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Federal Practice

by Honorable Richard Mills*

The formula for success in trial practice is simple: Be prepared, be decent, and be on time.

There are ninety-four district courts in the United States. Twenty-four states have two or more districts; for example, Illinois and Georgia have three. Twenty-six states, plus the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands, are single districts. And in all of those ninety-four districts over the last thirty years, the civil cases have tripled! In my district we have quadrupled our caseload in that same time frame. In the last five years alone, we have had a 58.7% increase in the district courts. That is an average of 520 cases per judge across the country. The contract disputes involving the government have doubled; the contract disputes between private parties have more than doubled; the personal injury lawsuits have risen more than forty-five percent since 1980; and complaints by federal prisoners have risen from more than thirty-five percent in that same seven-year span.

The average civil practitioner is not concerned for the most part with complaints filed by prisoners. Those come to us mostly pro se. But those are still civil cases upon which district courts must spend a great deal of time; in fact, courts spend a disproportionate amount of time on them because they are pro se, which means that we must expend inordinate time to comb the record very carefully. That adds to the tremendous caseload already on the dockets of district courts. The picture is equally bleak in the intermediate federal appellate courts. The cold hard data is that over thirty-three thousand cases were filed in 1985 in the thirteen circuit courts of appeals of our system.

Whether we are talking about small claims or traffic complaints in the state systems or whether we are talking about the United States Supreme Court, all tribunals are volume courts. We must deal with that volume. There are, of course, many ways to do this. One that is constantly being suggested is to appoint more judges, elect more judges, and build more courthouses. That simply is not going to do it. These simplistic solutions not only postpone the problem but, in fact, exacerbate the problem. The old snowball effect comes into play. What we must do is recognize that the legal frontiers we face today lie not in the area of substantive law but in the procedural processing of the cases and management of the docket. The key is case management. We must devise new and innovative ideas on how to handle this inundation, this unbelievable volume that has buried our entire legal system, state and federal.

But the federal court practitioner is faced with the territory as he finds it. So let us examine the practical way of treading through the district court.

The cardinal caveat is: "Know your Judge!" This is essential if one is to understand the clear but unwritten rules of the game. We all have our idiosyncrasies, and judges have more than their fair share. When a case is filed, the assignment system takes hold, the wheels turn and you learn which judge is going to be handling the case. Your first step is to learn the background of the judge. Nose around and find out what you can about him. Every law library of any magnitude has compilations of judicial biographies that can be quite helpful. Get a handle on your judge. Know who you are dealing with. You want to get the flavor of what he or she is. You want to know about his professional background, his career. Did he come up through the professional ranks? What has he done? We are all human beings. We are at least the products (if not the victims) of the environments from which we came. So look into it. That will give you a pretty fair handle on who the judge is.

That is the base, but you want to know more about him. You want to know how he thinks and whether he is considered conservative. He may be conservative in certain areas but extremely liberal in others, so you cannot trust labels. Go to the books and look at some of his opinions if any are published. Go to Lexis or Westlaw in the office, punch in the key words and numbers, and come up with a list of his cases. If you happen to have a particular type of civil case that you are filing in his court, you want to see what he has written or said about that particular kind of case. This is very important. If there is no written track record, check with your colleagues. Check with those that have been before him in your particular kind of case and get a good handle on how he
approaches the process and the procedure in that type of case. We judges are what we are. There are clear, yet unwritten, rules of the game, and you need to know them if you are going to travel on the proper track when you get into that particular judge's court.

Your prime inquiry should be whether that particular judge runs a slow or fast track. At what pace does he handle his case management? The answer to this will generally determine whether the rules are strictly complied with, and you go for broke, or whether the pace is more casual and the rules are more relaxed. With ninety-four districts across this country, judges come in every shape and kind with many variations. It is going to pay off in the long run if you get a handle right up front on what kind of judge you are dealing with, what he likes, what he wants, how he views the rules, how he enforces (or ignores) them, and whether he pushes his calendar and docket or lets it run with the tide.

Whenever there is a recusation, a reassignment of a case, or a visiting judge who has come in from another district, each judge brings his own rules with him. Some judges will take matters under advisement and sit on them forever. Others will not take anything under advisement unless it is absolutely unavoidable. Some will permit oral argument on motions while others will not, preferring to rely on briefs and memoranda. Most local rules limit the pagination for memoranda to be attached to the motions filed. Is the judge easy or tough on allowing extra pages? By contrast, in many state systems, oral arguments on civil motions are either a matter of right or custom. For years now the Federal Rules of Civil Procedure have placed that discretion entirely in the hands of the judge. Many federal jurists do not feel they have the opportunity or the leisure in which to schedule oral arguments on routine motions. Some judges make extensive use of the telephone conference as a means of cutting down on administrative time lost and as a convenience to counsel.

A minor coup de grace is to cite the judge's own cases. Common sense, right? If you find a case similar to yours that he has written or ruled upon (hopefully in your favor), it will be persuasive. Even if the case is adverse, cite it, distinguish it, and articulate why it is not the same and should not be applied in your case. These are practical suggestions that will bear some fruit down the line. My real message is that regardless of which judge is assigned to your case, take a close look at him. Get in there and dig. Do your homework and find out his thought process regarding any particular kind of case. This is an essential element in "knowing the territory."

To look at judges qua judges, regardless of who we are or where we sit, toss us all into a sack, shake us up, and most of us will conduct our court in essentially the same manner. Most basic requirements of case
progress are mandated either by congressional statutory mandate, by federal rules, or by decisional law. Thus, ninety percent or so of the work on any case—as to the substantive aspects—is going to be determined by those dictates, and there will be little deviation or change. It is only the procedural area that is going to change because of a judge's particular modus operandi.

Now let me tell you how to irritate the judge. These irritating ways are going to vary from judge to judge, but only by degree, because the bone and sinew of each of these points is shared by nearly every district judge in the ninety-four districts.

The first irritant is failure to prepare. The hallmark of a good lawyer is preparation, and preparation is a sign of respect for the entire judicial process. One judge has said that when a lawyer disappears into the recesses of his litigation bag and uncovers his witnesses' identities and then mispronounces their names, we know we are in for a long, painful trial. Preparing witnesses just as they take the stand, fumbling around to find that key exhibit, and failing to have the next witness ready to go are common occurrences, and they simply demonstrate a total lack of preparation.

I know one lawyer who has done defense work for many years and is always prepared when he comes into court. He settles most of his cases very advantageously to his client because he is totally prepared. He knows the plaintiff's case better than the plaintiff by the first settlement conference, and by the time the final pretrial conference comes around, he is loaded for bear. He always learns exactly what the judge's ground rules are and follows them to the letter, regardless of whether he likes them or not. That is preparation, and it pays huge dividends.

The second irritant that is endemic to judges qua judges is a lawyer being late. We understand there are extreme circumstances now and then causing delay that simply cannot be avoided. But if it does take place, get on the telephone and let us know. When final pretrial conferences are set in a row seriatum, half an hour apart, on a Monday from nine o'clock straight through to the last setting at four-thirty, every thirty minutes is crucial. This is a vital part of the case management system, and if an extreme circumstance arises (and I do mean a meritorious reason), at least call immediately because that final pretrial conference is the most crucial last-ditch stand before we put a jury in the box and go to trial. The results of that conference will govern the metes and bounds of that trial. Always let your office know exactly where you are. You cannot believe the number of times that we have tried to track down a lawyer whose office does not know where he is!

Misleading the court is the next irritant. Regardless of how you do it, it leaves a terrible impression with the court. If you mislead the court
intentionally, you face a host of sanctions too horrible to mention. If you do it inadvertently and then realize your error—either shortly after or later during the day or even a week later—immediately file a pleading explaining what has taken place, apologize for the misleading character of it, explain how it happened, and clean up the act. You will gain immeasurably if you follow that procedure. Lack of candor, twisting the holdings of cases beyond recognition, grabbing a quotation right out of the headnote without bothering to read the cited case, misstating or misrepresenting what a witness said—this conduct may cause you to be cut off at the knees. In a jury trial, believe me, the jurors hang on every single word the judge says. A lawyer stands in jeopardy when he does anything less than lay it out with perfect candor.

Another irritant that is not a rarity is: “Your Honor, I have researched this issue thoroughly, and I can find no case on point.” Then the judge reaches over, pulls out a common treatise at the bench, flips through the index, finds the headnote, and lo and behold finds a string of cases that are generally applicable. This is not good. It is a bad beginning for that lawyer.

Being rude is also a problem. Interrupting either counsel or the judge in midsentence is bad form. It is uncommon rudeness, the antithesis of common decency and good manners. In trial, the combat of the moment, you are an adversary for one side; your opponent is an adversary for the other. The battlefield is heated, you are both representing different positions, and it is not always easy to keep a tight rein—but do it you must. Most of us do not appreciate rudeness; we prefer good manners and common courtesy.

Do not argue after the judge has ruled! When a judge rules against you, arguing with him is only going to make matters worse. Snide remarks like “Your Honor, you may note my exception to that ruling,” or a peeved “Thank you, Your Honor,” add nothing and are counterproductive. This type of sarcasm does not endear you to the judge and does not go unnoticed by jurors. We have the best educated, most aware jurors in the history of common-law man. With television and instant communication, there is not a juror who is not generally aware of what is happening in our world. Not many things are put past them.

Avoid repetition. We lawyers tend to be verbose because we are taught to be precise. Some attorneys want to write fifty-page briefs when four pages will easily do the trick. I realize that you have time sheets to worry about. I am aware that you have short coffee breaks that have to be charged to some hapless client out there, but do not use pleadings to pick up all the overhead tab. Do not file a forty-page brief in an attempt to bypass a fifteen-page local rule without first obtaining leave of court. Do not use a page for string citations when a couple of
the most recent and on-point cases will do. It is akin to calling ten
witnesses in a trial to repeat what two or three on the stand have
already stated. A smart opposing counsel is going to say, "No questions,
Your Honor," and that is often the best cross examination there is.
Constant repetition of matters and persistent redundancy are both
tiresome and tend to dilute the potency of the underlying position.

The worst violation is not knowing the rules of court. Put a big red
star by this one: rules. And I am referring to all of them: the
substantive ones under the applicable statute, the Federal Rules of Civil
Procedure, the local district rules, and the clear (but unwritten) rules of
the presiding judge.

Let us now turn to rules. We are surrounded by rules. We are buried
in rules. But they must be followed as well as enforced. Bennett Cerf
said that there are three things a man must do alone: testify, die, and
putt. I suggest that there is one more: read the rules! No one can do
it for you. The judge keeps these on the bench and on his desk; the
magistrate judges do the same. Every law clerk has a set—their bible.
Make it yours. The printed set of most court rules has a list of judicial
officers of the court, the order adopting the rules, a table of the rules,
and the standing orders of the court that become part of the rules as
well as the various forms adopted by the court. Nothing is accomplished
by arguing against the rules or bemoaning the fact that they exist. They
are there, and they are going to be followed. That is all that needs to be
said.

There is a story about Justice Oliver Wendell Holmes walking to the
Supreme Court one day in the nation's capital. With him was Circuit
Judge Augustus Hand. On this particular day, when they came to the
corner where they would part ways, Judge Hand said, "Well, do justice,
Your Honor." Holmes replied, "Oh, it's not my duty to do justice, just to
see that the rules are complied with." And that is really all we are
about. It is the court's job to see that the rules are complied with.

The real procedural bible for federal practice consists of the Federal
Rules of Civil Procedure and the local court rules. They travel in
tandem. These two amount to ninety-five percent of the procedural tools
used in the federal practice. The first important item is in the very
front. It is a timetable in federal civil cases. It gives a thumbnail
outline of everything you need to look at. It is an invaluable tool set
forth alphabetically by topic: admissions, alternate jurors, answers,
appeal, appeal from magistrate to district judge, appeal from magistrate
to court of appeals, appeal from district court to court of appeals, appeal
to Supreme Court, default, defenses, dismissals, filings, judgments, legal
holidays, magistrates, references, subpoena, all the way down to verdict.
Nearly every district court has adopted local rules dealing with motions. These are most important. They address time requirements, memoranda of law, time for response, paginations, summary judgments, what the pleadings must contain, etc. If the rule limits a pleading to fifteen pages, do not exceed it without prior leave of court. If identification of the rule under which the motion is filed is required, comply. Judges do not have all the rules memorized; few of us have total recall. We need reference points. Usually there is a time deadline for filing a response to a motion. And if no response is filed within the time limit, the court can presume that there is no opposition to that motion and may rule on it instanter. Counsel does not have to "call them up." Most districts are now on computer. If every case is now computerized, it is a simple matter to flag all motions as the time frames expire. If no response has been filed within the number of days provided, the court may strictly enforce the rule and dispose of the motion. If documents or affidavits are required, either in support of or in opposition to the motion, the copies are usually required to be filed along with the motion or response. They must be filed with the pleading, not later. Oral argument on these motions is rarely granted and only upon request. Therefore, it is essential that the court have all pertinent matters before it when a ruling is made.

This is a final caveat: If you file in the wrong place or wrong division, we will, of course, accept the filings and then reroute them to the other division. You will not be thrown out of court, but it could cause you a possible time problem. So be careful with your filings. Know the various divisions and file in the proper venue.

Frequently, "courtesy copies" of motions or other pleadings are sent to the court directly. This is not encouraged. Only do this on direction. Most judicial officers work from the entire file with the docket sheets. Therefore, courtesy copies are throwaways. Unnecessary copies and paper become a logistical problem for court personnel. That time is diverted from dealing with cases and work that truly merit the court's attention. Do not waste it with unnecessary paperwork.

Let us turn now to jurisdiction and venue. Subject matter jurisdiction is mandatory. Before we can entertain a case, we simply must have subject matter jurisdiction. Jurisdiction over the person and venue are waivable; subject matter jurisdiction is not. It is absolutely required under Rule 12(b)(1) of the Federal Rules of Civil Procedure. A court can sua sponte dismiss for lack of subject matter jurisdiction, although it normally takes place after notice and hearing. In Shockley v. Jones, 1

1. 823 F.2d 1068, 1072-73 (7th Cir. 1987).
the Seventh Circuit held that a dismissal under Rule 12(b)(1) without
notice or hearing is similarly suspect. Even when the dismissal is on
jurisdictional grounds, unless the defect is clearly incurable, a district
court should grant the plaintiff leave to amend, allow the parties to
argue the jurisdictional issue, or provide the plaintiff with the opportuni-
ty to discover the facts necessary to establish jurisdiction. If it appears
that the court does not have subject matter jurisdiction, a rule to show
cause is entered upon the plaintiff to clarify why the case should not be
dismissed for lack of subject matter jurisdiction. The burden is upon
plaintiff to respond with authority to show that the court does have the
requisite jurisdiction. If plaintiff cannot accomplish this, the case will
be dismissed.

Personal jurisdiction, of course, is waivable; people can voluntarily
enter a case as a party and acknowledge that they submit to the
jurisdiction of a court. Virtually every jurisdiction has a long arm
statute conveying jurisdiction if business is transacted in the state, if the
commission of a tortious act takes place within the state, or if there is
ownership of property, etc.

If there is a slim or tenuous chance of establishing federal jurisdiction
in a case with pendent state claims and if that federal jurisdiction fails,
a sanction may be likely upon plaintiff and plaintiff's counsel. If the
federal subject matter jurisdiction is not clean, neat, and tight—clearly
arguable—the case will probably be dismissed, and all the state claims
will have to be determined in the state court. The federal tail can not
wag the state dog. We have had too many of these kinds of cases that
have no business being in federal court. Every lawyer should flag this
because it can be both very embarrassing and costly to you and your
client. Furthermore, it may seriously impair the court's confidence in
you as a lawyer. You will not be forgotten. Tenuous or merely arguable
state claims and novel theories all belong in state court, and it is
preferable for a state supreme court to first rule upon these matters
rather than look to a federal court in the first instance.

United Mine Workers of America v. Gibbs\(^2\) has been precedent for
thirty years. In Gibbs Justice Brennan stated that "[t]he state and
federal claims must derive from a common nucleus of operative fact. But
... assuming substantiality of the federal issues, there is power in
federal courts to hear the whole," not just pieces.\(^3\) But, he says, "[t]hat
power need not be exercised in every case in which it is found to exist.
It has consistently been recognized that pendent jurisdiction is a

\(^3\) Id. at 725.
doctrine of discretion, not of plaintiff's right." Justice Brennan concluded that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." And this is his final word: "Once it appears that a state claim constitutes the real body of the case, to which the federal claim is only an appendage, the state claim may fairly be dismissed."

There has been no deviation from Gibbs and its doctrine. We do not want the state court telling us what the federal law says, nor should we, by reciprocity, be trying to tell the state court what its law ought to be except in the very rare circumstance when there is no interpretation of state law extant.

Under diversity we have two requirements, and they operate in tandem. Both must be met: citizenship diversity and a claim involving at least $75,000. It is most disconcerting when the court has a case involving more than $75,000, and then gets a phone call that the case has been settled for $2,500 the day before trial, the week before trial, or the day before the final pretrial conference when we have gone through all the motions, we have checked the cases, and everyone is apparently ready to go. These cases do not belong in the federal system.

The bar has been put on notice that Rule 11 of the Federal Rules of Civil Procedure is here, it is here to stay, and it will be enforced. We are all members of the bar, of a higher calling. We conduct ourselves hopefully by standards that are indeed a cut above the madding crowd. We are not fish mongers in the marketplace. We should be able to practice our profession in good faith without getting afool of the Rule 11 sanctions. The language of Rule 11 is not ambiguous. It requires that every paper shall be signed by at least one attorney of record and the attorney's individual name and address shall be stated.

Now this is very important. The signature of an attorney constitutes a certificate by the signer that he has read the document, that to the best of the signer's knowledge, information, and belief and through reasonable inquiry the contents of the document are well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. The signature also certifies that the document was not interposed with any improper

4. Id. at 726.
5. Id.
6. Id. at 728.
purposes such as harassment, delay, or needless increase in the cost of litigation. These are the certifications that every member of the bar is making the minute you sign your name to a pleading—any pleading or paper that is filed in federal court. If the document is not signed, it shall be stricken unless it is signed properly after the omission is discovered. Any paper signed in violation of this rule is subject to appropriate sanction, which may include a whole array of different penalties, including expenses. A minimal sanction might be an extension of time for the opposing party, coupled most likely with attorney fees. More severe sanctions may extend directly against counsel. Alternatively, the case may be dismissed, or certain affirmative defenses or pleadings may be dismissed.

Before 1983, Rule 11 was not couched in these tough terms. Bad faith was required. Counsel had to file a paper and sign it in bad faith before any of the sanctions could be imposed. However, Rule 11 was amended in 1983 to give it teeth. Quite a dichotomy, of course, ensued. Some attorneys feel that Rule 11 now is like walking through a mine field. They want the bad faith standard back. Other lawyers favor the current Rule 11 which simply requires strict accountability in the practice. The New York State Bar conducted a survey of more than 8,000 lawyers in New York and received 1,400 responses back. From this tremendous return on a mailing, they found that seventy-five percent of the attorneys were in favor of sanctions for a Rule 11 violation. Ninety-three percent of the judges thought sanctions were absolutely necessary to monitor violations of the good faith rules. This would seem to indicate that we will not see any change in federal Rule 11. It is probably here to stay.

In bankruptcy appeals it is the plaintiff's duty under most local rules to file a copy of the bankruptcy court stay in any case pending in district court. Occasionally, we are ready for trial and final pretrial, a case is on the trial calendar, and in comes counsel saying this particular party or plaintiff is in bankruptcy and presents a stay order. Consequently, much court staff time, lawyers' time, and litigants' costs have been wasted. Although the bankruptcy court is part of the district court, these are two different worlds, each operating independently; only the appeals come to the district court. We need a copy of that bankruptcy court stay order to tell us that the case is on hold.

Moving on to other topics, I have always been an advocate of the principle that judges should give their reasons for their rulings. They should give them either orally in open court on the record, particularly on dispositive motions but preferably in every kind of situation, or set forth the reasons in the written order if there is to be one. If the case is significant enough from a precedential standpoint, an opinion should
be written and published in the reporters with a detailed recitation of
the court's reasoning. Every reviewing court is entitled to know why a
trial judge does what he does. He may be right for the reasons he
states. He may be right but for other reasons discernable from the
record upon which he did not rely. But if the reasons are not spelled
out, he may be reversed because those reasons are not obvious from the
record.

Now, let us turn to sanctions. I will begin with a genuine disclaimer.
No court is looking for opportunities to nail a lawyer or party with a
Rule 11 sanction. That is the last thing we want to do. We do not want
to make sanctions a cottage industry in the district court. We do not
want to see all those motions for sanctions. But they must be imposed
upon occasion, and they can be imposed sua sponte, or after a rule to
show cause why they should not be imposed, or on motion. This ties in
with the discovery sanctions. Under Rule 11 a lawyer signs as an
attorney of record, and the sanctions under Rule 26(g) of the Federal
Rules of Civil Procedure are almost a boilerplate of Rule 11. These are
purely discovery sanctions. We can see how important they are because
the Judicial Conference made a separate Rule 26(g) on the signing of
discovery requests, responses, and objections. The attorney's signature
constitutes a certification that the signer has read the document, that it
is true and correct, and that he has made reasonable inquiry, has a good
faith argument, and does not present it for an improper purpose or for
harassment purposes. We see more of the sanction problem in the
discovery area than anywhere else, and this does pose a problem. The
failure of counsel to cooperate when dealing with all of the discovery
rules—whether federal or local rules—violates the requirement for
cooporation and good faith effort to resolve the mundane, garden variety,
trivial disputes that are endemic to all cases. The district court has too
much to do to spin its wheels on these minor and irritating nuisances
that should be resolved by counsel.

By the way, we would appreciate your names being typed underneath
your signatures. It helps us tremendously on the cover page and the
face sheet of the docket so that we know exactly who to contact, who a
party's primary counsel of record is, and who we hold responsible.
Another housekeeping item that we would appreciate is for counsel to
learn the correct title of the judicial officer and type his or her name
correctly. It is not "United States District Court Judge." It is "United
States District Judge." It is not just the "Magistrate." It is "United
States Magistrate Judge." We would also appreciate having our names
spelled properly. Frequently, I am "Judge Miller" or "Richard J. Mills,"
or I have other middle initials attributed to me. It does not take very
much effort to do things correctly.
Incidentally, it is common for local rules to give the state government additional time in which to respond to service of process. With the complexity of state government and the difficulty in getting documents to the right assistant attorney general, this makes sense. So do not jump the gun. Do not attempt to default the state if no answer has been filed on the thirty-first day!

Furthermore, most local rules specifically require a showing of proof of service. In my district the Clerk of the Court will not file a pleading or a motion unless certification of service is attached. Most local rules limit the number of interrogatories, including subparts, in all civil cases. Additional interrogatories may be propounded only with leave of court. In Illinois, the Northern District, Central District, and Southern District all have a limit of twenty interrogatories. If you ask a question, whether it is a subquestion or whether it is a major question, it counts against the limit as an interrogatory. This means that a disingenuous attorney is going to attempt to circumvent the rule, and we get some very clever attempts. The answer, of course, is that additional interrogatories may be propounded only after leave of court. In a complex case with numerous experts, additional interrogatories may be justified. But counsel must set forth the reasons and attach the proposed additional interrogatories to the motion. There must be a justification.

Now I have a few comments about jury trial procedure. Our standing order relating to jury trials has been extremely helpful. On the monthly jury trial calendar, the oldest case by file number is first, and the trials begin approximately two weeks after the final pretrial conferences have been held. The criminal cases, of course, take precedence; then we begin trial of the civil cases by age, number, and readiness. Bench trials are sandwiched in wherever a time slot can be found. We have found by experience that normally the United States Attorney's office will list something like eight to ten cases for trial when they first begin, and we will reduce those to about three cases that will actually remain on the trial calendar. The rest of them will plead out or be continued for some reason. Unless it is an unusual criminal case, we are talking three or four days, two weeks at the most, for trial days on the criminal calendar. Then the third week we are ready to go with the first and oldest civil case. We take them in order unless there is some problem. But if we end up with two cases back to back, one a three- and one a two-dayer, we might just reverse the sequence for trial in order to fill in trial time available. We want to keep the continuity of trial for the jury whenever possible. It is not fair to them otherwise. We want to be fair and give them every benefit that we possibly can. With the trailing calendar, we cannot give an absolute, ironclad date unless the unusual circumstances of an individual case have already been reviewed and a firm trial date
has been locked in for one reason or another. Some examples of unusual circumstances are witnesses who are foreign nationals living abroad, terminally ill witnesses, age of the case, multiple parties, etc. But, of course, under the rules, counsel are ready for trial at the conclusion of the final pretrial conference. All exhibits are identified, witnesses are listed, experts are identified, and jury instructions have been submitted. In bench trials the proposed findings of fact and conclusions of law have been presented. We are ready to walk into the courtroom and try the case.

The cases are generally tried in the order listed on the trailing calendar, but we find once in a while that there is just no way that we can try the next case because of the unavailability of an expert witness, a party being abroad, attorneys’ prepaid vacations or professional meetings, etc. If we end up with a couple of extra days, we can reach down to the bench trial calendar and pull up a two-day bench trial and try it. It works out great. I mean it works out great for the court. I realize that there is a degree of uncertainty and resulting law practice conflict for all attorneys under this system, but the caseload volume is such that the court’s obligations must take priority. It is merely an application of Mills Law: Where you stand depends on where you sit.

In any event, the trailing trial calendar has been working quite well, and we hope that eventually we will be current enough to be able to give definite trial date settings. The clerk of court’s office and chambers should be regularly contacted to check the status of the trial calendar. Because we work on the odd/even case number assignments to the law clerks, all counsel need do is tell my secretary the number of the case to be transferred to the right law clerk who can discuss the question of the trial status. The law clerk will be able to tell counsel where the case stands within the closest degree of certainty possible—the definite trials we know of, possible settlements, where your case stands on the calendar, etc. That is the best handle we can give you, but it is better than no grip at all. If a case is not tried in the particular month that it is placed on the trailing calendar, it will normally roll over to the next month and move up to the head of the civil cases for the next succeeding month’s calendar.

Caution: Last minute settlements always disrupt the trial calendar to some degree. Do not make the sad mistake of coming in on the morning of trial with a jury venire reporting to the courtroom and tell me that it has been settled unless you are ready either to share with opposing counsel and parties the cost of bringing that jury in for a day or to possibly suffer the entire cost if the circumstances warrant it. I do not particularly enjoy conducting a hearing to decide who must pay, but if it must be, so be it. A jury is there for a purpose, and we lawyers
have historically tended to totally ignore the jurors. We look at them as just another tool of our trade, ever available to be used to handle our cases as a matter of right. We must stop this. It is a tremendous hardship for some to serve on a jury; at the very least, it is an inconvenience. The last thing we want to do is to leave the impression with jurors that their time is being wasted, that we can just play around willy nilly with their time and their efforts, make them leave their homes and their businesses, and inconvenience their lives. This is wrong. If it can be settled on the morning of trial, it can be settled at least by the afternoon before.

In a civil case, there will normally be eight jurors, although six is the minimum. Three preemptory challenges are allowed per side. Regardless of the number of parties, it is still three unless otherwise ordered by the court in its discretion. There are no alternate jurors anymore. We can all envision a scenario with an extremely prolonged trial or a trial that will be chopped up because of other criminal matters or other scheduling problems. It may take weeks to finish the case, and we might very well need to have even more than eight. The judge may decide to have any number as a matter of discretion. Whatever number of jurors remain in the box at the conclusion of the trial will deliberate the verdict.

Rule 47 of the Federal Rules of Civil Procedure teaches us that the court may permit the attorneys to conduct the voir dire examination or conduct the examination itself. If the court does decide to conduct the examination itself, the court shall permit counsel to supplement the examination by further inquiry as it deems proper or shall itself submit to the prospective jurors additional questions of the parties as it deems proper. Like many federal judges, my practice is to conduct jury voir dire myself. I did on the state court, and I do on this court. You might be interested in knowing that about seventy-five percent of the judges in the federal system conduct the voir dire exclusively themselves. Among the other twenty-five percent, a few older judges allow the attorneys to conduct all of the voir dire, and the rest do most of it themselves but allow limited direct supplementation by counsel.

I turn now to courtroom conduct. Every judge conducts his or her courtroom a bit differently. I have a list of my idiosyncracies and instructions to trial counsel that are passed out at final pretrial conference. We have found that this has helped considerably. This is just the Mills way. A lot of judges do much the same thing, perhaps in a different manner. There again, know your judge. Decency and good manners in a courtroom are very important.

It seems clear that in another few years, half of the lawyers in every courtroom will be female. Fifty percent of the law school population is
female. Consequently, more and more women will be trying cases. Male lawyers must find out, as I must do, whether we address a female colleague as Miss or Ms. or Mrs., whether we use her maiden name, her married name, or perhaps a hyphenated name. Female lawyers should let the courtroom clerk know how they wish to be addressed. If we do not know in advance, we may have to go through this dichotomy in open court. None of us wishes to be embarrassed. When female attorneys file a case or enter their appearances, they should set forth on the face sheet how they wish to be addressed.

Next, all counsel should advise the courtroom clerk who represents whom, who is here, who is lead, who sits second chair, etc. It is terribly disruptive for us to have a jury venire sitting in the courtroom ready to go and for the judge to walk out and find four lawyers at one table, four at another, plus parties, officers of corporations, etc. We do not know who is who. Often the face sheet from the first day the complaint was filed shows an attorney who left that firm a year ago. We have to rifle through the file to reconstruct the lineup. So please be good enough just to walk up to the courtroom clerk the morning of trial and say, “I'd like to tell you who is appearing here.” Better yet, write it down. This will make it much simpler.

Here again, know your judge. Some of us are lenient; some of us are less tolerant. Others are more demanding and adhere to rigid formality. My suggestion is that you can never go wrong with formal conduct; that is the safest approach regardless of the judge. Look your best—no open collars. Tie the tie. First impressions are the lasting ones, whether on the judge sitting up there at bench or the jury over in the box. Both juries and judges are quite perceptive.

Two judges in robes are walking down the hall. One says to the other: “Generally I don’t approve of cameras in the courtroom, but when I return from my vacation I usually look well-rested, calm and—in a word—magnificent.” How you look is important, I guess, whether or not there are cameras in the courtroom. Look your best. You will never be disappointed.

The visual aids that are utilized during the course of a trial need to be set up and ready to go prior to trial. If you need an easel, a tripod, a chalkboard, or a shadow box, talk to the marshal or courtroom deputy clerk ahead of time. They will have them ready for you. Now, if you have a video deposition that you are going to be playing, make sure a VHS video player is arranged for and scheduled for setup at a recess, noon break, or the night before. The best time to flag these requirements is at the final pretrial conference. That should normally allow sufficient time to line up the trial aids required. Demonstrative aids should be prepared in advance. Then you have a lot more leisure to
design and prepare them than on the morning of trial. They can also be marked for the record in advance. I also suggest that drawings, graphs, figures on a chalkboard, or even items of hard evidence can be preserved for the record by taking polaroid pictures and placing them in the record. The reviewing court will then have a nice photograph of that exhibit and can determine if it needs the original.

The same thing applies to depositions. Go through them in advance. Have them marked and highlighted and know exactly where you are and what page you are on in the crucial testimony. It is very important.

During trial, some judges view the use of impeachment in a very narrow, strict way. Impeachment is not for the purpose of getting into a cat fight. Counsel uses one word in his question; defendant has used another word that means about the same thing or arguably so in the deposition. Then we go into a totally fruitless dichotomy that takes up the time and effort of everyone. In fact, all it does is irritate the jury and the judge. My view is that impeachment must be diametrically opposite, an unqualified yes or no, black and white. There are, however, some judges who disagree with this interpretation. Even those who agree may let it go through. Here again: know your judge! You do not wish to invite some kind of comment by the court in front of the jury that it is not proper impeachment and a ruling that strikes the testimony.

Objections should be used sparingly and only when absolutely necessary. Nitpicking objections simply irritate the jury as well as the court. Once counsel loses on a motion in limine, it cannot be raised again at trial. A motion in limine must be specific, both factually and legally, and a motion in limine couched in broad statements is just not sufficient. Motions in limine right up to and during trial are fair game; they may be filed at any time. But the earlier they are filed the better, so that everyone will know the ruling in advance of trial and be able to plan the trial strategy accordingly.

Most jurists believe that jury instructions are counsel's responsibility. Not all judges agree; some enjoy working with them and crafting them themselves. However, under most rules the parties are directed to prepare jury instructions and submit them at the final pretrial conference. May I suggest that when counsel presents them to the court, the copy of the instruction should have the I.D. at the bottom (Defendant's Instruction #1, etc.) with the authority citation (Pattern Instructions, Devitt & Blackmar, Modern Jury Forms, etc.) or whatever case citation authority is relied upon. Place the copy on top and paperclip it to the unmarked original. The copy should be on top because it is the copy that we work from, and show either "given, refused, objection, or modified," and the judge may make notes on the copy for the file. If the
instructions get out of sync and separated, we are likely to end up with a hodgepodge and a real problem.

In fact, I had one criminal case that went to the jury after a stack of instructions had been given. One of the originals got out of sequence for some reason and was not even in the batch that I gave to the jury. Fortunately, I had all of the copies right there on the bench with me—including a very crucial one that had been overlooked and would have led to a mistrial had I not given it. Fortunately, we discovered the oversight before the jury retired, and I gave it even though it was out of normal sequence. Counsel caught it because they were following the copies of those as I gave them. One came up and said, “Judge, you missed one that is very crucial.” We never did find the original. But I had the copy, so I read it to the jury and told the jury that I was sorry but it was just sheer human frailty and inadvertence. I then took a ruler and tore off the marked bottom of that copy and put the copy right in there with the originals and sent it to the jury. Instructions can be very crucial!

When a major dispute over instructions comes up at trial—whether it is burden or issue—it holds up the proceedings. The jury is sitting back there waiting for us to get through this conference and get the show on the road. We can eliminate some serious time-consuming problems by simply addressing the problems earlier on. This can be accomplished in limine, at final pretrial conference, on motion, or informally by counsel. Different judges have different preferences. There again, know your judge.

Some judges do not impose any time limits on opening or closing arguments. Some do. If there are no restrictions, then it is up to counsel. You know your case better than we do. If you speak too long, you may jeopardize your case. It is your call.

During jury deliberations, make sure you leave a telephone number with the courtroom clerk where you can be located in case of a jury verdict, question, or problem. As soon as the jury has retired, I want counsel to remain in the courtroom so we can make a record as to what the procedure will be during deliberations. We will resolve how questions from the jury to the judge are going to be handled, whether or not counsel and parties waive their presence for return of the verdict, whether a copy of a question and a copy of the judge’s answer will be adequate in your absence, etc. We discuss decisions regarding meals for the jury, such as what time we are going to check with the jury to see if they want to order food in or if they want to go out to a restaurant, so that we can make arrangements. We will also talk about the length of time we will let the jury deliberate. Perhaps we will say that they can deliberate until ten o’clock p.m., and that if they have not reached a
verdict by then, they may disband, go home, and return the next morning at ten o'clock to continue deliberation. Perhaps we need to address the possibility of sequestering the jury and overnight accommodations. Are sealed verdicts to be opened by the judge, or should the jury return for opening the verdict? Get all of this on the record and get counsel to agree to the procedure so that the court, counsel, parties, and jury are all in sync and we can avoid problems later on. This is the time to do it.

The custody and disposition of models and exhibits are covered by Rule 26 of the Federal Rules of Civil Procedure, and after they have been received into evidence, they are in the custody of the clerk. Bulky exhibits may be photographed and a copy placed in the file. Counsel's neglect to remove any models, diagrams, or aids within thirty days after notice from the clerk may lead to the object being sold by the clerk at public or private sale.

After the trial, your attention is called specifically to Rule 26(e)(2) of the Federal Rules of Civil Procedure: No attorney, party, or representative of either may interrogate a juror after the verdict has been returned without prior approval of the court. That is mandatory and is very jealously guarded by the court. Judges differ in their application of the rule, but their control of the issue is closely exercised. In four criminal and several more civil cases, I have specifically given permission for counsel to contact the jury to see what the problem was and what issues were most important. In one case it looked as though discussions with the jury could help to resolve the case by final disposition—which indeed proved to be the case. In fact, I went to the extent in another case to send a letter to each juror telling them that they would be contacted by attorneys from both parties and asking them to please cooperate with the attorneys because their truthful answers would be very helpful in the ultimate disposition of the case. All of the jurors were superbly cooperative, and their assistance actually resolved all of the problems and all of the issues.

Finally, I have some thoughts on final judgments in post-trial motions. You have ten days and that is all! We are talking about ten days after judgment. An untimely motion does not extend the time for appeal. It must be timely filed within ten days, and there is no way out from under it. Rules 59 and 60 of the Federal Rules of Civil Procedure govern this completely. A motion for a new trial shall be served not later than ten days after entry of the judgment. And not later than ten days after the entry of the judgment, the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on the motion of a party. Both counsel and the court are locked in to the ten-day time frame.
Motions to "reconsider" are filed all the time. But there is no such animal in the federal practice. These motions fall under Rule 59 of the Federal Rules of Civil Procedure: "New Trials; Amendment of Judgments." These motions should be more than a mere rehash of your earlier arguments because if there is nothing new or different, it has not changed a bit. Therefore, the ruling will invariably be the same. Quite frankly, a frivolous motion to reconsider is clearly subject to sanctions under the infamous Rule 11.

Requests for attorney fees and bills for costs are to be filed within ninety days of judgment unless an extension is given for good cause. Keep within that time frame. If you need more time, file your extension motion and explain your reasons—the complexity of the matter, statements and fee costs from your expert witnesses have not been received, etc.—but do it on a timely basis.

In sum, these suggestions are the result of my thirty-two years on the bench—state and federal, trial and appellate. They are personal observations but most of them are shared with my colleagues. However, no two judges are identical. We each conduct our courts somewhat differently. So the ultimate imperative is to "know your Judge!"

Finally, always remember that there are two very difficult things to achieve in this world. One is to make a good name for yourself. The other is to keep it.