Principal Mistakes Attorneys Make in Litigation (A Judges Panel)

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How to Lose Successfully in the Bankruptcy Court

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Chicago Bar Association, Bankruptcy & Reorganization Committee
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Good afternoon. I'd like to thank the Committee for inviting me to speak today. I'd like to – but I can't. I can't because the Committee didn't invite me. I invited myself.

I invited myself because I felt it was time we got back to basics. We've had some sophisticated stuff discussed at these meetings recently: airline bankruptcies, the state of the auto industry, how to run a going-out-of-business sale without going out of business yourself, and so on. Time to come down to earth, I thought. Time to hear some advice we all can use. Time to learn *how to lose successfully in the bankruptcy court*.

Now, I realize some of you already know how to do this. You don't need help. So I apologize in advance to those who may find this old hat and therefore a bit tedious. Please sit quietly and allow the rest to learn how to do what you already do *so well*.

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I'm going to divide the discussion into two broad areas: how to lose on the motion call (both in preparing and in presenting motions), and how to lose at trial. (How to write the losing brief, a subject I could discuss for hours, we'll save for another time.)

And I want to add that what I'm about to say is no mere theoretical exercise. Every single technique I'll describe is one I've *actually seen practitioners put to use* in the four short years I've been on the bench. So listen closely. Don't be left behind.

1. Losing on the Motion Call

First, losing on the motion call. And let's begin with tips on preparing and filing motions.

a. Preparing Motions

• For starters, don't file a motion. Just file a notice of motion. Give notice that you're going to appear before so-and-so at such-and-such time and present . . . nothing. Or, conversely, file a motion but no notice. (Then call chambers and demand indignantly to know why your motion didn't make the call. More on dealing with chambers later.)

• For those who insist on filing both a notice of motion and motion, there's still hope. It's now March 2007, I believe. Notice your motion for February. Better, notice it for February 2006. Better still, notice it for February 30, 2006.

• If the judge hears original motions at 9:30 a.m., always notice your motion for 10:00 a.m. Or 10:30 a.m. Or 1:30 a.m. (We've actually been thinking of instituting a late evening call for you night owls. Judge Schmetterer has asked to take that one.)

• Carefully ignore any applicable notice periods. If the motion requires 20 days notice, for example, give 18 days notice. Never ask to shorten the notice. If you make the mistake of asking, don't give a reason that might be cause to shorten it. If you're so close to the hearing date that you can't give even the minimum notice, simply style your motion as an "emergency." (Emergencies are in the eye of the beholder, right?)

• If your case is assigned to me, notice your motion before Judge Doyle. It won't be a problem. Given our physical resemblance, we realize it's hard to tell the difference.

Motions in Eastern Division cases should be noticed for hearing in Rockford. Motions in Lake County cases should be noticed for hearing in Wheaton. And so on.

• Don't attach a proof of service to your motion. If you must, make sure that it's uninformative: declare, for example, that you served your motion on "_____," or on "January ___ at ____ p.m." Blanks in office forms are to be left . . . blank. If you do fill the thing out, try hard to make it equivocal: "I certify that I served this motion on the above-listed parties *either* through CM/ECF transmission *or* by fax *or* U.S. mail *or* carrier pigeon *or* pony express, as applicable." Don't let on which method is "applicable."

• Make certain, too, never to have any "above-listed" parties on your service list. At a minimum, endeavor to serve someone other than the person you have to serve. If you represent a creditor, serve the debtor *or* his lawyer but never *both*. If you represent a debtor, serve corporate creditors by serving them at P.O. boxes. Be sure not to serve the creditor's counsel even though counsel has appeared in the case and you know who it is or could find out easily. One favorite technique I've seen from debtors' counsel is to have an immense service list that includes every creditor – except the creditor the motion actually affects.

• What about the body of the motion itself? There are two basic methods. The first is to include as little information as possible. In particular, always leave out critical facts. So, for example, a motion to lift the stay to foreclose on a first mortgage on the ground there is no equity in the property should never mention the second or third mortgages that might establish a lack of equity. Motions in consumer cases to obtain

credit to buy a car or refinance a mortgage shouldn't describe the car or the terms of the loan. If you leave out things, the judge will express befuddlement, allowing you to disclose the omitted information for the first time in court and then give the judge that pitying, "it's-OK-we-all-know-you're-an-idiot" look jurists everywhere appreciate.

• If you can't help yourself and must put genuinely relevant information in your motion, make sure the information is presented as vaguely as possible. So a motion seeking to modify a chapter 13 plan to defer a plan default should say only that the default occurred because the debtor "ran into financial problems" but that "things are better." And if information in the motion is not only relevant but clear and specific, you can still file your motion with a page missing. Or multiple pages.

• A refinement of the "little or no information" technique is the self-contradictory or self-defeating motion. A recent motion presented to me, for example, sought to modify a chapter 13 plan to increase *and* decrease plan payments. About half the motions I see in chapter 7 cases asking to lift the stay to foreclose on mortgages allege there is no equity in the property and then state a loan balance and property value plainly demonstrating there is equity. Clever.

• A final point about this technique. Not only should there be little factual information, but in consumer bankruptcy cases motions should never include legal authority. Don't disclose the Code section or bankruptcy rule that governs the motion, entitles you to bring it, and might authorize some relief in your favor. And never cite any decisions that might provide the court with guidance. Why bother? Bankruptcy courts

are courts of equity, and in consumer cases particularly the judges just do what their breakfast and the barometric pressure suggest.

• If saying too little is one way to go, saying too much is the other. If you're a mortgage company objecting to the arrears listed in a proposed chapter 13 plan, never file an objection that says simply, "the correct arrears figure is X, not Y." No. Include instead pages of boilerplate discussion about a debtor's inability to modify the terms of a mortgage in a chapter 13 case. Cite a couple of unpublished and irrelevant 7th Circuit decisions while you're at it. Bury the actual basis of the objection in your boilerplate so it's all but impossible to find. Motions in chapter 11 business cases, meanwhile, should always contain a complete history of the debtor and its business from the founding of the company through the present day. (If possible, in fact, start off the motion: "In the beginning, God created the heaven and the earth . . .")

• As long as we're talking chapter 11, motions in those cases should ask the court to enter orders that violate the Code's overall scheme and, where possible, specific Code provisions. As support for that relief, cite if you can the actual Code provision to be violated as if it warranted the relief you want. Add a pinch of section 105. Then garnish heavily with a list of unpublished orders from other bankruptcy cases where the relief you want was allegedly requested and received. Bankruptcy judges are herd animals; where one goes, others will follow.

• Finally, a variation on the "saying too much" technique: do your best to be thoroughly incomprehensible. Always dive right in; don't preface an extended discussion

with an introduction that discloses what you're going to say: what the motion is about and what you want the court to do. Facts should never be presented in chronological order but should be jumbled together haphazardly so they're hard to follow. A legal discussion (if one must be included) should be equally confusing. With practice, in fact, a simple motion can be made thoroughly baffling. A recent motion I saw seeking sanctions for relatively straightforward stay violations was such a mess that it took almost half an hour for me to decipher. Then the movant was indignant when his opponent had the gall to request time to respond.

• A couple of quick comments about two kinds of motions seen mostly in adversary proceedings.

- **Motions to dismiss under Rule 12(b)(6)**: Always argue that the complaint fails to allege particular facts or essential elements of the claim. Support your argument with 7th Circuit cases from 1981 or earlier.

- **Motions for summary judgment under Rule 56**: Pay no attention to the standard for summary judgment in Rule 56 itself. File the motion because you feel your side of the case is "right," regardless of what your opponent may say or what evidence he can muster. Pay no attention to the local rule, either. File a motion and nothing else. Or file a motion, memorandum, and nothing else. If you must include facts, put them in the memorandum. Present no affidavits or other evidentiary material to support those facts. And if you must supply evidence, don't sweat its admissibility. (Rules of evidence are for trials.) Feel free, for example, simply to slap a bunch of documents on the back of

your memorandum – no need to consider foundational or hearsay problems. And no need to worry about supplying references to your evidence in the body of your paper. The judge will figure out it: that's why judges have law clerks.

b. Presenting Motions

• What about presenting motions in court? Here are a few pointers to aid you in your quest for defeat. Whether you're the movant or respondent, first of all, don't show up. If you do show up, at least show up late – preferably at the end of the call or after the judge has left the bench. (Then rage at the courtroom deputy for not having the motion held or recalled. Again, more on dealing with chambers shortly.)

• If there's no way around appearing and appearing on time, never fear: you can still do your cause a fair amount of damage. When you present your motion, interrupt the other lawyer when he's speaking. With luck, in fact, the other lawyer will continue talking during the interruption, making it impossible to produce a coherent transcript. The same technique works, by the way, if you're responding to a motion. Steal the movant's thunder by answering the motion before it's even been presented. With a little practice, in fact, you can keep the movant from saying *anything at all*. (I've actually seen this done.) Needless to say, the court will be awed by your zeal.

• If all else fails, interrupt the judge. Some judges have this quaint idea that when they talk, other people have to be quiet. If cutting off the other lawyer doesn't result in a loss, cutting off the judge will work wonders.

• Real pros in the field of lawyerly self-destruction do more than just talk over

other lawyers and the judge, of course. They display open hostility toward their opponents. They get angry and loud. They accuse their opponents of all kinds of underhanded behavior. Some lawyers express their hostility in what they consider a more subtle way: by being snotty and condescending. When the other lawyer is talking, they smirk, roll their eyes, shake their heads in disagreement (some even go for the full-body twist), and let out little gasps of astonishment or disgust. (Chapter 11 practitioners seem to be especially well versed in this advanced technique.)

• The *crème de la crème*, finally, go one step farther. They don't just get snotty and annoyed with the other lawyer. They get snotty and annoyed *with the judge*. They take personal offense when their position comes in for criticism from the bench. ("Disagree with *me*?")

• In your colloquies with the court, adopt a tone that makes clear you not only disagree with the judge but also hold his microscopic intellect in justifiably low regard. If you can't manage the tone, at least do the whole smirking, eye-rolling thing. And if tone and facial expressions aren't yet in your repertoire, preface every comment to the court this way: "With all due respect, your honor . . ." Combine this comment with complete condescension, and you've got it made.

• If the ruling is unfavorable (and by now that should be a certainty), ask to "respond" to it. Better yet, don't ask – just respond. (Rulings are really just invitations to further discussion.) And whether you respond or not, be sure to convey your thorough frustration, dissatisfaction, disgust with the ruling, the judge, the bankruptcy court, the

judiciary (federal *and* state), and, if possible, the government of the United States of America. Bang the podium. Slam your papers on the ground. Storm out of the courtroom. Most effective of all, slam your papers on the ground and storm out of the courtroom *during the ruling*. (Remember – these are techniques I've actually seen in use. They work.)

• A final thought before we move on. If the judge takes you to task for some formal deficiency in your motion (no motion, no notice, no service list, some other trivial detail), always remember who's really at fault: your secretary. Be sure to let the judge know so that blame can be placed where it genuinely belongs. Judges are invariably impressed with this sort of candor.

c. An Aside: Dealing with Chambers

A short aside, now, about dealing with chambers. The court and its staff are here to serve the public and the bar. Lawyers therefore shouldn't hesitate to call chambers whenever and for whatever they like. Chambers staff (every one of whom, not just the law clerk, holds a law degree from some ivy-covered institution) will not only be pleased to read you the judge's calendar and motion schedule from the web site or Law Bulletin, since lawyers can't be expected to do that for themselves. They will also happily explain to you how to practice law: how to notice motions, how to file motions, how to do research, how to write motions and briefs – even how to try a case.

Chambers staff are also available to offer their views on what a particular ruling means and why the judge ruled the way he did. Feel free to call and inquire. And you

may not know this, but it's even possible to get a judge to reconsider a ruling by arguing the matter over the phone to his secretary or minute clerk. Give it a shot. Really.

In all your dealings with chambers, finally, don't hold back. Even if you feel the need (for some reason) to be respectful to the judge in the courtroom, it's perfectly acceptable to be rude and condescending to the judge's staff. Yell at them. Curse at them. Hang up on them. Use them as your emotional punching bag.

The judge will never know.

2. Losing at Trial

Now, on to losing at trial. Since you'll have already lost your motion to dismiss and your motion for summary judgment, let's go for the hat trick. In the time remaining, of course, I can't begin to describe every way to blow a trial. The ingenuity of counsel on that score is limitless. But here are a few ideas that may help.

• Most judges have pretrial orders that require the parties to file and exchange pretrial materials: lists of witnesses, lists of exhibits, exhibits, trial briefs or proposed findings – that sort of thing. Don't file them. Or file some but not all of them.

• If you must file pretrial materials, try to mess them up somehow. It's pretty hard to botch witness and exhibit lists, but the exhibits themselves present a wealth of opportunities:

- Don't give the exhibits any sort of designation to distinguish one from another. Just dump a mass of loose papers on the court and opposing counsel.

- If you must affix some designation to your exhibits, don't use numbers. Use

letters instead – especially if you are going to have more than 26 exhibits. That way you can make the judge refer on the record to . . . "Exhibit PP." Or "Exhibit YYY," which is what the judge will surely be asking himself.

- Go for really bulky group exhibits if you can. They should be hefty enough to give the judge tendinitis in both elbows. Bulky or not, make sure each group exhibit consists of unrelated documents in no particular order. And don't paginate them.

- If you're one of those total suck-ups who can't resist helping out the court, put the exhibits in three-ring binders with tabs and deliver courtesy copies to chambers. But select binders so wide that it's impossible to turn the pages. With narrower binders, you can also bend the rings slightly so they don't meet correctly in the middle. That way, the exhibits will tear when the pages are turned.

• Suppose for a moment that you actually filed your pretrial materials, and the day of trial has now arrived. When the case is called and the judge emerges from his sanctuary, tell him that you need a continuance. Tell him the other side has no objection. Since the judge has spent no time preparing for trial (they never prepare, you know), he won't mind. And if he happens to be one of those oddballs who expect trials to go off on schedule, tell him you notified all witnesses under subpoena that they didn't have to appear because the trial was going to be continued. That should do the trick.

• And so to the trial itself. The really key thing, I think, is *not* to prepare – and that certainly seems to be the fashion these days. *Don't* consider in advance what you have to prove and how you're going to prove it. *Don't* think ahead about what

evidentiary obstacles you (or your opponent) might have to overcome. *Don't* write up examinations of the witnesses – direct or cross. And for God's sake *don't* prepare the witnesses themselves. Rely instead entirely on your gut, your instincts, your native intelligence. The model for trial lawyers these days is dashing D.A. Jack McCoy on the TV show "Law and Order." Have you ever seen McCoy use notes – or take notes, for that matter? Never. Neither should you.

• Here are a couple of fine points about specific areas of trial practice:

- First, direct examinations. Make sure you elicit the testimony from your witness in no particular order. Get right to the heart of things; don't even ask the witness who he is or what he does. If you must identify the witness at the beginning and get a little background, be sure thereafter to skip around in time as much as possible. (To keep the court on its toes, in fact, the witnesses themselves should be called in some sort of random order.) Presenting information chronologically is so drab, so staid, so old school. With a little effort, testimony (like motions) can be rendered baffling, even incomprehensible.

- To that end, always formulate your questions carefully. Short, crisp, and clean are out. Long and messy are in. Model your questions as if Henry James were doing the questioning. Last year I had a week-long trial in which every question from one lawyer (I noticed later when I read the transcript) was at least a paragraph long. An example for you all.

- Lead your witness if you can. Witnesses are unpredictable, especially if you

don't prepare them (and you won't). It's so much better if a witness's answers can be carefully confined, preferably to single words of one syllable. By using leading questions, the lawyer can do the testifying for the witness. The lawyers are the ones the judge really wants to hear from anyway.

- Always publish an exhibit to a witness *before* it's admitted. Show the exhibit to the witness and then have him testify about it length. Only then should you seek the exhibit's admission.

- Never lay foundation for the admission of anything. If you must, never consider that foundational requirements differ for different kinds of evidence. It's enough simply to ask the witness if he produced the evidence in discovery, as I saw one lawyer do recently. If he produced it, that takes care of foundation, authentication, the works.

- Whenever possible, have witnesses read exhibits – contracts, letters, invoices – into the record. The longer, the better, in fact. Judges don't know how to read, and the judge will be grateful for the help.

- Let's flip things around for a second and consider what you should do if your *opponent* is doing a direct examination. A technique popular with some luminaries of the bankruptcy bar is never to object to anything. Let every answer come in, whether it's hearsay, speculation, an opinion, you name it. The judge will sort it all out, after all. Remember the trial with the lawyer whose questions were each a paragraph long? Every paragraph-long question produced a page-long answer, sometimes multiple pages. The answers were objectionable in almost every possible respect. No one ever said "boo."

- You can also do the opposite, of course, objecting to every question whether or not the answer would damage your case. Object particularly on grounds appropriate to a jury trial but pretty ridiculous in a bench trial. (Always move to strike irrelevant evidence, for example. Then the judge can give himself a limiting instruction to ensure he disregards it.) If possible, in fact, turn the trial into an evidence exam. It doesn't take much to obstruct the flow of information and prolong the proceedings. The judge won't mind. Judges have lots of time.

• So much for direct. What about cross-examination? A fertile field indeed:

- Never lead a witness. Ask open-ended questions. Let the witness explain himself. If you're skilled, you may even be able to get the witness to fill gaps your opponent left on direct, making the case he failed to make.

- Like direct examination, cross-examination should be messy and confounding. Don't organize your cross into topics. And if for some reason you feel compelled to, be sure the topics proceed in no particular order.

- Avoid cross-examining a witness methodically, asking questions that proceed slowly, one to another, leading to an inevitable conclusion that assists your case. Head instead *directly* for the conclusion itself. Why use a scalpel if there's a sledgehammer handy?

- Use cross-examination, not to ask about facts (since trials aren't about facts), but to make a legal argument to the court using the witness as the vehicle. (This is another technique popular with the chapter 11 gang.) Consider going so far as to ask witnesses

questions about legal principles. In a trial I had last year, a cross-examining lawyer stuck a volume of U.S. Code Annotated under the witness's nose and asked him when a particular section of the Internal Revenue Code had been amended. The witness was neither a lawyer nor an expert, and we all had a good laugh at his expense when he whimpered: "I don't even know how to read this thing."

- Fight with the witness. Abuse him. Ridicule and humiliate him. Alienate him if you can. Ask cagey questions that begin: "So you *really* expect the court to believe [such-and-such] . . . ?" (Of course, the witness will always answer "no.") Make the witness admit right on the stand that he's a filthy liar. They always do. So go ahead – go for that Perry Mason moment. It's there for the taking.

- Last tip. Remember the "one question too many" you learned about in trial practice class? That's the one that calls for the conclusion I mentioned earlier, the conclusion that follows inexorably from a slow, methodical, surgical cross. Should you actually find yourself doing that kind of cross, never fear: you can still make a hash of it. At the end, don't stop. Don't let the conclusion hang unspoken in the air. Don't allow the court to draw that conclusion for itself. Give the witness the chance to deny the conclusion. *Ask* the "one question too many."

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Well. Those are all the helpful hints for today, unfortunately. Put even a few of them into practice, though, and you too can join the ranks of those esteemed practitioners adept at snatching defeat from the jaws of victory, those legal celebrities with smoking

holes in both feet.

Finally, for those who also practice in the Circuit Court of Cook County and want advice along similar lines for that court, let me commend to you an article by the late Judge Willard J. Lassers entitled "Losing Successfully on the Motion Call: Practice Hints" that appeared in the September 1987 *CBA Record*. It's from his classic article that the idea for this talk was shamelessly ripped off.

So best of luck. And as Judge Lassers advised: "Don't give up giving up."

Trying a Case Needn't Be Trying!

A Practical Guide to Effective Advocacy, From Client Interview to Closing Statement

Hon. Pamela Pepper, U.S. Bankruptcy Court, Milwaukee

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I. ***Assessing Your Case***

A. Interview your client yourself.

B. Ask the same questions more than once, in different ways.

C. Take the time to dig deeply--is there corroboration for your client's version? Are there corroborating documents? Third party witnesses?

D. Find out how many other lawyers they've talked to before coming to you; avoid clients who say the five other lawyers "weren't a good fit," but that you are.

E. Perform some due diligence before putting words on paper--possible weaknesses, possible defenses.

II. ***Drafting a Complaint or Answer***

A. Elements, elements, elements!

B. Make sure you have thought through all possible causes of action, statutory and common law.

C. If you are the plaintiff, assess the strength of the evidence you have that would support every element of every cause of action.

D. Think through what evidence you are missing, and how likely (and costly) it will be to obtain it.

E. If you're the defendant, assess the strength of the plaintiff's evidence regarding each element of each cause of action.

F. Think through the evidence you could present that would de-claw the plaintiff's evidence.

G. If you are the plaintiff, think of the complaint as a road map. Lay out all causes of action clearly (with source law--statutes, common-law causes of action, etc.) clearly identified. Have your aversions track the elements of each cause of action.

H. Imagine using your complaint as the basis for your closing argument--could you state the elements of each cause of action, and the supporting evidence behind each element, using only your complaint?

I. If you are the plaintiff in *federal* court, be wary of *Twombley* and *Iqbal*. Avoid mere "threadbare" recitals of the elements; have your complaint tell a story about the wrong done to your client.

III. ***Conducting Discovery***

A. If you are the plaintiff, re-visit your complaint during discovery, to make sure that it resembles the case you thought you had at the beginning. If it doesn't, consider whether you should move to amend the complaint before the close of discovery. It is easier to win such motions when you make them earlier in the case.

B. As you collect discovery, keep the trial in the back of your mind.

C. Demand documents that support the elements of your cause of action.

D. Carefully craft your deposition outlines with the thought of collecting the information you need to support the elements of each cause of action (or to defeat them, if you represent the defendant).

E. Use depositions to investigate, and to commit hostile witnesses to one story. This is a discipline that is distinct from advocacy before a court.

F. Build in time to winnow--you likely will collect many documents, or much deposition testimony, that does not directly relate to the evidence. For each document or statement, ask yourself whether that document is cumulative, or duplicative, or necessary. Would a jury need this (or a judge) to find for you on a particular element of a particular cause of action?

IV. *Preparing Witnesses for Trial*

A. Do not assume that witnesses know anything about trials--what they are, where they are, what will happen, who will be there.

B. Describe for your witnesses what the courtroom will be like, who will be asking them questions, where the jury and other counsel will be, what a judge's role is in the proceedings. Prepare witnesses for physical lay-out--must they pass through security? Is there a cafeteria in the building? Will there be breaks?

C. Then talk with your witness about what information the witness can offer that is useful. Tell them what you hope the judge or jury will learn from hearing their testimony.

D. Don't tell your witness that you have a "script" of the questions you will ask. This makes witnesses think they need to go home and memorize something. Instead, stress that you will ask them open-ended questions to obtain the information the fact-finder needs. Let them know that if one question doesn't do the trick, you'll ask another.

E. Go through your direct examination questions with your witnesses. Prepare them for the kinds of questions you will be asking, so that when you say, "What happened on May 15, 2006?" you won't get a blank stare. Explain to

them the sequence in which you're going to elicit from them the information they have to give the fact-finder.

F. Prepare witnesses for the fact that other lawyers may object to your questions. Let them know that this is perfectly okay. Advise them to wait to answer the question until the judge makes a ruling.

G. Prepare them for cross examination. Let them know that it is a routine part of the system for the other side to ask questions. Advise them not to be belligerent or argumentative. Assure them that if you think they have trouble on cross, you'll come back and clean it up on re-direct.

H. Be aware that if you do not subpoena witnesses, you have little remedy if they don't show up for the scheduled trial date.

I. Show them the documents that they're likely to see at trial--make sure they are familiar with those documents. In large or complex documents, make sure they know where in the document the relevant text appears. (Tabs are Good Things.)

J. Think through which documents each witness might need to refresh recollection, if refreshing becomes necessary.

K. Be aware of the rules for contacting a witness who is not your client--particularly if that witness has counsel.

V. *Collecting Documents for Trial*

A. Study the trial procedures for your court, especially the contents of, and schedule listed in, the pre-trial order.

B. Also study the preferences of the particular judge--does he want you to number the exhibits ahead of time? Number them in court? Use a particular numbering system? Provide him with copies? When?

C. If you have voluminous documents, use the pretrial conference to ask the court how best to handle them. Courts try to avoid lawyers dumping huge quantities of paper on them without specifying what is important within those papers. Some judges may admit the whole document, but note only the relevant pages/sections; others may ask you to take the document apart and give them only the relevant portions.

D. In that same vein, be careful with crafting stipulations. If you stipulate with opposing counsel to the admission of 600 pages of documentation, and then make no reference to any of that documentation during trial, or don't explain to the judge or jury why it is significant, the fact-finder likely won't consider it.

E. As you collect your documents and organize them, winnow some more. Constantly ask yourself, "What does this add that I don't already have?"

F. Organize the documents for optimal use with witnesses. Keep Witness Smith's documents with your notes for Witness Smith's testimony. If you need one of those same documents for Witness Jones, make another copy and keep that with Witness Jones' testimony.

G. Think through evidentiary issues *before* trial. Is this document likely to draw a hearsay objection? If so, is there an exception that would apply? Are any of these documents likely to draw authenticity objections?

H. Do *not* rely solely on courtroom technology. Technology--document cameras, white boards, PowerPoints, etc.--can fail. Have paper copies of your exhibits in the courtroom, in case of such failure.

I. Prepare and use some version of a trial notebook, listing the witnesses you are going to call, the documents relating to that witness, possible areas of cross-examination, stipulations relating to that witness, etc.

VI. ***Trial***

NOTE: Before ever setting foot in the courtroom, develop the *themes* that run through your case. Summarize your case in two or three sentences--boil it down to its core points. You won't tell the judge or jury about your themes, but they will define (a) the content of your opening statement, (b) the key issues in your witness outlines, (c) lines of cross-examination, etc.

A. Opening Statements

1. Particularly in a jury trial, think hard before waiving the opportunity to present opening statements.

2. They are called opening "statements," not opening "arguments." Advocate strongly for your client, but avoid arguing.

3. Don't predict what you can't prove.

B. Direct Examinations

1. Avoid leading questions. If you've already gone over with your witness the questions you are likely to ask, you should have already thought this through.

2. Let your witness tell the story, but let your questions provide order and organization to the story.

3. Verbally signal to the witness that you are about to change topics, by using "headliners." "Now I would like to ask you about, " or "now I'd like to turn your attention to . . . ." This tells the witness and the fact-finder that you have moved from one topic to another, as well as helps you to clearly organize your questions by topic. This is technically objectionable; no one ever objects.

4. Have a game plan for the points you want to elicit, and stick to that plan. Direct examination is not the time to be creative.

5. *Listen* to your witness's answers. Few things ruin your flow more than repeating a question that your witness has just answered. It also sends a terrible message: if you can't be bothered to listen to the answers of your witness, then why should the judge or jury?

6. Know how to offer an exhibit into evidence: Mark it, offer to show it to the other side, show it to the witness, ask the witness what it is and how she knows, then offer it into evidence.

7. End with a bang. Don't let your last Q-and-A be, "Okay. So--did anything else happen?" "No." "Okay--thanks."

C. Cross Examinations

1. Think surgical strikes, not carpet bombs. More is not better on cross.

2. Don't ask about the topics in the same order in which the witness talked about them on direct. Order the questions in terms of your priorities and the needs of your case.

3. Before your attack a witness's credibility, think about whether this witness, even though adverse, might have information helpful to your case. If so, you may not want to attack credibility.

4. Ask leading questions.

5. If the witness didn't cause you harm, don't cross. You don't have to ask a question just because it's your turn.

6. If a witness is evading you, do not ask the judge to instruct the witness to answer. There are other tools you can use--asking the question again; enquiring, "Was that a yes?"; offering to re-phrase the question to "help" the witness understand it.

7. Understand the scope of the direct exam, and stay within it.

8. Before you use a prior statement to impeach a witness, make sure it really does impeach the witness (in other words, make sure it really does call into question her veracity.)

D. Trial Motions

1. Fed. R. Civ. P. 50(a) and its state-law counterparts allow a party to move for dismissal if the other side has been "fully heard" and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.

2. Move for dismissal at the close of the other side's case--even if you lose, it can give you insight into what the judge is thinking.

3. Move again at the close of the trial--you're preserving your record, and getting more insight ahead of appeal.

E. Objections

1. It is the job of an attorney to object when there is a basis for doing so. Let clients and witnesses know that. Object when you have a reason to do so.

2. If the judge rules against you but you need to make a record, tell the judge that you understand his ruling, but that you need to make a record. Sometimes that's the best you can do.

3. Don't object just because you can. "Your name is Mary Smith, right?" is a leading question, but few judges are going to sustain a "leading" objection to such a background question.

4. Be prepared for the fact that some judges will ask you to explain the evidentiary bases for your objections, and stand ready to do so. Be aware that

other judges will not allow you to make "speaking" objections, and ask to be heard at sidebar if you think you need to explain the objection.

5. Remember your poker face. Both judges and juries are able to see it when you express anger/frustration/defeat over an evidentiary ruling.

F. Closing Statements

1. Again, think hard before waiving the opportunity to sum up.

2. If you are the plaintiff, separate clearly your opening close (summing up what the evidence showed) from your rebuttal (deconstructing the defendant's close).

3. If you predicted in your opening that the evidence would show something, and it did, remind the judge or jury of that fact.

4. Use the elements. Make a check list if you need to. Make sure you have listed the elements for the fact-finder, and then have described each piece of evidence that supports each element.

5. End on a strong note.