Rule cites are not to the Local Rules of the Bankruptcy Court for the Middle District of Florida

# Some Friendly, Random Advice On Federal Court Advocacy

The Honorable Paul C. Huck, United States District Judge

## I. General Advocacy

- Judges do not like surprises! Anticipate potential problems, issues or changes in circumstances, discuss them beforehand with opposing counsel in a good-faith attempt to resolve them, and if unable to do so, bring the matter to the court's attention as soon as reasonably practical. Give the judge sufficient time to carefully consider and resolve the matter. For example, do not wait until the hearing begins or the jury is filing into the courtroom to disclose that you have a new issue, a scheduling problem or an evidentiary issue that needs resolution before the proceeding can go forward.

- Learn about your judges, including her background, how she runs her courtroom. If possible, ask the judge's former law clerk or someone who has appeared before the judge about the judge's approach to your particular kind of motion and oral argument. Of course, the judge's prior written opinions will give you insight into the judge's approach and thinking.

- Keep in mind that your trial (or often a substantive motion) is simply the retelling of a story—where there are two competing versions. Your job is to help your "audience" (1) *understand* your story; (2) *believe* your story; and (3) *remember* your story.

- As an advocate, your job is to help the jury or judge understand, accept and remember your client's version of the contested "story." If it helps, do it; if it doesn't, don't. It's as simple as that.

- In helping the judge or jury understand, accept and remember your version of the story, keep in mind what I call the "3 S's and 1 C"—substance (including an appropriate and compelling legal theory and theme), structure (organization, signpost/headlines, etc), style, and most important, credibility.

- As with any effective advocacy, advise the judge right up front of the specific issues being raised, the general basis for granting the motion and the relief you seek. (Or, if opposing the motion, why it should not be granted.) That way the judge can put the statement of facts into proper perspective. It is frustrating to read through several pages or listen to a recitation of facts and background information without knowing why they are significant.

- Lead with your best point and argument. Don't waste your opportunity to make a compelling first impression.

- Simplify. The judge (or jury) doesn't know nearly as much about the complex technical and legal issues as you—you've been studying them for months. Your task is to help the decision-maker easily understand the issues, your argument and what is the right decision. Simplifying the case, reducing it to understandable, commonly accepted concepts, and language, is essential to effective advocacy. Use analogies (to which the decision-maker will relate), visual

aides and summaries.

- Visual aids can be effective in virtually every aspect of advocacy. That's why the old adage, "a picture is worth a thousand words," is an adage. And, if you use technology make sure it works in the courtroom!

- Be brief and concise. As Franz Kafka critically observed, "A lawyer is a person who writes a 10,000 word document and calls it a brief." Take the time to edit and re-edit your submission. Audiences don't complain about a speech being too short just as judges don't complain about a memorandum or argument being too brief, concise, and to the point. As Cisero so concisely observed, "brevity is the eloquence of persuasion."

- Do not raise every possible (though weak) argument imaginable. Otherwise, your strong arguments will be lost or diminished by a "throw everything on the wall and hope something sticks" approach. The same is true for causes of action and affirmative defenses. Be judicious when asserting them.

- Concede points that you cannot win. Those concessions protect your credibility and make your arguments more persuasive. Also, be prepared to point out why the conceded point is either irrelevant or not dispositive of the issue.

- Cooperating, compromising, and stipulating, which do not actually prejudice your client's rights, are not signs of weakness, rather of strength.

- Don't ignore facts that aren't in your favor. Elicit, acknowledge and distinguish them. This way you stay in control of the facts and how they are cast. And, again, this strengthens your credibility with the judge (or jury) because you are being candid by telling the whole story, not just part of it.

- Similarly, don't misrepresent or exaggerate facts, and don't overstate or spin cited cases. And if you speculate or assume in an answer to a question, always properly qualify your statement by explaining that you're speculating or assuming. Remember, in the kingdom of advocacy, credibility is king.

- Don't waste time or your reputation on personal attacks. And make sure your replies and responses are actually responsive to the relevant issues, rather than just attacking the other side.

- My law clerks, some time ago and unknown to me, created a "Worst Filing of the Month" contest. Typically, the filings that won that distinction were the ones that were the most hostile towards the opposing party. Those filings were too full of dramatic, exaggerated criticisms of the opponent's positions and actions to calmly and persuasively address the relevant legal issues.

- Adequately support your discussion of the important facts with specific, accurate record citations (including page and line numbers).

- Keep in mind that judges are persuaded to reasoned, logical analysis based on the law and facts, not appeals to their emotions.

- Do not pepper your arguments with emotionally charged superfluous adjectives. They are generally distractions and seldom add to the persuasiveness of your argument.

- Pay close attention to the trier of fact, jury or judge. Don't get so focused on what you are doing that you miss telltale signals from the trier of fact.

- Do not use acronyms. A confusing alphabet soup hinders the judge (and the jury) in trying to follow your argument. (I was reluctant to admit that I wasn't smart enough to comprehend a litany of acronyms until I recently learned that acronyms are a pet peeve of Justice Scalia).

- Use proper names, not pronouns. Pronouns are often unclear and require the judge to stop what he or she is reading (or interrupt your argument) to determine to whom you are referring. (The same goes for your statements to jurors).

- When you or your opponents examine a witness, listen carefully to the testimony. In a hearing or trial, as in life, things don't always go as planned. (Actually, they never do in trial.) Be ready to deviate from your prepared "script" of questions as circumstances dictate and use rebuttal to effectively respond to previous testimony and resolve new questions or issues that arose in the course of testimony.

- Learn to be a good listener. It is not as easy as you may think.

- Advocating your client's story should be a rewarding experience. Professionalism and civility will make it more so — and more effective.

- There is a good reason why the first rule of the Rules of Professional Responsibility is "Competence," and the first rule of competence: know what you don't know; the second: don't do what you don't know; the third: if you do what you don't know, get to know a competent Florida Bar grievance-defense lawyer!

- Always keep in mind that while you have worked on your case for months and know it intimately, your judge or jury has not and does not.

- Remember, that litigation is actually (or should be) rather simple: common sense and common courtesy.

## II. <u>Motions for Summary Judgment</u>

### A. <u>Timing</u>

- Do not wait until the dispositive motion deadline to file your motion. If you have a

legitimate motion, you should file it as soon as you have properly developed the supporting record and after your opponent has had a reasonable opportunity to do the same.

- Local Rule 7.1.C.2 prohibits the filing of multiple motions for summary judgment and was enacted to prohibit parties from evading page limitations or presenting the case piecemeal. However, there are times when a determinative, threshold legal issue or some other reason justifies the filing of one or more successive motion for summary judgment. If so, seek prior court approval to file multiple motions.

- File a reply memorandum to respond to your opponent's arguments, including clarifying, modifying, or conceding your points as appropriate. In the rare case that you do not believe a reply is necessary, advise the court after the response is filed that you do not intend to file a reply. Otherwise, the court will assume a reply is forthcoming and will not attend to the motion until the reply deadline passes. If you do not reply, the Court may also assume that you are conceding points made in the responsive memorandum.

B. Writing

- Do not spend much time and space discussing the summary judgment legal standard unless the motion raises a specific, unusual point. Judges are well aware of the general legal standard. (The same goes for motions to dismiss.)

- Your writing style should be clear, straightforward, and concise. You are trying to persuade the judge of the validity of your legal argument, not impress the judge with your expansive vocabulary and Baroque writing style. It is not a contest to win a Pulitzer Prize.

- Consider using a "theme" in legal memoranda or oral argument, similar to a trial theme, if one is appropriate and helpful in advocating your position. (Of course, a trial theme is almost always appropriate and effective in a jury trial.) However, don't use a theme simply to appear clever. Not using a theme is preferable to attempting to use a contrived one.

- Organize your memoranda in a logical and easy to follow manner, using headings and sub-headings as appropriate and as "road signs" to indicate where you are headed.

- Tell the judge up front exactly where you are going and why. *See supra* General Advocacy Tips.

- Do not "adopt by reference" another memorandum which you may have previously submitted, requiring the judge to interrupt his review of your motion in order to locate that other document. In other words, the motion and supporting documents should be self-contained.

- Support all references to material, disputed facts with specific citations to the record.

- In responding to a motion for summary judgment, set forth separately, clearly and respectfully (with citation to the record, including pages and lines referenced) the facts which you dispute.

- It is not necessary to string cite an endless number of citations when a controlling decision will do just fine.

- Use footnotes selectively and judiciously. If the point is important, include it in the body of the memorandum.

- In those rare cases where memoranda exceeding the local rules limitation are appropriate, seek the judge's prior approval.

C. The Record

- If you are submitting deposition transcripts, determine if the judge prefers the "mini-script" version. Some judges also prefer a separate set of supporting documents in addition to those filed with the clerk's office. You can inquire with chambers as to the judge's preference.

- Don't clutter up the record with unnecessary documents. Keep it lean and clean.

- If you need only a few relevant pages of a lengthy deposition to make your point, include a reasonable amount of context to preclude an argument that the evidence you submitted is misleading or incomplete, then include only those pages in the supporting record. You may file the complete transcript separately.

## III. **Oral Advocacy**

- Be prepared, including anticipating likely questions from the judge and being familiar with your opponent's likely arguments and all cases that were cited in the legal memoranda.

- Be respectful of the judge and your opponents, including being on time.

- Be flexible and ready to depart from what you may have intended to discuss in the hearing. It is likely that the judge has already identified specific issues or questions she wants addressed. Do not expect to simply regurgitate your legal memorandum.

- Listen carefully to what the judge is asking. Answer questions directly. Don't try to duck questions. It is seldom a good response to say that you'll get to that point later.

- Listen carefully to what your opponent is saying so that you can properly respond. Do not get so caught up with what you are going to do next that you miss an important point made by your opponent.

- Don't interrupt. In other words, don't let the beginning of your sentence interrupt the middle of the judge's or an opponent's sentence.

- Again, be prepared. This seems obvious, but if the judge has scheduled a hearing to discuss a certain statute and its effect on your case, read the statute and research it. Also, if coming to

a hearing with case law not previously cited (which is generally not a good idea), you should advise the judge and opposing counsel beforehand, and bring copies of those cases for the judge and opposing counsel.

## IV. Special Concerns Regarding Virtual Hearings

- Test your internet connection, microphone, and speakers in advance so as not to delay the hearing.
- Give the judge and opposing counsel ample time to finish their comments before you start speaking. In other words, don't interrupt.
- Dress professionally.

## V. Additional Notes

- Call chambers to let the judge know as soon as you have resolved any issue currently pending. Even though you may have come to a resolution, unless the judge is made aware of that, she is still working on the issue. Similarly, if you have settled the case, let the judge know as soon as possible.
- Be on time. No, be there early so you can get organized and relax.
- Be judicious in filing motions as emergency motions. (Remember the boy who cried "wolf.") A former chief judge advised me when I took the bench that there were only two legitimate emergencies—"someone is dying or the ship is sailing." And never file an emergency motion at 4:45 p.m. on Friday afternoon.
- When pointing out to the judge the error of his ways, do not use the phrase "with all due respect." This overused phrase is listed by researchers at Oxford University as the fifth most irritating phrase in the English language.
- Read the Local Rules!
- Did I mention, judges do not like surprises?