STATE BAR OF WISCONSIN

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Wisconsin Lawyer

THE OFFICIAL PUBLICATION OF THE STATE BAR OF WISCONSIN

OCTOBER 2011 VOLUME 84 NUMBER 10

WISCONSIN Lawyer YOUR PRACTICE. OUR PURPOSE.

Practice Tips: How to Impress or Annoy a Judge

A federal judge tells lawyers what they should know before going to the courthouse. Lawyers can apply these helpful tips to (almost) any jurisdiction.

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Here are some suggestions that will help you impress (and avoid annoying) the judge in the federal courts or in any court.

Know the Law

Know the substantive law that will govern your claim. Before you draft your complaint, take a look at the statutory elements, the jury instructions, or the most recent case that defines the elements of the claim you intend to assert and the damages or other relief available if you are successful. As you know, it's a mine field out there. Law governing common law and constitutional claims is constantly changing, and new statutory claims are being created and altered every year. Don't wait until you have to respond to a motion for summary judgment, file a proposed jury instruction, or even worse, after trial has commenced, to find out that you have no evidence for an essential element of your claim. Recognize where the weaknesses of your claim lie and focus on them at the outset.

Know the Rules

Know the rules governing jurisdiction and procedure. This is especially important in federal court, which has limited jurisdiction. Be sure you belong in federal court before you commence or remove a case there.[1] But you should be familiar not only with the applicable jurisdictional rules and the rules of civil (or criminal) procedure, but also the local rules of the court in which you intend to practice. Most federal district courts have detailed local rules, usually available on the court's website, that set forth additional procedures with which parties are expected to comply. In most districts, for example, the local rules set out a detailed procedure parties must follow on summary judgment motions. Proposed findings of fact, and responses thereto, are intended to isolate and clarify those facts that are not in dispute. Failing to comply can result in certain facts being deemed true, regardless of whether a party intended to stipulate to them.

The form of motions, the length of briefs, and the time to respond are also governed by the local rules. Some judges also have specific rules or preferred procedures, not contained in the local rules, that they want attorneys to follow, such as whether a hard copy of an electronically filed pleading or brief should be provided.

Refine the Complaint

If possible, don't make the complaint a law school exam. The "shotgun" or "everything but the kitchen sink" approach in which a simple contract claim is transformed into six separate causes of action adds more work for everyone and increases the likelihood of error. If the existence of a contract cannot be reasonably disputed, leave out the equitable claims.[2] Similarly, you should consider the economic loss doctrine before you add a tort claim to your contract claim.[3] "Kitchen sink" complaints generate early motion practice, which costs you or your client money and delays the case. Add-on claims often make your case look weaker, not stronger.

Understand the Purpose of the Scheduling Conference

Don't tell the judge at the scheduling conference that you know nothing about your case, especially if you're the plaintiff. The purpose of the scheduling conference is to put the case on the path to a "just, speedy and inexpensive determination."[4] To resolve the case, the defendant must have some idea what the plaintiff's claim is and what he or she believes it is worth. If there is a threshold issue (for

example, failure to state a claim, statute of limitation, failure to exhaust, statute of frauds, and so on), be prepared to discuss it. Don't assume that all discovery must occur at great expense to your clients before the case can be resolved. If there is not such an issue, be prepared to discuss what discovery will be needed, how much time will be needed, and what it is likely to cost.

Do Not Abuse Discovery

Don't turn discovery into a war of attrition or form of extortion. As Magistrate Judge Stephen Crocker (and Mick Jagger, too) has observed, "You can't always get what you want; you get what you need." This is especially pertinent with electronically stored information (ESI). The advent of ESI may have made every document, from first to final draft, ultimately accessible, but it did not broaden the rules governing the scope of discovery. To be discoverable, the information sought must be a "non-privileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter," or "reasonably calculated to lead to the discovery of admissible evidence."[5] Further, "a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost," absent a showing of good cause.[6]

Rules allowing access to ESI are not intended to authorize "fishing expeditions." Keep in mind what the case is worth. Judges are not impressed if it appears your discovery requests are motivated more by the threat of forcing the other side to expend time and money in responding than by a good faith desire for legitimate information.

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Do Not Abuse Summary Judgment Motions

A motion for summary judgment is a useful and valuable tool; don't abuse it. Bring summary judgment motions only when you reasonably believe such a disposition is appropriate, and respond to such motions honestly and in good faith. In other words, don't file a motion for summary judgment when material facts are clearly in dispute, and in responding to such a motion, don't create factual disputes where none exist. Recognize the different ways in which essentially the same procedure functions in state and federal court.[7]

Focus the Final Pretrial on the Trial

Complete settlement efforts before the final pretrial conference, and come to the pretrial prepared for trial. For many judges, the pretrial is not the time to have the judge settle your case for you. Others take an active role and make settlement a primary focus of the pretrial conference. Judges, of course, differ in their views as to how much, if any, pressure should be placed on the parties to settle a case. That is not to say that most judges, even those who don't view settlement as a primary focus of the conference, won't ask if there's any hope of settlement and try to help to reach a settlement if the parties request it. But unless there's been significant motion practice, the judge probably knows little about the value of your case. Given the paucity of cases that go to trial today, must judges will also lack the experience of seeing a sizable number of similar cases so as to provide a reasonable estimate of how a jury might see your case.

Most cases have gone through mediation by the time of the pretrial, and so the primary focus at the final pretrial will often be on the trial. The parties should by this time have submitted jury instructions (or lists of jury instruction numbers) that they anticipate requesting, together with any authority supporting nonpattern instructions. The parties also should be prepared to address motions in limine, the anticipated length of trial, and any other potential matters that may require the court's attention, for example, *Daubert* issues (if not previously addressed), witnesses out of order, and video presentations.

Conduct at Trial

Be prepared and on time. Make sure your witnesses are ready and waiting to go when you are putting in your case. Most judges hate to keep the jurors waiting in the jury room. Usually, they are the only ones required to be there throughout the trial who do not have even the prospect of getting paid anything other than a nominal amount – and may be from a long distance away. If an issue surfaces just before or during trial, bring it to the court's attention so that it can be dealt with either before or after the jurors are present or on a break.

Voir dire. If you're in federal court, the judge will probably conduct voir dire, and it will be far more limited than you may want.

Opening statement. Don't ramble on endlessly or argue in your opening statement. Make it meaningful so it will assist the jury in understanding your case, and don't make promises you can't keep.

Direct examination. Let your witnesses, clients, and experts tell their own stories. Don't lead them excessively or testify for them. Otherwise you will attract objections from opposing counsel or, worse, present a poor case. The jury wants to hear from the witnesses, not the attorneys. This means you need to prepare your witnesses and form your questions so as to elicit the information they have in an order and manner that will be intelligible to the jury. But preface any instruction to a witness with the advice to tell the truth. It's not only the right thing to do, but it impresses others when the witness repeats it in response to a question about what you told him. At the same time, don't tie yourself to a script. Listen to the witness's answer to your question, and ask a follow-up question if necessary to elicit the information you want to present. On the other hand, keep your witnesses focused. Remind them they are to answer the question asked, not the question they want to answer.

Cross-examination. Know where you want to go before you start. This isn't discovery. Don't open doors to areas that your opponent is just waiting to barge into. When you have the answer you want the jury to hear from the witness in a prior statement or deposition, know precisely where it is so that if the witness gives you a different answer in his or her testimony, you can immediately confront the witness without fumbling around for several minutes. Don't nitpick; if the witness said "about 10 minutes" in his or deposition and testifies that it was "a little more than 10 minutes," that will generally not be considered material.

Objections. Don't object simply because you can. If opposing counsel is leading his client, perhaps you want to let him continue if it appears less effective than if the witness were testifying herself. Also, a certain amount of leading will be permitted to establish foundation or background. Know the rules of evidence, especially hearsay and the exceptions to the general rule. Try to anticipate what might trigger an objection and be prepared to address it either with a rule or case citation. Of course, many attorneys are reluctant to object in front of a jury, at least at first. By the second or third day of trial, however, many jurors are happy to see someone try to hurry things along if an attorney gets bogged down and keeps going over the same thing.

Exhibits. Mark exhibits, if possible, ahead of time, and refer to them by number during trial. Don't forget, you're making a record. Seek admission of an exhibit before it is displayed to the jury. Copies of key documents may be shown electronically or the old-fashioned way by providing separate copies to each member of the jury. Of course, opposing counsel should already have copies of any exhibits intended for use at trial.

Avoid mistrials. When considering a line of questioning or argument that might give rise to a motion for a mistrial (for example, other-act evidence, criminal convictions, evidence from a prior proceeding), it's always safe to give counsel a "heads up" and ask the court for a ruling in limine when there's a dispute.

Jury instruction and verdict conference. In many cases, the form of the verdict or the instructions will not be a matter of dispute. If they do make a difference and are contested, make sure you are prepared to make your argument and your record at the jury instruction and verdict conference. Presumably, you've already submitted your requested verdict and instructions before the final pretrial. But things can change.

Closing argument. Discuss the evidence, not the Magna Carta. How does the evidence that the jury has now heard fit together to prove your case? Don't personally vouch for witnesses or cite evidence not in the record. Do not personalize your attack on your opponent's case or defense.

Be Courteous to Others

Treat opposing counsel and the court's staff with courtesy and respect. Don't take out your problems on the court staff. Not only is it wrong, but it's not smart. If you think my clerk did something wrong, tell me about it. Don't get mad at them because your request for an adjournment was denied. There's enough stress in the job you're doing without adding to it by losing your temper or having to put up with your opponent losing his. That doesn't mean you don't file motions to compel discovery or seek sanctions, but file such motions only when warranted and leave out the *ad hominem* attacks.

Preserve Your Reputation

Act always with honesty and integrity. Your reputation is more quickly lost than gained and is more valuable than any one case.

Endnotes

[1] *See Belleville Catering Co. v. Champaign Marketplace LLC*, 350 F.3d 691, 692 (7th Cir. 2003) (holding that where parties proceeded with discovery and dispositive motions even though parties were

Webcasts of May 2011 Litigation, Dispute Resolution and Appellate Practice Institute programs available

Many of the excellent programs presented at the May 2011 State Bar of Wisconsin PINNACLE™ Litigation, Dispute Resolution and Appellate Practice Institute are being offered as encore webcasts beginning Oct. 25 and continuing through December. As a bonus, people who attended the institute will be automatically registered to view each of the webcasts at no additional charge. People who did not attend will be able to register for the webcasts.

More information on the May 2011 Institute webcasts can be found on the Seminars calendar at www.marketplace.wisbar.org.

Watch for information on the 2012 Litigation, Dispute Resolution, and Appellate Practice Institute to be held April 19-20, 2012, at the Wilderness Resort in Wisconsin Dells.

incompletely diverse, proper course was to vacate, remand for dismissal, and instruct counsel to prosecute action to conclusion in state court without charging additional fees).

[2] *See Decatur Ventures LLC v. Stapleton Ventures Inc.*, 373 F. Supp. 2d 829, 849 (S.D. Ind. 2005) ("Plaintiffs' unjust enrichment claim becomes superfluous when neither side disputes the existence of a valid contract, even if it is being alleged in the alternative …. Plaintiffs went so far as to attach copies of the express contracts between Decatur and NovaStar to their complaint, and NovaStar does not dispute the existence or validity of the contracts. Accordingly, Plaintiffs' unjust enrichment claim is inappropriate.").

[3] *See Below v. Norton*, 2008 WI 77, ¶ 24, 310 Wis. 2d 713, 751 N.W.2d 351 (noting that the economic loss doctrine "is a judicially created doctrine that seeks to preserve the distinction between contract and tort," and serves to preserve the parties' opportunity to allocate risk by contract).

[4] Fed. R. Civ. P. 1.

[5] Fed. R. Civ. P. 26(b)(1).

[6] Fed. R. Civ. P. 26(b)(2)(B).

[7] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Goodman v. National Sec. Agency Inc.*, 621 F.3d 651, 654 (7th Cir. 2010) ("We often call summary judgment, the 'put up or shut up' moment in litigation, *see, e.g., Everroad v. Scott Truck Sys. Inc.*, 604 F.3d 471, 476 (7th Cir. 2010); *Eberts v. Goderstad*, 569 F.3d 757, 767 (7th Cir. 2009), by which we mean that the non-moving party is required to marshal and present the court with the evidence she contends will prove her case.").