

Opening Statement

OUR MEMBERS SHARE THEIR SECRETS FOR SUCCESS

DON BIVENS

The author is a litigation partner with Snell & Wilmer LLP, Phoenix, and chair of the Section of Litigation.

Two of my recent columns in *LITIGATION*—“Five Traits of the Best Lawyers I Know” (Fall 2013) and “Fourteen Tips to Make You a Better Litigator” (Spring 2014)—invited Section members to share your own practical tips for success as a litigator. I am now awash in responses, far too many to print or to attribute individually. I have done my best to distill the collective wisdom of 60,000 members into bite-sized topics, synthesizing related ideas but retaining original word choice as much as possible.

The resulting list of secrets for success comes from litigators and judges across the country. As a result, not every suggestion may apply in your practice setting. But I hope you learn as much as I did from the insights of your Section colleagues. This list shows the Section of Litigation at our best: Sharing practical advice to advance our profession and the ends of justice. That is why the Section of Litigation remains—after 40-plus

years—the premier organization for trial lawyers in America. I am proud to serve as your Section chair.

1. The most repeated practice tip? “Keep your client informed.” Make sure your client understands what is happening in the case and approves any major activity in advance. Return calls. Send written updates. If the value of the case changes, say so. Keep your client in the decision-making loop.
2. Trial judges offer the following advice: Read the judge’s standing orders and follow them. When judges take the time to put their requirements into orders and post them on their websites, they probably do so for a reason.
3. If you still have questions after checking the judge’s website, do
4. If you are a young lawyer working on a team, do not simply do what you are told. Look for additional ways to be helpful. Show intellectual curiosity. Strive to understand the big picture of the client’s case, not simply your assigned silo. Don’t think of yourself as working for a partner. You are working for a client. This is how you grow as a professional. This is how associates become partners.
5. Think carefully before using a slip-up of opposing counsel as a sword in your case. Remember the adage “there but for the grace of God go I.” The pursuit of justice is more than a game of “gotcha.”
6. Supplement your disclosures and discovery often as new things come up, and periodically invite your opponent to do the same, in writing. Review the status of discovery well before the cut-off date. Do the discovery that needs doing, but then stop. Mindless discovery denigrates our profession and our system of justice.
7. Send litigation hold letters early in the case, both to your own client and to your opponent. Don’t inadvertently damage your client’s case, or expose your client to claims of spoliation for failure to preserve evidence. Conversely, don’t allow the opposition to argue that “no one asked” for specific evidence to be preserved. A corollary: Litigation

not hesitate to call the judge’s chambers and ask the staff about preferences or procedures. Check the docket and determine which lawyers have appeared recently, or are about to appear, in the judge’s court. Call them, even if you don’t know them. Good litigators share their experience.

hold letters eliminate conjecture about whether you met your own professional responsibilities as litigation counsel.

8. Remember that your relationships with your client and your colleagues are always on display. This includes the courtroom, the restroom, the elevator, the sidewalk outside the courthouse, and your office.
9. If it is not in the record, it didn't happen. Ask that excluded exhibits be marked and made part of the record for appeal. For excluded witnesses, make a proffer of their expected testimony on the record. Articulate on the record why jury instructions are not proper, and why your proposed instructions are better. Whenever you can preserve any of these objections in writing, do so.
10. On direct examination, craft important foundational questions in advance with precision. Read them if necessary: "Do you have an opinion to a reasonable degree of medical probability whether . . . ?" "Does this photograph reasonably and accurately depict the intersection looking north on Camelback Road as it appeared the morning of February 5?" This will keep opposing counsel in her seat, and you in control of your case.
11. Proofread. Then proofread again. Spellcheck cannot read. Into every life creeps the occasional typo. But careless proofreading makes the court wonder what else you might be careless about. Typos undercut your credibility and make you (and your firm) look sloppy.
12. Don't ask for sanctions every time you file a motion. If someone's

behavior really deserves sanctions, fine. Don't be afraid to ask. But don't dilute your standing with the court by demanding sanctions at every twist and turn in the case. It grows tiresome, and so will you.

13. Every year our society pours some of our best talent into our law schools. What a waste of talent if not unleashed to lead! Young lawyers must insist on time for bar service and community betterment, and law firms must encourage lawyers—young and non-young—to take up the mantle of leadership in our bar associations, communities, and country. When we do this effectively, we increase our professional prestige and satisfaction, and our country is better off.
14. The best lawyers know that judges will eventually discover their clients' criminal history, compromising correspondence, or other negative information. The judge also will find that critical case that mirrors your fact pattern and cuts against nearly everything you have asked the court to do. Top lawyers take control of negative information, disclose it up front, and then

explain why it is not dispositive or even damaging.

15. Success in the courtroom requires three things. Preparation. Preparation. Preparation. You should strive at the end of each trial day to feel that you came to court grossly over-prepared. That's how the best lawyers do it.

In closing, let me offer a last tip of my own. Make the most of your membership in the Section of Litigation. Our website offers a treasure of practical insights and advice from the best lawyers and judges in our profession. Visit it at www.americanbar.org/groups/litigation.html. Our live meetings and webinars offer the nation's best CLE and an unparalleled opportunity to meet peers and make friends across the country. You can register now for our Annual Meeting in Boston, August 7–9, 2014, at www.americanbar.org/groups/litigation/events_cle/2014_aba_annual.html.

Finally, do something today that confirms your status as a leader. Tell a colleague why you belong to the Section of Litigation. Pass it forward. All the best lawyers do.

If you have any comments, my email is dbivens@swlaw.com. ■