

THE BOX SET:

**HOW TO LOSE YOUR CASE WITHOUT REALLY TRYING
(A Somewhat Satirical Look at Litigation Tactics)**

**EVIDENCE AND BANKRUPTCY:
THE EFFECTIVE PRESENTATION OF EVIDENCE IN
CONTESTED MATTERS AND ADVERSARY PROCEEDINGS**
(No, Really!! I'm not kidding!! Why are you all laughing?)

**OLD LAWYERS NEVER DIE – THEY JUST LOSE THEIR
APPEAL (Or, How to Lose Your Appeal Without Really Trying)**

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Introduction¹

One of my former partners who shall remain nameless (Steve Turner) is a master of the seminar paper. He writes brilliantly, and is a great speaker. He is also a genius when it comes to getting the most mileage out of every seminar paper. He presents them over and over again, to anyone who will listen. Apparently it's a great way to ride the rails and see the country.

Since I became a judge in 1997, I've been asked to speak at a lot more seminars.² That's the good news. The "bad" news is that I always get asked to speak about one of three topics: litigation tactics, evidentiary issues, or missteps in appellate practice. As a result, over the years I have prepared and revised some pretty detailed papers on all three issues. When I was asked to speak at the Eighth Circuit Judicial Conference, I was asked to "give one of those bankruptcy litigation things that you do."³ As instructed, what follows is the "best of" my materials on all three topics. They are taken from my prior papers, with some updating and a bit of new material thrown in. While I have asked my colleagues for input, the opinions contained in this paper are mine and only mine. May you find something of use to you.

¹ This paper (and the tone in which it is written) is dedicated to the memory of our dear friend, Paul Festersen. Nobody wrote a seminar paper (or a letter or a brief for that matter) like Paul. When I was done reading his work, I was always educated, ever entertained, and often persuaded. If, as you read this, you laugh a little or learn a little, think of Paul.

² Never thought a little black robe could make a lawyer that much smarter, but apparently it does. They are most certainly not slimming.

³ Bankruptcy Judge Rule No. 1: Listen to the Circuit Court Judges at all times, even if they're not from your circuit. Bankruptcy Judge Rule No. 2: When in doubt, consult Bankruptcy Judge Rule No. 1.

TERRIBLE LITIGATION TACTICS
(From “How to Lose Your Case Without Really Trying”)

I. I May Never Pass This Way Again (so who the *%!@^*%* cares how I act?).

I am continually amazed by how many lawyers abide by the principles espoused by this Florida attorney:

In Coconut Grove, a suburb of Miami, a lawyer last year took out a \$5,400 billboard ad which said, “We Kick Butt.” It shows a lawyer in a suit with a briefcase in his hand booting someone’s backside. When interviewed by the media, the lawyer explained what he believed clients really want: “They’re not looking for a guy who coaches Little League. They don’t want a wimp. They want a lawyer who means business, an animal who’s going to get the job done, whatever it takes, as long as it’s

legal. I’m an honest lawyer. I just don’t take crap.”⁴

The public perception is obvious: the lawyer who acts most like a rottweiler will win. Since that is what clients want; that is what you should give them. Forget about things like cooperation, returning phone calls, timely discovery responses, and the like. Forget that most judges find civility persuasive. There is nothing a judge likes less than to listen to lawyers bicker at each other in court, admit that they don’t like each other, make it clear that the matter is personal, and/or refuse to return each other’s telephone calls. Besides, who wants to spend only 5 minutes dealing with a matter that, with a little added dose of antagonism, can take hours and hours of court and attorney time. Remember, you bill by the hour.

Epilog: The more things change, the more they stay the same. Lack of civility still tops the list of unpersuasive conduct. My favorite example is the fight I had between two lawyers over a deposition. They could not agree *where and when* to take the deposition, or even if the deposition

⁴ *Miami Herald*, April 5, 1995, at 2B (cited in Robert C. Josefsberg, *The Topic is Civility: You Got a Problem With That?*, OR. ST. B. BULL., Jan. 1999, at 19, 22).

should be taken. This battle (at least in the eyes of the lawyers) necessitated the filing of a motion, a response, and the use of the court's time and the taxpayer's money. Here's how I solved the problem:

THIS MATTER comes before the Court pursuant to the Motion to Quash Notice to Take Deposition (the "Motion") filed by Jan Ellis-Gough, Debtor herein. On February 1, 2008, this Court issued a Progression Order, which ordered, in relevant part, that "Counsel shall confer in good faith and shall file, on or before April 10, 2008, a discovery plan identifying all depositions to be taken, and stating the date, time, and location of such depositions[.]"⁵ Notwithstanding this Order, a consensual discovery plan was never filed. Instead, the Court has been presented with separate discovery plans and a flurry of documents indicating that counsel cannot agree on a date, time, and location for the deposition of the Debtor. The Court has little doubt that additional discovery disputes over matters both great and small lie waiting in the wings.

It is apparently necessary for the Court to intervene and do what all lawyers should be able to do between themselves: set a date and time for the deposition of a party. The Court, with no small degree of amazement at the conduct of counsel, and in order to keep the underlying contested matter moving toward resolution, will resolve this most petty of disputes in a manner which favors no one. This matter will be set for hearing. At said hearing, by the flip of a coin, the Court will determine when the deposition of Jan L. Ellis-Gough will be taken. If the coin comes up "heads," the deposition will be taken on April 25, 2008, at 1:00 p.m. If the coin comes up "tails," the deposition will be taken on April 28, 2008, at 1:00 p.m. If the coin stands on its edge, the Court will flip it again. In any event, the deposition will be taken in person in the office of Gregory Colpitts, counsel for the Debtor. If counsel are able to resolve this matter prior to the hearing, they may file a joint discovery plan outlining all of the depositions to be taken with respect to the contested matter presently before the Court, and the hearing will be stricken.

Failure to appear at the hearing or to conduct the deposition of Ms. Ellis-Gough in accordance with the outcome of the coin flip will subject the disobedient party to the full contempt powers of this Court.⁶

⁵ *Docket No. 64.*

⁶ *Case No. 07-10609-M, Jan Ellis-Gough, Debtor, Docket No. 81* (footnotes omitted). If you want a good example of how to annoy everyone involved in a case through the use of scorched earth litigation tactics, take a look at this docket. You can't make this stuff up.

The most important part of this order is what is written between the lines. Eventually these folks took the hint and worked the discovery issues out amongst themselves.

II. Burden, Burden – Who’s Got the Burden?

The nature of litigation is that someone always has a burden to prove something to the court. If you really want to lose your case, you should completely ignore factors like 1) which party bears the various burdens in your case; and 2) what those burdens are (i.e., preponderance, reasonable doubt, etc.). Forgetting even one element that is your burden to prove can spell certain defeat for your client.

Epilog: When I first wrote this paper, this part almost found its way to the cutting room floor. Nine years later, it seems like more and more of the cases actually tried are very close calls.⁷ If the case is a close call, we judges take a close look at the burden of proof. As a result, you need to know what the burden of proof is in your case (e.g., preponderance of the evidence, clear and convincing, etc.) and then be ready to meet it.

III. Elements? This Isn’t Chemistry Class.

Another effective way to seal your doom is to go into court not knowing the elements of the case you intend to prove. On more than one occasion I have stopped a lawyer dead in his or her tracks with this simple question: “What are the elements of your case?” If you don’t know them, you can’t prove them, and if you can’t prove them, you can’t win. Another disadvantage of knowing the elements you have to prove is that, prior to trial, you may figure out that you cannot make your case. If you know that going into trial, that might be a disincentive to trying the case, resulting in

⁷ There are two possible explanations for this phenomenon: either my well written opinions and microscopic reversal rate have given counsel enough guidance to settle most things out of court, or I am just no fun as a trial judge. Guess which one gets my vote.

fewer billable hours being thrown at this lost cause. Once again, remember, you are on the clock.

Epilog: This is still a problem, and seems to rear its ugly head most often in dischargeability (fraud) adversary proceedings. Recently we had a case involving dischargeability of a debt owed by a half-sister to her formerly incarcerated half-brother. Turns out that while brother was in prison, his sister spent over \$200,000 of his disability benefits.⁸ The trial kind of meandered all over the place. In closing argument, when I asked counsel for the plaintiff about the elements he needed to prove, his response (more or less) was, “Gee, Judge, I’ve shown what a bad person this lady is. Isn’t that enough?” In a word, no. Whether a judge likes someone is irrelevant.⁹ If you allege fraud, you must prove each and every element of fraud. You fail, you lose.¹⁰

⁸ *Hubanks v. Jouett (In re Jouett)*, ___ B.R. ___, 2014 WL 948517 (Bankr. N.D. Okla. Mar. 12, 2014).

⁹ Whether that judge believes their testimony in another matter altogether.

¹⁰ In case you were wondering (and also to get some case citations into this paper), here are the elements for a claim of nondischargeability under 11 U.S.C. § 523(a)(2)(A):

Statutory language:

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by – (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition.

In order to prevail under this section, a creditor must establish each of the following elements by a preponderance of the evidence:

1. a representation was made by the debtor;
2. the representation was false;
3. the representation was made with the intent to deceive the creditor;
4. the creditor relied upon the representation;
5. such reliance was justifiable; and

IV. Research is for Sissies (or “Cases, we don’t need no stinking cases!”)

This principle dovetails with the principle of not knowing the elements you need to prove. I cannot tell you how many times an attorney has made an argument, and, when asked if they had any authority for that position, turned into the proverbial “deer in the headlights.” The more novel your approach or extreme the relief you seek, the less authority you should bring. Go ahead and assume one or more of the following: (1) your words are all the authority the judge needs; (2) the judge doesn’t need anybody to tell him or her how to do anything; or (3) if the judge wants cases, he or she can go find his or her own \$@%#@#\$^!! cases. Besides, you can always present the authority to the appellate court later.

Epilog: The only thing I can add to this one comes from the brief writing tips found on our court’s website:

Know thy audience. Most bankruptcy judges write and publish opinions. The first thing anyone should do when they begin writing a brief is find out whether the judge that will decide their case has already written on the issue. The bankruptcy judges in the Northern District make it easy for you; we both have indexes of our published opinions on the Court’s website. We publish those opinions in order to give you some idea of what we have done and why. We try to be consistent. It is extremely frustrating (and remember, a frustrated judge is not easily persuaded) to have counsel in either written or oral argument raise an issue and be completely ignorant of the fact that we decided that issue in a published opinion last week, last month or last year. It is also embarrassing, both for you and for us. In addition, if your judge also serves in an appellate capacity (i.e. as a member of the Bankruptcy Appellate Panel), you might want to take a look at those opinions as well.

Never forget, the most persuasive authority to any judge is that judge’s prior written decisions.

6. as a result of such reliance; the creditor suffered loss.

See In re Herrig, 217 B.R. 891, 895 (Bankr. N.D. Okla. 1998); *Burt v. Maurer (In re Maurer)*, 256 B.R. 495, 500 (8th Cir. BAP 2000). Unless all of these items are established by a preponderance of the evidence, the debt is dischargeable.

Nothing is less effective than citing a decision of another bankruptcy judge while ignoring the fact that the judge you are before has ruled the opposite way.

V. If Proofreading is not Billable, it is not Necessary.

One of the quickest ways to destroy your credibility with the judge is to present him or her with written materials full of typographical errors. Even better, when you submit a brief, don't worry about the accuracy of the case citations. Judges love nothing better than to be sent on a wild goose chase trying to find the case you want them to read because there is a typographical error in the citation. The beauty of these types of errors is that not only do they antagonize the judge, but they also rile the law clerk, who is left to ponder why you are making the big bucks while he or she toils in relative obscurity. As an added bonus, the loss of credibility created by such errors poisons your entire presentation. Remember, judges are human. They have memories. Why should they think your oral argument or witness preparation is any better than your written submissions? Nowhere will you find more fertile ground in which to sow the seeds of defeat.

Epilog: Can I get an "AMEN" from every judge and law clerk in the audience? Or, to put it another way:

Quality is Job One. Check your cites. Make sure they are accurate and that each case you are relying on is still good law. We do. There is nothing more frustrating than being unable to find a case because the citation contained in the brief is wrong. There is nothing less persuasive than finding out that a case you have cited to us has been overruled or misquoted. These flaws weaken your entire presentation.

Enough said.

VI. Never Listen to Larry the Cable Guy.

OK, so he never comes to court, but unless you have been hiding under a rock or have far more sophisticated comedy tastes than I do, you have heard of "Larry the Cable Guy." If you have

seen his act, you know his catch phrase: “GIT ‘ER DONE!” I have found that one “pet peeve” shared by many judges is the lawyer who never gets it done. Lawyers who never show up on time, tell the judge that they will have an amended pleading filed within a certain date (and then don’t), or fail to follow through in filing settlement documents have hit the mother lode when it comes to undermining their own credibility.

I know this probably seems like small potatoes to you big-time litigators. Surely this can’t be enough to make us look bad in the eyes of the judge. Take a step back and look at it from a judge’s point of view: unless and until the paperwork is in, we can’t close the case or show the motion/adversary proceeding as resolved. That means that someone in chambers or the clerk’s office has to keep track of the \$%#@\$@% thing, and that some pencil pusher in Washington who lives to compile statistics will generate a report which states that the judge is not properly managing his or her docket. In the event that the case has been set for trial, we normally don’t take the case off of the docket until the paperwork is filed. That means that the days which we set aside for your trial can’t be used for something more productive (like the next case). If you don’t live up to what you said you would do, you show us that we can’t take you at your word, and that you have little respect for our work and our time. Could there be a better way to undermine your effectiveness and ensure defeat?

Epilog: If you don’t believe me on this one, ask your own judge.

HIGHLIGHTS FROM “EVIDENCE AND BANKRUPTCY”¹¹

Rule No. 1: “Just the facts, ma’am (or sir).” Leave the hostile courtroom tactics to the TV lawyers (or your partners in the litigation section).

Here are some things you probably already knew about bankruptcy judges:

1. Most of us are busy. Very busy.
2. Almost all of us like to get to the point. We want to know what is the real source of the dispute between your clients and deal with it. Quickly. Efficiently.
3. All of us hate to see lawyers bickering at each other in court, or behaving in court in a way that makes clear you don’t ever have a civil word between you outside of the courtroom. If we really want to see that stuff, there is more than enough reality TV to go around.

My point is a simple one – if there is really no dispute about a fact, don’t make the other side go to the ends of the earth to put on evidence to prove it.¹²

Epilog: This concept seems to find itself into every paper I write. Get to the point and quit bickering. And don’t expect my sympathy or my cooperation if you choose to use scorched-earth

¹¹ When I wrote this paper, I decided to set the discussion points up as rules (get it? Evidence? Rules? Pretty good, huh??)

¹² The corollary to this rule is that if you have to make an objection, do so succinctly, with a basis under the Federal Rules of Evidence. Don’t find yourself in this situation:

Fletcher: Your honor, I object!

Judge: And why is that?

Fletcher: Because it's devastating to my case!

Judge: Overruled.

Fletcher: Good call!

— *Liar Liar* , Universal Pictures/Imagine Entertainment, 1997.

litigation tactics. Few judges care for them, or find them persuasive.

Rule No. 2: Pleadings are your friend.

The easiest fact to prove is the fact that is already admitted. The operative rule is Federal Rule of Civil Procedure 8, made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7008. Rule 8(a)(2) requires the plaintiff to file a pleading containing “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹³ The next section of the rule requires that a party answering the pleading must “admit or deny the allegations asserted against it by an opposing party.”¹⁴ In addition, the Rule 8(b)(6) states that an allegation that is not denied “is admitted if a responsive pleading is required and the allegation is not denied.”¹⁵ Before you go to the ends of the earth trying to prove something or figuring out what you have to do to prove something, make sure it has not been admitted. Most judges (this one included) consider admitted facts as established for all purposes with respect to the contested matter or adversary proceeding at issue.

The corollary to this rule is to make sure that admitted facts are brought to the attention of the court. I learned this one the hard way. Early in my judicial career, I presided over a nondischargeability proceeding. Debtor was a party to a drug deal gone bad. In order to resolve the matter short of physical violence, the debtor allowed another party to take his car. The car had been pledged as collateral to a bank. The debtor filed bankruptcy and the bank came in claiming that the

¹³ F.R.C.P. 8(a)(2).

¹⁴ F.R.C.P. 8(b)(1)(B).

¹⁵ F.R.C.P. 8(b)(6).

debtor's failure to maintain control of the car amounted to conversion.¹⁶ I ruled in the bank's favor, finding that the terms of the security agreement prohibited unlawful disposition of the collateral. On appeal, I was reversed.¹⁷ The appellate court found that the record did not support my findings with respect to the security agreement, as the security agreement had not been introduced into evidence. Technically, the appellate court was correct; the security agreement had not been listed as an exhibit and offered and received into evidence. However, it had been attached to the complaint as an exhibit. Moreover, the answer admitted the execution of the security agreement and the validity of the copy attached to the complaint. The appellate court missed the issue because I didn't flag it. Do not make the same mistake.

Epilog: Probably the most forgotten aspect of trial practice. If it's admitted, it's already been proven. Make that point and move along.

Rule No. 3: The Pre-Trial Order is Your Friend.

This rule is just the logical extension of Rule No. 2. In virtually all of our adversary proceedings, and some of the more complicated contested matters, the submission of a proposed pre-trial order is required. Both judges in the Northern District of Oklahoma have a form pre-trial order that we require the parties to use. Most courts do the same. The following sections may be of interest to you:

¹⁶ The Debtor candidly admitted that he chose to deal more favorably with the creditor that routinely carried a gun. Discretion remains the better part of valor.

¹⁷ See Note 1 *supra*.

Admitted Facts

My pre-trial order requires counsel to complete a section under this heading: “*The following facts are admitted, and require no proof*[.]” Most other pre-trial orders contain a similar section. This is one of the first things I look at when I get a proposed pre-trial order. I want to know what you folks are really fighting over.¹⁸ The list of admitted facts are just that: facts that need no more time devoted to them at trial. It is by far the easiest way to get evidence into the record.

Exhibits

Most judges are picky about exhibits when it comes to pre-trial orders. Take a look at the form I use:

The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are as follows:

(Here (1) list all documents and things intended to be offered at the trial by each party, other than those to be used for impeachment, in the sequence proposed to be offered, with a (2) description of each sufficient for identification, and a (3) statement of all admissions by and all issues between any of the parties as to the genuineness thereof and the truth of relevant matters of fact set forth therein or in any legend affixed thereto, together with a (4) statement of objections reserved as to the admissibility in evidence thereof. **A list of exhibits which is general in nature [e.g., all financial records of debtor] will not be accepted. Exhibits must be numbered and identified in the same manner as they will be offered at trial.**)

I am looking for two things here: (1) a list of exhibits in the same detail as the list you would present at trial; and (2) a list of all objections to the exhibits. From our standpoint, you should be ready to

¹⁸ This part of the pre-trial order also gives a judge some idea of whether counsel have put any effort into the pre-trial process. Speaking only for myself, few things are more disappointing than getting a pre-trial order containing one or two admitted facts, with the idea that everything else is to be left for trial. What most judges take from something like this is that the lawyers haven’t spent much time on this or simply don’t want to play nice (see Rule 1 *infra*).

try the case when you finish the pre-trial order. Discovery is finished. The issues should have been framed for quite some time. There should be few or no surprises, for you or the court.

Under our form of pre-trial order, objections to exhibits not raised in the pre-trial order are waived.¹⁹ Therefore, if an exhibit is listed in the pre-trial order with no objection from the opponent, it is automatically admitted if offered. Some of you out there are probably saying, “Hey, wait a minute. What about foundational objections? Why should I have to raise those now? If the other side forgets to bring a witness, that’s their problem!” The reason objections must be raised in the pre-trial order is so that if there is a true foundational objection, everyone knows about it well in advance of trial. If you raise the objection and the other side still ignores it, that’s their problem. I just don’t want any objections laying in the weeds. Leave the ambushes to the movie Westerns.

Pre-Trial Conferences

A quick word about pre-trial conferences. Take a look at Federal Rule of Civil Procedure 16(c). It gives the court some serious latitude. For example, at a pretrial conference, the court is permitted to:

- “eliminat[e] frivolous claims or defenses.” (Rule 16(c)(2)(A))
- obtain “admissions and stipulations about facts and documents to avoid unnecessary proof.” (Rule 16(c)(2)(C))
- rule in advance on the admissibility of evidence. (Rule 16(c)(2)(C))
- limit the use of expert testimony. (Rule 16(c)(2)(D))

If there are issues of fact that should be agreed upon, but aren’t, the pre-trial conference is the time to raise those issues. If there are issues regarding documentary evidence, the pre-trial conference

¹⁹ Not all courts have such a policy. Be sure to know the rules where you practice. Don’t be proud. When in doubt, ask.

is the time to iron those out.

Rule No. 4: The fact that you found it in a box in an office does not make it a “business record.”

In my experience, there is nothing so misunderstood as the business records exception to the hearsay rule. Time and time again, attorneys will offer a letter or other document that they received as part of a document production in order to prove the truth of the matter contained therein. Oftentimes, the document is a letter from an entity that is neither the opposing party nor the party whose records were produced. The offer is met with a hearsay objection. The response: “The business records exception applies. We got this document by going through the records of XYZ Business.”

Not so fast. Let’s take a look at the rule in question:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.²⁰

Our Court of Appeals has held that “[t]he rationale behind the business records exception is that

²⁰ F.R.E. 803(6).

such documents have a high degree of reliability because businesses have incentives to keep accurate records. ‘The business records exception is based on a presumption of accuracy, accorded because the information is part of a regularly conducted activity, kept by those trained in the habits of precision, and customarily checked for correctness, and because of the accuracy demanded in the conduct of the nation’s business.’²¹

Courts have held that in order for a document to be admitted as a business record, the proponent of the document must secure the testimony of the “custodian or other qualified witness” that:

1. It was the regular practice of the business to make the record in question;
2. The record was kept in the regular course of the business;
3. The record was made by a person with knowledge of the facts contained in the record; and
4. The record was made near or at the time of the event recorded.²²

It is easy to see that a lot of documents that were in the boxes handed over to you do not qualify as a business record under this rule. Correspondence from third parties doesn’t fit.²³ Documents prepared in anticipation of litigation don’t fit.²⁴

Even if the documents you want admitted fall within the business records exception, you

²¹ *Timberlake Const. Co. v. U. S. Fid. & Guar. Co.*, 71 F.3d 335, 341 (10th Cir. 1995).

²² *United States v. Blechman*, 657 F.3d 1052, 1065 (10th Cir. 2011).

²³ *Cruz v. Aramark Servs., Inc.*, 213 Fed. Appx. 329 (5th Cir. 2007) (holding inadmissible third party letters contained in file, finding that letters were “unauthenticated”).

²⁴ *Hertz v. Luzenac Am., Inc.*, 370 F.3d 1014, 1020 (10th Cir. 2004); *Timberlake Const. Co. v. U.S. Fid. & Guar. Co.*, 71 F.3d 335, 342 (10th Cir. 1995).

have to lay the proper foundation. This means that you have to bring the custodian of the records to court with you.²⁵ The custodian need not be the person that prepared the record in question. However, the custodian must be able to testify as to each of the elements identified above, and must be able to establish that the document in question meets each of the four requirements. The exceptions to this rule involve documents created as part of a governmental activity, either domestic²⁶ or foreign,²⁷ or where a statute permits certification.²⁸ In those instances, you don't need a live witness. Instead, you may use a written declaration. Just make sure the declaration is given under penalty of perjury.

Rule No. 5: It's a trial, not a discovery deposition.

In my experience, examination of witnesses in bankruptcy cases is the most problematic area for most attorneys. Maybe it's because most bankruptcy lawyers don't do a lot of it— they spend most of their time negotiating settlements rather than preparing for litigation. Maybe it is a function of economics— many cases just don't have the dollars at issue to justify pre-trial depositions. I don't know. What I do know is that far too many cross-examinations of witnesses in bankruptcy cases take on the tenor of a discovery deposition. They cover every conceivable topic, and drone on for

²⁵ Don't worry. You will know far in advance of trial whether you need to bring a witness, because the issue will be made plain in the pre-trial order. If your opponent objects to the exhibit, you know you need a witness. If there is no objection, the exhibit may be admitted. Isn't pre-trial practice wonderful?

²⁶ F.R.E. 902(11).

²⁷ F.R.E. 902(12).

²⁸ F.R.E.803(6).

far too long.²⁹

Treating the examination of a witness like a discovery deposition is a very dangerous practice. It causes all parties (including the judge) to lose the forest for the trees. No less an authority than Irving Younger advised that “[y]ou should never try to make more than three points on cross-examination. Two points are better than three and one point is better than two.”³⁰ He is right. By and large, cross-examination in a bankruptcy case should be surgical. Make your point (or two or three at the most) and sit down.

I think that the desire to break this rule in bankruptcy cases has its origin in one of two areas. Perhaps this is the attorney’s first chance to examine the witness since the case was filed.³¹ Everybody is there, the witness is under oath, and the court reporter is free. Why not just go for it? This leads to an examination that covers the waterfront when all that is presently before the court is a narrow issue (such as an offer of adequate protection). Everybody gets lost, except maybe the judge. He or she just gets frustrated. The second reason for overly broad examinations is that the attorney never knows what he or she will find out. The answer to the next question may reveal the “smoking gun” that tilts the entire case in your favor. Resist that urge. Professor Younger was right.

²⁹ To those who take issue with my characterization of discovery depositions, I ask one simple question: how many of you go out and read discovery depositions for the pure fun of it? I thought so.

³⁰ Irving Younger, *The Art of Cross-Examination*, 1976 A.B.A. Section on Litigation, Monograph Series No 1. I have attached Professor Younger’s “Ten Commandments of Cross-Examination” as an appendix to this paper. They are as valuable today as they were in 1976.

³¹ Amazingly (at least to me), this seems to happen with unsettling regularity in my court on direct examination as well as cross. Counsel will seem shocked by the answers to questions given by their own client. It is like watching an episode of “Kids Say the Darndest Things,” without any of the cuteness and with much higher stakes.

“Cross is not a fishing expedition in which you uncover new facts or new surprises at the trial.”³²
You should never ask a question on cross-examination that you don’t already know (or at least have a very good idea of) the answer to. Far more often than not, the answer hurts you rather than helps you.

Epilog: Read Younger’s stuff. Better yet, find an old recording of his lecture on this topic. Brilliant. Simply brilliant.

HIGHLIGHTS FROM “OLD LAWYERS NEVER DIE – THEY JUST LOSE THEIR APPEAL”

Appeal Killer No. 4: Failure to Get to the Point

For the last ten years, I have posted brief writing tips on our court’s website. Tip number five is one of my favorites:

Shorter is better. Thurgood Marshall once said that in all his years on the Supreme Court, every case came down to a single issue. If that is true, why do most briefs contain arguments covering virtually every conceivable issue (good, bad or indifferent) which could arise in the case. Weak arguments detract from the entire presentation. If you feel compelled in a particular case to include everything including the kitchen sink, maybe you ought to take another look at settling the case.

When I polled my BAP colleagues on what needed to be in this presentation, ***every judge who responded said the same thing***: shorter briefs would be better and more helpful.³³ It’s not because we are lazy. We are not lazy. We are busy.

³² Younger’s Commandment No. 4.

³³ If it makes you feel any better, I have learned that the same rule applies to me as well. The shorter the opinion, the more the district court (or BAP, or circuit court, for that matter) seem to like it (and by ***like***, I mean ***affirm***).

There is a corollary to this rule. Be precise. An appeal is not a retrial of the entire case. The issue is not whether the appellate judge or judges would have made the same decision. The issue is whether the lower court *got it wrong*. If they did, you ought to be able to tell us what was wrong and why it was wrong in relatively simple and straightforward terms. The longer it takes you to explain error to an appellate court, and the more obtuse your explanation, the worse your chances on appeal.

Appeal Killer No. 5: Failure to Think Like a Judge



I assume you all recognize this man – Carl Spangler, the unsung hero from the greatest golfing movie of all time: “Caddyshack.” Consider this line uttered by Carl as he prepared to meet his enemy, the gopher:

“I have to laugh, because I’ve often asked myself, my foe, my enemy, is an animal. In order to conquer him, I have to think like an animal, and, whenever possible, to look like one. I’ve got to get inside this dude’s pelt.”³⁴

Now I would never ask any of you to consider a BAP judge your foe, or to look like an

³⁴ *Caddyshack* (1980).

appellate court judge, but you need to think the way we do. Let me explain. We are not looking to retry the case. We are not deciding whether we would have done the same thing or reached the same result. We are looking for error. Reversible error. That's all.

When the BAP office in Denver assigns a case to a panel, they send each member of the panel (and their law clerks) copies of the order appealed from, the record, and the briefs submitted by the parties. The first thing I read is the opinion issued by the bankruptcy judge.³⁵ I want to know what the bankruptcy judge decided, the facts relied upon, and the reasoning behind his or her decision. I want to get that straight from the horse's mouth before I have the lawyers tell me what the trial court did wrong. After considering the trial court opinion, I go to the appellant's brief. In my first reading of that brief, I want to learn what it is that the trial court did wrong, and why it was wrong. In my second reading of the brief, I look to see if the record supplied by the appellant supports the allegation of error. I will then turn to the appellee's brief to see why the appellant is wrong and the trial court is right. After I have been through the briefs and looked at the portion of the record identified by the parties, I will begin discussing the case with my law clerk.

Here is how, in her own words, my BAP law clerk approaches things:

The first thing I do upon receipt of the materials for an appeal one of my judges has been assigned to is review the screening memorandum and jurisdictional checklist prepared by the BAP clerk's office. I double check for timely filing of the notice of appeal, finality of the order being appealed, standing of the parties, and ripeness or mootness of the issues— all of which

³⁵ If the ruling on appeal is a bench ruling, I go to the transcript and read the ruling as it was read into the record.

can be “Appeal Killers.”³⁶ Next, I read the bankruptcy court’s opinion and order, and then review the appellant’s brief to ascertain what they assert are the issues on appeal, i.e., the alleged errors made by the bankruptcy court that require reversal. After comprehending the issues, I try to determine which issues may be dispositive and which issues are merely gratuitous. Now having 11 years of experience as an appellate law clerk, and never having worn two hats—trial and appellate—simultaneously or otherwise, I’m getting pretty good at separating the wheat from the chaff so that answering unnecessary questions and giving advisory opinions can be avoided.³⁷ The next, and perhaps most important step, is to determine the appropriate standard of review for each issue. Although Fed. R. Bankr. P. 8010(a)(1)(C) requires the appellant to state the applicable standard of review in its brief, sometimes there is only a statement of standards of appellate review generally with no application to the specific issues being raised, and sometimes the issues can be misinterpreted resulting in the appellant arguing the wrong standard of review. And as you can tell from what follows below, in the appellate world, the standard of review is *KING*.³⁸

Well said. As you may have noticed, great minds think alike.³⁹

We are looking for error. Our review is limited by the record that you give us, and the standard of review for the particular matter being reviewed. Let’s quickly review the three standards of review. Findings of fact are reviewed under the clearly erroneous

³⁶ Occasionally I learn something interesting. Who knew that last year Christmas Eve was in fact a federal legal holiday for purposes of Fed. R. Bankr. P. 9006(a)(6) because President Obama issued an executive order declaring it one? *See* Executive Order 13633 (dated December 21, 2012). According to the LA Times, giving federal employees an extra holiday on December 24th, 2012, was a goodwill gesture to improve morale of the federal workforce in light of lengthy pay freezes. Yippee.

³⁷ We’re all familiar with the saying “bad facts make bad law.”

³⁸ I’ve heard it said that knowing the standard of review is what separates appellate lawyers from trial lawyers.

³⁹ sarcasm (n.): the use of words that mean the opposite of what you really want to say especially in order to insult someone, to show irritation, or to be funny. www.miriam-webster.com/dictionary/sarcasm. Just in case you were wondering, I was going for funny.

standard. A factual finding is “clearly erroneous” when ““it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.””⁴⁰ This is a pretty tough standard, as previously discussed. Many decisions, such as whether to grant an extension of time or to award fees or punitive damages, are reviewed under the “abuse of discretion” standard. “Under the abuse of discretion standard: ‘a trial court’s decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.’”⁴¹ The United States Court of Appeals for the Tenth Circuit has held that a trial court abuses its discretion when it makes ““an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.””⁴² Another daunting standard. The only review where the appellate court starts over is in dealing with questions of law. All legal conclusions are reviewed *de novo*.⁴³

Translation: if the bankruptcy court makes a finding of fact supported by any evidence in the record, it is likely to be left alone, unless the reviewing panel says to itself,

⁴⁰ *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting *LeMaire ex rel. LeMaire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)).

⁴¹ *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991)).

⁴² *FDIC v. Oldenburg*, 34 F.3d 1529, 1555 (10th Cir. 1994) (quoting *United States v. Hernandez-Herrera*, 952 F.2d 342, 343 (10th Cir. 1991)).

⁴³ *Miller v. Bill and Carolyn Ltd. P’ship (In re Baldwin)*, 593 F.3d 1155, 1159 (10th Cir. 2010).

“no one in their right mind could have made such a finding.”⁴⁴ If the bankruptcy court has discretion in an area, abuse means abuse. The only unfettered second bite at the apple lies with questions of law.

⁴⁴ We get more appeals than you might think where the appellant acknowledges that two witnesses testified to two different versions of the same story, and the trial court committed error by believing the wrong one. Good luck with that since Fed. R. Bankr. P. 8013 provides that “due regard *shall* be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.”

APPENDIX

IRVING YOUNGER'S 10 COMMANDMENTS OF CROSS EXAMINATION

1. Be Brief

Be brief, short and succinct. Why?

Reason 1: Chances are you are screwing up. The shorter the time spent, the less you will screw up.

Reason 2: A simple cross that restates the important part of the story in your terms is more easily absorbed and understood by the jury.

You should never try to make more than 3 points on cross-examination. Two points are better than three and one point is better than two.

2. Use Plain Words

The jury can understand short questions and plain words. Drop the 50 dollar word in favor of the 2 dollar word. "Drive your car" instead of "operate your vehicle."

3. Use Only Leading Questions

The law forbids questions on direct examination that suggest the answer. The lawyer is not competent to testify. On cross-examination the law permits questions that suggest the answer and allows the attorney to put his words in the witnesses' mouth. Cross-examination, therefore, specifically permits you to take control of the witness, take him where you want to go, and tell your important point to the jury through the witness. Not asking controlled leading questions leaves too much wiggle room.

What happened next?

I would like to clear up a couple of points you made on direct.

These questions are the antithesis of an effective cross-examination. Any questions which permit the witness to restate, explain or clarify the direct examination is a mistake. You should put the witness on autopilot so that all of the answers are series of yes, yes, yes!

4. Be Prepared

Never ask a question that you do not know the answer to. Cross is not a fishing expedition in which you uncover new facts or new surprises at the trial.

5. Listen

Listen to the answer. For some, cross-examination of an important witness causes stage fright; it confuses the mind and panic sets in. You have a hard time just getting the first question out, and you're generally thinking about the next question and not listening to the answer.

6. Do Not Quarrel

Do not quarrel with the witness on cross-examination. When the answer to your question is absurd, false, irrational, contradictory or the like; Stop, sit down. Resist the temptation to respond with "how can you say that, or how dare you make such an outrageous claim?" The answer to the question often elicits a response, which explains away the absurdity and rehabilitates the witness.

7. Avoid Repetition

Never allow a witness to repeat on cross-examination what he said on direct examination. Why? The more times it is repeated, the more likely the jury is to believe it. Cross-examination should involve questions that have nothing to do with the direct examination. The examination should not follow the script of the direct examination.

8. Disallow Witness Explanation

Never permit the witness to explain anything on cross-examination. That is for your adversary to do.

9. Limit Questioning

Don't ask the one question too many. Stop when you have made your point. Leave the argument for the jury.

10. Save for Summation

Save the ultimate point for summation. A prepared, clear and simple leading cross-examination that does not argue the case can best be brought together in final summation.

Summarized from The Art of Cross-Examination by Irving Younger. The Section of Litigation Monograph Series, No. 1, published by the American Bar Association Section on Litigation, from a speech given by Irving Younger at the ABA Annual Meeting in Montreal Canada in August of 1975.