Getting It Right and Getting It Wrong: Trial Tips From the Bench

The First Steps: Interacting With Court Staff And Filing Your Case

1. Be nice to staff, particularly the judge's judicial assistant, law clerks, courtroom deputy, and courtroom reporters. These people are part of the judge's team and work closely with the judge. Remember, the judge often relies on their observations, perceptions, and insights about lawyers' work and behavior.

2. Cooperate and be civil towards each other. Being on opposing sides of a lawsuit is no no reason for counsel to resort to a scorched earth approach (especially here in Oregon where you're likely to sit next to the lawyer you recently offended at a bar or social function). Don't be afraid to pick up the phone. All to often lawyers resort to communicating over email instead of dealing cordially with the actual person on the other side.

3. Initial Pleadings:
   - Complaints require an **original signature** preferably in **blue** ink.
   - Provide an original civil complaint, one judge's copy, and a disc that contains a PDF of the complaint, summons and civil cover sheet.
   - Summons **must** include the return address of the attorney.
   - Provide three copies of each summons to be issued.
   - It takes approximately 20 minutes to open the average case. The Clerk's office closes at 4:30 PM.

4. Correctly Filing in CM/ECF–common problems to avoid:
   - You filed your document in the wrong case–please check the case number prior to filing.
   - The wrong document is attached as a PDF.
   - A document is filed using the wrong event. Please review the list of motion types and use "misc" as a last resort.
   - A document is filed without a case caption.
   - A document is filed twice. There are no mulligans in federal court. If the first try does not seem correct, please call the Clerk's office to get help making a correcting instead of filing the same document twice.
   - DO NOT add yourself to the database twice. Please use your name as on your bar certificate; no nicknames. Search for yourself if you have had a case in federal court before.

5. Judge's Copies
   - Judge's copies are sent to the judge's chambers, not to the court.
   - Tab exhibits and attachments to judge's copies. It is frustrating and time consuming for judges and chambers staff when a memorandum is accompanied by an unseparated stack of exhibits that must be paged through to find which each

exhibit, declaration, and deposition excerpt begins and ends.

- Check with individual judges to see if the judge would like delivery of the judge's copies directly to chambers. Filing judge's copies at the intake desk can result in delay.
- Although the Local Rules require judge's copies only for documents in excess of five pages, it is good practice to make judge's copies of all e-filed documents.

Motion Practice

1. Conferral Before Filing Motions (LR 7-1(a))
   - The Rule requires parties to make a "good faith effort through personal or telephone conferences to resolve the dispute" before filing a contested motion.
   - Conferral must be meaningful: email or letters may supplement conferral, but there is no substituted for a "real time" (phone or in person) expression of each party's position.
   - Some judges require that the LR 7-1 certification include a brief summary of opposing party's position, particularly on motions to compel and motions to extend pretrial dates.

2. Resist The Temptation To Write A Treatise To The Court
   - Write less not more
   - Be concise, sparse, and efficient with your writing
   - Use your response and reply briefs to do just that–RESPOND or REPLY. Resist the urge to rehash your entire initial filing
   - Determine which facts are material, which facts are not material but provide needed background context and which facts are interesting to know, but don't serve any purpose other than to lengthen your motion. If your memorandum in support of your motion exceeds the LR limit of 35 pages, you should probably reconsider your evaluation of which facts are necessary to include.
   - Unless your case is exceedingly complex (and those cases are few and far between), the maximum limit of 35 pages per brief should be more than enough.

3. Get To The Point
   - This applies when writing a supporting memorandum, participating in a telephone conference, or arguing your motion in court.
   - Ask yourself what the judge will want to know. Come to every court appearance, telephone appearance, or status conference knowing key information about your case, such as whether discovery has closed, and if it has not, when that deadline is.
   - It is fine to underscore your argument, but there is no need to repeat yourself if you have argued your point adequately in your brief.
   - The more streamlined and efficient you can be in litigating your case, the better the court can do its job. We work on many cases at the same time. These cases

involve a broad variety of subjects ranging from criminal cases to civil rights actions, trademark and patent cases, applications for writs of habeas corpus, environmental actions, and cases here on diversity jurisdiction. The more streamlined and articulate you are, the better educated we are.

- It takes a lawyer's common sense and anticipation to give the judge the information he or she needs to know so the judge can help the parties move their matter forward.

4. Consider Alternative Dispute Resolution
   - Keep the possibility of settlement on the table before you go too far down the litigation road when positions are entrenched and costs are too high.
   - Honestly evaluate your case. And be prepared to re-evaluate your case following discovery. Try your best to consider how evidence on both sides might appear to a jury
   - If you do schedule a settlement conference, bring a client representative who has full settlement authority to settle the case.
   - The judges in this district are committed to work hard to help parties reach fair settlements.

<u>The Trial</u>

1. The Proposed Pretrial Order (LR 16-6).
   - Parties may stipulate, subject to the court's approval, or the court may order, that no pretrial order (PTO) need be filed.
   - If neither of the above is the case, the parties "will prepare and sign a proposed pretrial order to be lodged with the court on or before the date ordered by the court." LR 16.6(a).
   - At a minimum, the PTO will contain a concise statement of the nature of the action, including whether the trial shall be by jury and whether the partes have consented to magistrate jurisdiction, a concise statement of the nature of the basis for federal jurisdiction, all agreed facts, with an asterisk by those where relevance is disputed, a statement of each claim and defense to that claim with the contentions of the parties, other legal issues not stated under either claims or defenses and designating those appropriate for decision before trial and a statement indicating proposed amendments to the pleadings if any. (LR 16-6(b).
   - The PTO **amends** the pleadings, "and it, and any later order of the court will control the subsequent course of action or proceedings as provided in Fed. R. Civ. P. 16. (LR 16-6(d).

2. The Rules of Evidence: Learn these! You may have a great case, but that doesn't matter if your story is not admissible.

3. Prescience, planning and preparation: The three p's. All lawyers doing trial work are fairly smart people, but generally are constrained by time. Shortly before trial take some

time to close your office door, stop all telephone calls, ignore email and just think about this particular case. Doing this can do wonders to help you "get to the point" during your trial.

4. Use available technology. Our Medford, Eugene, and Portland Courthouses are equipped with Evidence Presentation Systems (EPS). If you are not familiar with their use, call the judge's courtroom deputy before trial and arrange for yourself and/or your paralegal to come in and learn how to use our EPS system.

5. Voir Dire And Jury Selection Process:
   - This process allows counsel to: (1) introduce themselves, their clients, and their key themes; (2) eliminate biased jurors; and (3) understand background information about jurors.
   - Judges differ widely in the amount of time and specific ways in which counsel are allowed to interact with jurors. During the pretrial conference, find out what the judge assigned to your case allows.
   - As a general rule in this district, the judges perform the majority of the voir dire questioning, guided by written questions submitted by the parties, followed with limited voir dire follow-ups by counsel.

6. Get To The Point.
   - Remember, jurors are only human and are prone to boredom if your presentation of your case focuses on minutiae or simply restates a concept or argument too many times.
   - Closing arguments should be concise. Too many closing arguments are unnecessarily too long. The jury has heard the entire case, and, if the case is not complex, a long closing argument is not needed. Emphasis the high points of favorable evidence, address key point's in the opponent's case and tie all of it to your theory of the case.