Opening Statement

FOURTEEN TIPS TO MAKE YOU A BETTER LITIGATOR

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Thirty-plus years as a litigator have taught me some ways to bring out my best as a litigator in writing motions, in the courtroom, and in the tumble of daily practice. I suspect these tips may work for you too. Pick a couple, give them a try, and let me know what you think. Learning from the experience of other litigators is a huge benefit of your Section membership. But here's the deal. In exchange for my tips, I ask you to share some practice tips of your own with your 60,000 Section colleagues. That is how we all become better lawyers and judges. My email address is dbivens@swlaw.com. When you have considered my tip list, give me your reaction and send me your suggestions. I will plan to share them in a future column. In the meantime, I offer the following tips based on my personal experience.

Writing Tips

1. News flash. Not all trial judges, even the best, have the time or resources to read every page the parties file before every hearing. Life intervenes. The judge may only read your first paragraph. The judge may flip to the last page hoping your conclusion will spell out what you want the court to do. Perhaps time will allow the judge to skim the headings of your motion. Write with these realities in mind.

2. Do not waste your first paragraph unveiling the mysteries of Rule 56. The judge knows Rule 56. Her eyes will move elsewhere. The judge wants to know about your motion. Your first paragraph, standing alone, should answer the questions "who?", "what?", "when?", "where?" and "why?". Your first paragraph should also tell the judge exactly what outcome you seek with your motion. Over the years I have come to write my first paragraphs last, because I find that I write shorter, more pointed openings after I understand what the rest of my motion looks like.

3. Place signposts in your motion that tell the judge where you are going. For example, the heading "Factual Summary" is content free. What information does this offer a time-pressed judge? Might a heading such as "The Facts That Compel Estoppel" be more effective? Or "The Plaintiff's Own Emails Contradict Her Argument"? Moreover, headings should be short. I suspect that no one reads a heading over two lines long. I know I don't.

4. How many times have you read (or written) a generic conclusion, "For all the reasons stated above, the court should grant this motion." What thin legal gruel. A judge hungry for the purpose of your motion will starve on this stuff. Consider instead a conclusion that distills your motion and requests a specific remedy from the court. Compare, for example, "In sum, paragraph 6 of the contract and the defendant's own emails eliminate her defense. The evidence compels summary judgment for the plaintiff."

5. A bare citation to a case will not likely help you, unless the case is *Brown v. Board of Education*. When you cite a case, always give the judge a reason to trust your judgment with a parenthetical quote or description that confirms your citation's accuracy and relevance. For example, *Black v. Smith* (holding defendant estopped from raising argument that "ran counter to her own email representations"). Want to guarantee the judge skips to your next paragraph or page? A string cite without parenthetical descriptions should do the trick.

6. Spend a lot of time on the fact section of your motion. Then come back again to re-edit the facts after you have finished your later legal arguments. By this I do not mean write a lengthy fact description. Just the opposite, pare the facts ruthlessly. Unless a fact triggers a rational or emotional reaction, toss it.

Do not so much recite the facts as tell an accurate story with a goal. Your goal is not to tell the judge what to think. Your goal is for the facts, standing alone, to trigger an unspoken inclination, if not conclusion, in a reasonable legal mind. Do not tell the judge "the issue here is estoppel." Tell a story that allows the judge to conclude silently to herself, "that sounds like estoppel to me." You are much more likely to persuade a judge to follow her own instincts

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after reading the facts than to get the judge to adopt your reasoning for her own. That is just human nature.

7. If you can, pepper your description of the facts with words and phrases from the cases you will later cite in your legal arguments. You want to plant conceptual seeds in your description of the facts that will later blossom when the judge finds those same words and phrases echoed in your legal authorities. Of course, you must be scrupulously accurate. But an overlap of words and phrases between your facts and your legal authorities will improve your potential to persuade. Again, understatement is more powerful here than overstatement. Do not insist that a particular case you cited controls the outcome of your motion. Instead, allow the obvious overlap in words and phrases between your facts and your cited authority to lead the judge to her own silent, internal conclusion.

Courtroom Tips

8. In the courtroom, while opposing counsel questions a witness, be alert to the judge's face. Some judges will signal with their glance, intentionally or not, that this might be a very good time for you to object, or at least to be alert to the prospect that inadmissible evidence may spew from the next answer. I am not saying don't take your own notes of witness testimony. You need to do that too. But if you lift your eyes now and again from your legal pad (or iPad), you can learn important stuff by watching the judge.

9. Even in the electronic courtroom, into every trial lawyer's life comes the venerable easel and tattered pad of paper. If your lettering or drawing skills fall short of DaVinci's, try this next time you leave the podium. Have your drawing/letters/graph, whatever, drawn in advance in very light pencil, so that you are actually tracing on the easel rather than drawing free hand. You will move faster, more confidently, and your ability to draw near perfect diagrams will grab everyone's attention.

10. If you want to appear to work free of notes at the easel, without actually doing so, you can pencil on a small part of the easel (or a yellow sticky noted placed in advance on the easel) a list of the several points you want to make while standing at the easel before returning to the podium. For myself, I often scribble stage directions on the left margin of my trial notes to remind myself to "go to easel," "back to podium," "hand treatise to expert," "use this gesture for emphasis," so I can plan in advance how to hold people's attention by moving around the courtroom rather than standing glued to one place. I don't always follow my best-laid plans, but having such plans helps me do my best.

11. Always treat every member of the judge's staff with dignity and respect, and with a smile. They are not the judge, but they are closer to the judge than you may ever be. Make sure that when they talk about you among themselves, and with the judge (and they will) that they have good things to say. A corollary to this? Remember that in many courtrooms the judge's office staff can monitor what people are saying in court through a separate microphone and speaker system. Note to self: This system does not turn itself off when the judge leaves the bench for his chambers and leaves you standing with your team in the courtroom. Keep this in mind before sharing your assessment of the judge's wisdom out loud.

Tips for Your Practice

12. We all receive emails to the effect of, "Does anyone have experience with Judge Jones or with attorney Smith?" Resist the urge to enshrine your opinion for all time in a reply email susceptible to forwarding. It may come back to bite you. If you have an opinion on Judge Jones that you wish to share, pick up the phone and share it orally, especially if Judge Jones is not your favorite.

13. In working with your colleagues, praise in public and criticize in private.

14. If you want more practical tips from experienced litigators about how to be a better lawyer, explore the Section of Litigation's "Sound Advice" podcasts on our website: americanbar.org/groups/litigation. Search the keywords Sound Advice, and you will discover a complete audio library of practical advice from experienced litigators. Topics range from "Rainmaking for Young Lawyers" to "The Last 24 Hours Before Oral Argument" to "Right Sizing E- Discovery." Most podcasts last about 10 minutes. You can download Sound Advice podcasts on your mobile device and listen to them on the go. Unless you are very careful, you will learn new and useful information. Just another benefit to your membership in the Section of Litigation. ■

Postscript: Last issue's Opening Statement column, entitled "Watergate Inspires After 40 Years," yielded a number of comments from readers, including attorney Robert B. Anderson of Pierre, South Dakota, who wrote:

> I read your Opening Statement on Watergate just now. I was a college student in 1972/73 and despite Watergate—or maybe because of it—I enrolled in law school in 1974. My dad told me that most people learn "things" (such as facts and information), acquire skills (such as writing persuasively and doing research) and also learn or acquire values. He said that success in school was not truly success without the values part of the equation. He pointed to the numerous lawyers (very bright people with academic success) gone wrong in Watergate as an example. He was a farmer with a 6th grade education but more perceptive than most. An excellent article.

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