By J. Scott Bovitz[1]

Meeting a Judge's Expectations

An Interview with Hon. Barry Russell

Hon. **Barry Russell** has been on the bench since 1974 (that is not a misprint). He has the longest tenure of any bankruptcy judge in the U.S. From January 2003 to December 2006, Judge Russell was chief judge of the U.S. Bankruptcy Court for the Central District of California. From September 1999 to December 2001, he was chief judge of the Bankruptcy Appellate Panel for the Ninth Circuit. He has also been an ABI member since 1985 and served on ABI's Ethics Standards Task Force.

Judge Russell has presided over thousands of bankruptcy cases, contested matters and adversary proceedings. His expectations are simple. In this article, he shares his expectations for lawyers engaged in contested matters and adversary proceedings.

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Review Your Judge's Public Materials

If your judge has posted procedures on the court's website, study these procedures before you file a pleading or show up in court. Does your judge allow self-calendaring? If so, when does the judge schedule hearings on your type of contested matter? Does your judge require a paper courtesy copy of briefs, two-hole punched, with exhibit tabs, on blue paper?

Read the Rules — All of the Rules

Study and cite to the relevant parts of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, the Local Bankruptcy Rules, the posted procedures on the court's website and the *Court Manual* (if any).[2]

Is There a Court-Approved Form for Your Motion?

The U.S. Bankruptcy Court for the Central District of California has posted "fillable" forms for common motions and filings. These include PDF forms for filing a bankruptcy case, loan-modification forms, Local Bankruptcy Rule forms, mediation forms, official bankruptcy forms, proof-of-claim forms and miscellaneous forms.[3] If your court posted a form, use it. If necessary, file a supplemental document to support your "form" motion.

Study Binding Appellate Case Law

Hon. Barry Russell
U.S. Bankruptcy Court (C.D. Cal.); Los Angeles

Has the U.S. Supreme Court, court of appeals, bankruptcy appellate panel or district court issued an opinion on the substantive law? If so, synthesize these opinions into your motion, complaint or brief. Before drafting a nondischargeability complaint, start with the following cases: *Husky Intern. Elecs. Inc. v. Ritz*,[4] *Lamar, Archer & Cofrin, LLP v. Appling*,[5] *Bullock v. BankChampaign NA*,[6] *Kawaauhau v. Geiger*[7] and *Rimini Street Inc. v. Oracle USA Inc.*[8]

Read Your Judge's Published Opinions

If your judge has written a decision on the relevant substantive law, carefully study that decision. Read all cases citing the judge's opinion. When Judge Russell publishes an opinion, he really cares about the topic.

Know When (and Whom) to Call, and What Not to Say

Most judges have an active website, which will usually list the proper contacts for calendaring, emergencies and (if needed) "second call" requests. Do not try to argue your case with the bankruptcy judge's staff. *Ex parte* advocacy will not help your case.

Speaking of "Second Call," Do Not Be Late to Court

This author was in Judge Russell's courtroom when a tardy lawyer said, "Siri said it would only take an hour to get to court." Really? Judge Russell mounts the bench on time. Put the clerk's number in your cell phone (now!) so that you can find the number when you are stuck behind a protest march near the courthouse. (Judge Russell's clerk might be in the courtroom with the judge, so call his clerk at least 30 minutes before the scheduled hearing.)

1 The author thanks Judge Russell for his advisory opinions. Judge Russell's advisory opinions (as interpreted by the author) are not binding in his courtroom.
2 *Court Manual*, U.S. Bankruptcy Court for the Central District of California, *available at* cacb.uscourts.gov/court-manual (unless otherwise specified, all links in this article were last visited on Feb. 26, 2020).
3 "Forms," U.S. Bankruptcy Court for the Central District of California, *available at* cacb.uscourts.gov/forms.
4 136 S. Ct. 1581 (2016) (11 U.S.C. § 523(a)(2)(A)).
5 138 S. Ct. 1752 (2018) (11 U.S.C. § 523(a)(2)(B)).
6 569 U.S. 267 (2013) (11 U.S.C. § 523(a)(4)).
7 523 U.S. 57 (1998) (11 U.S.C. § 523(a)(6)).
8 139 S. Ct. 873 (2019) (costs).

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If You Want to Withdraw a Motion, Call the Clerk, then File a Stipulation

What if the moving party wants to withdraw the motion or dismiss the complaint? Contested matters do not just go away. A stipulation (and court approval) might be required. When you have an adversary proceeding, refer to Rule 7041 of the Federal Rules of Bankruptcy Procedure and Rule 41 of the Federal Rules of Civil Procedure.

Telephonic Appearances

Some judges are comfortable with telephonic appearances. However, Judge Russell very rarely authorizes active telephonic appearances. He will allow passive telephone links — for listening only. He believes that lawyers "get more things done" in the hallway of the courthouse. If Judge Russell authorizes a telephonic appearance, that lucky lawyer should put his/her dog in the basement (without the dog's favorite squeaky toy) before calling in.

Tentative Rulings

Some judges post extensive tentative rulings. If there is a tentative ruling, focus your oral argument on the judge's written points; do not waste time on anything else. At times, a judge will issue a final ruling and excuse appearances by counsel. Do not show up for a non-hearing.

Judge Russell does not issue tentative rulings. This means that each lawyer must be fully prepared to argue the law, recite the facts and explain the procedural posture of the case. Earn the judge's trust with each appearance, and take responsibility for your procedural errors, if any. This author likes the challenge of oral argument, as the client gets to see the best work in the courtroom.

Affirmative Defenses

Do not assert 19 affirmative defenses in your answer to a complaint. Stick with a few. To underscore this point, Judge Russell advises, "Please study Federal Rule of Bankruptcy Procedure 9011." Ouch!

Consider Mediation

Your client can avoid the risks and costs of litigation by participating in a mediation (supervised settlement) and reaching a settlement. Judge Russell founded and still manages a very successful mediation program in the U.S. Bankruptcy Court for the Central District of California. Volunteer mediators are available at no charge.[9] A few retired bankruptcy judges are also available for paid mediation work.[10] (Of course, Judge Russell cannot formally promote paid mediators.)

Read Civil Rule 26

Follow Rule 26 of the Federal Rules of Civil Procedure regarding disclosures. There is a "discovery hold" in Civil Rule 26(d)(1) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)....").

Consider Expert Testimony

If expert testimony would be helpful to the judge, hire that expert early and share the report with the other side. A good report might help with settlement.

If the Judge Issues an Order Regarding Procedures, Follow That Order

Many judges issue orders regarding discovery and pretrial procedures. Read, calendar and comply with these orders.

Status Reports

In the U.S. Bankruptcy Court for the Central District of California, the mandatory form of the summons in an adversary proceeding includes this text:

> You must comply with LBR 7016-1, which requires you to file a joint status report and to appear at a status conference. All parties must read and comply with the rule, even if you are representing yourself. You must cooperate with the other parties in the case and file a joint status report with the court and serve it on the appropriate parties at least 14 days before a status conference. A court-approved joint status report form is available on the court's website.... The court may fine you or impose other sanctions if you do not file a status report. The court may also fine you or impose other sanctions if you fail to appear at a status conference.

Judge Russell requires timely joint status reports. If a lawyer fails to file a joint status report, Judge Russell will usually fine the lawyers at least $400.

Discovery Disputes

You do not like discovery disputes. Judge Russell does not like discovery disputes. Solve your discovery problems outside of the courthouse. If you cannot solve a discovery dispute, refer to the Local Bankruptcy Rules. In the Central District of California, Local Bankruptcy Rule 7026-1(c)(3) sets up a meet-and-confer procedure, with a joint stipulation. Judge Russell is surprised that "many good lawyers miss this requirement":

> If the parties are unable to resolve the dispute, the party seeking discovery must file and serve a notice of motion together with a written stipulation by the parties. The stipulation must not simply refer the court to the document containing the discovery request forming the basis of the dispute. For example, if the sufficiency of an answer to an interrogatory is in issue, the

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9 *See* "Mediation Program," U.S. Bankruptcy Court for the Central District of California, *available at* cacb.uscourts.gov/mediation-program (mediation program details). The mediation program settles almost two-thirds of the cases assigned to it.

10 Your author has learned that the witty Hon. **Leif M. Clark** (a retired bankruptcy judge with the Western District of Texas who authored more than 300 opinions and an ABI member since 1986) "provides mediation and consulting services for a broad spectrum of commercial matters both domestically and internationally." *See* "Executive Summary," *available at* leifmclark.com/assets/lmclark-cv.pdf.

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stipulation must contain, verbatim, both the interrogatory and the allegedly insufficient answer, followed by each party's contentions, separately stated.

Pretrial Stipulations

Avoid dueling *unilateral* pretrial statements. If there are difficulties with language, try "Plaintiff Smith contends" or "Defendant Jones contends" to break the logjam. Alternatively, use neutral language. "Did Defendant Jones make any misrepresentations to Plaintiff Smith regarding the purchase of XYZ Inc.? If so, what were such misrepresentations?"

Perhaps you can follow the elements of a claim for relief. "On Plaintiff Smith's claim for relief under 11 U.S.C. § 523(a)(2)(A) regarding material misrepresentations, has [Plaintiff Smith] established: (1) misrepresentation, fraudulent omission or deceptive conduct by [Defendant Jones]; (2) knowledge of the falsity or deceptiveness of [Defendant Jones'] statement or conduct; (3) [Defendant Jones'] intent to deceive; (4) justifiable reliance by [Plaintiff Smith] on [Defendant Jones'] statement or conduct; and (5) damage to [Plaintiff Smith] proximately caused by its reliance on [Defendant Jones'] statement or conduct? *In re Harmon*, 250 F.3d 1240, 1246 (9th Cir. 2001); *In re Jacks*, 266 B.R. 728, 733 (9th Cir. BAP (Cal.) 2001). *See* Trial Testimony of actor Jason Statham; Exhibits 1, 24, 37."

In the pretrial stipulation, stipulate to the authenticity and admissibility of most exhibits. The pretrial stipulation/order will govern the rest of the adversary proceeding, so extra care is required at this stage.[11]

Evidence and Elements

What are the elements of each claim for relief? For each element, write down the evidence you have (or hope to discover). Do you need authentication for an exhibit? Do you anticipate evidentiary issues at trial? You will not impress Judge Russell with unimportant evidentiary objections — because he wrote the book. Literally.[12]

But ask whether Judge Russell will strike the other side's expert's testimony under Rule 702 of the Federal Rules of Evidence (because only the witness who is not qualified as an expert by knowledge, skill, experience, training or education).

Also, ask yourself if the opponent's declaration refers to a purported "admission" of your party/client. Was the statement "made by the party's agent or employee on a matter within the scope of that relationship and while it existed" as provided by Rule 801(d)(2)(D) of the Federal Rules of Evidence?

Finally, consider whether certain evidentiary issues should be addressed before or at the start of trial through a motion *in limine*. Renew your evidentiary objections during trial.[13]

Direct Testimony by Way of Declaration

In almost every adversary proceeding, Judge Russell issues an order providing for the use of declarations in lieu of live testimony from most witnesses. Judge Russell's order states:

> [Trial] procedure is similar to a motion for summary judgment, except that the admissibility of a declaration is dependent upon the presence of the declarant at trial subject to cross examination....
>
> [E]ach party shall present the testimony of all its witnesses through declarations....
>
> [O]ral testimony will be strictly limited to rebuttal testimony....
>
> [I]f a portion of the witness' declaration concerns an exhibit ... the exhibit must be attached.
>
> If a party is unable to obtain a declaration of a witness, counsel for that party shall file a declaration stating the name of the witness and a detailed summary of the expected testimony and why the counsel was unable to obtain the witness' declaration.

This provides an opportunity to present the testimony of each witness in a chronological, factual manner — without interruption from that pesky lawyer on the other side. The opponent will still get the chance to conduct live cross-examination of the witness (declarant) at trial. Judge Russell's trials are speedy. His trial-by-declaration process complies with due process:[14]

> The Adairs have challenged the bankruptcy court's standard procedure requiring that direct testimony be presented by written declaration. Under this procedure the parties submit written narrative testimony of each witness they expect to call for purposes of direct evidence. The witness then testifies orally on cross-examination and on redirect....
>
> The use of written testimony "is an accepted and encouraged technique for shortening bench trials." *Phonetele, Inc. v. American Tel. & Tel. Co.*, 889 F.2d 224, 232 (9th Cir. 1989) (citing *Malone v. United States Postal Serv.*, 833 F.2d 128, 133 (9th Cir. 1987)), *cert. denied*, 488 U.S. 819, 109 S. Ct. 59, 102 L. Ed. 2d 37 (1992). Accordingly, we have held that a district court did not abuse its discretion in accepting only declarations and exhibits on a particular issue where the parties were afforded "ample opportunity to submit their evidence." *See Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330, 1342 (9th Cir.), *cert. denied*, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 414 (1990).
>
> The bankruptcy court's procedure permits oral cross-examination and redirect examination in open court and thereby preserves an opportunity for the judge

11 *Neilson v. United States (In re Olshan)*, 356 F.3d 1078, 1085 (9th Cir. Cal. 2004) ("The trustee was bound by the pretrial order. *See* Fed. R. Civ. P. 16(e) (stating that the pretrial order 'shall control the subsequent course of the action unless modified by a subsequent order' and 'shall be modified only to prevent manifest injustice'")); *N.Y. Skyline Inc. v. Empire State Bldg. Co. LLC (In re N.Y. Skyline Inc.)*, 497 B.R. 700, 704, fn.5 (Bankr. S.D.N.Y. 2013) ("The pre-trial order supersedes the pleadings and becomes the governing pattern of the lawsuit." [quotes and citation omitted]).

12 Barry Russell, *Bankruptcy Evidence Manual, 2019-2020 ed.*

13 Johnine Barnes, "So How Should I Deal with My Opponent's Expert Witness Report," Am. Bar Ass'n, *available at* americanbar.org/content/dam/aba/administrative/labor_law/meetings/2009/ac2009/135.pdf ("As a result, any *in limine* ruling is essentially an advisory opinion by the court, subject to change during the course of trial. *U.S. v. Allison*, 120 F.3d 71, 75 (7th Cir.).....").

14 *See In re Adair*, 965 F.2d 777, 779 (9th Cir. 1992).

to evaluate the declarant's demeanor and credibility. The procedure is essential to the efficient functioning of the crowded bankruptcy courts. *See In re Heckenkamp*, 110 B.R. 1, 4 (Bankr. C.D. Cal.).

Judge Russell's trial-declaration procedure allows a lawyer to prepare a clean cross-examination of an opposing witness, using questions suggested by the language of each declaration itself. For example:

On page ten, you said, "I conclude that the value of my house is $550,000.00, based on my review of Zillow's web site." Mr. Witness, is Zillow all that you relied upon in reaching your conclusion of value? On page 54, you said, "I conclude that the defendant is liable under the doctrine of *res ipsa loquitor*." Did you study Latin in school?

Should You Ever Object to the Judge's Question to Your Witness at Trial?

Of course not. The judge is your finder of fact. abi