Through the Court’s Eyes: Judicial Perspectives on the Pretrial Process

Gemma N. Zanowski, University of Arizona

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Note from the Chair: A New Year for the Litigation Section
by David M. Rose

It is a privilege to prepare my first Note from the Chair for Litigation News, the newsletter of the WSBA Litigation Section. I am writing to provide an update with respect to the Section’s past and upcoming activities.

As we have done in the past, we continue to focus and comment upon pending legislation that could affect the Litigation Section and its members. To that end, we are pleased to announce that the special legislative subcommittee headed by former Section Chair Bob Siderius will continue to review proposed legislation. The subcommittee takes in and reviews, if appropriate under GR12.1, all potentially relevant proposed legislation provided by WSBA and makes a recommendation to the Executive Committee regarding whether the section should take a position with regard to the legislation. The Executive Committee then votes on the recommendation and passes the results on to the WSBA’s legislative liaison, Kathryn Leathers.

The Section will continue to produce newsletters with articles focusing on a specific litigation topic area. We have received positive responses to this practice over the past several years. This particular issue is focused on pretrial preparation. This issue includes articles regarding efficient case preparation, picking the correct battles during discovery, pretrial preparation insight from the bench, motions in limine, witness preparation, new local rules regarding electronic discovery in the Western District of Washington, and tips when introducing evidence. As we have in the past, we welcome suggestions for future topics as well as members interested in writing an article for publication in a later issue of the newsletter.

Speaking of pretrial preparation, our annual CLE was successfully completed on August 23, 2013. The CLE was well attended and we received very positive feedback from those who attended in person and online. The topics included efficient case management, motions in limine, strategic use of court rules, efficient written discovery, depositions of expert and lay witnesses, and getting the case in shape for mediation.

We are continuing our practice of community and law school outreach. We are currently preparing to hold events at the law schools at the University of Washington, Seattle University, and Gonzaga University. We present $750 scholarships to support the schools’ moot court programs during each visit.

This autumn should see a lot of activity in the Litigation Section. We will do our best to keep the Section informed of all the events and resources that the Section provides to its members.

David M. Rose is an attorney at Minnick-Hayner in Walla Walla, and 2013-14 chair of the Litigation Section. His practice focuses on employment law, and personal injury. He can be reached at david@minnichayner.com.
Through the Court’s Eyes: Judicial Perspectives on the Pretrial Process

by Gemma Zanowski

Working for the past two years as the judicial law clerk to four of the eight superior court judges in Kitsap County has without a doubt made me a better lawyer. The mentoring I have received from the judges as well as my observations of and interactions with experienced attorneys have impressed upon me numerous practical lessons. In this article I discuss what I consider to be the most valuable information on courtroom pretrial practice I have learned during my tenure.

Lay the right foundation

Knowledge of the applicable state and local court rules. It is often apparent that an attorney has not cracked a copy of the court rules—local court rules in particular—before filing a motion. While court rules vary by jurisdiction, and learning them cuts into a lawyer’s already scant time, disregard of local practices and procedures is unsound lawyering. Missing a deadline set by a local court rule can cause delay or prevent the court from considering a pretrial issue. On a multi-judge bench with rotating calendar assignments, attorneys will encounter both judges who rigidly adhere to court rules and judges who take a more flexible approach. Attorneys should assume judges are all sticklers and save themselves a heart attack.

Timely provide bench copies of your pleadings. Some judges will not consider a matter if bench copies have not been provided. Some judges will call an attorney out in court if she did not provide bench copies. And even if a judge does not neither of the above, attorneys should consider bench copies an indispensable component of motions practice. Judges read bench copies. A bench copy is the medium through which a judge educates herself on a pending matter. Judges highlight and write questions and thoughts on the copies and tab what they consider to be critical issues or irreconcilable weaknesses—issues an attorney then may have the opportunity to address in oral argument.

Bench copies should provide all the materials the attorney wishes the judge to consider for the motion under consideration. It may not be apparent in the record to which document an attorney is referring. If these documents are not included, the judge wastes time fishing around for them (best-case scenario) or misses or disregards the document altogether (worst-case scenario).

Write professional briefs

Assume all judges want to make legally sound rulings. It is an attorney’s job to fully prepare the judge to rule on the issues in her motion—if the motion was important enough to bring in the first place, it is important enough to prepare thoroughly. Ask: What information can I provide the judge to ensure she makes a sound ruling? Then provide that information in a clear and concise manner. Note that while an attorney may be an expert in a legal area, the judge may not. Give legal context when necessary. The same goes for any scheduled oral argument.

Never cite a case you did not read completely. Attorneys with busy schedules and pressure from clients, partners, and impending deadlines may be tempted to cut corners by skimming only what they consider to be the meat of the case they are citing, or by failing to read the case at all. By doing this, an attorney runs the risk of missing important details that may help his case. Or of missing an opportunity to reconcile factors that distinguish the case from his own. Or of missing the fact that the authority is contrary to, rather than supportive of, his seminal point. Judges read cases cited in briefs. Motions have been won and lost on this point.

Cite check and edit briefs. If the judge cannot find a case cited because the attorney failed to cite it correctly, the attorney is at fault.

Final Notes

In general, preparing a witness for trial testimony can be a challenging proposition, but it does not have to be as daunting one if you are well prepared and understand the limitations of what can be accomplished. Above all, you cannot control the witness on the stand, and trying to obtain that sort of assurance of witness performance is a lost cause. Simply provide the witness with the information she needs to testify as clearly, effectively and painlessly as possible. If that approach is taken, your witnesses will deliver effectively testimony at trial and be very grateful she had the chance to work with you.

Lisa Marchese and Jessica Andrade are attorneys with Dorsey & Whitney LLP. Ms. Marchese is the Seattle and Anchorage Trial Department Head. Ms. Andrade, an associate, concentrates her practice in the area of complex commercial litigation. They can be reached at marchese.lisa@dorsey.com and andrade.jessica@dorsey.com.
attorney risks looking incompetent, dishonest, or sloppy. Typos emerge in briefs from even the most skilled practitioners, but rampant spelling and grammar errors detract from readability and are an immediately apparent reflection of the time and care the attorney put into her briefing, a point that may carry on to the judge’s consideration of the merits of the brief.

Eliminate sarcasm or ad hominem attacks from briefing or oral argument. Personal attacks between lawyers bring down the entire profession. A cheap shot can be smugly satisfying to make. But judges do not like and do not want to hear such attacks. When a judge does not want to hear something, the judge stops listening. And that’s generally a poor position for an advocate.

Use oral argument to assist the judge

Take oral argument seriously. Some lawyers assume that a judge has already made a ruling before taking the bench and that oral argument is an extraneous formality. This often is not the case. Motions can be won or lost on oral argument. If a motion has an accompanying oral argument scheduled, an attorney is wise to take it as a critical component in the judge’s decision-making process and to prepare accordingly.

Be quick and concise in oral presentations. If an attorney has written a thoughtful and complete brief and timely provided a bench copy to the court, the judge should be well-apprised of the key issues at bar. There is no need to perform a read-through of the brief. An attorney may have only 10 minutes to present an argument, and should use that time on critical points.

Thoughtfully address the judge’s questions. When a judge asks a question, the question is an opportunity to provide the judge with important information that may persuade her to rule in your favor. If a judge is asking questions, it means she is engaged in the material at bar and has given thought to the matter. Listen to the question. Answer the question asked—and that question only. Like a bench copy, an answer to a judge’s question is an opportunity to educate the judge in a uniquely precise manner.

Do not lie to the judge. Attorneys should abide by the same oath all witnesses take when they testify, and tell the truth, the whole truth, and nothing but the truth. It can take years of diligent work to build a reputation and seconds for that reputation to come tumbling down. If an attorney does not know the answer to a question, he should admit it. If an attorney did not read a case, he should admit it. If an attorney made a mistake, he should admit it. Judges are far more gracious toward these concessions than of attempts to conceal or deceive.

Judicial insight on common pretrial motions

Discovery Motions. Before filing a discovery motion, attorneys should ensure they have met any prerequisites to bringing the motion, such as a CR 26(i) conference. When asking for sanctions, they should take the time to do a thorough analysis of the remedy they are requesting. If an attorney has requested harsher sanctions such as dismissal or exclusion of evidence, the judge must make a record that he considered less severe alternatives and the attorney should provide the information he needs to make these considerations competently.

Summary Judgment. Summary judgment can be an important force in the quest to narrow a case prior to trial. The law should be settled before trial starts. Trials should be about facts. Motions for partial summary judgment are a good—and underused—tool to achieve clarity on legal issues prior to trial. Often attorneys use motions in limine to attempt to exclude matters that could have been resolved earlier on summary judgment; this strategy can complicate trial unnecessarily.

Motions in Limine. Attorneys should make motions in limine early. The first day of trial with the jury waiting is probably not the best time. If the motions are important enough to be made, the judge should be provided sufficient time to give them due consideration. Do not bring motions in limine that merely repeat rules of evidence the judge will apply to your case anyway (e.g., “exclude from evidence any inadmissible hearsay”). Along with wasting the judge’s time, some judges see these boilerplate motions as an insult to their intelligence, as they imply that the judge does not know the rules of evidence.

A final word

The better an attorney is, the easier a judge’s job becomes. On the other hand, a frustrated judge will make an attorney’s job more difficult. Pretrial interactions with the court form the basis for the judge’s relationship with the attorneys on a case as well as provide form and scope for the trial. Attorneys should keep these considerations in mind while setting the course for trial.

Gemma Zanowski serves as judicial law clerk for the Honorable Judges Jay Roof, Sally Olsen, Jeanette Dalton, and Jennifer Forbes. She lives in Tacoma and is an active member of the Tacoma-Pierce County Bar Association as well as the Washington State Bar Association. She can be reached at gzanowski@co.kitsap.wa.us.