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VIEWS FROM THE BENCH
PRACTICAL TIPS FROM LITIGATORS TO LITIGATORS

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I. INTRODUCTION

The steering committee of the ABA Forum on Franchising Litigation and Alternative Dispute Resolution Division prepared this paper as a supplement to the ABA Forum on Franchising “Views from the Bench” workshops. The live workshops offer Forum attendees the opportunity to hear from a distinguished panel of current and former judges from around the country regarding best practices for appearing in court. The panelists include: Hon. Jeffrey J. Keyes, Magistrate Judge, United States District Court for the District of Minnesota; Hon. James L. Robart, District Judge, United States District Court for the Western District of Seattle; and Hon. Leah Ward Sears (Ret.), former Chief Justice of the Supreme Court of Georgia.

This paper provides a general overview of factors to consider before, during, and after a court appearance, as well as best practices for effective advocacy through the entire course of representation.\(^1\) As litigators who practice before tribunals throughout the United States, we recognize that rules, preferences, and other protocols may differ significantly depending on the region, court, judge, and other case-specific circumstances. However, we believe this paper provides general advice that will apply and be useful in the majority of courts and venues.\(^2\)

II. KEEP THE JUDGE HAPPY

A. Review and Follow the Rules

Reviewing and following all rules of court is critical to presenting a case effectively. Compliance with these requirements allows the judge to focus on what matters most to the client, the facts and law of a case, while avoiding delays and tangents resulting from the failure to follow the proper procedures. At best, a failure to abide by court rules is embarrassing; at worst, such a failure can preclude the client from obtaining the relief it is seeking.

A litigator must be aware of a multitude of rules to represent and advocate for a client effectively. The location and complexity of rules vary by jurisdiction (federal or state), by venue (county or district), and even by individual judge. The jurisdiction’s formal rules of civil procedure (or general rules of court) are one source of rules, as are the court’s local rules and the individual rules or preferences promulgated by particular judges. Understanding the interaction of all applicable rules and applying them properly is critical prior to making appearances or court filings.

1. Rules of Civil Procedure and Equivalents

The rules of civil procedure applicable to a particular court are the primary source establishing the procedures for conducting civil litigation in that jurisdiction. In federal courts, these rules are the Federal Rules of Civil Procedure (the “FRCP”). Each state also has its own rules of civil procedure for its trial level courts. In addition, federal courts and state courts have

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1 This paper represents the collective work of the authors. The views expressed herein do not represent the views of the judicial panelists, individually or collectively.

2 For a comprehensive discussion on practical advice for litigators, see Cecil C. Kuhne III, Convincing the Judge: Practical Advice for Litigators (2008).
separate procedural rules applicable to their respective appellate courts, and Federal Bankruptcy Courts have their own separate procedural rules. Criminal proceedings are also governed by separate procedural rules. Obviously, identifying which rules are applicable to a particular matter is fundamental, especially when that may encompass more than one set of rules.

Rules of civil procedure in most jurisdictions address primarily trial-level rules about various topics, including the following:

- the content, form, and timing of pleadings;
- methods of service of papers on parties;
- motion practice;
- discovery and disclosures;
- trial procedure; and
- obtaining, enforcing, and appealing judgments.

In addition to rules of civil procedure, some jurisdictions adhere to other supplemental rules, akin to procedural rules, that a lawyer also must follow. For example, proceedings in California state courts are governed not only by the California Rules of Civil Procedure, but also by the separate California Rules of Court. The California Rules of Court provide further guidance and administrative information to attorneys, in that they often inform the lawyer of how to obtain certain relief, e.g., detailing the information a particular motion must contain.

2. **Local Rules**

Local rules, occasionally referred to as “county rules” in state courts or “district rules” in federal courts, are drafted and approved by the local bench, making familiarity with their content imperative. Despite their importance, local rules can be difficult to locate. Sometime, these local rules can be found on the court’s website. Other times, these rules are exclusively available in printed form. A diligent lawyer should search for local rules or ask the clerk how to obtain a current copy before filing a new matter, periodically checking for revisions or updates.

Even in the same state or district, local rules can differ to a startling degree between counties or regions. For example, the United States District Court for the Central District of California Local Rule 7-3 requires all counsel to meet and confer to discuss the substance of a motion and potential resolution, preferably in person, at least seven days before a party can file most motions. This rule’s existence requires significant lead time and planning on the part of counsel. In contrast, the United States District Court for the Northern District of California has no similar rule or requirement.

Local rules typically are a hybrid of the substantive rules of civil procedure and the more administrative rules promulgated by individual judges. Local rules may address an assortment of issues, including:

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3 See generally Cal. R. Ct. 1.1.

4 C.D.Cal. R. 7-3.
• Filing procedures, particularly electronic filing requirements;

• special rules about discovery, including those specifying when, where, and how discovery may be taken; and

• motion procedures, such as how many days’ notice must be given for a motion and how many pages may be submitted when filing a motion.

3. **Judge’s Rules**

Individual judges may also have rules that apply exclusively to their assigned cases. Attorneys refer to this subset of rules as “chambers rules,” “judicial preferences,” or even more colloquially, “local, local rules.”

Similar to local rules, obtaining a copy of these rules and becoming aware of their existence can be challenging.

In many jurisdictions, these rules can be found on the court’s website through an individual webpage associated with each judge. If no information appears on the court’s website regarding a judge’s rules or preferences, a good practice is to call the clerk to inquire if the judge has any rules or preferences that are published and available to the bar. Lastly, some judges issue an initial order shortly after being assigned a case, attaching his or her specific rules as an appendix.

The judge’s rules may be more administrative in focus than the rules of procedure or local rules, but are still critically important to advocating effectively before that judge. Of all the rules applicable to a civil case, the judge was most personally involved in establishing his or her own rules, so their adherence is of particular importance. A judge’s rules may cover items such as:

• when hearings will occur;

• how to request hearing dates;

• expectations for communicating with the court and permissible methods of requesting court or clerk assistance, *i.e.*, email, telephone call, letter, or motion;

• forms that the court requires be used, such as initial orders and scheduling orders; and

• requirements for notifying the court of filings, including delivery to chambers of courtesy copies after electronic filings.

Regardless of the venue, a litigator must learn and follow all of the rules that apply to the jurisdiction, the court, and the judge.

B. **Research the Judge**

A savvy litigator will undertake due diligence regarding the assigned judge immediately after the commencement of formal court proceedings. Understanding relevant aspects of the judge who has been assigned to the case meaningfully enhances chances of success in litigation.
For attorneys working in unfamiliar courts in which they do not typically practice, obtaining intelligence from local counsel concerning the pet peeves and proclivities of a particular judge can be an invaluable tool in gaining an understanding of the manner in which particular issues, e.g., motion practice and discovery disputes, among others, will be handled. Aside from conferring with local counsel and other knowledgeable attorneys, numerous other resources are available for researching a judge.

1. **What was the Judge’s Career Prior to Taking the Bench?**

Using the Internet, locating general background information about most judges is relatively easy. Merely entering the judge’s name into a search engine likely will yield useable, relevant information. Search results may include media reports detailing notable cases over which the judge presided, articles written by the judge, and the judge’s bio on the relevant court’s website or elsewhere.5 Online materials may also shed light on the judge’s education and general background prior to taking the bench. For federal judges, basic information about the judge, such as his or her education, the appointing President, and information concerning his or her prior career can be obtained from the Federal Judicial Center’s website.6

Additional websites compiling generalized background information on judges and reviews by practitioners (sometimes, with varying depth or reliability) include Judgepedia,7 The Robing Room,8 and RobeProbe.9 Some of the reviews posted by online contributors may be of modest value. However, occasionally these sites provide interesting insight into a judge’s protocols, potential biases, and temperament.

Identifying a judge’s former practice areas, whether through online resources or otherwise, will often provide particularly valuable insight. This knowledge may forecast how the judge may view a particular dispute or how familiar the judge may be with the subject matter of the case. For example, a former partner in a large, civil litigation defense firm may have a different view of franchise and supply contracts than a judge who previously was a consumer rights advocate or practiced exclusively in the criminal law arena.

2. **Review Relevant Decisions by the Judge**

Beyond collecting general biographical information, important insights can be derived by reviewing prior decisions written by the judge. Knowing how the judge previously ruled on a matter factually similar to a case in active litigation or involving similar legal issues, and the judge’s reasoning in deciding that case, can provide intelligence on how best to present a motion or the entire case. Critically analyzing the judge’s previous decisions can also assist in gauging the

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judge’s familiarity with the subject matter of a case. This may provide guidance on how much
time and effort should be spent educating the judge on the legal background applicable to a case,
e.g., in a franchise case, the history of the franchise business model and the genesis of franchise
regulation.

Depending on the jurisdiction, orders and decisions of a particular judge can be retrieved
via online legal research systems with effective use of Terms and Connectors. For example,
Westlaw has several searchable online directories that provide background information on judges,
including a general directory for all judges10 and a specific directory for federal judges.11

Additional case-specific orders, motions, and briefs can be found using the Public Access
to Court Electronic Records (“PACER”) system, which provides online access to all current federal
court matters nationwide. PACER is an electronic public access service that allows users to
obtain case dockets and filings from federal appellate, district, and bankruptcy courts. The
PACER Case Locator provides a method of searching the nationwide PACER system via the
Internet.12 An increasing number of state court systems provide online access to court records as
well.13

Prior to appearing in court, a prudent attorney will make every effort to become familiar
with the judge’s background, the judge’s rules and personal proclivities, and the judge’s previous
decisions rendered on similar facts and legal issues as those in the case the attorney is litigating.

C. Protect Credibility

Judges expect attorneys appearing before them to exhibit the highest ethical standards.
Each attorney has an obligation to be familiar with, and comply with, the ethical rules applicable
to the practice of law in the jurisdiction. The ABA Model Rules of Professional Conduct provide
ethical guidelines to practitioners that have been adopted in most states. Those states that have
not adopted the ABA Model Rules have enacted their own codification of ethical rules applicable
to members of the bar practicing in their state. Attorneys are required to abide by the relevant
ethical rules. Those who do not do so face potential discipline from courts or from the licensing
authorities of their state of admission, and, if different, usually in the state where the violation
occurred. Beyond individual consequences, the collective compliance with ethical rules by all
members of the bar protects the credibility of the judicial system and legal profession as a whole.

D. Professionalism

then follow “West Legal Directory” hyperlink; then follow “West Legal Directory Judges” hyperlink; or from the Home
page, search “WLD-JUDGE” database).


13 E.g., Public Access to Court Records – State Links, National Center for State Courts,
http://www.ncsc.org/topics/access-and-fairness/privacy-public-access-to-court-records/state-
In addition to following the court’s rules and obeying ethical standards, judges expect attorneys to comport themselves in a professional manner at all times. Abiding by the following guidelines is critical to building credibility with judges, professional peers, and clients:

- **Be Respectful.** Be respectful beyond reproach when in the courthouse or when addressing all court personnel, the judge, opposing counsel, and parties. Do not roll eyes, sigh heavily, or make snide comments while opposing counsel is addressing the judge (and make sure clients avoid such conduct as well). In addition, during oral argument an attorney should address his or her arguments only to the judge, and should not argue with opposing counsel directly.

- **Be Timely.** Arrive early for court appearances. Allow ample time to travel to the courthouse, park, clear security, and prepare for the hearing. If the court provides a time limit for argument or response, adhere to it. Do not request extensions unless absolutely warranted, and do not request a continuance on the eve of trial barring exceptional and dire circumstances.

- **Be Professional.** Never argue with the judge. Show deference to the judge in tone and demeanor, and respond to questions asked by the judge promptly and directly. Do not be evasive or sidestep the inquiry, irrespective of an earnest intention to “get to it later.” Do not interrupt the judge. When the judge is speaking, everyone else should be or instantly become silent, including parties and witnesses. When in doubt, err on the side of formality in dress, demeanor, and tone.

- **Be Prepared.** Know the material facts, cite cases on point, and be prepared to discuss and distinguish relevant case law.

III. **APPEARING OUT OF STATE**

A. **Pro Hac Vice Admission Procedures**

Many clients prefer to have a particular attorney represent them in litigation, even when that attorney is not admitted in the jurisdiction where the litigation is venued. Through a process known as *pro hac vice* admission—a Latin phrase meaning “for this occasion”—most state and federal courts will permit attorneys licensed in other jurisdictions limited authorization to appear in a specific case. However, the courts make this allowance only after a number of requirements are satisfied—including payment of a fee.

Responsibility for filing the paperwork necessary to satisfy a jurisdiction’s *pro hac vice* admission requirements often falls to the most junior associate staffing a case, but it is an issue that requires a significant amount of planning and attention to detail. The myriad of laws have unique requirements and vary greatly among the numerous jurisdictions in the state and federal system. Ideally, eligibility and costs should be researched prior to accepting representation in a foreign forum, but the *pro hac vice* process should be completed (or at least underway, depending on jurisdiction-specific rules) before filing any pleadings or appearing in court.

The first step in this process is locating and examining in detail the applicable *pro hac vice* rules for the forum where the case is pending. For the state court system, these rules often appear in the rules of practice for the highest general jurisdiction court in the state; in federal courts, the local rules for each district typically specify requirements for attorney admission on a
pro hac vice basis. The ABA also maintains an online table\textsuperscript{14} highlighting the general requirements and some unique provisions across all 50 states. Practitioners should be mindful, however, that some jurisdictions have effectively eradicated pro hac vice admission altogether. The U.S. District Court for the Northern District of Florida, for example, implicitly abolished\textsuperscript{15} its separate process for admission of attorneys pro hac vice, noting that the district “no longer draws any substantive distinction between membership in the bar of this district and pro hac vice admission.”\textsuperscript{16} As a result, all attorneys must apply for admission to the district, and, in addition to payment of the standard admission fee, pass a quiz and “tutorial on [the] court’s local rules,” and complete a “tutorial on the CM/ECF System.”\textsuperscript{17}

Next, each attorney who must be admitted under the jurisdiction’s rules needs to be identified, which should minimally include every attorney who will be i) named on pleadings; ii) taking or defending a deposition;\textsuperscript{18} or iii) addressing the judge or participating in conferences, hearings, or trials. An application for admission by each attorney must be prepared, along with all required documents and background information. Some of the most common application requirements are furnishing a certificate of good standing from the home jurisdiction, serving a notice of the application on the state bar or attorney disciplinary agency of the admitting jurisdiction, and completing a motion to appear pro hac vice tailored to the foreign jurisdiction’s requirements (often available as a form). Because many jurisdictions restrict the number of pro hac vice admissions an attorney may be granted over a given time period, all attorneys should maintain a list of jurisdictions where appearances or applications pro hac vice have been made. Florida, for example, requires attorneys seeking pro hac vice admission to include the “date, case name and case number [of] all other matters in Florida state courts in which pro hac vice admission has been sought in the preceding 5 years, and whether such admission was granted or denied.”\textsuperscript{19} Montana’s pro hac vice rules state that “[e]xcept upon a showing of good cause, no attorney or firm may appear pro hac vice in more than two actions or proceedings,” and “[f]indings of good cause to exceed the two-appearance limit are not to be routinely granted.”\textsuperscript{20}

\textsuperscript{14} Comparison of ABA Model Rule for Pro Hac Vice Admission with State Versions and Amendments Since August 2002, ABA Ctr. for Prof’l Responsibility CPR Policy Implementation Comm., http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/prohac_admin_comp.authcheckdam.pdf (last updated August 16, 2012).


\textsuperscript{16} N.D. Fla. L.R. 11.2(D)(2), available at http://www.flnd.uscourts.gov/forms/Court%20Rules/local_rules.pdf (“An attorney admitted pro hac vice will be treated as a member of the bar of this district and will remain a member, even after termination of the case, until such time as the attorney affirmatively withdraws from the bar of this district or no longer meets the admission qualifications.”).

\textsuperscript{17} Id. at 11.1(B).

\textsuperscript{18} See, e.g., Ohio Bd. of Comm’rs on Grievances and Discipline, Op. No. 2002-4 (June 14, 2002), available at http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2002/Op%202002-004.doc (“An out-of-state attorney may take a deposition in Ohio if the deposition is incidental to a case pending or to be filed in an Ohio court for which the attorney is admitted pro hac vice.”).


\textsuperscript{20} State Bar of Montana, 2009 Amended Rules for Admission to the Bar of Montana, at IV(C) (July 31, 2012).
As important as abiding by the rules and requirements is following through to ensure the admission process, whether pro hac vice or otherwise, is completed. Orders ruling on applications for admission pro hac vice are a highly ministerial task competing with countless other, more engaging demands on scarce judicial resources. Few judges revel reviewing and approving pro hac vice applications, but most will not tolerate skirting the admission requirements of their jurisdiction. After submitting the application, the docket should be periodically monitored for the status of admission. Once the order is entered, bring a copy to every court appearance so that it can be provided to the judge if admission is challenged or questioned. If a hearing date approaches without admission, bring a file-stamped copy of the application for admission and a proposed order of admission ready for the judge’s signature. Raising pending issues of attorney admission at the outset of a hearing should be appreciated by the judge, and is preferable to later defensively answering questions about it.

Despite varying state requirements, young attorneys would benefit from a limited amount of advanced planning by examining the specific eligibility requirements for pro hac vice admission in neighboring jurisdictions. For example, Tennessee requires that applicants be “admitted to practice before the court of last resort in another state … in which the lawyer maintains a residence or an office for the practice of law.”21 Rather than rushing to satisfy prerequisites when a client is seeking to retain counsel, a more preferable approach is to meet these requirements well in advance of the need to submit a pro hac vice application.

B. Associating With and Using Local Counsel

Navigating the pro hac vice admission requirements of another state, including the administrative process of submitting the application for approval, can be challenging, particularly when those requirements are significantly different from a lawyer’s home jurisdiction. Those variances, however, are likely only the beginning, as the differences between the substantive law and procedure of a lawyer’s home state to that of a foreign jurisdiction can be both surprising and time consuming to research. Although local rules are published and readily available, local custom and unwritten tradition can informally control, yet be difficult to discover without a lawyer with experience in the jurisdiction. Judges who view pro hac vice applications as an exception to normal rules have little appetite for educating lawyers on local customs, preferences, and procedures. Engaging “local counsel”—a term used for a lawyer admitted in the forum state, preferably with an office near the court—can be a cost-efficient means of addressing the challenges of practicing in a new jurisdiction. The vast majority of state courts,22 and many federal district courts, mandate that out-of-state lawyers “associate” with local counsel as a condition of their pro hac vice admission. Selecting a sponsoring attorney as part of the pro hac vice application process is important for reasons far beyond satisfying that prerequisite because local counsel can add immense value throughout the course of a representation, aiding in the following areas:

- **Knowledge of Judge.** As noted above, researching the judge is an integral part of properly preparing for a case, and the many resources available cannot substitute for prior, first-hand experience practicing before the judge. Learning a judge’s demeanor and temperament, along with legal tendencies and style early in the case can affect strategy, even as early as determining whether or not to remove an action. Before

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22 ABA Ctr. for Prof’l Responsibility CPR Policy Implementation Comm., supra note 30, at 19 n.9 ("Forty-six jurisdictions require pro hac vice admission applicants to associate with local counsel").
drafting a motion or letter to the judge, initiate a conversation with local counsel to discuss the issue and debate the best time and method of raising it.

- **Credibility.** Judges typically know little, if anything, about attorneys admitted *pro hac vice*, so establishing a relationship with local counsel who is a respected member of the local bar, and preferably has cases pending in that specific forum, is crucial. Local counsel’s introduction and affiliation will carry weight with most judges and equalize the impact of having an opposing counsel who practices in the jurisdiction full time.

- **Sample Documents and Authority.** Although the general content of pleadings is similar across jurisdictions, the style, structure, and formatting can vary considerably. Allow local counsel to provide a document template for use throughout the remainder of the proceedings, and ask for a few sample documents so that stock items—like motion standards and certificates—will comport with local requirements and spare the wasted time of locating citations for mundane, general concepts.

- **Logistics for Depositions, Hearings, and Trial.** Local counsel’s office space, especially if close to the courthouse, can prove to be an invaluable home base for interviewing witnesses, conducting discovery, and preparing for court appearances. The alternative of locating and securing rental office space can be both costly and cumbersome and is especially challenging away from major metropolitan areas. Through years of practice, a seasoned local counsel will have amassed a rolodex of vendors useful in their jurisdiction and should be able to recommend reliable court reporters, couriers, nearby printers, and accommodations—just to name a few. Local counsel should do everything possible to make sure out-of-state attorneys have a sufficient “lay of the land” and access to the same quality resources as opposing counsel.

These are just some of the ways that local counsel can prevent opposing counsel from exploiting a “home field advantage,” but only if the associating attorney appropriately leverages local counsel and builds a strong working relationship. With proper organization and planning, duplication of effort between lead and local counsel can be eliminated while generating significant value-added for clients.

IV. USE OF MAGISTRATE JUDGES

Federal courts are increasingly engaging magistrate judges to resolve discovery disputes, hold settlement conferences, and even conduct entire cases through trial. “In 2009, magistrate judges handled 20,021 settlement conferences in civil cases, 49,150 pre-trial conferences in civil cases and 166,899 civil motions, as well as other civil tasks.”

In the district of interest, an early understanding of what matters and issues are routinely referred to magistrate judges; how and when their decisions may be challenged; and the demarcation for the transition of the case to the trial judge is of significant importance.

“A magistrate judge’s workload generally originates in one of two ways: Referral of matters from a district judge or consent by the parties to the magistrate judge’s jurisdiction.”

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24 *Id.*
procedures for referral and consent are generally laid out in the FRCP and the court’s general orders or local rules. FRCP 72 provides procedures when non-dispositive and dispositive pretrial matters are referred to a magistrate judge, while FRCP 73 outlines how parties may consent to a trial with a magistrate judge. District-specific information concerning what items are referred to magistrate judges and the mechanics of this process may be contained in a general order issued by the district court or in the local rules. These district-specific orders and rules sometimes provide more detail about how FRCP 72 and 73 operate in that district. The Central District of California, for example, has a general order regarding the random direct assignment of civil cases to magistrate judges who meet certain criteria, but the parties ultimately must consent to the use of the magistrate judge. The local rules of the United States District Courts for the Southern and Eastern Districts of New York contain rules and procedures regarding the powers of magistrate judges and the procedure for consent to jurisdiction of a magistrate judge. Many of these rules are heavily nuanced and can have significant repercussions regarding what judge decides issues in a case. A failure to adhere to them will only attract negative attention from more superior judges in the jurisdiction.

Additionally, some judges will specify in their standing, initial, or scheduling orders which matters they refer to magistrate judges. Depending on the jurisdiction, some district court judges refer all discovery proceedings and disputes to magistrate judges. This can be a very useful procedure, as the magistrate judge may have greater availability to review the details that comprise a discovery dispute, leading to a well-reasoned ruling. If a party does not agree with the magistrate’s order on a non-case dispositive matter and has not consented to the magistrate judge’s jurisdiction over the matter, FRCP 72 provides that a party may object to the order within 14 days of service of the order. This objection will trigger the district judge’s consideration of the order, along with the objections. Similarly, if a case-dispositive matter is referred to the magistrate judge and the parties have not consented to the magistrate judge’s jurisdiction, the magistrate judge will issue a “report and recommendation” to the district judge, instead of an order. The parties are permitted 14 days after that report to file objections, and 14 additional days to file responses to any objections, which the district judge then considers in issuing an order on the case-dispositive matter.

With heavy workloads and diminished financial resources, the use of magistrate judges likely will continue to increase. Lawyers should be aware of how related procedures work and can be used to their clients’ advantage.

V. PRE-TRIAL

A. Pre-Pleading Assessments for Motions to Dismiss

After a client is served with the complaint, the knee-jerk response is often to begin preparing a motion to dismiss. In doing so, the facts and claims alleged are tested against the law, often with a significant number of attorney hours devoted to legal research of jurisdiction- or

25 Fed. R. Civ. P. 72, 73.


27 S.D.N.Y. R. 72.1, 72.2, 72.3; E.D.N.Y. R. 72.1, 72.2, 72.3.

circuit-specific case law, followed by drafting pleadings and possible oral argument. The temptation of an early knock-out is so great that many attorneys and clients overlook the many downsides of a motion to dismiss. First, arguing the weak points of a plaintiff’s case at the motion to dismiss stage only highlights those potential shortcomings at a time when corrective action may be taken. If the claims survive a motion to dismiss, opposing counsel will have a roadmap of factual items that must be shored-up before the close of discovery, in preparation for summary judgment. And, if the claims fail, the most probable result is that the judge will grant leave to amend the complaint so that the plaintiff can at least attempt to correct the shortcoming by alleging additional facts. An unsuccessful motion to dismiss also allows opposing counsel an early opportunity to persuade the judge about the merits of the case, while providing little benefit to the moving party.

A full appreciation of the likelihood of each probable outcome requires more than a solid understanding of the applicable law. Before investing thousands of dollars in a motion to dismiss, attorneys should conduct not just general research on the assigned judge, but a targeted search to determine the propensity for granting such a motion, preferably on the specific subject matter involved in the particular case at issue. As discussed above, a number of services are available that provide “judicial profiles,” which can be tailored to include attorney inquiries relevant to a specific case, along with a wide breadth of other information gathered from reviewing dockets and interviewing litigators with experience before that specific judge. Where opinions issued in a jurisdiction have been captured by electronic legal research systems or are otherwise available online, manually reviewing prior decisions on motions to dismiss can provide tremendous insight into how receptive a judge is to defense arguments, or how forgiving the judge is to plaintiffs’ counsel. Whether to file a motion to dismiss or preserve many of those arguments for maximum impact on summary judgment should depend on an assessment of the judge’s history. This type of pre-pleading research and assessment has the potential to alter strategies dramatically, while avoiding the legal fees associated with a motion that has virtually no chance of success.

B. Discovery

The rules of discovery strike a balance between the parties, but lawyers have varying interpretations of what, precisely, those rules require. As discovery becomes increasingly electronic, the costs of compliance with this phase of litigation, and clients' objections to the scope of discovery proposed by the opposing party, increase proportionally. Although disputes over discovery frequently occur, the majority are resolved informally through negotiations between counsel. When the differences are irreconcilable despite counsels’ good faith efforts, the only remaining options are: i) abandoning the request; or ii) asking a judge to intervene, both of which must be weighed against the costs and probable consequences of each scenario—all while remaining cognizant that most judges loathe such disputes.29

After a series of spats with opposing counsel, many lawyers channel their own and their client’s frustration by quickly writing and submitting a motion to compel, for sanctions, and for attorneys’ fees. In some jurisdictions, particularly in federal courts, this is not the proper method for bringing the issue to the judge’s attention. Counsel should, as discussed above, first review

29 See Basic Information, at 9, N.Y. Courts, http://www.nycourts.gov/courts/1jd/supctmanh/Uniform_Rules.pdf (last updated June 17, 2014) (“Discovery motions are strongly discouraged.”).
the appropriate rules before placing a motion on the docket or transmitting a formal letter to chambers.\textsuperscript{30}

When determining how to proceed in a discovery dispute, remember that discovery is not always a weapon or an offensive tool. The fastest way to destroy any rapport with opposing counsel is to bully or intimidate them with the threat of a discovery dispute, conduct that will itself only increase the likelihood of an \textit{actual} dispute before the case concludes. A party considering the initiation of a discovery dispute should examine its own discovery house before throwing a stone at that of another party. A frequent defensive tactic lawyers employ when attacked with a motion to compel is to file a \textit{cross motion} to compel, aggravating most judges' already significant distaste for discovery disputes. Where this countermeasure has some semblance of merit, judges are likely either to be dismissive of or especially harsh on the original, complaining party. Involving a judge in a discovery dispute should truly be a last resort effort to obtain important and necessary information, and only after creating a paper (or digital) trail that nearly assures success on the merits.

Knowledge of a judge's appetite for, and history of, deciding discovery disputes may arguably be more important than having that knowledge on substantive, dispositive motions because of the likely, negative impact on the relationship with opposing counsel and the risks of reputational damage with the judge. Before invoking judicial assistance, determine who—whether the presiding judge, magistrate or special master—is most likely to be responsible for resolving the conflict, and then try to determine the likelihood that the arbiter will sympathize with the client's position. If a judge is known for almost never imposing sanctions, or at least absent a failure to abide by an order regarding discovery compliance, an attorney will appear overzealous and lose credibility by asking for them.

\textbf{C. \textit{Motion Practice}}

\textbf{1. \textit{Pleadings}}

Pleadings accompanying motions are appropriately named "briefs." This title should remind drafters to select and arrange arguments with discretion and purpose. Countless arguments could be made for and against the relief requested in a motion, but an important skill in crafting effective briefs is filtering potentially meritorious arguments from those deserving of less or no mention. Inserting a litany of arguments into a brief will not increase the likelihood of success, but instead bury the strongest arguments and thereby decrease the probability that the judge will find any single argument persuasive. The best practice is to lead with the strongest arguments while limiting the number of secondary or fallback positions, which should themselves receive proportionately fewer lines in later pages. Finally, arguments included \textit{solely} for the purpose of preserving reversible error should receive the amount of treatment necessary to accomplish that result and no more.

Despite tapering the number of arguments and prioritizing each according to relative strength, a brief will not be effective unless its content clearly communicates the facts and selected authority to the judge. Create a structure for the brief that provides a preview of key points and facts at the outset, includes a summary of the brief's content, and announces transitions between topics. The ideal brief is targeted to the reader, appreciating the judge's familiarity with the type

\textsuperscript{30} \textit{See, e.g.,} Rules for Discovery Conferences in Cases Before Judge Chatigny (D. Conn), \textit{available at} http://www.ctd.uscourts.gov/sites/default/files/forms/RNC-rules-for-disc-conf.pdf (last visited June 27, 2014) (“Before filing any motion relating to discovery, the parties are required to jointly confer with the Court by telephone...”).
of case at issue while balancing the need to be informative for the judge’s less seasoned law clerk. An appropriately tailored brief will introduce issues and rules and discuss the facts of a case while proactively anticipating and answering the reader’s questions within the brief itself.

Finally, comply with page number limitations and do not consider the absence of any restriction as an open invitation or tacit approval to deluge the judge. Every additional page increases the likelihood that the judge and law clerks will resort to skimming content or worse, stopping short of reading the entirety of the submission. Where court rules mandate page limitations, those restrictions usually allow for motions seeking leave to file excess pages. Resist the urge to do so in all but the most exceptional, convoluted cases. Page limitations are a blessing in disguise, as lengthy briefing should signal the need to overhaul the structure, prune arguments, or upgrade overall writing quality. The Supreme Court of the United States, for example, limits briefing on the merits to 15,000 words and caps reply briefs at 6,000 words.  

Appropriate internal consideration should be given before allowing pleadings and briefs in trial courts to approach those constraints.

2. **Oral Argument**

After briefing is complete, oral argument is the next phase in persuading the judge how and why one party should prevail over another. Never assume that the judge or clerk will simply schedule an oral argument once briefing is completed. Many jurisdictions require counsel to request an oral argument before the judge will even consider setting a motion for a hearing, so review the prerequisites for oral argument before filing the underlying motion or response to it.

At oral argument, proper and thorough preparation is key, appreciating that several contingencies—many of which will not be known until argument begins—can significantly alter the course and order of the presentation. For example, attorneys should assume that the judge has reviewed the briefing and is familiar with the facts of the case, but should be prepared for the impact of scarce judicial resources and increasingly taxing caseloads. While some judges will concede at the outset to having little or no opportunity to preview the briefing prior to argument, others will not be so forthright. Where the judge’s questions may be indicative of less than optimal preparation or expose some confusion, an attorney should be prepared to supplement argument on the fly with the necessary background—factual, procedural, and legal.

The core of the oral presentation, however, must include clear and concise arguments supported by a succinct summary of the facts that are relevant. An effective oral argument should focus on the strongest and best arguments with the greatest likelihood of convincing the judge. Re-hashing weak arguments or addressing all of the arguments inserted into briefs likely will be as laborious as it is ineffective. If a theme was not already developed through briefing, oral argument is the last opportunity to expose one by weaving it throughout all of the arguments. Themes provide cohesion to facts and law that can otherwise be jumbled, resulting in the speaker seeming to jump abruptly from one topic to the next. Themes that are sufficiently versatile to serve a dual purpose by also undermining opposing counsel’s contentions, are highly valuable. But, just like themes at trial, care should be used to avoid ones that can be turned or “flipped” against their proponent by a crafty adversary.

Regardless of the strength of the arguments or theme selected, the style of delivery is a significant driver of the overall impact of oral argument. Foremost, be courteous and honest to the judge and respectful to opposing counsel. This begins with being mindful of the judge’s time.

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Strictly adhere to representations and announcements made about the time allowed for oral argument and strive to deliver a presentation that will make the judge’s decision to rule in favor of the advocated position an easier one. At minimum, make eye contact with the judge and hold it to transform the argument into a conversation about the case—not merely a scripted reading from notes. Invite questions from the judge throughout the argument and encourage them by providing immediate and thorough answers. Judges rightfully expect their questions to preempt the argument and presentation that lawyers have prepared. One of the most novice and cringe-worthy responses to a direct question from the judge is only an acknowledgement that the answer will be provided “later” in the argument. The few judges that do not take affront to that reply likely will be preoccupied with and distracted by their question until it is answered.

VI. PREPARING FOR TRIAL

A. Pre-Trial Motions

The types of motions that may be filed before trial are almost as varied as the plethora of reasons and issues that motivate them. The most obvious include the go-to motion to dismiss and subsequent motion for summary judgment, which both have the purpose of limiting issues that need to be resolved at trial. Though these common motions certainly have strategic considerations, other motions can have equal impact on the settlement value and overall strategy of a case:

- **Motion for Mediation.** Many jurisdictions use structured alternative dispute resolution programs to select and refer at least some civil cases to mediation as a prerequisite to trial. Where those programs are absent, and if an informal request to mediate has stalled or been refused, a motion for mediation can compel every member of the case and their counsel to attend mediation in good faith, with an appointed neutral party. Judges typically favor these motions, and any party objecting to them will not improve their standing with the judge absent a truly compelling reason. Beyond the goal of obtaining an equally favorable outcome, the mediation process can also yield a greater understanding of the opposing party’s case and provide counsel with an opportunity to evaluate the strength of its own claims and defenses.

- **Motion for Settlement Conference.** Another form of alternative dispute resolution that is often overlooked, but can be much more productive than mediation in an appropriate case, is a “settlement conference.” Many mediators focus on improving communication, helping parties understand the other’s position, and driving a compromise with which all parties are equally unhappy. Settlement conferences typically employ a markedly different style—one that includes “articulat[ing] views about the merits of the case or the relative strengths and weaknesses of the parties’ legal positions.”

Settlement conferences are especially useful where an opposing party and, occasionally, opposing counsel, are in need of a reality-check about the strength of their claims, defenses or their likelihood of success. Whether part of a formal program or not, judges and magistrates in a jurisdiction may be willing to participate in a settlement conference to do more than merely facilitate negotiation and instead, share a neutral third-party’s perspective on the probable outcome of a matter. In the event

32 N.D. Cal. L.R. 7-1 (July 2, 2012).
the jurisdiction does not have a structured program and the assigned judge declines
to offer such a perspective, private services are available to fill the void. One, provided
by a prominent arbitration organization, is designed to “mirror[] the process—and
share[] the goals and objectives—of settlement conferences sponsored by courts.”

- **Motion in Limine.** Another staple of the pre-trial arsenal, a motion *in limine* seeks to
exclude evidence of any kind—exhibits, testimony or otherwise—well before it draws
an objection at trial. Parties should make the most significant and sensitive potential
evidence the subject of motions *in limine*. Although powerful, these motions should
be employed conservatively to restrict key components of an adversary’s case that are
likely to have an impact on the outcome of trial, or where a thorough record on appeal
is desired. Presenting numerous weak or tangential motions *in limine* can irritate the
judge and may also set a tone for the relative strength of other objections made at trial.

- **Other Evidentiary Motions.** Motions seeking evidentiary rulings are almost
ubiquitously used to *exclude* evidence or otherwise restrict the opposing party’s case
presentation at trial. Often, lawyers who intend to utilize evidence of dubious
admissibility either i) anticipate that opposing counsel will file a pre-trial motion to
exclude it, or, alternatively, ii) wait until trial, at the time of tendering evidence or
questioning the witness, for an objection to trigger argument and ruling by the judge.
For key pieces of evidence around which case strategy is formed, young attorneys
should consider *offensive* motions that seek rulings holding that evidence is
admissible. Though this strategy can be risky in that it can trigger a stronger objection
than might otherwise have occurred at trial, it allows full briefing on an issue and
provides the judge with appreciated, ample time to make an informed decision on
critical evidence, in comparison to a spur of the moment ruling during a jury recess.

- **Challenging Expert Witnesses.** When debating whether to make such a challenge in
state court, strong considerations should be given not only to the text of the state
court’s rule, but also how it is applied by appellate courts. This legal research should
have been completed prior to selecting a party’s own experts, publishing reports, and
preparing for deposition, but it is equally useful in evaluating potential grounds for
attack on other experts in the case. Many states are far behind the federal *Daubert*
standard even on the face of their rules, much less in the actual state appellate
decisions that interpret and provide guidance to trial courts. If a putative challenge to
an expert has little success given a state’s loose standard for expert testimony, the
vulnerabilities that would otherwise serve as a basis for exclusion may be best saved
for disclosure during the expert’s cross examination.

**B. Witness and Exhibit Lists**

Witness lists and the exchange of exhibits are two of the most important parts of
preparation for trial, but the mechanics of the process for actually doing so often fall on default
rules of civil procedure. Judges demand that the parties be prepared for trial and to utilize the
judge’s and jurors’ time efficiently, yet have little interest in becoming involved in the minutiae
required to yield the expected results. Agreed scheduling orders negotiated between counsel can
provide the level of detail warranted by the case, create a precise timeline that delineates exactly
what information is due to be exchanged, and may even specify the format for the information to

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“Services”; then follow “Judicial Settlement Conferences” hyperlink under “Dispute Resolution Services”).
be provided. Many of the challenges and pitfalls in this phase of litigation are manageable through communication with other attorneys working on the case, especially opposing counsel.

By the pre-trial phase of a case, all of the potential fact and expert witnesses should be known to both sides and most, if not all, will have already been deposed. Exchanging witness lists is another means of preventing trial by surprise and can also avoid unnecessarily subpoenaing witnesses. Witness lists are a commitment, depending on requirements of rules or agreements with counsel, that a party either “will call” or in some cases “may call” the identified witnesses at trial. Parties seeking to modify these lists—especially by adding a witness unfavorable to an opposing party—should anticipate strong resistance. Witness lists should be thoughtfully prepared, and an opposing party’s witness list should be strategically analyzed. Inclusion or omission of witnesses can inherently disclose trial strategy of the opposing party, e.g., not intending to call the best or only witness able to testify about a certain aspect of the case. As necessary and helpful as knowing the opposing party’s witness list can be for trial preparation, it provides diminishing returns in more complex litigations with dozens of potential witnesses. Notably, a list of witnesses is not the same as order of witnesses, and the latter is highly beneficial to all counsel by allowing proper preparation for cross examination. An agreement between counsel to provide for example, a 24-hour notice before calling a witness from the witness list is a wise proposed addition to scheduling orders.

Similarly, the more complex the litigation, the more onerous management of exhibits will be—but not unavoidably so. Judges rarely become involved in this mire of details, expecting all counsel to cooperate sufficiently to solve the details of exhibit logistics. However, judges will notice and comment when a lack of organization and preparation is apparent to them, especially if it impacts the pace of presenting evidence. Whatever system is devised for managing exhibits, it needs to be fast, efficient, and seamless. No attorney wants to be fumbling to find an exhibit during the pinnacle moment of cross examination or, worse, appearing flustered when attempting to rehabilitate his or her own witness. Trial is the presentation of evidence and the method of delivery, whether poised or a kerfuffle, matters in the jurors’ perception of the attorney and therefore, the client.

Judges are finicky about the handling of exhibits in the courtroom. Most will expect attorneys to have a sufficient number of copies of all exhibits, pre-numbered and ready for admission, and could care less about maintaining sequential order of exhibit numbers. Instead, their priority is on speed and consistency. Other judges however, hold steadfast to the rule that the first exhibit introduced by a party is Plaintiff’s One or Defendant’s One, and number up as each exhibit is introduced by each side. Preparing with the wrong numbering system can make for a daunting first day of trial, followed by a lengthy night of re-numbering to appease the judge. If the judge’s exhibit management preference is not known to an absolute certainty, ask the judge’s court reporter—the person who likely spends the most time managing exhibits out of anyone in the courtroom.

In the event the parties are given carte blanch for exhibit numbering, an ideal system can be built on a few simple principles. First, dispense with prefixes to the numbers that reference the party that introduced the exhibit. After a few days of trial, the prefixes of “Plaintiff’s” and “ Defendant’s” will become abbreviated to “P’s” and “D’s” by witnesses, if not the attorneys themselves. Because these sound so similar, the court reporter will become annoyed, and any mistake made only creates an error in the record. Jurors are also likely to remember only the number, and the resulting need to explain the concept that two or more “Exhibit 43s” can exist is completely unnecessary. A better practice is to number exhibits once both sides have exchanged their exhibits and rebuttal exhibits—after nearly the full universe of documents and objects to be
introduced as evidence are known. Start the next party’s exhibit list after rounding up to the nearest increment of 50 to leave room for late additions to the trial exhibit list within the party’s numerical range.

Colloquially, revealing trial exhibits to other parties is known as “exchanging exhibits,” but no attorney revels in the thought of receiving a box of printed documents from each party in the case. Instead, this process is merely the disclosure of information, usually in the form of a list or spreadsheet. The information exchange should be adequate to identify each unique document indisputably and easily. In many cases, a production or document Bates number is sufficient, but including a brief, generic document description is also advisable. More than a courtesy to opposing counsel, it also provides an argument that an item was included on an exhibit list notwithstanding an error in other means of identification. After this initial exchange, parties often trade rebuttal exhibits and objections to exhibits.

For small cases with only a few dozen exhibits, exhibit binders are an acceptable solution, but they quickly become cumbersome. Witnesses will struggle switching between exhibit binder “volumes,” appearing incompetent to the jury. Assuming this hurdle can be cleared, binders still involve flipping through hundreds of pages to arrive at the correct exhibit—only then to be unable to lift and show a portion of the page to the jury without cumbersomely handling a heavy binder or opening the rings to remove pages. For a particularly aggressive hostile witness, handing over an entire binder full of exhibits—admitted and not—is akin to handing over a loaded gun and inviting a shot.

Whatever the source of the process for exchanging information or agreement with opposing counsel, be sure to prepare for the deadlines and supply the deliverables on time. Missing a scheduling order or disclosure deadline is not only embarrassing, but also could lead to sanctions because it disrupts the fairness of the trial preparation process for all parties in the case.

VII. TRIAL

As we all know, the majority of cases settle before trial. However, at some point, a case will proceed to trial, and all franchise litigators will want to prepare for this eventuality. Whether the attorney represents a franchisor, a franchisee, a franchisee association, or a group of franchisees, certain fundamentals of trial advocacy should be employed in every trial. These include preparation, persuasion, and credibility.

A. Preparation

Continuing the theme from pre-trial proceedings, proper preparation for trial is essential. Because the presentation of a trial to a judge or jury is a complicated endeavor (even in the simplest of cases), clients and counsel must be thoroughly prepared. Attorneys should be intimately familiar with all aspects of the case—the good, the bad and the ugly. One tool that some attorneys find useful is a checklist identifying all claims that will be prosecuted or defended and, for each such claim, the facts necessary to prove it.34 For each such fact, the evidence (witness testimony and demonstrative evidence) that will be used to prove that fact is included in the list.35

34 Kuhne, supra note 2 at 86
35 Id.
This will help ensure that all necessary evidence is submitted and that the attorney will focus only on what is relevant.\textsuperscript{36} If an item is not on the checklist, it need not be addressed.\textsuperscript{37}

Attorneys, however, do not submit documentary evidence, and their case presentation will only carry their client so far. Because of this, witness preparation is also of utmost importance. Not only should witnesses be prepared for cross-examination, but also for direct examination,\textsuperscript{38} along with a general understanding of what to expect in the courtroom. An appreciation of basic objections that may be raised can prevent a witness from appearing flustered or lacking confidence.\textsuperscript{39} In a jury trial, the witness should know that the jury will be not only listening to the testimony, but also watching mannerisms. Every witness should be instructed to speak clearly, slowly, and no more and no less than is necessary.\textsuperscript{40}

Use of technology at trial should be carefully weighed and considered against alternatives. Technology undoubtedly has potential to enhance the case presentation,\textsuperscript{41} but it can malfunction, be a distraction (to the attorney and the jury), and be an impediment to a clear and cohesive trial. Although many judges are tolerant of or even embrace courtroom technology, little leeway is given to lawyers for being unfamiliar with presentation systems or glitches during trial. Once a decision is made to use technology at trial, be sure that all attorneys and the trial team are capable of using the equipment and quickly troubleshooting any problems that may arise. In advance, verify that the courtroom is adaptable for or compatible with the equipment. And of course, be sure to have a backup plan in the unfortunate event of a catastrophic technology failure, such as a loss of power.\textsuperscript{42} While high-tech courtroom presentations are popular and can capture the attention of some audience members, less can be more at trial.\textsuperscript{43}

**B. Persuasion**

The trial lawyer’s primary job is to ensure the case is understandable.\textsuperscript{44} The fact finder, whether judge or jury, cannot be persuaded if it does not understand or cannot hear the presentation of the case.\textsuperscript{45} Judges and juries deserve a lawyer’s full attention, but likewise should not be presented with unnecessary distractions.\textsuperscript{46} Distracting garments and jewelry—whether

\begin{thebibliography}{99}
\bibitem{36} Id.
\bibitem{37} Id.
\bibitem{38} Id. at 91
\bibitem{39} Id.
\bibitem{40} Id. at 91.
\bibitem{41} Brian J. Hurst, *Fundamentals of Courtroom Delivery and Advice on When to “Show Them the Truck”*, 36 A.B.A. Litig. No. 1, 6 (Fall 2009).
\bibitem{42} Id.
\bibitem{43} Id. at 7.
\bibitem{44} Kuhne, supra note 2 at 85
\bibitem{45} Hurst, supra note 54 at 6.
\bibitem{46} Id. at 7.
\end{thebibliography}
clanging bracelets or squeaky shoes—will detract from the delivery of the attorney’s message. Keep the case simple, present it clearly, and avoid injecting any confusion for the finder of fact.47

Opening statements should be used to bring the case alive and compel the jury to view upcoming evidence as favorable to the desired outcome of the case, not simply to list what the witnesses will say and exhibits will demonstrate.48 Take the jury to the operation of that franchised location, into the board room of the franchisor, or to the humble beginnings of that franchise system; ask the jury to return to the point in time when the dispute began. A properly constructed theme, presented early in the case, will carry through each witness to closing argument, e.g., lack of responsibility, unfair treatment, or righting a wrong. Regardless of the theme selected, clearly articulate and explain it to the judge or jury, and continue to reference it with each witness.

C. Maintaining Credibility

As noted above, an attorney’s credibility with the judge is paramount during pre-trial proceedings and elsewhere, but witnesses’ and parties’ credibility is also vital to success at trial, regardless of whether the fact finder is the judge or a jury. The work, time, intensity, and focus required for trial advocacy and testimony are taxing, so maintaining composure and credibility may become difficult. A witness’s performance and credibility is itself a reflection of the credibility of the lawyer offering the testimony, so attorneys should evaluate not only the substance of the testimony but also the witness’s courtroom presence. Question the witness, challenge his or her story, and address illogical statements and inconsistencies—be the litmus test. Counsel’s role is to cajole, instruct, and require the truth. Some clients and witnesses are more challenging than others; not because they are intentionally lying but because they see their case through a single lens. Of course, the commandment of credibility can also be a powerful weapon. Be prepared to attack adverse witnesses in a way that exposes their lack of credibility.

D. A Word on Voir Dire

Even lawyers with vast trial and litigation experience may have limited jury trial experience. The purpose of voir dire is to determine whether prospective jurors are qualified and suitable to serve on a jury. In the process of questioning prospective jurors, many trial lawyers will focus exclusively on the questions for the panel that were submitted on behalf of their client. Identifying panel members for bias against a client or favoritism of the opponent is important, and specific questions may elicit those biases. Carefully listening to the panel members when they speak is helpful in this respect. Who are these people? What past experiences relate to the case and their general attitude about life? Do these individuals seem to have a negative or positive attitude? Do they appear trusting or skeptical? Forming an impression of the jurors, generally, will help in deciding which panel members to strike.49

VIII. POST-TRIAL MOTIONS

Before a trial concludes and a verdict is entered, attorneys should consult jurisdiction-specific resources regarding proper appellate procedure and the preservation of error, taking all steps during trial necessary to ensure that issues will not be deemed waived. Preparing for post-

47 Kuhne, supra note 2 at 85.
48 Id. at 99.
49 Kuhne, supra note 2 at 105.
trial appellate review requires striking adequate balance between perfecting the record and appropriate deference to and respect for a trial judge’s decision. Illustrating the necessity of implementing an appellate strategy well before the conclusion of trial, many jurisdictions require:

[a]n appellant who seeks reversal of an adverse judgment on the ground that there is insufficient evidence [to have met] a two-pronged test: he must have asked for a directed verdict at the close of all the evidence, specifying ‘insufficiency of the evidence’ as a ground, and he must have renewed this motion by way of a timely filed motion for judgment notwithstanding the verdict that again specified the same insufficiency-of-the-evidence ground.\(^50\)

Proper trial preparation requires researching these issues and drafting the motions that are necessary to ensure that appellate arguments are not irrevocably lost. The two most common post-trial motions are ones seeking entry of judgment as a matter of law or an entirely new trial. Unlike other motions, the trial judge’s track record is nearly irrelevant to the decision to file these motions because of their importance in the appellate process.

A motion for judgment as a matter of law, also known as a motion for directed verdict or judgment notwithstanding the verdict, asks the judge to preempt or override a jury’s decision.\(^51\) Although this motion theoretically can be made by the party with the burden of proof, the typical movant is a defendant in the action. These motions usually are based on the insufficiency of evidence or some other legal issue that would cause a jury’s verdict in favor of the non-moving party to be unsustainable and, therefore, asks the judge to render the judgment required by law. As a matter of practicality, judges typically will not grant this type of motion before the jury renders a verdict because, if granted, the non-moving party would have a right of appeal. If the jury sides in favor of the party seeking judgment as a matter of law without the judge’s intervention, this entirely obviates the risk of reversal on appeal.

Another type of motion, one for a new trial, seeks a different type of remedy—a complete disregard of the prior proceeding and a retrial of the action beginning with the selection of a new jury.\(^52\) A wide variety of reasons can be argued as justifying a new trial, so the jurisdiction’s rules should be consulted for an enumerated list\(^53\) along with the many secondary sources that aggregate potential bases for obtaining a new trial\(^54\).

Finally, be cognizant that post-trial motions can impact the window for filing a notice of appeal, so the rules of appellate procedure should be consulted when considering the filing of post-trial motions and especially before withdrawing them prior to a ruling in the trial court.\(^55\)

\(^{50}\) E.g., Johnny Spradlin Auto Parts, Inc. v. Cochran, 568 So. 2d 738, 741 (Ala. 1990).


\(^{52}\) Fed. R. Civ. P. 59.

\(^{53}\) N.C. R. Civ. P. 59 (listing nine enumerated bases for the grant of a new trial, including "[a]ny other reason heretofore recognized as grounds for new trial").

\(^{54}\) E.g., 12 James Wm. Moore et. al., Moore’s Federal Practice § 59.13 (3d ed. 2014).

\(^{55}\) Fed. R. App. P. 4(a)(4)(A) ("If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion ....").
IX. APPEALS

A. Follow the Rules

As with all litigation procedures, when prosecuting or defending appeals, the rules of the court must be learned and followed. In addition to the Federal Rules of Appellate Procedure, many federal appellate courts have local rules, procedures, and timetables. Similarly, state appellate courts have appellate rules of procedures, local rules, local procedures, and timetables. Be sure to locate and follow all of the rules of the court in which the appeal will be filed. The failure to timely file an appeal may result in a litigant’s loss of rights, and appellate courts have near-zero tolerance for deviations from clearly published requirements. Thus, once a client begins contemplating an appeal, the applicable rules should be reviewed and followed.

B. Appellate Briefs

The first step for writing an appellate brief is to determine the applicable briefing schedule and space limitations by reviewing the rules of the court in which the appeal is pending. Note page numbers, margins, and other requirements for the brief, and rigorously comply with them. The appellate brief should inform the court clearly and concisely of the issues for consideration and why it should reverse or affirm. Effectively framing the issues is critical to the ensuing argument, so a statement of the issues should be formulated to appear neutral, but gently suggestive of the desired outcome of the appeal. The statement of fact section of a brief should be reserved for facts, not another rendition of the argument. Even in the argument section, accurate citation to the record is important. Appellate courts will not search transcripts for helpful portions of the record, so an absent or erroneous citation translates to a lost opportunity to persuade the court. Because opposing lawyers will address contrary facts and analyze contrary authorities, the failure to address negative facts or precedent will not be viewed as an oversight, but as jeopardizing credibility.

Well-written appellate briefs are those that comply with the applicable rules, are organized and clearly written, easily identify the issues and result sought, and compel the reader to agree with the author.

C. Oral Argument

The following is an account of a lawyer on deck for oral argument in the Florida Supreme Court: “When the chief justice called the case ..., and the lawyers mustered at the counsel tables


60 Id. at 12.

61 Kuhne, supra note 2, at 162.
oral argument can be an intimidating experience for even more seasoned counsel. the role of counsel at oral argument is to be an assistant to the justices, not simply act as an advocate of the client. as with all other aspects of litigation, preparation is key to help the attorney present the best possible case (or argument) to the court and to assist the court with enabling it to rule in favor of the attorney’s client. at minimum, an appellate lawyer must know his or her own case well, know the record, and know the cases on which both sides rely. the appellate courts represent a higher level of play, meaning that justices and judges are presumed to have read all briefing. the attorney’s challenge is to convince each member of the court that the position being advocated is the correct one.

a particularly stressful and intimidating aspect of oral argument arises from having to answer questions interjected by the panel. prepare answers for all questions that can be anticipated. colleagues may be willing to “mock” the appeal, that is to listen to the prepared argument and simulate questioning. prepare in front of a mirror until the argument is persuasive. of course, members of the court likely will have questions for which no amount of preparation would have been adequate, because questions are interjected for a variety of reasons. whatever the justification, assume that a question is asked because the inquirer wants to know the answer, and answer it. if a member of the court is having difficulty with an argument, the question can be a new avenue to address it. questions are an opportunity to help ensure that the court understands the argument, as well as the facts and law used for support. if the answer to a question is unknown, though embarrassing, the best policy is to concede the lack of knowledge and ask the court for permission to file a supplemental paper with an appropriate response.

all cases have weaknesses, but their damaging potential can be contained by acknowledging them, at least internally, and preparing responses to questions that will enable the court to rule favorably notwithstanding those weaknesses. remember that the tone in which responses are given is almost as important as the answer itself, so avoid being combative or using overstatement. oral argument can be intimidating for even the most experienced trial lawyers. however, with the right preparation, litigators can learn to succeed in any appellate court.

D. Hiring Appellate Counsel

Many appeals are lost, or made more difficult to win, because the attorneys handling the appeal are not experienced appellate counsel. convincing appellate courts requires a different set of skills than those used in persuading trial judges and jurors. specialized appellate counsel
are retained for the purpose of doing what they do best—winning appeals. As former Chief Justice Sears states, “lawyers are finding the expertise of specialized appellate counsel to be an invaluable asset at every stage of litigation.” She notes that the presence of appellate counsel at the trial table can aid in the settlement process because it communicates to opposing counsel that the client will proceed with an appeal, if necessary. “Additionally, during the pre-trial process and at trial, a specialized appellate lawyer can assist with preserving issues for appeal, developing the evidentiary record, and drafting jury instructions ...” Appellate counsel can also assist with evaluating whether to file post-trial motions or an appeal. And of course, appellate counsel have expertise in appellate procedures, standards of review, persuasive writing, and oral advocacy skills that are not only immeasurable, but also often less common in trial lawyers who typically are not seasoned on the appellate level. Appeals may naturally follow any trial, so that possibility should be considered—and prepared for—early in the case.

X. CONCLUSION

Prevailing at trial or on appeal is a difficult endeavor, even with the benefit of favorable facts and compelling authority. The engine of the nation’s legal system—magistrates, judges, and justices—are continually facing expanding caseloads with less resources. More than ever, adherence to the rules, expectations, and customs of various courts is vital to maintaining an equal footing with opposing counsel and avoiding prejudice to clients. By adhering to the guidelines outlined in this paper, litigators of all types will benefit their careers, their clients, and the legal profession.


70 Id.


72 Sears, supra, note 73.
James L. Robart has served as a United States District Court Judge for the Western District of Washington since 2004 after being nominated by President George W. Bush. Prior to his appointment to the bench, Judge Robart practiced law for thirty-two years with the law firm of Lane Powell in Seattle, Washington where he served as Chair of the Litigation Department and Managing Partner. Judge Robart is a Fellow of the American College of Trial Lawyers and has served on the Ninth Circuit Information Technology Committee. A Seattle native, Judge Robart received his undergraduate degree from Whitman College and his J.D. from Georgetown University Law Center.
Hon. Jeffrey J. Keyes

Jeffrey J. Keyes is a U.S. Magistrate Judge for the United States District Court, District of Minnesota and has been since his appointment in 2008. Judge Keyes started his career as a litigator with the law firm Gray Plant Mooty where he became a shareholder. In 1986, Judge Keyes joined the law firm of Briggs & Morgan. Both at Gray Plant and Briggs, Judge Keyes maintained a vibrant and varied litigation practice focusing on antitrust, franchise and dealership cases as well as civil rights and civil liberties law. During his time in private practice, Judge Keyes was an active member of the Forum on Franchising and a frequent speaker at the Forum’s annual programs. A New York native, Judge Keyes received his undergraduate degree from the University of Notre Dame and his J.D. from the University of Michigan, School of Law.
Leah Ward Sears joined the firm of Schiff Hardin LLP in 2009 when she retired as Chief Justice of the Georgia Supreme Court. Justice Sears was the first African-American female Chief Justice in the United States. When appointed to the Georgia Supreme Court she also became the first woman and youngest person to sit on that court. At Schiff Hardin, Justice Sears focuses her practice on general and appellate litigation as well as corporate compliance issues. She received a B.S. degree from Cornell University, her J.D. degree from Emory University School of Law and an L.L.M degree from University of Virginia School of Law. Justice Sears holds honorary degrees from Morehouse College, Clark-Atlanta University, LaGrange College, Piedmont College, and Spelman College. Justice Sears has served as an Adjunct Professor at Emory University School of Law and as a Visiting Professor at University of Georgia School of Law.