

The “Court” in “Bankruptcy Court”:
Trial Tips from the Bench and
Experienced Bankruptcy Litigation Counsel

November 1, 2018
6:00 p.m. to 7:30 p.m.

Panelists:

The Honorable Thomas J. Catliota
United States Bankruptcy Court for the District of Maryland

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- I. At the beginning...
 - A. Determine if the relief you are seeking should be requested by motion (contested matter) or complaint (adversary proceeding). Examples where lawyers get it wrong: turnover, injunctive relief, contempt.
 - B. The intersection of telling a story and your theory of the case. Determine the elements you need to prove, and make sure you touch on each with supporting grounds.
 - C. Consider whether to use declarations or affidavits to support your pleading.
 - D. Draft pleadings from the back: Start with the order. The order should not be an afterthought, it is quite literally the point of the filing. Next, the service list. Once you have thought about what it is you want and who is a party, you will often draft a better pleading because it will be focused on the two things that really matter - the relief requested and notice. Judges often get a proposed order that requests relief not addressed by or requested in the motion itself.
 - E. Emergency motions: Approach these with caution. Will the relief requested and the basis for emergency withstand scrutiny? You are turning the spotlight on your motion when you make an emergency request for relief, so be sure it is justified. If it is a true emergency, do not wait for the court to contact you; you should be contacting chambers immediately. If it is not a true emergency, or if you can't establish that it is, don't seek expedited relief. If the emergency was created by you or your client, think twice before filing.
 - F. Proofread everything carefully. Then proofread it again.
 - G. Tips about drafting memoranda: Do string cites help? When do out of Circuit cites help? What is counsel's duty to direct the Court to local jurisdiction precedent that is against that counsel's client's interests?.
 - H. Before filing, make certain that the pleading meets the requirements of all relevant service rules.
 - I. Before filing, check the Court's website for your judge's own procedural rules. They may be highly relevant and significant to your case.
 - J. What should counsel do if they find important case authority after the briefing is complete but before the hearing? Just show up with citations?
 - K. Review the Local Rules and the Administrative Orders.
- II. Before you get to Court...
 - A. Is there a discovery dispute that requires the Court's attention to resolve? How effective is a motion that does not contain the required certification of good faith attempt to resolve?
 - B. Have you considered the evolving law of proportionality in discovery? The importance of having a definitive theory of the case to discovery disputes.

- C. If this is to be an evidentiary proceeding, ask the Court to set it specially, particularly if it's a contested matter. If it's a contested matter, consider asking the court to set a scheduling conference and enter a scheduling order.
 - D. Should counsel ever call chambers in order to discuss scheduling issues? What other issues warrant a call to chambers? When should counsel avoid calling chambers? Who in chambers should counsel speak with? How about an email to chambers copying all counsel?
 - E. Considered Stipulations? You should.
 - F. Exhibit Binders: Get them to court at the required time with the right number of copies. Organize them in a way that follows the flow of your case if possible. Make sure the copies of the documents are complete. Review the binders before they are sent to or presented to the Court. Many times the document behind the tab does not match what is described on the exhibit list/index. The binders are often very cumbersome, as counsel tries to include too many exhibits in one binder. They fall apart opening them and finding particular exhibit is often awkward and it interrupts the flow of a trial. Be sure to bring a copy for the judge's law clerk in the appropriate case.
 - G. Plan your witness examinations. Will you be showing them documents?
 1. Have you made copies for counsel and the Court?
 2. Counsel cannot randomly use documents with witnesses, unless the document is first admitted into evidence or is shown to the witness in accord with FRE Rule 612.
 3. How are you getting your expert reports admitted? Do you need to share them with the other side?
 4. Is there a procedural difference for expert reports in adversary proceedings versus contested matters?
 - H. Have you planned how to get your exhibits admitted? Documents attached to pleadings are not exhibits for purposes of trial. Use the requirement to prepare the exhibit list and binders as an opportunity to think through what your evidence will be, who the likely witnesses are, and (hopefully) whether the exhibits will be admissible.
 - I. If non-local counsel is pro hac'ed, is local counsel required to attend?
 - J. The merits of mediation. When should it be sought?
 - K. Be aware of deadlines for objecting to exhibits and witnesses in a scheduling order. Cross designations of depositions. The rule of completeness.
- III. In Court...
- A. When you are ready to begin:

1. Introduce yourself and your client when you have the judge's attention!
 2. Suggest to the judge how you intend to proceed and ask if it is okay to proceed in that manner.
 3. In an evidentiary hearing, make an opening statement that tells the judge what you intend to prove, and then use evidence to prove every element of what you told the judge you would prove. Do not make your closing argument in your opening statement.
- B. Making the Record.
1. The opportunity for cross examination is a requirement for a proffer.
 2. There is value in knowing and understanding the Rules of Evidence.
 3. When can you show a witness a document that is not in evidence?
 4. When can you get seemingly hearsay documents in evidence (i.e. government data websites, good standing certificates, tax assessments, *de bene esse* testimony)
 5. Are printouts from websites admissible? When?
 6. Know how to use discovery responses in the courtroom.
 7. What should counsel do when the court sustains an objection based on lack of foundation. How much foundation is enough to make evidence admissible?
 8. When should counsel object to a question. Should he or she give a basis when objecting or wait for the Court to ask?
 9. Is there such a thing as too many objections? Are there tips to objecting less to a line of questioning? (preserve the objection to the entire line)
 10. Tips about presenting valuation testimony.
 11. Leading questions. When to object and when not to object.
 12. Relevancy objections. How valuable in a bench trial? The importance of having a definitive theory of your case to relevancy objections.
 13. Should you always cross-examine a witness?
 14. How to use a deposition to impeach a witness.
 15. When should you make a motion at the end of the plaintiff's/movant's case?
 16. Don't forget the rule on witnesses. Who is exempt from the rule?

C. Closing.

1. Use key exhibits. Cite facts/testimony/exhibits for all disputed elements of your claim.
2. When should you ask to submit proposed findings of fact and conclusions of law? How about post-trial briefs on unresolved legal issues?
3. How to deal with holes in your case. Or bad law. The art vs. science of advocacy.

D. Miscellaneous Tips:

1. What other actions of counsel in pleadings and the courtroom does the Court find to be counter-productive?
 - (a) Interrupting a judge or an attorney.
 - (b) Not addressing a question asked by a judge.
 - (c) Objecting during closing?
 - (d) Addressing opposing counsel and not the Court?
 - (e) Others?