

HOW TO TIPTOE AROUND A **SLEEPING RATTLESNAKE**

**Practice Tips and Ethics Considerations from 1/1208th of
Federal Trial Bench**

– Gregory J. Fouratt, United States Magistrate Judge (D.N.M.)

Relevant Texas DRPC

- Preamble: A Lawyer's Responsibilities
- Rule 2.01 Advisor
- Rule 3.02 Minimizing the Burdens and Delays of Litigation
- Rule 3.03 Candor Toward the Tribunal
- Rule 3.04 Fairness in Adjudicatory Proceedings

I. Motion Practice: Ways to Impress

II. Settlement Conferences/Mediations: Advice/Caution

III. Two Predictions

Motion Practice: General Tips

- Comply with Local Rules: speaks volumes about overall trustworthiness as court's legal advisor
- *Always* think about audience, whether it is reading you or listening to you
- Is motion necessary? Better yet, is it essential?
- Ensure conferral process was reasonable and adversary had sufficient time
- State clearly whether motion is opposed or unopposed (in latter case, submit proposed order)

Tips for Effective Briefing

- Opening paragraph most important; audience never paying more attention; sets tone; summarizes why court intervention is/not necessary; states with specificity relief sought
- Write tersely; eliminate unnecessary words; edit, edit, edit
- Your goal: most persuasive part of brief should be *your signature*
- Minimize exhibits to extent possible but maximize use of those you include
- Beware **OVERUSE** of emphasis (bold, underline, italics, CAPS); risks coming across as patronizing or condescending

Tips for Effective Briefing, Cont'd

- Address each argument made so you're not deemed to have admitted it
- Don't save anything for motion hearing...because there might not be one
- Bare cites without parentheticals are not usually helpful
- Provide as much help as possible to judge (who may not have 2-3 clerks)
- Punch above the belt: deftness and nuance beat snark and sarcasm
- Motions for reconsideration: be *certain* the juice is worth the squeeze

Tips for Effective Advocacy at Hearings

- Held because court *has questions*: listen, answer question, stop
- Don't fight the question: answer directly, then pivot to why not fatal
- If you're calling witnesses, let court know in advance
- Emphasize SOR and BOP: helps anchor judge's thinking
- Ride the horse you briefed: unveiling new arguments/authorities for first time at hearing is counterproductive (and irritating)

Tips for Effective Advocacy at Hearings

- Be fluent in how to use exhibits – use highlighter/zoom function – provide exhibits to court and opposing counsel in advance
- Be ready to narrow relief requested or to make concessions – play long game; conceding point at MTD hearing may help you later at MSJ hearing – likely not your last case with this judge
- Be mindful of record, including rate of speech; spell out words and acronyms where necessary; identify exhibits with clarity (page #, which ¶, etc.)
- Appreciate judge's concerns: (a) resolving this logjam; (b) appellate durability of decision; (c) precedential nature of decision to other cases

Remote Hearings

- Biggest surprise of pandemic: federal judges embracing Zoom court
 - Here to stay: crucial platform for *civil* litigation (my own 9-day bench trial)
 - Vastly superior to telephonic hearings
 - Much cheaper than in-person hearings without compromising effectiveness of communication or advocacy
 - Crucial to master the technology: courts less patient than in 2020-22

Remote Hearings: What Do Practitioners Think?

- Q: effective medium for you?
- Q: % motions hearings by Zoom?
- Q: any bench trials by Zoom?
- Q: % of depositions taken remotely (in 2023-24)?
- Q: % of mediations/settlement conferences held remotely (in 2023-24)?

Better Only to Be Read...or to Be Read *and* Heard?

- Q: what % of your **discovery** motions result in hearings (of any kind)
- Q: via which method (telephone, Zoom, in-person)
- Q: how about **dispositive** motions (MTD; MSJ)
- Q: prefer higher %? Lower? About right?

Settlement Conference: When to Have It?

- At initial scheduling conference, be ready to identify sweet spot in litigation lifecycle where settlement conference would be timely
 - 98-99% of federal civil cases not dismissed on motion eventually settle, so...
 - Identify with precision what essential discovery must be accomplished first
 - What written discovery and as to which issues?
 - Any depositions truly essential?
 - Expert reports need to be prepared first?
 - IME necessary?
 - Be ready to answer whether particular legal issue must be decided first

Before the Settlement Conference

- Take advantage of opportunity to educate judge in advance about the case (to earn judge's respect and trust for this and future cases)
 - Explain where you need help educating client about vulnerabilities
 - Identify for judge most powerful levers or pressure points in negotiation
 - Think about monetary *and* non-monetary terms; all the bargaining chips
 - Circulate proposed settlement agreement in advance
 - Be prepared to handicap outcome of MSJ and trial
 - Identify fees/costs to date *and* for remainder of litigation

Before the Settlement Conference, Cont'd

- P counsel: brief client on litigation risk, settlement discount, time value of \$
- Beware the client anchoring expectations about value
- Brief client on how fees/costs affect recovery
- Deconflict client's best interests and attorney's fee
- Ascertain lien-holders and third-party payors' bottom line
- Give thought to characterization of proceeds for tax purposes
- D counsel: disclose to judge as much as possible about authority limit and how best to interface with adjuster, company rep, or individual defendant

Two Predictions

- Impact of Artificial Intelligence

- In five years, AI's impact on the practice of law will prove to be _____?
- The profession of law should regulate AI _____?
- Using AI to prepare legal briefs/filings should be _____?
- Requiring disclosure when AI was used to assist in preparing briefs/filings – yes or no?
- Anyone use AI in their practice now (and who is willing to admit it)?

Two Predictions, Cont'd

- The Jury Trial: Mentioned 3x in U.S. Constitution
 - On endangered list? Headed for virtual extinction?
 - Primary reasons for its trajectory?
 - Possible to bend the curve?
 - Still a reliable way to solve problems and make decisions?