

Chapter 8 Humor

By J. SCOTT BOVITZ

Things They Didn't Teach You in Moot Court

Can you imagine a calendar call in the year 2064? “Good morning. RoboLawyer #2A356, appearing for Big Bank, Your Honor, Your Honor, Your Honor, Your...” Yet until appearance-drones can pass the bar examination, bankruptcy lawyers will still need to polish their courtroom style. I have spent 34 years in bankruptcy courts, so permit me to pass along a few things they did not teach us in moot court.

Advice for Novice Litigators: The Big Picture

Here's the big picture: Unless you were an accomplished stage actor before law school, you will get butterflies before most court appearances. This is understandable.

First, think about your judge. Your judge is really smart and was appointed to the bench from a pool of 68 highly qualified applicants. The judge knows bankruptcy law and procedure better than 99 percent of the attorneys who appear in his/her court. Last year, the judge disposed of 432 motions *just like yours* and justifiably imposes sanctions on a regular basis. The judge is busy, understaffed, underpaid and pressed for time (in part because of the late-filed 37-page reply brief from your opposing counsel). However, the bankruptcy judge really wants to make the right decision, despite your inexperience and your limited courtroom wardrobe.

Second, think about your opposing counsel. Your opposition is a bankruptcy god. According to his website, opposing counsel has an advanced degree in rocket science, is counsel of record on a dozen published appellate cases, gave testimony before Congress on an obscure section of the Bankruptcy Code, made a recent appearance before the U.S. Supreme Court and holds a patent on an appliance found in 34 percent of the kitchens in the U.S. You heard that your opposing counsel went to acting school and uses a faux British accent in court. However, your opposing counsel is limited to the facts of the case and the Bankruptcy Code. He is probably too busy to spend much time preparing for a battle with you.

Third, think about the courtroom environment. The typical bankruptcy courtroom is a refrigerated echo chamber. It has uncomfortable seating, bad acoustics, dim lighting (obviously a U.S. General Services Administration (GSA) requirement) and

an overenthusiastic public address system. One of the chairs at the counsel table emits embarrassing noises when someone sits in it (like the floorboards in a samurai shogun's castle). When you are standing at the lectern microphone, you cannot move two inches forward (because of squeals and pops) or backward (because your words fade into the background noise of a packed courtroom). Your client will be sitting there and listening to every word. (You do invite your clients to court, don't you?) Your friends, your “significant other” from your second year at law school, and all their senior partners will be carefully observing your oral presentation while looking at the back of your wrinkled, wet jacket. (Just a few moments ago, the drinking fountain squirted water on your suit.)

Alas, the courtroom is your home. Lawyers are an honorable and critical part of a system that handles more than 1 million bankruptcy cases every year¹ (and provides an alternative to the Roman tradition of ripping the individual debtor into little pieces).² You earned the right to push open the gate and represent a client. You made your parents proud by graduating from law school and (*thank heavens!*) passing the bar. The Committee of Bar Examiners overlooked your indiscretions as a college party animal and concluded that you had good moral character.

Fourth, think about the jury. Whoops. The only juries you will see are on television.

Like thousands of other lawyers before you, you will blossom into a litigator during your first 50 appearances. Every journeyman bankruptcy lawyer develops his/her courtroom skills in the crucible of the courtroom, so look for opportunities to appear in court. Whenever you prepare a motion or opposition, ask the senior partner to send you to court. Since you sifted through the facts and read all the cases cited in the brief, you can be an effective advocate. If Mr./Ms. Senior Partner ignores your request, ask to accompany him/her to court. Watch how the master works his/her magic on the judge.

While you are a novice litigator, avoid telephonic appearances. You need to see whether your presentation makes the judge roll his/her eyes.

¹ See generally U.S. Courts, Bankruptcy Statistics, available at www.uscourts.gov/Statistics/BankruptcyStatistics.aspx (last visited March 3, 2014).

² “On the third market day, [10] creditors shall cut [the debtor's body into] [11] pieces...” See Theodor C. Albert, “The Insolvency Law of Ancient Rome,” December 2005, available at www.ancientworlds.net/aw/Article/688167 (quoting the *California Bankruptcy Journal*).



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However, if you must make a telephonic appearance, make sure that you know how to operate the telephone's mute button (to avoid typing noises, paper shuffling and heavy breathing over the courtroom public address system).

Embrace your apprenticeship as a junior litigator. You will learn more from your losses (there will be many) than your victories (there will be a few). Only a few judges keep score of your personal win/loss record. After a while, you should feel pretty comfortable on those wooden benches.

Advice for Junior Litigators: Practical Tips for Law and Motion

As you gain more experience in court, please consider the following practical tips. For starters, take an acting course at the local community college. Learn about vocal control, blocking, staging and engaging your audience. If nothing else, your acting "career" might start a few conversations at the local bar association meetings.

As a memory aid, prepare a case map (schematic) for each matter on a large manila folder. On my case maps, I include a timeline, a chart of the parties (with arrows showing who did what to whom), the calendar number, the calendar clerk's telephone number (in case I am delayed on the way to court) and a short list of the most important points for my presentation. Take this oversized chart and place it on the lectern before you begin speaking so that you can avoid the embarrassment of forgetting your client's name. (Do not ask me how I know this.)

Always pack a copy of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. I place a sticky note on the sections that are addressed in my motion.

Print the posted tentative ruling.³ Highlight the good, the bad and the ugly in different colors. While you are at it, print directions to the courthouse from Google Maps, and tape the directions to your chariot.

If you have never appeared before your judge, visit the judge's courtroom a few days before your hearing. Familiarize yourself with the surroundings and the pace of the proceedings.

Develop a subtle trademark to help the judge distinguish you from those other dark suits in the courtroom. I wear a fresh rose in my suit lapel. You could dye your hair purple or wear a mustard-colored jacket (but not at the U.S. Supreme Court, where certified specialist **Susan M. Freeman** (Lewis Roca Rothgerber LLP; Phoenix) says black is, well, the *new black*).

Arrive at least an hour early. Find your seat in the courtroom about 20 minutes before the hearing. If you sit in the back row on the aisle, no one can read your notes over your shoulder and you can hop to the counsel table in a hurry.

Bring the client to court. If your client is present, he/she can hear the judge's comments and watch the judge's demeanor. (You won't have to explain why your unopposed motion was denied.)

If a settlement is reached in the hallway before the hearing, write it down so that you can accurately state the settlement on the record. Be true to the letter and spirit of any

settlement. The judge does not want a debate over the terms of a settlement.

Write the calendar number of your matter and your client's name on the front side of your business card. When you give this customized card to the courtroom deputy, he/she can still read all your information after stapling the card to the calendar sheet.

Turn off your cellphone and put your iPad (with your updated personal calendar) in airplane mode. "Mr. Bovitz, how about June 24 at 2:30 p.m. for the continued hearing?" With practice, you should be able to answer this question in about five seconds.

Be civil in the courtroom (and in the halls). Shake everyone's hand. The clients hate one another, but most lawyers are just working for a living. Also, when the judge enters or exits the courtroom, stand up.

While waiting for your matter to be called, watch the earlier proceedings. Why is your matter different than the motion that the judge denied just five minutes ago?

When your contested matter is called, walk quickly to counsel table. Take what you need and leave the rest (*e.g.*, oversized purses and backpacks) in a pile next to the client. Do not slam your books and papers on the table in front of the microphones at counsel table.

If the judge's clerks are sitting in the jury box, give them a subtle nod (as a thank you for their work). Stand tall at the lectern, open your case map, take a deep breath and speak s-l-o-w-l-y and clearly.

Start your presentation with a "good morning," your matter number, your name, your law firm and your client's name/role (*e.g.*, "appearing for Mr. Smith, moving party"). If the client is present in the courtroom, tell the judge. The judge and law clerks like to see the parties in the courtroom; it puts a face to the name and establishes that the client cares about this matter.

The moving party usually goes first, but the judge may ask for the respondent to go first. Be ready. When the other lawyer is making a presentation to the court, do not interrupt; this is not "Judge Judy." You will ask for the same courtesy during your presentation.

Avoid lectern wrestling. When it is your turn to speak, ask counsel to cede the entire lectern to you. (When your argument is complete, pass the lectern smoothly to your opposition. You do not gain any points by hanging on to a piece of the lectern.)

During your presentation, do not touch the microphone. Do not click your pen or shuffle your papers at the lectern. Modulate your voice and your distance from the microphone to get the correct volume on the public address system.

Do not read a prepared speech. Instead, make your presentation from bullet points alone. Aim for a conversation with the judge. Look the judge in the eye.

The judge can read, so you do not need to regurgitate your brief. If the judge issued a tentative ruling, start by addressing any questions raised by the court. When the judge asks you a question, answer the question. Right now. Not later. Not after you finish your presentation.

If the other side has made a great point, find a way to turn that point against them. If you cannot do this, concede the point and move on. Do not feel compelled to respond to every unimportant point raised by the other side.

³ Tentative rulings are common in the Central District of California. See, *e.g.*, Bankr. C.D. Cal. Local R. 9013-1(j)(3) (providing that court may dispose of oral argument by posting tentative ruling day before hearing).

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When the judge makes a joke, go ahead and laugh. (If you aren't sure whether the judge just made a joke, drop your pen and duck behind the lectern.)

Once you are at the counsel table, never speak to the other lawyer directly. Always direct your comments to the judge. If the other lawyer asks you a question, direct your answer through the judge.

If anything in your briefcase starts making noise in the courtroom, turn off the device. Apologize to the court. (I was once cross-examining a witness when the judge's cell-phone rang on the bench. Hon. **Barry Russell** (C.D. Cal.; Los Angeles) points out that there is no acceptable protocol for answering your telephone in the courtroom.)

If the judge is going to rule against you, make your record for appeal and then submit the matter to the judge. If you are clearly winning, stop talking. (Seriously.) Win or lose, make sure the judge puts his/her evidentiary rulings on the record.

Make sure you understand all aspects of the judge's ruling. Ask for clarification when needed. If the judge rules in your client's favor, do not "spike the football" or dance for joy. A simple "thank you, your honor" is best. You are thanking the judge for his/her clarity of thought. When the hearing is over, leave the courthouse. Your prompt departure will discourage the judge from recalling your matter for reconsideration. (This happens more often than you think.)

If the judge issues a ruling against your client, do not pout. Again, a simple "thank you" is appropriate. When you lose, you are thanking the judge and his/her team for carefully considering your arguments. Also, do not ask the judge whether he/she will validate your parking (why do debtors do this?).

Lodge a neutral, accurate order that reflects the actual court ruling. Avoid creative docket entries on CM/ECF (e.g., "Notice of lodgment of order granting silly motion by XYZ Corp.").

More Advice for Litigators: Tips for Trials

Finally, here are a few odds and ends about trials. If you want to be a great orator, study *Courtroom Persuasion 2d* (West, 2009) by Russ M. Herman. His chatty tome is full of eye-opening war stories. If you have Herman's extroverted personality and skill set, you should immediately drop bankruptcy law, put on your "Better Call Saul" t-shirt and become a bigger-than-life personal-injury lawyer!

Winning trials in bankruptcy court is subtle. Your audience is one bankruptcy judge and his/her small team of clerks. Your persuasive tools are your reputation, candor, the facts of your case, knowledge of the law and a mastery of evidence.

Never waste the judge's time. Do not file complaints with 14 claims for relief. Do not bother with 18 affirmative defenses. Do not ask for three days of trial time when one will suffice.

Be fair and considerate to everyone during litigation. Work with the other attorney to draft useful status reports and a balanced pre-trial stipulation.

Don't make unnecessary evidentiary objections. Object only when it will help your case. (Of course, a timely objection might be helpful to wake up your witness.) Motions *in limine* are rarely helpful.

Tell your client (in person and in writing) about the risks and costs of extended litigation and a trial. Do this before the client spends big legal fees to get to trial. Encourage settlement, and promote mediation. No client is prepared for the significant legal fees that are involved in any serious contested matter or trial.

Tell your client that he/she can lose at trial, even when the facts and law are in his/her favor. For example, an appellate decision might change a key point of the law after your matter is already briefed. Your key witness might fail to show up. The other side's key witness might have a "creative day" on the witness stand. Your well-prepared witness might panic under pressure, or the judge might strike an important witness's testimony after observing the witness casually texting from the witness stand. (Hon. **Scott C. Clarkson** (C.D. Cal.; Santa Ana), brought this problem to my attention. He has a liberal policy on the use of electronics in the courtroom. But not *that* liberal.)

A judge might rule against your client for not-so-obvious reasons. Bankruptcy judges have the advantage of learning about your client in preliminary motions and contested matters long before your client's big trial.

Conclusion

In litigation, the losses are so very painful, but the victories are even sweeter. Please send me (bovitz@bovitz-spitzer.com) your war stories on witnesses-gone-wild. I hope to use some of your anecdotes in a future Chapter 8 Humor column. **abi**

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