AMERICAN BANKRUPTCY INSTITUTE

2017 Winter Leadership Conference

How to Win the Failing Case

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CONCURRENT SESSION

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HOW TO WIN THE FAILING CASE

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I. Things Don't Seem to Be Going So Well . . . .

A. The Judge Doesn't Allow You to Make Opening Statements.

1. Never hurts to ask—explain why you think they'd be helpful.
2. Asking also makes your record, in case the judge denies the request.
3. Give up gracefully—"I understand, Your Honor. I'll call my witness."

B. It Looks Like the Judge Is Going to Exclude Critical Evidence.

1. Make the record—ask to make a proffer as to why the evidence is critical.
2. Have a copy of the Federal Rules of Evidence handy—if the judge thinks the evidence is cumulative, explain why it isn't. If she thinks it is hearsay, explain why it isn't. If she thinks it's irrelevant, explain why it isn't.
3. Have a back-up plan—another document, a different witness.

C. The Judge Won't Let You Call a Specific Witness, Or Elicit Specific Areas of Testimony on Direct or Cross.

1. The offer of proof is an important tool that you can use to preserve error for appeal in these situations. Just as you should object to preserve errors when a judge *admits* evidence for review, you should also make an offer of proof to preserve errors when a judge *excludes* evidence.

2. Federal Rule of Evidence 103 specifically provides that a party may claim error "if the ruling excludes evidence, [and] a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context." Fed. R. Evid. 103(a)(2).

3. The rule: Federal Rule of Evidence 103: Rulings on Evidence

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

4. Purposes of the rule

    a. Preserve the issue for appeal.

        i. By making an offer of proof, you are creating a record so that the appellate court can determine whether the exclusion of evidence requires reversal.

        ii. If you fail to make an offer of proof in the lower court, you put yourself in a weaker position to later claim that your evidence was wrongly excluded on appeal. In cases where parties failed to make an offer of proof, they have been unsuccessful in reversing dismissals of their

cases under the theory that evidence was wrongly excluded. *See, e.g.*, *Nulf v. Int'l Paper Co.*, 656 F.2d 553, 562 (10th Cir. 1981); *Sime v. Trustees of Cal. State Univ. & Colleges*, 526 F.2d 1112, 1113–14 (9th Cir. 1975).

b. Potentially persuade the judge to change his or her mind and admit the evidence.

i. An offer of proof provides the judge with more information about the evidence that was previously excluded—and this information may cause the judge to rethink that earlier decision.

ii. Additionally, an offer of proof provides you with another opportunity to persuasively present your theory of the case to the judge.

5. What to do if the judge rejects your offer of proof--

a. When a judge rejects your proffer, you should still make sure that the judge's refusal to accept the proffer appears on the record.

b. Example: "Your Honor, we ask that the record reflect that we tried to make an offer of proof concerning the excluded testimony."

6. Timing

a. Federal Rule of Evidence 103 does not explicitly mention when an offer of proof is timely. But the offer must be made at some point during the trial; "[p]resentation of an offer after the trial or on appeal does not help the trial judge, and is too late." *United States v. Wen Chyu Liu*, 716 F.3d 159, 170–71 (5th Cir. 2013) (quoting 1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 103.20(4)).

b. Ideally, you should make your offer of proof immediately after your evidence has been objected to, or immediately after the court ruled on the objection. This way, the circumstances surrounding the evidence are still fresh in the judge's mind. *See U.S. v. Nacchio*, 519 F.3d 1140, 1154–55 (10th Cir. 2008), vacated in part on other grounds, 555 F.3d 1234 (10th Cir. 2009)

(court abused its discretion by excluding defense's expert testimony, where judge did not allow counsel to present arguments as to admissibility once the court had ruled).

c. In practice, however, the court may postpone your offer of proof to a later time. If that happens, you still should request to present your offer of proof at a later time. *Montgomery v. State*, 383 S.W.3d 722, 726 (Tex. App. 2012) (where a judge asked counsel to offer proof at a later time and counsel failed to do, counsel's objection was not preserved).

7. Requirements

a. Federal Rule of Evidence 103 states that you must inform the court of the excluded evidence's "substance," but case law has fleshed out what "substance" means in more detail.

b. In sum, you should prepare a concise statement that gives a "reasonably specific summary of the evidence" as well as an explanation of why the evidence is relevant. *Mays v. State*, 285 S.W.3d 884, 889–90 (Tex. Crim. App. 2009).

c. An offer of proof should address three requirements:

i. Describe the content of the excluded evidence. *U.S. v. Muncy*, 526 F.2d 1261, 1263 (5th Cir. 1976) (refusing to consider whether exclusion of certain defense evidence was error where record was "inadequate to show what the excluded evidence would have been.")

ii. Explain the purpose of the evidence and what it tends to show. *U.S. v. Winkle*, 587 F.2d 705, 710 (5th Cir. 1979) (holding that counsel did not make adequate offer of proof where he merely stated that witness would testify as to his version of the story, but did not explain how witness' "denial of what had already been adduced would have been . . . helpful.")

iii. State why the evidence is admissible. *Perkins v. Silver Mountain Sports Club & Spa, LLC*, 557 F.3d 1141, 1147–48 (10th Cir. 2009) (upholding district court's exclusion of rebuttal testimony where counsel failed to make offer of proof "articulating any relevant grounds" for admitting testimony).

8. Source

Christin J. Jones, *A Guide to the Offer of Proof*, Am. Bar Ass'n, http://apps.americanbar.org/litigation/committees/trialpractice/articles/summer2016-0816-a-guide-to-the-offer-of-proof.html (Aug. 31, 2016).

D. The Judge Has Imposed Unreasonable Time Limits.

1. Ask to be heard on why you need more time.
2. Couch your request in due process terms--you need the time in order to uphold your client's due process rights.
3. Show the judge that you are moving efficiently—don't fumble for exhibits, punctuate questions with "umms" and "uhhhs," call cumulative witnesses or present cumulative documents.
4. If all else fails, decide what's most critical to get in, and then make your record.

E. Your Critical Witness Can't/Won't Appear.

1. Know F.R.C.P. 45—subpoenas.
2. Know Rule F.R.C.P. 32—definition of unavailable witness.
3. Plan ahead—take a really good deposition, and know the rules in your district for how to designate deposition testimony.
4. Learn about "*de bene esse*," or testimonial, depositions, and if your witness truly is unavailable, ask to conduct one.

F. *Your* Witness "Goes South" On You—Deliberately, or Otherwise.

1. If the witness says he can't remember, know how to refresh recollection:
   * Ask if there's anything he could look at that would help refresh his memory;

* If the answer is yes, ask what would help;
* Show him the document, and ask him to review it *silently*;
* Ask if he's finished;
* Take the document back;
* Ask if that refreshed his recollection as to whatever the issue was;
* Hopefully he'll say yes; ask your question again.

2. If the witness says he remembers, but you know he remembers incorrectly (or has gone squirrely on you):

* Ask other questions that might get him back on track, then circle back and ask again;
* If it doesn't matter, leave it;
* If worse comes to worst, you can ask the court to allow you to treat your own witness as hostile or adverse, and you can impeach him.

3. The witness has become flustered/nervous/angry:

* Encourage him to listen to the questions carefully.
* Encourage him to breathe.
* Break the questions down into smaller chunks.
* Ask the judge for a brief break.

G. The *Other Side's* Witness is Fighting You at Every Question.

1. Use leading questions.
2. Consider whether to let the witness hoist herself on her own petard—if she insists on babbling on, maybe there's something in there you can use.
3. Calmly repeat your question, word for word. Often, after a couple or three rounds of this, a difficult witness will give up an answer.
4. Try, "Is that a 'yes?'" "Is that a 'no?'"
5. Do not ask the judge to order the witness to respond unless it's really, REALLY obvious that the witness is being deliberately difficult. It is your job to control the witness—even though she's not your witness.

H. Counsel for One of the Other Parties is Not Trustworthy, or is Difficult.

1. Have a little faith and patience—judges often figure it out.

2. Be the most reasonable person in the room—judges see that, too.
3. Document everything.

I. The Judge Just Doesn't Seem to Like You.

1. Hang in there.
2. Make your record—politely.
3. NEVER say, "With all due respect, Your Honor." The judge hears, "Hey, nitwit . . . ."
4. Consider some *post hoc* nuclear options below.

II. This is Going *Really Badly*, and It Is Because of the Judge!

A. 28 U.S.C. §455, Disqualification of justice, judge, or magistrate judge.

1. Section (a): "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned."

2. Section (b)(1): "He shall also disqualify himself in the following circumstances: Where he has a personal bias or prejudice concerning a party . . . ."

3. The onus is on the *judge* to recuse himself. It is up to the *judge* to decide whether he should recuse himself.

4. This is a nuclear option—if you raise it, you had best be *very* sure that it is a circumstance in which the judge's impartiality might *reasonably* be questioned, or in which he has a personal bias or prejudice. "He just doesn't seem to like me" won't cut it.

5. Make a *very* good record of why you are asking a judge to recuse.

6. Know that if the judge denies the request, it is possible that you have lost your case, and that judge's confidence.

B. 28 U.S.C. §144, Bias or prejudice of judge.

1. The rule:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

2. This, too, is a nuclear option. This has the effect of forcing the judge off the case, without giving her the opportunity to address her conduct.

3. Same possible impact as asking a judge to recuse under §455.

C. 28 U.S.C. § 157(d), Procedures (Withdrawal of the Reference)

1. The rule:

"(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce."

2. Oddly, you must make the motion to the *bankruptcy court* first—awkward.

3. You must show cause, which often includes showing that laws other than the Bankruptcy Code are involved.

4. Not the best vehicle for accomplishing recusal.

5. District court has to agree—and then you're in district court, where bankruptcy isn't the most familiar topic.

D. Federal Rule of Bankruptcy Procedure 5011, Withdrawal and Abstention from Hearing a Proceeding.

1. The rule:

"**(a) Withdrawal.** A motion for withdrawal of a case or proceeding shall be heard by a district judge.

(b) Abstention from hearing a proceeding. A motion for abstention pursuant to 28 U.S.C. § 1334(c) shall be governed by Rule 9014 and shall be served on the parties to the proceeding.

(c) Effect of filing of motion for withdrawal or abstention. The filing of a motion for withdrawal of a case or proceeding or for abstention pursuant to 28 U.S.C. § 1334(c) shall not stay the administration of the case or any proceeding therein before the bankruptcy judge except that the bankruptcy judge may stay, on such terms and conditions as are proper, proceedings pending disposition of the motion. A motion for a stay ordinarily shall be presented first to the bankruptcy judge. A motion for a stay or relief from a stay filed in the district court shall state why it has not been presented to or obtained from the bankruptcy judge. Relief granted by the district judge shall be on such terms and conditions as the judge deems proper."

2. This is complex stuff—review the statutes, including §1334(c).

3. Again, this isn't really meant to deal with recusal situations.

III. That Went Badly—Can I Clean It Up Afterward?

A. So-Called "Motions to Reconsider"

1. Federal Rule of Civil Procedure 59: New Trial; Altering or Amending a Judgment

a. The rule:

(a) In General.

(1) *Grounds for New Trial.* The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or
(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) *Further Action After a Nonjury Trial.* After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

b. There are time limits—be aware of them.

c. There are standards—be aware of them.

d. "Judge, let me make my same arguments again, but louder/more strenuously" doesn't qualify as a Rule 59 motion.

2. Federal Rule of Civil Procedure 60: Relief from a Judgment or Order.

a. The rule:

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

b. There are time limits—be aware of them.

c. There are standards—be aware of them.

d. "Judge, let me make my same arguments again, but louder/more strenuously" doesn't qualify as a Rule 60 motion.