

Eastern District of Texas 2017 Bench-Bar Conference

***Words, Phrases & Rhetorical Ploys That Will Make Some Judge's Skin Crawl.
Are you Playing Russian Roulette With Your Briefing?***

Judge Interview Responses submitted by Boone Baxter

Judge #1

Avoid:

1. Overusing the following words.
 - a. spurious
 - b. disingenuous
 - c. red herring
 - d. unpack
 - e. tenuous at best
 - f. misplaced
 - g. specious

Advice:

1. Use white space advantageously if a judge allows you to use a word-limit.

Judge #2

Avoid:

1. Disparaging opposing counsel too often or not in a measured way.
2. Failing to compromise.

Advice:

1. Do not try to win every argument/point.
2. Maintaining your credibility is almost always the best way to advance your client's position.

Judge #3

Advice:

1. Pare down your arguments – you don't get any credit for the bad ones and you only take focus away from the good ones.
2. Address the other side's points.

Judge Interview Responses submitted by Philip Vickers

Judge #1

Avoid:

1. Failing to carefully proofread and edit.
 - a. Using the wrong word can completely change the meaning.
 - b. Be careful to ensure your writing says what you want it to say.
2. Overuse of pronouns – he, she, they, it.
 - a. Overuse of pronouns renders writing ambiguous.
3. Overuse of adjectives and adverbs.
 - a. Some use is okay, but overuse may undermine the point you are making.
4. Improper quotes or citations to authority.
 - a. When cite is incorrect, it may create doubt on whether there is authority for the proposition of law necessary to support your point.
 - b. If holding not as solid as suggest in briefing, this will undermine your credibility with the court.
5. Informal writing.
 - a. No contractions – no “can't” or “won't”.
 - b. Use appropriate writing for occasion.

6. Not necessary to add artistic flair to writing.
 - a. Do not be too flamboyant, overly colorful.
 - b. “A meat and potatoes guy.” is an example.
7. Wordiness.
 - a. Be succinct.
 - b. Summarize facts, tell the best case or statute.
8. Disrespect to opposing counsel.
 - a. Don’t ridicule the other side.
 - b. Argue your client’s strongest legal points without getting personal.
 - c. No “tit for tat” arguments.
 - d. Having good authority to support your position best advocacy. (prefer 5th Circuit and Supreme Court authority; EDTX authority to lesser degree).
9. Objections to Report and Recommendations.
 - a. Objections should be stated without expressing disapproval of magistrate judge.

Judge #2

Avoid:

1. Too much verbosity and too little brevity.
2. Arguments that lack a logical flow.
3. Too much repetition of your points.
 - a. Briefs that repeat the same point so often that it becomes a “bumper sticker”.

4. Overuse of footnotes.
 - a. Too many footnotes interrupt and slow down the reading flow.
 - b. Footnotes should be used as reminders of prior arguments made in the brief or to show important cross-references.
5. Witness-by-witness statements of facts.
 - a. Sometimes okay but usually overdone.
6. Distortions of the facts or the law.
 - a. Be careful – do not overstate the facts.
 - b. Distortions of the law – severely undermines credibility.
7. *Ad hominem* attacks on opposing counsel.
 - a. Accusing the other lawyer of intentionally misleading the Court.
 - b. Overly contentious briefs – slapping your opponent in the face with how absurd the argument is.
8. Showing off with language.
 - a. Using unnecessary Latin phrases or other words that one does not ordinarily use.
9. Failing to put your arguments in a logical, succinct, flowing, common sense organization. Make it easy for the judge to read your brief.
10. No boring writing.
11. Using too many quotes in briefs – lacks originality.
 - a. Okay to summarize some points in your own language.
 - b. Block quotes – not good where overused. The Court should not be put in a position where “you’re supposed to look in there and find the nugget.”

Judge #3

Avoid:

1. Misstating facts or law.
 - a. Do not take advocacy too far.
 - b. You will appear in front of the judge again – do not lose your integrity with the court.
 - c. You have to understand that to persuade the court, you must have the trust of the court.
 - d. Part of candor to the court involves admitting the shortcomings of your case.
 - e. Candor will help the lawyer gain the judge's trust.
2. Discourteousness – whether in court or in briefing.
 - a. Attacking the other side.
 - b. Attacking the magistrate judge.
3. Take out the adjectives.
 - a. Describing a position as “ridiculous” or another lawyer as an “idiot.”
 - b. Too much exaggeration.
 - c. Too much emotion is unnecessary.
4. Failure to meaningfully conference on a matter.
 - a. Court can almost tell if the parties have not had an adequate conference.
 - b. E.g., there are fifty disputed issues.

5. Strive for quality and not quantity.
 - a. Putting everything in the papers runs the risk of diluting good arguments.
 - b. “Offer a select menu as opposed to a buffet.”
 - c. Not enough time to edit is a sign of laziness.

6. Oral arguments – if granted, it’s because the judge has questions.
 - a. Listen carefully for the judge’s questions and answer the questions.

7. Be conscious of who your audience is.
 - a. The Court understands you have clients, but it is your job to explain to the client what the judge is looking for and how it will help your case.

Judge Interview Responses submitted by Alexandra McNicholas

Judge #1

Avoid:

1. Does not like the use of “with all due respect”.
2. Do not refer to opposing counsel’s client by using “your plaintiff” or “your defendant”.
3. Do not refer to opposing counsel or parties by first names.

Judge #2

Avoid:

1. The obvious – use of “hereby”, “wheretofore”, “hereinafter”, etc.
2. “The expert’s opinion is nothing more than improper and inadmissible *ipse dixit*.”
3. Citing Rule 56(c) in a motion for summary judgment – it has been rule 56(a) for about six years now.
4. The U.S. Marshal spelled as U.S. Marshall.
5. “Respective costs are paid by the parties incurring same.”
6. A certificate of conference that says the lawyer left a message for opposing counsel as to whether or not he or she objects to the motion but they have not heard back yet.
7. A motion characterized as an emergency has a 98% chance that it is not an emergency.
8. If you file a writ of mandamus, you better be right.
9. “Judge, we would like a stay of discovery until you decide the motion to dismiss.”
10. “This case will just have to be tried.” *Translation*: this case will take longer than others to settle.

Judge #3

Advice:

1. Keep a copy of *The Redbook* by Bryan Garner and consult it whenever a question on style arises. (Also check to see if the court requires use of the Blue Book for text and citation forms).

Avoid:

1. Briefing without a clear introduction, clear subject headings, and a clear conclusion – these are needed to create a roadmap for the Court.
2. Not listing the relief that you are requesting in your motion.

3. Filing Rule 12(b)(6) motions as a matter of course. If fact questions must be resolved consider a motion for summary judgment instead. (perhaps General Counsel could consider this as a cost saving measure?)
4. Filing a motion with well-known legal standards rather than analysis (the Court does not need more than a one paragraph summary of the legal standard for a motion to dismiss, motion for summary judgment, etc.)
5. Filing discovery motions without attaching copies of the pertinent subpoena, deposition, request for production, or disclosures.
6. Filling space for the sake of adding extra pages. If you only have a one-paragraph argument, then file a one-paragraph motion.
7. Name-calling and mudslinging, usually appearing in the form of attached lengthy email exchanges that do not cut to the heart of the issue. If there is prejudice, say there is prejudice rather than focusing on all the reasons why the other party is “at fault.”
8. Using empty words and phrases like “therefore” or “whereas” or “in order to” or “for these reasons” Save space and do not insult your reader’s ability to follow the argument.
9. Adding attachments to motion just to make your brief seem more substantive. With rare exceptions, like issues of qualified immunity, a court cannot be reversed for denying a motion for summary judgement. And in most courts there is insufficient time to closely read every page of every attached exhibit that does not obviously have an impact on the issue in question. So do not include extraneous pages that will take up the court’s limited time. Use precisely focused excerpts, with perhaps the cover page, and for depositions, the introductory pages so the reader knows who was at deposition, and perhaps the page before and after the relevant excerpt if needed for context. Do not include extraneous exhibits that you could simply explain in your brief or reference without attachment.

Judge #4

Avoid:

1. Failing to familiarize yourself with the Local Rules before filing a motion. Knowing the procedures set forth by the Local Rules – especially on motions for leave, page limitations, and the required conferences under Local Rule CV-7 – this will save a lot of time and headache for the Clerk’s office and chambers staff in reviewing filings.
2. Having the Court contact counsel for courtesy copies of lengthy motions. Please consult each judge’s requirements on sending courtesy copies to chambers – they

can be found on the court's website at www.txed.uscourts.gov under the Judges' section.

3. Filing a discovery motion without engaging in the required conference first. A discovery dispute can be solved usually 90% of the time if counsel first would meet and confer to the extent mandated by the Local Rules before burdening the court with a motion.
4. A lack of common courtesy for opposing counsel in terms of flexibility. The Court takes note when an attorney opposes a requested extension, motion for leave, motion to exceed page limitations for no valid reason. This also congests the docket as the Court then has to wait for response before ruling.
5. Failing to include a citation in making an argument or citing a case for something it does not actually hold. Law clerks often do in fact check case citations and the Court will remember when an attorney misstates precedent. The Court is also hesitant to find an argument credible if it is contained in a lengthy paragraph without any supporting citations.

Judge #5

Avoid:

1. "Too many long words and lengthy paragraphs means no substance and lots of billable hours."

Judge Interview Responses submitted by J. Wesley Samples

Judge #1

Avoid:

1. Name calling.
2. Snarky arguments and/or tone that detracts from the merits.
3. Using negative adjectives where it would be more effective to explain why something is bad.
4. *Ad hominem attacks* – they are far too common.

Advice:

1. Arguments and facts presented for the first time in an Objection to a Report and Recommendation are particularly frustrating, because they deprive the Magistrate Judge from taking a crack at the party's best argument – put your best arguments in your motions.
2. Email chains, whenever attached as an exhibit, will get read – write every email to opposing counsel as if the Court will read it.
3. Tables of Contents and Tables of Authorities are not useful – have good clear headings for the reader to go by.
4. Please file good (i.e. actually useful) Proposed Orders when submitting opposed motions.

Judge #2

Avoid:

1. Mudslinging.
 - a. It is more effective to step back and be objective — consider what would meaningfully help the Court.
 - b. The Court does not want to wade through ever little slight — recapitulating every little egregious thing and sniping should be avoided.
2. Overstating.
 - a. Think carefully before calling something “misconduct” or “egregious”.
 - b. Overuse of words like “ambush” can disengage the Court — it causes a “boy who cried wolf” effect.
3. Identification of points conceded by the opposing party are not helpful — there is obviously a dispute (in any opposed motion), so address that.
 - a. In a Motion for Summary Judgement, stipulated facts can be useful, but those are different because they are not merely feigning “agreement” as a rhetorical ploy.
4. Mis-cited cases.
 - a. Cases are mis-cited far too often.
5. *Ad hominin* attacks are rare, or at least it seems they rarely reach the Court but avoid them at all costs.

Advice:

1. Be objective – think about what will be helpful for the Court.
2. Know and address the weaknesses of your case.
3. Proposed Orders represent the prayer, but are too often thrown away when they could be used to concisely recite the requested relief — even if you know the Court is not going to use your Proposed Order, that does not mean it should be thrown away.
4. Be as judicious as possible with sealing — over sealing can put the Court in a difficult position, making the Court uncertain if its Order can be filed unsealed.
5. When filing an Objection to a Report and Recommendation, parties should not expect anything new if they are just rearguing the same points — but if the Court really missed something, or there is something for the parties to clarify, then of course the Court wants to know about it.
6. Email chains attached as exhibits, 9 of 10 times, are not even a factor —emails between parties arise in a specific context, making them usually not useful for the Court.

Judge Interview Responses submitted by Elizabeth Forrest

Judge #1:

Avoid:

1. It is probably ill-advised to call the District Court judge or the Magistrate Judge “an idiot, ignorant, lack-witted (or such similar phrases),” which does occasionally occur.

Judge #2:

Avoid:

1. The Court has noticed in briefing that “many lawyers walk the line in attacking the other counsel/party or even the court in briefs.” Parties should remember to be to be civil to one another – and explain why your argument wins under the law without all of the negative personal attacks.

2. Using strong language in your briefs/motions. Parties should just point out the deficiencies in the opposing side's argument or why your argument should win without all of the added adjectives. Parties that use "over the top" language in their briefs do not help their side and tend to lose credibility with the Court.
3. Misstating the law and facts. Credibility is big, so if the Court finds that your misstating the law or the facts of the case, you will tend to lose credibility with the Court.

Judge Interview Responses submitted by Claire Henry

Judge #1

Avoid:

1. *Ad hominem* attacks by and against attorneys.
2. Using ellipsis to misquote or misconstrue a case.
3. Failing to use pin cites in case citations or in citations to the record.
4. Using hyperbole or statements to the effect that this is the "most egregious" case of discovery misconduct/abuse/etc.

Judge #2

Advice:

1. Use pertinent quotes from the cases you rely on so the Court can confirm that the cases stand for the propositions they are being cited for.
2. Point out areas of disagreement between the parties that narrow the issues in replies and sur-replies because the Court often reads the briefing in reverse.

Avoid:

1. Overuse of adjectives, especially of the extreme variety.
2. Listing all of the parties' grievances against the other in discovery motions – the Court does not care how it started and who said what to whom. The Court just wants to know what the request is, what the response is, and what else is being sought.
3. Citations to out-of-district cases unless they are exactly on point.

4. Using too many exhibits – “Exhibits are grossly overused now, with so much volume that we cannot possibly consider them all.” Therefore, it is important to summarize whatever is really crucial from exhibits in the brief.

Judge #3

Avoid:

1. Subjective characterizations of your opponent or their motivations (i.e. this is a “desperate plea” this “doesn’t pass the straight face test,” etc.)
2. Briefs that devolve into name calling.
3. Overly verbose briefing
4. Grammatical errors in briefs (subject verb disagreement, etc.)

Judge Interview Responses submitted by Andy Tindel

Advice:

1. Keep it short. Get to the point. Be focused. Use short declarative sentences. Put your best arguments first.
2. Be conservative when you cite a case for a particular holding. The absolute worst thing you can do is misstate a case’s holding. The Court reads the cases you cite and if you have exaggerated or misrepresented what a case stands for you have already lost the race for credibility with the Court.
3. Use spell check. Nothing is more off-putting to the Court than reading a brief containing misspelled words, incorrect punctuation and poor grammar. When encountering these types of briefs the Court’s first thought is that the legal positions asserted in them are either not strong enough or important enough to merit the lawyer’s best work.

Avoid:

1. Trying to circumvent the page limits for motions and briefs contained in the local rules, i.e., do not submit a 5-page reply with 40 pages of exhibits attached. The Court sees through this and it can result in getting your brief struck and potentially not being allowed to re-file it.
2. Using phrases like “as the court well knows” in your briefing. If the Court knows something already you should not be wasting the Court’s time discussing it in your brief.