

LITIGATORS CORNER: A Judge's Top Ten List



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I'm told about a judge who was an experienced trial lawyer before ascending (I use the term loosely) to the bench. After some time hearing cases as a judge, he characterized his new career: he had been sentenced to a lifetime of watching amateur theatricals. Poor devil.

Last month I wrote about the ten things lawyers would like judges to do. This month, I imagine myself on the other side of the chasm, and try to identify ten things judges would like lawyers to do, or avoid. Never having been a judge, I have to guess. But some of my guesses aren't hard to make.

Keep your briefs brief. Different districts have different page limits. Whatever these limits may be, one thing judges aren't crazy about is too much reading — particularly of briefs that exceed the page limit. A judge who commanded a great deal of respect in our district was Hubert Will; he used to tell lawyers asking permission to file over-length briefs to go ahead and do so. But, he added, he doubted he would

stay interested in the subject after fifteen pages.

You must be able to make your point quickly and effectively. Judges have too many cases competing for their attention.

I find that one of the hardest things to do is to boil a subject down to its essentials. But we must try. Eliminate repetition. Eliminate attacks on the other side. Eliminate every word you don't need. Don't use noise words like "specifically" and "moreover." And don't start every sentence with "It." The Patent Office might be used to seeing so many "its," but that's not good writing. Eliminate footnotes; you aren't writing for a law review. Don't cite a bunch of cases where one will do. Use short sentences. Organize each paragraph around a single thought. In other words, get rid of all of your law review habits.

Avoid the lingo common to your practice area. Judges have to deal with age and sex discrimination, securities cases, drug cases, mail fraud and tax cases, patent cases and many others. In addition, they must handle cases based on diversity jurisdiction, which causes them to address issues of state law. So, keep it simple. For instance, in patent cases, maybe it's better idea to say "new" instead of "not anticipated," or "old" instead of "anticipated."

Don't send the rookie lawyer who knows nothing about the case to the status conference. I've seen it time after time, but I've always thought it was insulting to a court when a judge is holding a status conference on a case and the lawyers who show up don't know anything about it. I realize there's a temptation to send a junior lawyer to court. It's cheaper. In truth, the partner doesn't want to go. But this is a mistake. Judges want to hear from the people who are making decisions about the case, and from someone who knows something about the facts of the case. Show some respect.

There is another advantage to going yourself. You get a chance to observe how the judge handles other matters. You see what a court does — and does not — like.

Follow the directions. Our district, like most, has a local rule governing preparation of the pretrial order. One day, I was

sitting in court waiting for my case to be called. Two lawyers on another case stood up and told the judge they had agreed between themselves to defer submitting items that were required by our local rule to be included in the pretrial order. The judge, who had set a trial date, was relying on the submission in accordance with the pretrial order, so the lack of some parts of the order left him in the dark.

Our Local Rule 16.1 adopts a pretrial procedure. Paragraph 6(d) of the Standing Order Establishing Pretrial Procedure says that all parts of the order have to be submitted with the order, and that no part of it may be deferred without having the court's permission to do so. These two fellows had taken it upon themselves to defer parts of the submission and tell the court after the fact — and in violation of the local rule. Their actions were presumptuous, and not terribly respectful of the court. The judge was justifiably irked.

Another example of this is the lawyers who agree that they can take discovery after the close of fact discovery simply because they agree to do so. Never mind that a judge has issued an order setting a date for the close of discovery.

Follow the judge's directions, too. I used to make sure, on my first trip to a particular court in our district, that I looked at the bulletin board outside the courtroom. That was where our judges posted notices and memos about their procedures and requirements. I was always amazed at the ignorance some lawyers displayed over how a particular court operated. Now, of course, it is even easier: you can find most, if not all, of this stuff on a web site, and download it. Judges are like everyone else; they like to know that you have read what they wrote.

Attack your opponent's logic and positions, not your opponent. Attacking your opponent sends a signal and puts a judge in an uncomfortable spot. The signal that the judge (or his or her clerk) takes from your brief is that your opponent's intent matters. From there it is only a short step to concluding that something about intent has to be proved before you are entitled to the relief you seek. A personal attack puts a judge in an uncomfortable position, too.

Don't ask for extensions of discovery. In these days of Biden reports and congested calendars, I suspect judges are dismayed to hear the excuses I have heard as justifications for extensions of discovery.



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Two lawyers stand at the podium and tell the judge they've been busy with other “stuff,” or that they have been working on settling the case – blah, blah, blah. The excuses are vague twaddle. If you must ask, have the sense to give details and reasons, and to limit the extension to specific purposes.

Keep your pleadings, defenses and claims simple. Complicated pleadings are hard to read. We have a case where the defendant has counterclaims that include about one hundred and eighty paragraphs. If a judge cannot grasp the basics of your case without feeling like he or she has read *War and Peace* or *Ulysses*, then you have overdone it.

Don't repeat. Judges would like lawyers to assume that they are not idiots.

Don't move for reconsideration unless your case truly meets the requirements. You will not win every motion, of course. Don't make the mistake of moving for reconsideration just because you think the court was wrong. By doing this, you are telling the court it flunked the first time around; this is like telling the court that its mistaken opinion was a “mere

first draft, subject to revision and reconsideration at a litigant's pleasure.” *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988). You might even be right, but you will get nowhere with this insulting approach.

Don't overprove your case. Prosecutors (I was one) are criticized for over-proving their cases. It is an easy trap to fall into when you must prove someone's guilt beyond a reasonable doubt. But it leads to too much evidence, and too long a trial.

Judges want to watch as few amateur theatricals as possible, so pare your evidence down. In one of our cases, which was set for trial in the Eastern District of Virginia (the “rocket docket”), the defendant designated six thousand six hundred trial exhibits. I walked by the boxes in our hallway, where our copies were temporarily stored. I thought I was in a warehouse, not a law office. There is no way any human being can contemplate such a volume of evidence, and no way a judge can be expected to rule on the admissibility of such a volume. I can imagine the reaction

of the judge's staff: “Help! This is the ‘case from Hell.’”

Keep control over the deposition testimony you designate. There's a tendency to think all of it means something because you and your client took it. But no judge (and no jury) wants to be stultified by reading all of this stuff. Be selective, even if it hurts.

Try to agree on some jury instructions. Agreeing on jury instructions takes a load off the court. One way to do this is to use pattern instructions wherever possible. For patent cases, consider using the AIPLA pattern instructions. Even if your opponent disagrees, a judge will be inclined to use such instructions in order to minimize the risk of reversal. There are many pattern instructions for other kinds of cases. Use them.

Judges, like lawyers, are people. They like and deserve to be treated properly by the lawyers who appear before them. You can't always agree with a judge. But you can do things that reduce the burden on a court, which will benefit the court and, in the long run, you. **IPT**