIFFERENT WAY TO APPROACH IT."
2. "GIVE ME A MINUTE." OR "WHERE ARE MY NOTES?"
a. AT THE START: GRAB MY ATTENTION - BE READY.
b. IN THE MIDDLE: KEEP MY ATTENTION - BE PREPARED.
c. DISORGANIZATION . . .
3. "YOUR HONOR, I'M NOT SURE."
a. WHEN I ASK - "WHAT DO YOU WANT?" KNOW WHAT YOU WANT.
b. NOT JUST WHAT THE LAW IS.
c. EXPLAIN TO THE COURT WHY THE RELIEF IS NECESSARY.
d. KEEP MOVING THE CASE FORWARD.
4. "BUZZ; BUZZ"
a. WHATEVER THE SOUND IS WHEN A TEXT COMES IN AND YOUR DEVICE VIBRATES (AS IT BOUNCES ACROSS THE TABLE).
b. VIBRATE IS NOT SILENT.
5. "THERE IS NO OTHER WAY TO LOOK AT THIS" OR "THERE IS NO WAY TO RULE AGAINST THIS."
a. REALLY, BECAUSE IF YOU ARE IN COURT, YOU PROBABLY ARE OPPOSED.
b. REMEMBER CREDIBILITY - DON'T WASTE YOUR CREDIBILITY W/THE COURT.
6. "THIS IS THE WAY WE HAVE ALWAYS DONE IT."
a. WHAT IS THE CODE SECTION?
b. IF I MAKE A MISTAKE 10X AND FIND OUT, I WILL NOT MAKE AN 11 TH.
7. "I'M NOT TRYING TO HIDE THE BALL ..."
a. THEN WHY DO YOU HAVE TO TELL ME YOU'RE NOT.
b. YOU MUST THINK I AM SUSPICIOUS ABOUT SOMETHING.
c. I MIGHT NOT HAVE BEEN SUSPICIOUS, BUT I AM NOW.
8. "I AM SURE YOU ALREADY KNOW THIS ..."
a. IF I DO, WHY ARE YOU TELLING ME.
b. IF I DO NOT, YOU JUST MADE ME FEEL INSECURE.
c. DON'T GROVEL TOO MUCH.
d. ARGUE TO THE COURT - CANNOT ARGUE LIKE YOU MIGHT WITH YOUR BEST FRIEND OVER THE FOOTBALL GAME, BUT YOU CAN STILL STATE YOUR OPINION.
9. "LET ME ANSWER THAT QUESTION WITH A QUESTION."
a. NO - MY JOB IS TO ASK QUESTIONS AND MAKE DECISIONS BASED ON YOUR ANSWERS.
b. BE DIRECT; ANSWER THE QUESTION.
c. OKAY TO GET CLARIFICATION; SOMETIMES THE JUDGE IS THINKING OUT LOUD.
10. "FINALLY, ..."
a. DON'T TEASE ME.
b. IF IT REALLY IS FINALLY, OKAY.
c. TOO MANY TIMES FINALLY PRECEDES 5 MORE POINTS OR 5 MORE MINUTES OF ARGUMENT.
11. "SORRY I'M LATE ..."
a. DO AS I SAY; NOT AS I DO.

b. EVERYONE IS LATE ONCE IN A WHILE.
c. DON'T MAKE IT A HABIT.

EXTRA CREDIT DISCUSSION POINTS:

- IT IS SURPRISING WHAT PEOPLE WILL PUT THEIR NAMES ON (PERMANENTLY)
- SHOW COURTESY (TO THE CLIENT, OTHER LAWYERS AND THE COURT)

APPEARING IN COURT: ADVICE TO YOUNG/NEW ATTORNEYS

Hon. John E, Waites

1. There is no substitute for preparation.

- Know the facts & applicable law.
- Prepare your client & witnesses (yes, rehearse) so they are comfortable in the courtroom - explain the players, setting and what will happen.
- If you will present expert testimony, know what your expert will say.
- Anticipate what the judge would like to know. At the outset of the trial, ask the judge if s/he would like a brief background of the case. The answer often depends upon the thoroughness of your pleadings.
- Supply copies in advance. Organize your file for easy reference.
- Use stipulations, motions in limine & pre-trial motions to save trial time,
- Read pretrial orders and meet requirements.

2. There is no substitute for prehearing communication.

- Communicate with opposing counsel - explore settlement and stipulate to facts & exhibits.
- Communicate with client on possible outcomes and settlements.
- Communicate with the courtroom deputy regarding exhibits and anything unusual about the hearing.
- Communicate with chambers if there is anything really unusual about the hearing. especially if a lengthy hearing is expected.

3. The courtroom is an empty box in which you must deposit evidence.

- Outline the points you need to present to win & match them with the evidence.
- Recognize the burden of proof and mention it in your closing argument.
- Know how to properly introduce your exhibits into evidence.

4. Strive to reduce your argument to three points or less.

- Foreshadow your three points in your opening argument.
- Include a clear statement of the relief you are seeking.

5. Don't speak unnecessarily.

- Don't ask questions unnecessarily or just because you think it is expected by the judge or your client
- Don't object unless you have to - if you do object, know the grounds for your objection and speak timely.
- Don't ask to confer at length with your client or anyone while the judge is on the bench.

6. Don't make it personal.

- Don't mistreat or disparage opposing party or counsel.
- A sharp tone is not necessarily effective. You cannot be too nice, civil or patient.
- Don't fuss with opposing counsel or be snide, critical, make faces or gestures.

7. Always make it personal.

- Personalize your client - even a corporate client - in a sentence or two.

8. If you are winning, stop talking. If the ruling is against you, stop talking.

• After the judge rules, the correct response is "Thank you, your honor" and stop talking. Do not engage in questioning of the judge, especially during the ruling.

9. Brevity is appreciated.

• All argument and writings (memoranda and orders) should be concise but contain the necessary substantive information.

10. Concede to other side's strengths or winning points if you can still win on your necessary element.

11. Be formal in the courtroom.

• The courtroom is a place of respect, like church, and you should refrain from making noise or causing distraction.
• Communication should be directed to the bench.
• Always speak slowly and distinctly.

12. Be Sensitive to the Judge's Workload.

• Know the court's calendar for the day. Communicate with chambers if a lengthy hearing is expected. The judge may want to reschedule the hearing for another time.
• If you settle in advance and timely advise chambers, the matter may be removed from the calendar and it relieves the court of unnecessary preparation.
• If the matter is one of the only matters scheduled for that day and the hearing requires travel by the judge and court staff, you should advise chambers as soon as possible if you expect to settle to avoid unnecessary travel expenses by the Court.

13. Cite the best authority.

• Supreme Court, Fourth Circuit, S.C. District Court, prior cases of judge.
• Don't use brief bank type citations (make sure your case law is the most relevant and up to date) and ensure your citations are correct,
• Use the single best case with similar facts and emphasize it.
• Never use a judge's prior case or colleague's cases to try and corner the judge.

14. Listen.

• Listen to opposing counsel & to the witnesses answers.
• Listen to judge's questions & hints about rulings.

15. On cross examination, only ask leading questions, but allow witness to fully answer, On direct, never lead; instead, rehearse client's testimony so it is unnecessary. Unless the introduction of evidence is unduly lengthening the trial, its relevance is relative- let the judge sort it out.

"The 3-3-3 Rule"

By Judge Michael G. Williamson

"Judge is the 3-3-3 Rule in effect for this case or is this a 10-10-10 case?" Those of you who have appeared in my courtroom may have heard this question asked, or you have probably heard me discuss these rules. But just in case, let me explain: Keep it Short! Few motions need to exceed three pages--thus **the first "3" in the Rule stands for 3 pages. That's the length that works best for most routine motions.** Even if it is a really complex matter, try to keep the page count down to 10 pages (get it? 10-10-10). The more succinct 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."'

The second "3" relates to the maximum number of cases that you should cite for any proposition of law. Simply put: Avoid Excessive Case Citations! If there is a novel legal issue, cite a case or two that supports your position. One or two cases are ordinarily sufficient. Avoid long string cites unless you are trying to make a point. And 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. These comments

apply equally to bigger cases in which the 10-10-10 Rule applies (I know--it should be the 10-3-10 Rule--but that doesn't sound very good so I'm exercising some artistic license on the name of the Rule).

The third "3" applies to the length of your argument on most routine matters. Believe it or not, we bankruptcy judges have probably seen the type of motion that you have filed before (like maybe a 1000 times). So if it's just a motion for relief from stay on a car with no insurance and no payments have been made for four months--we get it. That's all we need to know. Three minutes of oral argument should be more than sufficient. We don't need a primer on the constitutional underpinnings of adequate protection.

While I've got the floor, here are some other practice pointers on oral argument and drafting of motions and memoranda for the court (I know I'm breaking the 3-3-3 Rule by going on at this point, so I'll *sua sponte* invoke the 10-10-10 Rule).

Preview Relief Sought. Explain at the beginning of your argument and in the introductory paragraphs of the motion the relief you are seeking before you lay out the factual and legal bases for the relief requested. Let us know what you want at the front end so we know where you're heading and will understand the relevance of the facts you proffer in support.

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?"

Avoid Minutiae. When drafting your motion or making your argument, first ask yourself what the court needs to know, then include that information in the motion or argument. You need to communicate the big picture in a fashion that it can be understood quickly by the reader or listener. Avoid minutiae. For example, a tedious recitation in a motion 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.

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. If the opposing counsel makes disparaging remarks about you or your client avoid responding in kind. Keep the high road!

Be Intellectually Honest. If you have weaknesses in your position, "pull the teeth" by addressing them in your motion or up front in your oral argument 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.

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.

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. (You'll note that I covered exactly 10 points in compliance with my 10-10-10 Rule.) See you in court.

The Functional Approach to Installment Land Sales Contracts in Chapter 13

James J. Robinson

United States Bankruptcy Judge

Northern District of Alabama, Eastern Division [FN4]

Installment land sales contracts, often called agreements for deed or bonds for title, are strange, hybrid creatures that combine some aspects of a purchase-money mortgage with those of a residential lease. The treatment of such an arrangement in chapter 13 will usually be one of two options: as an executory contract, which must be assumed or rejected under Code §§ 365 and 1322(b)(7), or as a secured transaction for which defaults may be cured and payments maintained over the life of the plan pursuant to Code § 1322(b)(5). [FN5]

The issue is further complicated if termination notices sent prepetition are sufficient under state law to destroy any right the debtor may have had to include the debtor's interest in the homestead as property of the bankruptcy estate under Code § 541, despite the fact that the debtor remains in possession. When the debtor is the purchaser / tenant and wants to keep the property and cure any arrears, the Eleventh Circuit's functional approach may well mean the agreement can be treated as a secured transaction under the debtor's plan, so long as the debtor has remained in possession. [FN6]

Installment land sales contracts are often structured to provide for the secured, purchase-money-financing of the debtor's homestead, and serve the same purpose for both parties as would a typical purchase-money note and mortgage. The arrangement is often used by relatively unsophisticated parties, and is a means of financing home purchases for buyers who would not qualify for traditional credit, while avoiding the expense and formality of executing and recording a full-fledged mortgage. The flip side is that, under state law, such agreements are also a means of avoiding the expense and delay of foreclosure and its attendant procedural protections and redemptive rights for the purchaser.

Like a standard mortgage, such agreements often grant the debtor-vendee the right to possession, obligate the debtor to pay taxes and maintain insurance, provide that the debtor assumes risk of loss and all liability, and bestow all other incidences of ownership but-for legal title. Installment land sale contracts do not typically contain the usual granting, habendum and defeasance clauses, or power of sale foreclosure provisions found in a mortgage. Upon completion of the payments under the agreement, the creditor-vendor is routinely required to deliver “a good and sufficient deed” for the property to the Debtor - the functional equivalent of defeasance of a mortgagee's legal title upon payment of the secured debt. Typical creditor-vendor remedies upon the occurrence of default seek to convert the debtor-vendee's interest in the property to a month-to-month tenancy that may be followed by eviction through an unlawful detainer action - similar to strict foreclosure followed by an ejectment.

The law applicable to the treatment of such agreements in bankruptcy is not uniform. Among other variations, the cases differ in their deference to state law, the language used in the transaction documents, and the relationship and history between the parties. Even within each of the two main lines of cases-- those finding an executory contract and those finding a secured transaction-- the reasoning behind the results varies.

In the Eleventh Circuit, guidance can be found in *Sipes v. Atlantic Gulf Communities Corp. (In re General Development Corp.)*, 84 F.3d 1364 (11th Cir. 1996). In that chapter 11 case, the debtor was a developer and seller of real estate, who had entered into installment land sales contracts as vendor for various residential lots in Florida. In analyzing whether the debtor-vendor could treat the installment sales contracts as executory contracts subject to rejection, or must instead treat them as secured obligations (the objecting vendees' preferred result), the circuit court adopted the district court's decision allowing rejection, and incorporated large excerpts of the district court's opinion as an appendix to the circuit court's published decision. While the *General Development* decision held that the land installment sales contract in that case could be treated as executory, and therefore subject to assumption or rejection, the court's rationale supports a finding in many consumer chapter 13 cases that the debtor may treat a residential land installment sales contract as a secured transaction, and cure the prepetition defaults through the chapter 13 plan.

The Eleventh Circuit, in approving the district court's opinion, directs that the position of the debtor in the arrangement--as vendor or vendee--is decisive in determining the permitted treatment in bankruptcy. In support of its approval of what has been termed the “functional approach” to determining executoriness, the circuit court cited *In re Booth*, 19 B.R. 53 (Bankr. D. Utah 1982). *Booth* is the seminal case in the line of cases that allow a debtor, as vendee, the option to treat such contracts as secured claims subject to cure and reinstatement rather than as executory contracts that require assumption or rejection. The *General Development* opinion provides as follows:

> GDC concedes that although state law generally governs questions of property rights in bankruptcy in the absence of any conflict between state law and bankruptcy law, this deferral to state law gives way where there is a specific federal interest governing the relationship between the parties in bankruptcy. Such a federal interest exists here, GDC maintains. As recognized by one court "Congress has expressed an overriding federal interest in certain executory contracts, i.e., collective bargaining agreements and *real property sales contracts when the debtor is the seller* ..." *In re Buchert,* 69 B.R. 816 (Bankr.N.D.Ill.1987), *affirmed,* 1987 WL 16019 (N.D.Ill.1987) (emphasis added).
>
> The distinction between a debtor as the seller versus a buyer of real property is fundamental to the determination of whether the sales contract may or may not be deemed executory, GDC asserts. This is because:
>
> > . . . non-debtor vendees, by virtue of Sections 365(i) and 365(j), may receive more favorable treatment in bankruptcy than debtor/vendees. And debtor/vendors, because of other policies and provisions in the Code, may fair better than debtor/vendees. It may be argued that this disparity in treatment is warranted because of the risk of default when debtor is vendor, or because the non-debtor . . . is an innocent victim.
>
> *In re Booth,* 19 B.R. 53, 63 (Bankr.D.Utah 1982). The court concluded that:
>
> > . . . it is the consequences of applying Section 365 to a party, especially in terms of benefits to the estate and the protection of creditors, not the form of contract between vender (sic) and vendee, which controls.

General Development, 84 F.3d at 1371 (quoting *Booth*, 19 B.R. at 63). The *General Development* opinion also made reference to another Eleventh Circuit case:

> While it does not appear that the Eleventh Circuit has adopted the "functional approach" over the "Countryman approach", the Eleventh Circuit in *In re Martin Brothers Toolmakers, Inc.,* 796 F.2d 1435 (11th Cir.1986) appears more inclined to embrace the "functional approach." In *In re Martin Brothers Toolmakers, Inc.,* the Eleventh Circuit stated in dicta:
>
> > It is true that a real estate lease, as well as an installment sales contract, may be the functional equivalent of a secured financing transaction. [citations omitted] The determination in bankruptcy, however, of whether a particular agreement is in fact a lease or a security agreement for purposes of § 365 often depends on *which characterization will best serve the interests of the estate*. Section 365 enables the bankruptcy trustee to affirm or reject leases and executory contracts, and is based on the trustee's long-standing power to abandon obligations burdensome to the estate.(emphasis added).
>
> *Id.* at 1439. Citing the Sixth Circuit, the Eleventh Circuit continued:
>
> > The key, it seems, to deciphering the meaning of [§ 365's lease-executory contract provision] is to work backward, proceeding from an examination of the purposes rejection is expected to accomplish. If those objectives have already been accomplished, or if they can't be accomplished through rejection, the [agreement] is not [a lease or executory contract] within the meaning of the Bankruptcy Act.
>
> *Id.* (citing *In re Becknell & Crace Coal Co., Inc.,* 761 F.2d 319, 322 (6th Cir.1985)).

General Development, 84 F.3d at 1375. Accordingly, the Eleventh Circuit has endorsed the functional approach [FN7] when it comes to the treatment of land installment contracts in a bankruptcy case, and that approach opens the door for chapter 13 debtors to treat such agreements as secured transactions in their chapter 13 cases. Under the functional approach, the court may consider that preserving the chapter 13 consumer-debtor's residence is of utmost importance to the estate, and to the success of the debtor's chapter 13 plan.

On the creditor's side of the case law is *In re Parker*, 2004 Bankr.LEXIS 1128 (Bankr. S.D. Ala. 2004). In the *Parker* case, the "agreement" was purportedly terminated prepetition by the creditor-vendor, and the court found that under Alabama law, the debtor had lost her rights under the agreement's forfeiture provisions and further found that the homestead could not be saved through the debtor's chapter 13 plan or assumption and cure. The court in *Parker* found that the debtor's equitable interest in the property lasted "only so long as the [debtor] performs under the contract" and that default under the contract "stripped her of any equitable interest in it that could have been assumed in her bankruptcy." *Id.* at *14. However, under the functional approach, the inquiry does not begin and end with the application of state law, but as emphasized in *General Development*, with the effect that the application of Code § 365 would have on the estate, as well as the impact on the creditor if its claim were treated as secured.

Other cases on the executory contract side are *In re Dunn*, 2006 WL 3079632 (Bankr. N.D. Ala. 2006) and *Taunton v. Reding (In re Taunton)*, 306 B.R. 1 (M.D. Ala. 2004), which support the position that an installment land sale contract should be treated as an executory contract under Alabama law. The *Taunton* case dealt with a debtor in the position of vendor in a land installment sale contract, which distinguishes the outcome of that case under the functional approach adopted by the Eleventh Circuit in

General Development. In addition, the *Dunn* opinion cites both *Taunton* and *General Development* for the proposition that installment land sale contracts should be treated as executory contracts in bankruptcy. *See Dunn*, 2006 WL 3079632 at *3. However, such a broad characterization, while technically accurate under the facts of those two cases in which the debtor was the vendor, does not account for the fact that the Eleventh Circuit in *General Development* established an approach that centers the inquiry on the effect of such treatment on the bankruptcy estate, as opposed to developing a rule that such contracts are always to be treated as executory. *General Development*'s functional approach means that the effect will vary depending upon whether the debtor is the vendor or vendee, and the appended district court opinion quotes extensively in support of its rationale from a bankruptcy case finding that the result is indeed the opposite and allowing treatment as a secured claim when the debtor is in the position of vendee in a residential installment land sale contract.

The effect in a typical chapter 13 case of treating an installment land sale contract as an executory contract that must be assumed or rejected under Code § 365 would be to require that the debtor promptly cure the arrears (or provide adequate assurance that such prompt cure is forthcoming) or lose the home. The net effect, then, would be the loss of the home, since most debtors will not have the ability to cure the default at confirmation of the plan or to provide assurances of a cure soon thereafter. In contrast, treating an installment land sale contract as a secured claim gives the debtor the option to cure the arrears over the life of the plan, while making the ongoing payments as they come due. This is exactly the opportunity Congress afforded financially distressed homeowners under Code § 1322(b)(5).

In the *Booth* case, the debtor-vendee was a real estate broker who had purchased property from the objecting sellers under a contract for deed controlled by Utah real estate law. 19 B.R. at 54. The debtor wanted to treat the contract for deed, which required regular payments and withheld delivery of the deed until the payments were completed, as a secured transaction, and the sellers objected, insisting the arrangement was an executory contract that must be assumed or rejected. *Id.* The bankruptcy court in *Booth* allowed the debtor-vendee to treat the contract as a secured transaction, and explained the rationale behind its use of the functional approach:

> [I]n the final analysis, executory contracts are measured not by a mutuality of commitment but by the nature of the parties and the goals of reorganization. A debtor as vendee is free from the constraints of Section 365, and is thereby afforded flexibility in proposing a plan, but meanwhile must provide, upon request, adequate protection to vendors. A debtor as vendor may use Section 365 as a springboard to rehabilitation, but not at the expense of vendees. Thus, it is the consequences of applying Section 365 to a party, especially in terms of benefit to the estate and the protection of creditors, not the form of contract between vendor and vendee, which controls. This conclusion is supported by many statutory provisions and much judicial gloss.

19 B.R. at 56-57 (citations omitted).

The functional approach explained in *Booth* and approved by the Eleventh Circuit is also consistent with a Pennsylvania bankruptcy case in which the creditor-vendor was attempting to dispossess a defaulting debtor-vendee under an installment land sale contract. *In re Fox*, 83 B.R. 290 (Bankr. E.D. Pa. 1988). The court in *Fox* utilized the functional approach espoused in *Booth* and approved by the Eleventh Circuit in *General Development*:

> The novel and determinative issue presented by the matters before us is whether the Debtor is entitled to treat the Agreement in issue, the installment land sale contract . . ., as a security device rather than as an executory contract. Although this is a close issue, and one on which the authorities are split, we are inclined to allow the Debtor to do so, principally because we believe that 11 U.S.C. § 365 should be conceptualized as a tool of the Debtor, to benefit the estate at the Debtor's option whenever possible, and *should rarely, if ever, be used as a basis to deprive a consumer-debtor of a residence.*

Fox, 83 B.R. at 294 (emphasis added).

The *Fox* opinion outlines several of the various rationales employed in reaching different results, *see* 83 B.R. at 295-298, and also makes the point that state law designation of installment land sales contracts as "executory" is "not determinative of the issue for federal bankruptcy purposes." *Fox*, 83 B.R. at 297-98 (quoting *In re Johnson*, 75 B.R. 927, 930 (Bankr. N.D. Ohio 1987)). In addition, the "Supremacy Clause would prevent the [state] legislature from fixing the status of such contracts in a manner inconsistent with the bankruptcy code." *Id.* at 298.

While competing interests must be considered, preserving homes is an important and worthwhile function of chapter 13. Under the functional approach, a bankruptcy court can consider the effect on the bankruptcy estate in determining whether to allow a cure of defaults over the life of the plan, or to instead give effect to forfeiture provisions in installment land sales contracts that will have the effect of dispossessing the debtor from her home while she remained in possession when her chapter 13 case was commenced and no final judgment for possession has been issued**.** *See* *In re Mumpfield*, 140 B.R. 578, 580 (Bankr. M.D. Ala. 1991) (discussing rights of debtor as vendee under installment land sale contract and determining that such rights are property of the bankruptcy estate under Code § 541 stating, "It may be argued that it is not property as of the commencement of the case because of the acts of the defendant in terminating the contract and seeking eviction, but the debtor does have some interest since she is still in possession."); *Cf.* *In re Morgan*, 181 B.R. 579, 584-85 (Bankr. N.D. Ala. 1994) (holding that under Alabama landlord-tenant law, and not in the context of an installment land sale contract, a "possessory toehold" provides sufficient interest in the property to form the basis for assumption, as "termination" did not "effect some mystical disappearance of the lease which cannot be undone," until such time as a "writ of restitution is finally entered and no appeal is taken or stay of the writ's execution is obtained."). It is a common practice to file a chapter 13 case on the eve of a mortgage foreclosure in order to stop the sale and allow the debtor a chance to cure the default over the life of the chapter 13 plan. The functional approach recognizes that the same opportunity may be afforded a debtor as vendee under an installment land sale contract in order to best serve the bankruptcy estate and save the home which remains in the debtor's possession.

In balancing the competing interests of vendor and vendee, application of the functional approach to an installment land sale contract that is functioning as a purchase-money mortgage is not only beneficial to the debtor, but also protects the interest of the creditor. As the court in *Booth* explained:

> Classifying the contract for deed, where debtor is vendee, as a lien rather than an executory contract benefits the estate by enlarging the value of the estate and furthering the rehabilitation of the debtor. Sellers, as lienors, enjoy adequate protection. This is in harmony with the rationale for Section 365(i) and 365(j). The blessings and burdens of reorganization are fairly distributed between the creditors and the estate.

19 B.R. at 63 (citations omitted).

The court in *Booth* said that "if forfeiture is invoked prepetition, and if no further act is necessary to terminate the contract, the interest of the vendee may expire before a petition can be filed," but then questioned whether the provisions for cure and repayment under a plan would trump such forfeiture under state law. 19 B.R. at 58, n.9. It will almost always be the case that the possessory interest of the debtor in the homestead is sufficient to bring such contracts under the cure and repayment provisions of a chapter 13 plan and thereby avoid the forfeiture of the homestead and the resulting negative impact on the estate. If the property were vacant or a final judgment awarding possession to the creditor-vendor had been entered in state court when the petition was filed, the result might be different.

By allowing cure and repayment as though the arrangement were a secured transaction, as anticipated by Code § 1322(a)(5), the creditor will retain the economic benefit of its bargain, although that bargain will be modified to allow the arrears to be paid over the life of the chapter 13 plan. In addition, the creditor-vendor always has the right to move for stay relief for cause, including lack of adequate protection based on the typical mortgagee-asserted grounds of failure to provide insurance or pay taxes, as well as for default in the ongoing payments. Treating installment land sales contracts, when the property is the debtor's home and the debtor is the vendee, as a secured claim rather than an executory contract thus preserves the benefits of the bargain for the debtor, the estate, and the creditor-vendor.

In discussing the adequate protection of creditors under such arrangements, the court in *Booth* explains:

> Vendors have two rights under a contract for deed: the right to payment, which is not adequately protected, and the right to hold title as security, which is adequately protected. While the right to payment is suspended, the interest in property is adequately protected. This strikes a balance between vendors, other creditors, and the estate. Vendors are not preferred, for example, in terms of administrative claims, but are treated on a par with other mortgagees, who are protected against any decrease in the value of their liens.

19 B.R. at 61 (citations omitted). *See also Mumpfield*, 140 B.R. at 580 (pointing out that allowing the debtor to maintain the residence and cure the defaults over the life of the plan damages neither party, where the creditor will receive the benefit of its bargain).

When chapter 13 functions as intended, and when the debtor completes a plan that treats an installment land sale contract as a secured claim, the creditor will come out of the bankruptcy whole and in the same position it would have been had no bankruptcy intervened: with all arrears cured and the debtor on track with the monthly payments If the debtor does not perform, and the odds of default for chapter 13 cases are significant, then the stay can be terminated for cause and the creditor may exercise it remedies to terminate the debtor's interest in the property and gain possession, including dispossession with the assistance of the state courts. The functional approach affords the honest but unfortunate debtor a chance to save the home despite having structured the purchase of the home as an installment sale arrangement.

OBSERVATIONS FROM THE BENCH: SELECT LIEN AVOIDANCE ISSUES UNDER § 522(f)(1)(A) and (f)(1)(B)

James J. Robinson, United States Bankruptcy Judge

Northern District of Alabama, Eastern Division [FN8]

Lien avoidance motions under § 522(f)(1) of the Code are among the most commonly filed motions in bankruptcy practice. They are routinely filed, rarely draw an objection from creditors, and are granted by the court with little analysis. In most courts, including the Northern District of Alabama, the lien avoidance procedure is one of "negative notice" or "notice and opportunity" with no hearing unless the creditor objects. By far, most of the issues that arise in my court related to lien avoidance motions are problems the court identifies during its review in preparation for entry of an order granting the motion after the notice time has expired with no objection having been filed. While mundane, and frankly not very exciting, lien avoidance can have tremendous implications for both debtors and creditors. I will attempt here to highlight the most common issues encountered in my court, and also look ahead to possible changes in the lien avoidance procedure as set out in the proposed model plan.

Service. Rule 4003(d) provides that lien avoidance under § 522(f) is accomplished by motion, which is a contested matter under Rule 9014, and, therefore, requires service in compliance with Rule 7004. Service on a domestic or foreign corporation, partnership, or other unincorporated association may be accomplished by mailing, but it must be addressed to the attention of an officer or agent. If the lien claimant is an insured depository institution under the Federal Deposit Insurance Act (think bank, savings and loan, or credit union), Rule 7004(h) requires service by certified mail addressed to an officer. Failure to use certified mail when required is a very common service mistake. If the institution has appeared by an attorney, the attorney may then be served by first class mail. Remember that some credit card issuers are in fact member banks of the F.D.I.C. A list of F.D.I.C. member institutions can be found at www.fdic.gov. An order granting a motion that was not properly served may, at the end of the day, be a worthless piece of paper.

§ 522(f)(1)(A): Judicial Lien Issues. As an initial matter, the inquiry here begins with whether the lien at issue is, in fact, a "judicial lien" as that term is defined in § 101(36) of the Code, which provides, "The term "judicial lien' means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." Liens that are created by statute, such as tax liens, mechanics liens, and hospital liens, to name a few, are not judicial liens and are not subject to lien avoidance under § 522(f)(1)(A).

It is important to understand (and to train your staff to understand) when a certificate of judgment becomes a lien against real property under Alabama law. I frequently see attorneys reciting in our form motion and declaration that a lien was created on the day judgment was entered, or even on the day the certificate of judgment was issued. That is not correct. Under Alabama law, "Every judgment, a certificate of which has been filed as provided in [Alabama Code] Section 6-9-210, shall be a lien in the county where filed on all property of the defendant which is subject to levy and sale under execution . . ." Ala. Code § 6-9-211. Alabama Code § 6-9-40 then defines the types of property upon which executions may be levied. Accordingly, the judgment becomes a lien against property in the county of recordation when the certificate of judgment is recorded in the

probate records. The recording date is the lien date--a fact that becomes even more important when dealing with more than one potentially avoidable lien.

Doing the Math. Here is where lien avoidance goes from boring to confounding. The calculation itself can be confusing and is best accomplished in several discreet increments. First, know the value of the debtor's interest in the property subject to the lien. Second, calculate the sum of the exemption that could be claimed in the absence of any liens, together with all liens against the property (including the lien to be avoided). If the sum of the figures in the second step is greater than the value of the debtor's interest in the first step, then the difference between the two is the extent of impairment and the lien may be avoided to that extent. 11 U.S.C. § 522f)(2)(A). If the value of the debtor's interest is greater than the sum of the figures in the second step, there is no impairment and the lien is not avoidable. There are a couple of scenarios that will require you to refine your calculations, including when more than one lien is subject to avoidance, and when the debtor owns less than 100% of the property subject to the lien.

Under the multiple-liens-subject-to-avoidance scenario, the formula for determining the extent of impairment under § 522(f)(2)(B) instructs, "In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens." As one court has explained:

> In order to comply with Code section 522(f)(2)(B), the formula must be applied consecutively, avoiding one lien at a time. Although the formula makes no explicit reference to the priority position of any of the liens included in the calculation, the iterative nature of the formula . . . implicitly requires a determination of the relative priorities of the judicial liens. Courts purporting to apply the formula literally have implicitly recognized the priority order of liens established under state law by applying the formula consecutively, starting with the most junior of the judicial liens and avoiding one lien at a time, until the formula indicates no further impairment.

In re Napolitano, 2009 WL 2905608 (NDNY 2009) (explaining how the formula works, including mathematical example, and citing *Dolan v. D.A.N. Joint Venture (In re Dolan)*, 230 B.R. 642 (Bankr. D. Conn. 1999); *Bank of America v. Hanger (In re Hanger)*, 217 B.R. 592 (9th Cir. BAP 1997); and *In re Fox*, 353 B.R. 388 (Bankr. D. Conn. 2006) (collecting cases)). What this boils down to is: rank all liens in terms of priority and begin with the lowest (last-recorded) lien, and perform the statutory calculation for each lien, working your way up the chain. Do not include avoided junior liens in the calculations for higher priority liens.

For example, assume a debtor owns a home worth $200,000 that is subject to a mortgage of $175,000, and he is entitled to a $5,000 homestead exemption. Further assume there are three judgment liens against the property (A Bank for $15,000 recorded 1-1-2011; B Bank for $17,000 recorded 2-2-2012; and C Bank for $19,000 recorded 3-3-2013). The formula would work as follows: Starting with the junior-most judgment lien of C Bank, the subject-lien sought to be avoided is $19,000. All other liens on the property total $207,000, which includes the other two judicial liens and the mortgage. The exemption amount is $5,000. The sum of all the liens plus the exemption is $231,000. The value of the property is $200,000. Therefore, the sum of the liens plus the exemption exceeds the value by $31,000 and the exemption is impaired to that extent. Because that impairment ($31,000) exceeds the subject-lien amount ($19,000), the lien is avoidable in its entirety.

The next lien in line is that of B Bank, for $17,000. All other liens on the property (which would NOT include the avoided lien of C Bank) total $190,000. The exemption amount is still $5,000. The sum of all the liens and the exemption is $212,000 ($17,000 + $190,000 + $5,000). The value of the property is still $200,000. Therefore, the sum of the liens and exemption ($212,000) exceeds the value of the property by $12,000 (which is the extent of the impairment). Thus, the lien of B Bank is avoidable only to that extent, with the remaining $5,000 of the lien continuing to attach to the property.

As for the lien of A Bank, the lien sought to be avoided is $15,000. The value of all other liens is $175,000 for the mortgage plus $5,000 of the B Bank lien that remains attached as being unavoidable under the formula in the prior step. The exemption is $5,000. The sum of all liens plus the exemption is $200,000; which is also the value of the property. There is no impairment under that math ($200,000 minus $200,000 is zero). The lien is therefore unavoidable as not impairing the exemption.

Another thing to remember is that a junior non-judicial lien - thus not subject to avoidance under§ 522(f)(2)(A) - should be included in the calculation under § 522(f)(2)(A). *See The Cadle Co. v. Taras (In re Taras)*, 131 Fed. Appx. 167, 2005 WL

1006870 (11th Cir. 2005) (unpublished decision holding that unavoidable junior tax lien was properly included in the calculation under § 522(f)(2)(A) because the statute did not instruct courts to exclude junior liens that were not subject to avoidance). For example, in the prior scenario, if an unavoidable tax lien had been filed between the liens of C Bank and B Bank, the tax lien would be included in the formula as part of the "other liens against the property" even though it would be inferior to A Bank and B Bank's liens. The fact that the lien is unavoidable by its very nature means it is included in the formula no matter its priority relative to the lien at issue for which avoidance is being sought.

The Eleventh Circuit has also spoken to the issue of how the formula works when the debtor owns less than the full ownership interest in the real property at issue. In *Lehman v. VisionSpan (In re Lehman)*, 205 F.3d 1255 (11th Cir. 2000), the debtor owned the homestead property jointly with a nonfiling spouse as tenants in common. The debtor performed the lien avoidance calculation with regard to the homestead by using the value of his interest (1/2 the value of the property) but then using the entire mortgage balance. The Court of Appeals affirmed the bankruptcy judge's ruling that the entire value of the property, not just the debtor's interest, should be used if the entire mortgage balance were being used to get an accurate picture of the Debtor's equity (and pointing out that the same result could be obtained by using 50% of the value and 50% of the mortgage debt). Otherwise, the debtor could shield far more than his share of the exempt equity--an absurd result in contravention of Congressional intent. *Id.* at 1257. The opinion contains the mathematical calculations performed by the bankruptcy court, and reads in part:

> The value of the entire property is $225,000.00. Deducting the mortgage, $165,000.00, leaves $60,000.00 equity in the property, not accounting for VisionSpan's lien. The Debtor's half-interest in the property is therefore worth $30,000.00. After deducting the Debtor's exemption, $5,312.00, there is remaining in the property $24,688.00. [VisionSpan's] lien is in the amount of $53,879.00, which clearly impairs the Debtor's exemption. [VisionSpan] is, however, entitled to retain its lien on the unencumbered, nonexempt portion of the Debtor's property, in the amount of $24,688.00.

Id.

The circuits are split over whether a debtor who owns property jointly with a nondebtor may nonetheless use the entire amount of the debt secured thereby in performing this calculation. The Eleventh Circuit, First Circuit, Third Circuit, and Ninth Circuit B.A.P. have followed the approach as set out in *Lehman*. *See In re Miller*, 299 F.3d 183 (3d Cir. 2002); *Nelson v. Scala*, 192 F.3d 32 (1st Cir. 1999); and *In re Nielson*, 197 B.R. 665 (9th Cir. B.A.P. 1996). *See also In re Moore*, 495 B.R. 1 (8th Cir. B.A.P. 2013) (citing *Kolich v. Antioch Laurel Veterinary Hospital (In re Kolich)*, 328 F.3d 406 (8th Cir. 2003) and including an inferior but unavoidable consensual lien in the formula, as well as approving of proportioning the percentage of the debt to the percentage of the debtor's ownership interest). On the other side of the issue is the Tenth Circuit B.A.P. *See In re Cozad*, 208 B.R. 495 (10th Cir. B.A.P. 1997) (allowing debtor to use percentage of value commensurate with his percentage of ownership, but allowing use of entire amount of mortgage debt in the calculation).

In addition, our form in the Northern District of Alabama requires the inclusion of the date the debt was incurred. It may seem obvious, but in almost every scenario, the debt must have been incurred (e.g., the contractual obligation entered into) some time before the suit was filed, and before the judgment was entered and certificate of judgment issued and recorded. We frequently have motions reciting that a debt reduced to judgment, for example, in April 2012 was incurred in April 2012, which is obviously not correct. A reminder to your staff that the date the debt was incurred in the lien avoidance motion should always match the date the debt was incurred according to the schedules might avoid some of those mistakes and save your office the expense of filing and serving amended motions when such mistakes are made.

Discharge: Requirement or Non-issue for lien avoidance? Once an order has been entered granting a motion to avoid a judicial lien, is that lien avoidance contingent upon discharge? For a good discussion of cases on both sides of that issue, see *In re Harris*, 482 B.R. 899 (Bankr. N.D. Ill. 2012). The court in *Harris* ruled that, when a creditor objects, lien avoidance should be conditioned upon the entry of the discharge in accordance with the majority view that lien avoidance is not self-effectuating given the protection to creditors in § 349 in the event the case is later dismissed, or closed without a discharge. The practical problems facing creditors who would attempt to reinstate liens in such circumstances could be tremendous, as any real estate lawyer may imagine. And if third parties had acted in reliance on the lien avoidance order in the meantime, the creditor would have to do the legal equivalent of "unringing a bell" in order to return to the status quo--a near impossibility. The *Harris* court

also cites the minority line of cases, which stress that § 349 does not apply in the event of a case closing, as opposed to dismissal, without discharge and also stress that nothing in the text of § 522 explicitly hinges lien avoidance upon discharge. Consider also Code §§ 348(f), 1325(a)(5)(B), in support of the majority position.

The Eleventh Circuit currently has ruled in a case involving a related but distinct matter, and has allowed the strip-off of totally unsecured junior mortgages under § 506 even in "no discharge" cases. *Wells Fargo Bank, N.A. vs. Scantling*, 754 F.3d 1323 (11th Cir. 2014). *Scantling* came before the Eleventh Circuit on direct appeal with regard to whether in a chapter 20 case, a lien strip under 506 should be contingent upon discharge. The Bankruptcy Court for the Middle District of Florida, Tampa Division (Judge Michael G. Williamson), ruled that the liens could be stripped even in the absence of discharge. The opinion was published as *In re Scantling*, 465 B.R. 671 (Bankr. M.D. Fla. 2012). There was conflicting authority within that district, and indeed, nationwide, on that issue. The Eleventh Circuit's allowing such lien strips under § 506 as self-effectuating in the absence of discharge may shed some light as to how the circuit court would view lien avoidances under § 522: likely self-effectuating rather than being contingent upon discharge.

§ 522(f)(1)(B): nonpossessory, nonpurchase-money security interests in certain enumerated items. By far the most common issue I encounter with these lien avoidance motions is the failure to describe the item subject to the lien with particularity, so that it could be identified by a third party (say, the sheriff coming to levy and execute). You protect your client by leaving no ambiguity in your item descriptions. "Miscellaneous whatnots" will not pass muster.

Also, consider the impact of an order that avoids a lien in an item of personalty that is not, by definition, subject to lien avoidance--a boat, for example, or a lawn tractor or four-wheeler. While the court reviews for obvious mistakes before entering lien avoidance orders, the court does not police the items for definitional qualification. The court in *In re Weaver*, 2003 WL 22331786 (Bankr. W.D. Tenn. 2003) considered such a scenario, and found that where the creditor had been given proper notice of the lien avoidance motion, and had failed to act to protect its rights, the order was effective even though it avoided a lien that was not on its face properly avoidable, despite the fact that the debtor had filed what the court found to be an unnecessary second motion to avoid the lien after the case converted. The court explained, "Res judicata would also bite at Wells Fargo's effort, since the order granting the first motion is final, involving the same parties and issue, and was actually decided after notice and opportunity for a hearing." *Id.* at *2.

This is a warning to creditors: object if the motion purports to avoid a non-avoidable lien, or you may find your lien avoided if you received proper notice and did nothing. Even if a creditor does not object to the debtor's claimed exemption in a particular item (such as the expensive big-screen television in *Weaver*) within the 30 days allowed under Rule 4003(b), the creditor can still raise that issue at the lien avoidance stage under Rule 4003(d). Unfortunately for the creditor in *Weaver*, it did not raise the issue at either stage and was bound by the lien avoidance order.

Coming Attractions: Proposed Model Plan Form and Proposed Rule 4003(d) and Rule 5009(d). The proposed Model Plan Form, and Proposed Rules 4003(d) and 5009(d), have been made available for public comment. The plan form at page 1, near the top in the "Notice to Interested Parties" section, contains a check box that should be marked if "[t]he plan requests the avoidance of a judicial lien or nonpossessory, nonpurchase-money security interest as set out in Part 3, Section 3.4." Section 3.4 then requires that the calculation of the impairment of the exemption be set out on Exhibit A. Draft Rule 4003(d) will allow § 522(f) lien avoidance motions to be accomplished via plan provision, and requires service of such a plan in compliance with Rule 7004. The Bankruptcy Noticing Center typically serves a timely-filed plan by first class mail. The burden of serving a plan containing a lien avoidance provision in accordance with Rule 7004, and of certifying service, will be on the debtor. Consistent with current practice, Draft Rule 4003(d) allows creditors to object to the exemption at the plan stage even if the time to object to the exemption has otherwise expired, as is currently the case when a motion to avoid lien is filed.

Draft Rule 5009(d) sets forth a procedure for chapter 12 and chapter 13 debtors to request an order declaring a lien is satisfied. This can be accomplished by motion, served in accordance with Rule 7004. An order entered thereunder operates as a release of the lien according to the language of the draft rule. By its terms, Draft Rule 5009(d) contemplates that the allowed secured portion of the claim has been paid in full, and that any other portion of the claim has been discharged. See Bankruptcy Code §§ 349(b), 348(f), and 1325(a)(5)(B). The rule seems to be designed to make it easier for debtors to clear title to encumbered

property. Rather than producing a lien avoidance order and a discharge order, they can instead present one order that says both have been accomplished. This procedure seems to apply to valuations or strip-offs under § 506 as well as lien avoidance situations. It also leaves open the question of whether discharge is a requirement for lien avoidance, and lien stripping.

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[FN1]. Judge Robinson greatly appreciates the hard work and assistance of his law clerk, Alyssa Ross, with respect to the preparation of these materials.

[FN2]. For mortgages entered into prior to October 23, 1994, *Rake v. Wade*, 508 U.S. 464 (1993) still controls and requires the payment of interest on arrears and other charges for an oversecured mortgage creditor, regardless of whether the contract so provides.

[FN3]. I recently began a new procedure for proffers in my court. As has always been the case, the debtor must be present in court. I have the debtor sworn and explain that the attorney will be proffering what the debtor's testimony would be. After the proffer, I ask the debtor to confirm the accuracy of the proffer and give the debtor an opportunity to add anything that might have been omitted from the proffer.

[FN4]. I wish to thank my law clerk, Alyssa Ross, for her help with this material.

[FN5]. References to the "Code" and "Bankruptcy Code" are to 11 U.S.C. § 101, *et seq.*

[FN6]. This Court recently addressed this issue in *In re Curtis*, 500 B.R. 122 (Bankr. N.D. Ala. 2013).

[FN7]. In *Thompkins v. Lil' Joe Records*, 476 F.3d 1294 (11th Cir. 2007), the Eleventh Circuit stated, "We note that the bankruptcy court's approval of the rejection of the 1989 Agreement would be consistent with the "functional approach' to 'executoriness' that we have tacitly approved in our precedent." (citing *General Development*, 84 F.3d 1364).

[FN8]. Judge Robinson appreciates the able assistance of his law clerk, Alyssa Ross, in researching and preparing this article.

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Twenty Tips from a Battered and Bruised Oral-Advocate Veteran

by Sylvia Walbolt

A partner of mine was once arguing in front of an appellate panel when, suddenly, the lights went out and the courtroom was plunged into utter darkness. My partner heard "Counsel, continue with your argument." Unfortunately, his brain had "short circuited" in the dark, and he could not remember what he was saying—he could not even remember what case he was arguing. He stammered "Your Honor, I can't see my notes," and he remained silent for hours (minutes) until the lights returned.

He then finished his argument and returned to his seat. This panel rarely asked questions. When the chief judge of this local district court was on the panel and asked a question, it usually foreshadowed a reversal. The chief judge called my partner's name, and his spirits soared as he thought "The chief has a question; I have a chance to win!" He jumped back up, expecting to be challenged with a question going to the key issue in the case. Instead, the chief judge declared "Counsel, I want you to know that we're still in the dark about your argument."

The point is, you never know what may happen at oral argument, no matter how hard you have prepared. Here are some tips, from hard, cold lessons learned over many years of being beat up in oral arguments.

Get to the point right away. Start with your best point in your first sentence out-of-the-box. Don't try to build up to it. You may never get there. Never start with a basic discussion of the facts or the law.

Counsel for the appellee, the plaintiff Mr. Sullivan, in *The New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), began his argument to the U.S. Supreme Court by saying "this is an appeal from a jury verdict for the plaintiff," thereby reminding the Court that all presumptions had to be applied in favor of the jury's verdict. Years later, a justice told the appellee's counsel that this was the best opening the justice had ever heard while on the Court. It would have been a more gratifying compliment had the Court not reversed the jury verdict for the plaintiff 9–0.

Have a two-minute drill of what you must tell the court in order to win. It should be the crux of your position—the core of what the court itself would write to explain why you win. With luck, you can say it, before the questions come, at the very beginning of your argument. You also should be able to use it to answer a question or, at worst, to sum up your argument before you sit down.

We once had a two-hour hearing scheduled in federal court on a motion to certify a class action. The judge was running very late and ultimately sent word that, in one hour, each party would have two minutes to argue the motion to her. We boiled down our prepared argument to two minutes and rested (successfully) on our best precedent. Most cases can be similarly condensed, but it takes great discipline. Just assume in your preparation that the court may only give you two minutes to frame your argument, and figure out what you would say to win in those two minutes.

Always be prepared to address your weakest point. Even if the other side did not catch it, the court will do so at oral argument. Be especially prepared if there are any jurisdictional or standard-of-review issues in your case. Do not assume the appellate court will be so eager to correct the egregious error you have demonstrated that it will overlook those issues as mere technicalities. One federal appellate judge told a group of experienced appellate lawyers that one thing he discovered after going on the appellate bench was how seriously the judges take the standard of review. By the same token, be prepared to address any preservation of the record issues that may lurk in your record.

Sylvia Walbolt has been arguing appeals, in both federal and state court, for over 47 years, with Carlton Fields. She is board certified in appellate law, a former president of the American Academy of Appellate Lawyers, and a fellow of the American College of Trial Lawyers.

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Answer every question directly. Only then can you go on to explain why you still win. Do not tell the judge his question is not "relevant," as one lawyer did. The judge thinks it is, and that makes it relevant by definition.

I could not write an article on oral arguments without at least one story about my partner, the late Alan Sundberg. He was a very tall, physically imposing man, as well as a terrific oral advocate. On one memorable occasion, he was presenting argument to the Florida Supreme Court, on which he had previously served. He was on a roll when one of his former colleagues on the bench interrupted him to ask a question. Alan held up his hand to the justice in the classic policeman's "stop" sign and kept speaking. My jaw dropped, everyone on the bench laughed, and Alan finally turned to hear the question once he had finished the point he wanted to make.

Only Alan Sundberg could get away with that. The rest of us have to stop and respond to the question as soon as it is asked. It never is appropriate to tell the judge you will get to that later. Answer it immediately, even though it will interrupt your flow. The best course, if possible, is to weave your answer into your argument.

Sometimes you may not hear a question or understand it correctly. Being very hard of hearing, I once answered what I thought was the question, only to be met with a puzzled look from the judge. I said "I'm afraid I answered a question you didn't ask could you please ask it again." There have been other occasions where I did not even understand what the judge was asking me until someone else on the panel framed it in simple terms I could understand. As long as the court knows you are trying to respond, rather than being evasive, you should get there in the end.

Never try to blow smoke at the court at oral argument.

Never assume a question is hostile. One of my partners, who was an appellate judge in his former life, was sitting on a panel when another judge threw a softball to a young lawyer. The lawyer struggled with the question, sure it was a trap. Finally, my partner said to the lawyer "just say yes."

By the same token, sometimes the question is downright hostile and you should take any help you can get in dealing with it. As a young lawyer, I was in the middle of my first oral argument to the Florida Supreme Court when the chief justice curtly asked me why the court even had jurisdiction over my appeal. Because I was a very young lawyer, I did not then know about my third tip (above) and did not have a clue what to say as the other side had not challenged jurisdiction, and I had never thought about that mere technicality.

Another justice took pity on me and said "Mrs. Walbolt, wouldn't you agree that this court has jurisdiction under our decision in [name of case]?" I had never had heard of the decision, much less knew what it held, but immediately I began to nod vigorously in agreement and climb in the lifeboat that had appeared miraculously. Everyone knew I was clueless, but that was the end of the questions about jurisdiction, and the court went on to rule (in my favor!) on the merits.

Concede only what you must to retain your credibility with the court. If it appears likely that the issue will come up during oral argument, consider raising it first and then explaining why you still win.

There are two wonderful stories about the legendary lawyer Buddy Segal. Making the point that "[l]awyers sell effectively by talking straight to judges and juries," one of Buddy Segal's partners related the following:

> In a case in which he was drafted at the last minute to make an argument in the Court of Appeals for the Third Circuit (and that ultimately went to the U.S. Supreme Court), Buddy started this way: "I'd like to withdraw the argument made in section III A of our brief. That argument was persuasive to my partners who wrote the brief, but it doesn't persuade me. And I'm not going to try to convince you of something that doesn't convince me."
>
> In another case, Buddy was asking the Iowa Supreme Court to reverse the action of an administrative agency on a ruling within its discretion—an almost impossible task. Buddy began his argument by saying to the justices of that court, "Let's start with the recognition that everybody in this courtroom knows that I have only one chance in 10 to win this appeal—but let me tell you why I should." I would like to tell you he won that argument. He didn't. But they listened. They listened because he was talking straight to them.

Dennis R. Supplee, "Buddy Segal and the Art of Diplomacy," *The Philadelphia Lawyer* (Winter 2005).

Most of us would never dare to do this, but the point remains a good one: never try to blow smoke at the court at oral argument. As Judge Mark Kravitz has pointed out:

> Lawyers are held accountable at oral argument. There is no place to hide when one stands at the lectern before the judges; it truly is a lonely spot. Counsel has no choice but to respond to the court's questions about aspects of the case that they might have purposefully ignored in the briefs.

Mark R. Kravitz, Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on their History Function and Future, 10 J. App. Prac. & Process. 247, 265 (2009).

Point out any concessions by the other side and build on them. Point out any of your arguments that the other side has ignored. I had an appeal in which we had relied at trial on a controlling (so we said) statute that required the result the trial court had reached. The appellant's initial brief did not address the statute. Our brief did so in depth, and the appellant's reply brief, again, wholly ignored the statute. So I went to the oral argument not knowing what the appellant was going to say about the statute. I still did not know after the appellant's opening argument because she did not address it, and no one on the bench asked her about it.

In my response, I pointed out, politely, that the appellant

had failed to address the controlling statute. I proceeded to discuss it in some detail. Only when the appellant arose in rebuttal did I hear for the first time what she had to say about the statute. Not surprisingly, it wasn't much, and the panel had been expressly forewarned that the rebuttal argument would be the first time the appellant might address the statute. The court held in our favor, resting on the statute. Had the appellant raised anything in her rebuttal warranting a reply, I would have stood up at the end and, politely and non-argumentatively, requested the opportunity to address the new argument made for the first time in rebuttal oral argument.

Know each crucial case backwards and forwards. You must know its facts, the actual holding, and what relief was granted. Read every case either party cited, and read it in its entirety, not just the head note that helps your case. There may be something else in the decision that some judge may ask you to address.

One of my partners was once arguing away when one of the judges asked him about something discussed in a decision that had been included in a long footnote string—citing to cases outside our jurisdiction that held in our favor on an issue of first impression in Florida. Precious minutes passed as he fumbled to frame an answer about a statement in a case he had never read. He swears he will never go into an oral argument again without reading every word of every cited case.

It also is a good idea to run a check of cases a few days before the argument to make sure nothing has come down that might affect your argument. I learned this lesson when I once discovered, to my horror, that the Florida Supreme Court had just disapproved an old decision of the Second District Court of Appeal that I had relied on as my principal authority in my appeal before the Second District. Better, however, to have learned it before the argument than during.

Which leads to a related tip—if you know your panel, check to see what cases or law review articles those judges have written on the issue before the court. One of my partners had a pro bono child custody appeal in which he represented a woman who had a child from birth to age five but was not the birth mother and had never legally adopted the child. In those days, that appellate court did not announce the judges on the panel until the day of the argument. On arrival at oral argument, my partner learned that presiding was a judge who had recently published a law review article titled "Quasi-Marital Children," in which he analyzed two recent Florida family law cases. Although the issues there were substantially different from those of the pending case, the judge had coined the phrase "functional parent" in his article, which my partner thought aptly applied to our client.

In his opening argument, my partner used that term to describe our client. Opposing counsel took umbrage, saying my partner was "making up labels" and that he didn't know where my partner got the label "functional parent." The presiding judge replied, "[p]erhaps he got it from my recent law review article on that subject."

The moral of the story—if a judge on an appellate court has written an article on any substantive topic that is remotely close to the issue in your appeal, you should know what is in that article. It goes without saying you should read any relevant decisions of your judge(s). I once had a hearing before a federal district judge on an issue he previously had ruled on in a decision we cited in our responsive brief. Midway through opposing counsel's argument, the judge interrupted him and asked "Haven't you read my decision on this issue in [case name]"? Unbelievably, opposing counsel was forced to admit to the judge that he had not read the judge's decision, and things then went from bad to worse.

Sometimes there is no way to know that a judge has some specialized knowledge. One appellate lawyer arguing an issue about expert testimony in a products liability case used an analogy based on *The Joy of Cooking* and told the panel that what happened in this case was like baking a cake and not having the recipe. It turned out one of the judges was a gourmet cook who immediately rejected the analogy and used up valuable argument time by explaining why it was inaccurate.

Be prepared to answer a question with "I don't know." A friend of mine was once watching an appellate argument in which a lawyer responded to a question by saying "I wasn't trial counsel." Frowning, the judge said "That's the wrong answer, counsel." It is always the wrong answer because you are expected to know the record better than trial counsel. A simple "I don't know," followed by a request to be allowed to submit a short letter providing the answer within 24 hours is the right answer.

Sometimes the question will be about a matter that is outside the record. Say so and tell the court if you can answer the question, if the court still wishes you to do so.

Always answer the other side's substantive points. Go for the jugular immediately, and demolish their arguments. Do not ignore them and simply advance your own arguments. The court has to resolve the case in the light of the arguments on both sides of the issue.

Do not go down rabbit trails. You do not have to address every argument, or even every misstatement, if it is unimportant in the total scheme of things. Stay focused. Do so even if a judge becomes unfocused and asks questions on peripheral matters, as Justice Harry Blackmun famously did in asking counsel whether the drug store (in Justice Blackmun's home town) that sold the drug at issue was the one located at such and such corner. "Who cares" is not an appropriate answer, but "I do not know" is.

Answer questions the court asks of opposing counsel. When it is your turn, answer the court's questions to the other side, especially if your answer is different, and pick up on these questions and the other side's answers to advance your argument. Support your answer with a record or case cite whenever possible. Go where the court wants to go, even if that is not where you had planned to go. It is the court's decision, and you want to help the court reach the right decision—that is, the result you seek.

Politely and professionally correct any material misstatements by the other side. Be prepared to do so with record or case citations. Explain why the misstatement is important to the issue before the court. Do not respond to any personal attacks on you, your client, or the trial judge—and do not retaliate with personal attacks against the opposing party. Stick to the issues.

Acknowledge and apologize for misstatements. Then move on to why you still should win. Never ignore it if the other side or the court does not pick up on it, however innocent it was.

In a Supreme Court argument by then Solicitor General Elena Kagan, Chief Justice John Roberts called her on what he viewed as a shift in the government's position in its briefs

and its failure to address a certain point in sufficient detail. She responded "if we didn't emphasize it enough, I will plead error." She issued a simple apology and returned to the point she wished to press. Good advice for all.

One experienced appellate lawyer reminds us of the danger of over-arguing, which can lead to misstatements that the court will catch. During oral argument as appellant's counsel in a malicious prosecution case, he noted the plaintiff had never moved to dismiss the criminal prosecution against him for want of probable cause. One of the judges immediately pointed out that no such motion exists. Counsel, a civil lawyer, quickly conceded the point, stressing it was not germane to his argument. As he later told me, the judge "graciously resisted the temptation to ask me 'Then, why did you say it in the first place?' for which 'Sheer stupidity, your Honor,' would have been my only truthful answer."

Do not respond to any personal attacks on you, your client, or the trial judge.

Learn in advance any customs of the court in which you are appearing. The New Mexico Supreme Court has a lovely custom that any out-of-state counsel, even though already admitted pro hac vice, is introduced to the court by a local lawyer at the time of oral argument.

Learn how to address the judges. One of Justice John Paul Stevens's law clerks tells the story of an argument before the Supreme Court in which a very nervous lawyer arguing in the Court for the first time repeatedly referred to the justices asking questions as "Judge." After being told by then Chief Justice William Rehnquist that it was Justice [Anthony] Kennedy and Justice [David] Souter who had asked the questions, the lawyer called Chief Justice Rehnquist "Judge." Justice Rehnquist sternly said "Counsel is admonished that this court is composed of justices, not judges." Justice Stevens took pity and interjected "It's OK, Counsel. The Constitution makes the same mistake."

By the same token, always double and triple check the time and location for the oral argument and always arrive early. One of my partners had an argument in an appellate court in another city. About a week before the argument, he got a postcard saying the time had been changed from 10 a.m. to 9 a.m. There were three cases set to be heard at 9:00 a.m. on that day, and his was scheduled to be first. Because his opposing counsel had not yet arrived, the court decided to hear the other cases first. Both were completed, however, by about 9:30 a.m.

The panel looked out and saw that my partner now was the only person sitting in the courtroom. He reminded the court that it had just recently changed the time of the argument, and perhaps that accounted for why his opponent was late. The presiding judge, who knew my partner had traveled a long way, directed him to come up and present his argument.

From the start, Judge A was quite hostile to my partner's arguments, asking very pointed, slanted questions. Judge B was considerably more receptive to his arguments, lobbing him softball questions and helping him out with his responses to Judge A's questions. Judge C remained silent during my partner's presentation.

About 10 minutes into my partner's argument, opposing counsel and his client walked into the courtroom. Judge B, who recognized him immediately, told him to "come on up." The counsel quickly learned that the time for the argument had changed but explained that he had not received the notice. Judge B told him, "Counsel, don't worry, you have not missed much. Let me bring you up to date. Judge A has been siding with you, I have been siding with your opponent, and Judge C has yet to take a position. So why don't you go ahead and present your argument." To his credit, the opposing counsel did not miss a beat, was not flustered, and he presented his [winning] arguments. But he no doubt gained more gray hairs from this experience.

Some of my own gray hairs came from an experience that occurred before an argument I was making for the first time in one of Florida's intermediate appellate courts across the state. I arrived at my hotel the evening before, only to discover while unpacking that I had failed to pack the skirt that went with my suit jacket. In fact, I had failed to pack any skirt at all, and I could hardly appear before the court in the jeans I was then wearing. Luckily stores were still open. I purchased a new suit, and all went well the next morning. The young lawyer who had come with me was shocked at my lapse of memory, but it never happened again, to either of us.

Know the facts of your case inside and out. Judges know a lot about the law. What they may not know as well are your facts. So it is critical for you to know the facts, good and bad, cold. Judge Alex Kozinski said it best in his own inimical way: "There is a quaint notion out there that facts don't matter on appeal—that's where you argue about the law; facts are for sissies and trial courts. The truth is much different. The law doesn't matter a bit, except as it applies to a particular set of facts." Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325,330 (1992).

Be prepared, therefore, to support any crucial fact. Never make a factual statement you cannot support with a record cite.

An accomplished appellate lawyer tells of a civil rights case in which opposing counsel for the appellee cited a page in the trial transcript that he asserted contained testimony creating a jury issue as to liability. The appellant's lawyers had the transcript at counsel table and, in rebuttal, pointed out that the statement opposing counsel had cited was contained in a question, to which the answer was a denial. Opposing counsel went home with his tail between his legs, and the court promptly reversed his jury verdict.

Never do a split argument. Well, hardly ever.

Never give up, however hostile the panel seems to be. Press your position. That is what oral argument is for.

Never feel you have to use all of your time.

Always finish with a bang. Never end by saying "if there are no further questions" or by telling the court what it should do (affirm, reverse) without tying that requested relief to the substance of your argument. If the court does not know the relief you seek by the end of your argument,

you should be ashamed. Judge John Godbold was always surprised by how many lawyers "could not respond when asked how they wanted the court to rule." David A. Webster, *Judge John C. Goldbold—Remembering a Wrestler,* Eleventh Circuit Historical News, Vol. VII (Spring 2010).

Never make a factual statement you cannot support with a record cite.

One of the best appellate lawyers I know tells this story about her first appellate argument when she was a second-year associate. Her firm had taken the appeal on a pro bono basis for a pro se plaintiff who had claimed the local power company had substantially overcharged her. When the power company produced the records of her power usage showing the charges were correct, she argued the company had snuck into her house, taken her bills, forged new bills, broke back into the house, and substituted the forged bills. Based on the "cold record," the plaintiff seemed to be asserting an incredible story.

Not surprisingly, the senior partner who had taken the case sent my friend to present the appellate argument (it is a long story why he took the appeal in the first place). Although very nervous, she presented the best argument she could, while the panel sat silent. When she concluded, there was only one question: "Ms. [client's name], why in the world would the power company want to do this to you"? After listening to this budding appellate lawyer's argument for 15 minutes, the court thought she was the pro se client! So make sure at the start that the court knows who you are and what relief you are seeking for whom. Then you can end substantively and end strong.

The most important lesson of all is to be prepared. There is no better way to be sure you are as prepared as humanly possible than to subject yourself to a mock oral argument before some folks who are completely cold to your case other than from the briefs. Being prepared is better than being a great oralist. It also is better than being well-dressed. One appellate advocate appeared for argument in a beautiful custom-made suit. Unfortunately, he was not well prepared to argue, causing one judge to comment to another "Better dressed than equipped."

No matter what happens in your oral argument, it is not the end of the world. You have simply joined the legions of oral advocates who have made bloopers and dropped routine fly balls during oral arguments. One day you will laugh about it. Or write an article about it.

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THIRTY WAYS TO BECOME AN EFFECTIVE APPELLATE ADVOCATE

Almost every bankruptcy practitioner has seen at least one of his or her cases taken up on appeal. Yet few appear regularly in the appellate courts, and, for many, the process can seem rather daunting. To help illustrate some of the techniques of effective appellate advocacy, the American Bar Association's Business Bankruptcy Committee recently conducted a program on the art of litigating bankruptcy appeals at the annual meeting of the National Conference of Bankruptcy Judges in Boston. As part of the program, bankruptcy appellate specialist G. Eric Brunstad, Jr. of Bingham Dana LLP in Hartford, Conn. and Judith Greenstone Miller of Raymond & Prokop, P.C. in Southfield, Mich. conducted a live hour-long mock argument before the Hon. Edith H. Jones of the Fifth Circuit, the Hon. Marjorie O. Rendell of the Third Circuit, and the Hon. Thomas L. Ambro of the Third Circuit.

Following the argument, which Judge Jones described as “excellent” examples of appellate advocacy, Brunstad and the three judges offered a number of pointers on the do's and don't's of the process. In case you missed the program (which was standing room only), here are Brunstad's top 30 points.

• Understand your audience and the court's likely level of experience in dealing with bankruptcy matters.

Appellate judges (other than bankruptcy judges serving on a BAP) are not often immersed in the substance and practice of bankruptcy law and often express frustration in resolving bankruptcy issues. In preparing for any bankruptcy appeal, counsel should bear this in mind and think carefully about how best to present and explain the relevant issues so as not to add to the frustration.

Of particular importance is the need to pay careful attention to the idiom of bankruptcy law and its relative inaccessibility to most appellate judges and their law clerks. Before writing the briefs and preparing for argument, it is critical to spend some time thinking about how best to explain arcane bankruptcy concepts like “adequate protection” and “indubitable equivalent” if these are relevant to the appeal.

It is also helpful to think about how much of the bankruptcy process should be explained by way of background. It is easy for bankruptcy lawyers to take for granted that the audience understands what “property of the estate” is, or how the “automatic stay” functions. This can be a mistake.

• Understand the general perspective of the appellate court and how this may impact your case.

It is also useful to remember that the appellate courts have “daily diets” that are quite different from those of the bankruptcy courts. A bankruptcy judge's typical “diet” consists of a steady stream of financial woe in which success is often measured in terms of jobs saved, debtors reorganized, discharges granted and value preserved. On the other hand, the “daily diet” of the average appellate judge (which may include a heavy docket of criminal matters) is quite different, and the judge's general perspective on how to address cases and controversies is shaped accordingly.

For example, bankruptcy judges are often concerned with advancing the policies of the Bankruptcy Code as they perceive them. In contrast, many appellate judges never acquire much of a sense of comfort that they actually understand the policies of the Bankruptcy Code, let alone how they relate to the particular case before them.

Similarly, bankruptcy judges often perceive their role as essentially equitable in nature. In contrast, equity is not particularly in vogue in the federal courts generally, and most appellate judges are far more cautious about invoking equity as an overt basis of decision-making - at least the kind of equity that typically animates proceedings in the bankruptcy courts.

Not surprisingly, appellate judges are more likely to emphasize different doctrinal tools in interpreting the Bankruptcy Code. This helps explain an increase in "plain meaning" interpretations as cases move up the appellate ladder. The upshot is that the particular equitable policy or practice- based argument that may find such currency in the bankruptcy court may be a much harder sell on appeal.

In addition, the institutional focus of the appellate courts, particularly the courts of appeals, is quite different from that of the bankruptcy courts. The bankruptcy judge has to decide cases, and often must do so quickly - on occasion more quickly then he or she would like. Likewise, the bankruptcy judge also understands that if he or she makes a mistake, there is a higher court that can fix things.

The judges of the courts of appeals, on the other hand, are often the end of the line. Not only do few cases go any farther, but the decisions of the circuit courts have precedential effect over all the lower courts within their respective jurisdictions. Accordingly, the circuit judges often place a greater emphasis on understanding how a particular result will add or detract from the larger jurisprudence, and appellate presentations should be tailored accordingly.

• Understand the relevant standards of review.

In general, appellate courts review factual determinations under the clearly erroneous standard. In contrast, questions of law are subject to de novo review. In addition, decisions to grant discretionary relief based on the particular facts are subject to review for abuse of discretion.

With regard to issues of law, the question becomes: Did the court below apply the correct legal standard, which is freely reviewable? With regard to factual findings, the question often becomes: Are they supported in the record? If so, they are not likely to be disturbed on appeal unless the bankruptcy judge clearly missed the boat.

Assuming that the bankruptcy court applied the correct legal standard to the relevant facts, and the relevant legal standard permits some leeway in applying the law to those facts (e.g., in considering whether to grant a request to extend plan exclusivity), the question becomes: Did the court abuse its discretion in making its decision? This standard is highly deferential, and is not likely to be overturned on appeal unless the appellate court is convinced that the bankruptcy court made an obviously incorrect choice.

A common pitfall for trial lawyers, who both prosecute a matter in the bankruptcy court and then prosecute the same matter on appeal, is the tendency to focus on the details of the lower court proceedings at the expense of the legal issues that are more likely to attract the attention of the appellate judges. In most instances, the bankruptcy court's factual findings are a non-issue, and the real focus should be on analysis of the legal principles at stake in the case.

• Pay attention to the story.

In writing the briefs and preparing for argument, remember that the task is essentially that of crafting a story that is being told at two critical levels. First, there is the story of the particular case before the court - the human drama that is the foundation of the controversy. Second, there is the story of the law - the story behind the legal principle that the court is being asked to resolve. To be effective, both must be presented in an interesting and compelling way.

• Think Hemingway, not Faulkner.

Simplify your points, and strip down your prose. Distill the most important facets of the story, and avoid layering the presentation with too many issues, too many arguments, and too many adjectives. Every practitioner has seen briefs that take the "kitchen sink" approach by presenting every argument that the lawyer could think of. This approach only demonstrates a lack of focus and direction, and inevitably undermines the lawyer's credibility.

• Organize the materials from the court's perspective.

A good organization anticipates the questions that the reader will have, and anticipates what the reader really wants to know. It has a good logical and narrative flow.

• Structure the decision-making process

Judges like to pull away the different strands of the argument to see what your position is really based upon. Make it easy and logical for the judge to do this in a way that allows your main points to shine through.

• Define the issues narrowly.

Avoid asking the court to overturn an entire area of law. Judges have a natural reluctance to take large leaps. Identify issues that the court need not decide if the court rules in your favor on preliminary matters.

• Prioritize.

Focus on the three or four most critical points and build your main arguments around them.

• Pay careful attention to analogies.

Lawyers tend to argue by analogy. Pure logic and statistics tend to leave a colder impression than a powerful analogy or anecdote. Certainly logical reasoning is a critical part of sound lawyering, but it is the story and the analogy that really make the point. Good analogies can be enormously powerful. Bad ones, however, leave the argument open to attack.

• Explain why the court should rule in favor of your client.

Do not simply recite what the cases or statutes say and leave it to the court to "do justice" in a vacuum. Many briefs lack analysis, and this can be fatal.

• Test your arguments from different perspectives.

Have others review your arguments for weaknesses and potential improvements. Consider running things by a non-lawyer, which can help sharpen the "justice" aspect of your presentation.

• Avoid vicious hyperbole.

Just because one side says the other side's argument is "outrageous" does not make it so. More important, by saying so, the lawyer insults the reader's intelligence. If the other side's argument is really outrageous, the reader will usually be able to figure that out. Attack the issues, not the other lawyers, or the judge below.

• Oral argument is important.

Indeed, oral argument can be a critical part of the process. In general, it is a chance to answer questions and either cement the court's views, or cast doubt on any tentative conclusions.

• Preparation is critical to a successful argument.

Know the case thoroughly: the facts, the record, the parties, the proceedings, the briefs, the important cases, the statutes, and the arguments on all sides. If a judge asks a question about the record, be prepared to answer and avoid responding: "I was not the lawyer who tried this case."

• Make wise use of your time.

Avoid attempting to uncover and memorize every detail about even the most trivial precedent cited in your brief. Target the most important cases and principles, and focus on understanding and organizing them to make the most persuasive presentation.

• Develop a theme for the argument.

Tighten your focus and be able to explain your key points in three or four short sentences. It is often not possible to make more than a few good legal points in the limited time available for oral argument. Develop your theme and, if possible, make use of it in answering questions.

• Practice with several moot court sessions.

The conventional wisdom is that, in preparing for argument, counsel should do what feels comfortable. But forget the conventional advice if following it means you would avoid doing moot court sessions. You must practice with moot courts. In practicing your argument, pay particular attention to the following:

-try to eliminate distracting ways of arguing or answering questions, such as distracting hand motions.

-focus on which questions are the most frequent, and which responses are working or not working.

-consider whether is it taking you too long to get to your point.

• Anticipate the questions.

Understand the strengths and weaknesses of your arguments and prepare to address the weaknesses, not simply hammer away at strengths. At the very least, you should be able to answer the following questions with short, common-sense responses:

-What is the case about?

-How would the legal rule that you advocate work in practice?

-How would the particular result that you seek affect future cases?

-Does the court have the authority to grant the requested relief?

-Why should the court grant the requested relief?

• Focus on your opening.

This may be the only chance that you have to get in one or two uninterrupted lines. Use the opportunity to highlight the most important points. Hook the judges from the beginning and explain why you should win.

• Pay attention to organizational mechanics.

Try the Winston Churchill approach. During the war, Churchill required reports to be distilled to a single page. Similarly, outline your argument on a single sheet of paper (making sure that you can read the type). Underneath this single sheet you may have your entire argument written out on several pages for reference in case you get lost at some point. But do not read your argument. Tab your copy of the appendix and briefs, so that you can go directly to particular references if necessary.

• Avoid obscure reasoning.

Avoid presenting elaborate, multi-step proofs at oral argument to support your position. For example, other bankruptcy lawyers may well appreciate an elaborate argument drawn from the interplay between a section of the Bankruptcy Code and various provisions of the procedural rules. Oral argument, however, is not often the place for obscure complexity.

• Prepare to concede points that are indefensible.

If pressed, make concessions that should be made. Sticking to an indefensible position only undermines your credibility. If you must make a concession, however, explain why the concession does not mean you lose. Do not concede a point unless you agree that it should be conceded.

• Answer the questions.

Listen carefully and do not be evasive. The judges' questions present an opportunity to understand what it is that the judges care about and what it is that is bothering them. Make sure you understand the question before giving an answer, and try to answer the question by first stating, “Yes,” or “No,” or “I do not know,” or, “It depends.” If a judge asks a question, avoid saying things like “I'll get to that later,” or “that's irrelevant.” Do not try to bluff your way through an answer. Lawyers often do not like to admit that they do not know an answer. But it is better to respond that you do not know the answer than to fake a response.

• Answer hypothetical questions carefully.

Listen carefully, and respond succinctly and directly. If the hypothetical question is not your case, answer it anyway, and then explain why the hypothetical is distinguishable. Avoid answering with responses like, “but that's not our case” or “that's not the facts here.”

• Return to your theme.

Use your key points in responding to questions and redirect the argument wherever possible. For example, if the case involves the applicability of a particular section of the Bankruptcy Code, you might develop the theme that “there are three circumstances that must be present, A, B, and C, for the statute to apply.” In responding to a hypothetical question, you might explain that “although the answer to your question is yes, the hypothetical omits one of the key circumstances, C, so in that case the statute would not apply.”

• Be respectful yet conversational.

As one commentator has suggested: “Use the tone that you would use when you're initiating conversation with an elderly relative from whom you seek a large bequest.” Be informal and conversational without being familiar. Treat the argument like a seminar, not a lecture.

• Listen to the judges' comments and concerns and be flexible.

Prepare your argument in interchangeable parts. If the court wishes to proceed down a particular path, be prepared to go down that path, even though you would prefer to address that topic later. If a judge begins by making it clear that one of your arguments is dead wrong, and you have another good argument that gets you to the same point, consider focusing on the alternative argument rather than battling with the judge and wasting your time.

• Avoid speaking too quickly.

Some lawyers tend to speak quickly, particularly when they fear that they will not have enough time to make all their points. This is often counterproductive. It is better to speak slowly and have your points understood than speak too quickly and leave the judges behind.

• Be enthusiastic about your case.

If you have no passion for your case, it is unlikely that the court will either. Avoid presenting your position in a monotone. Be sincerely enthusiastic, but do not go overboard.

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