JUDICIAL DECISION MAKING IN LOCAL GOVERNMENT CASES
Local Government Attorneys Association
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We have prepared this outline based on discussions with and comments by the judges participating in the program and others. We have also contributed our own observations prompted by the discussions with the judges. Any insights must be credited to the judges. Any mistakes must be attributed to the outline authors.

We emphasize that this outline has been prepared by the outline authors. The content is based on our interpretation of the comments of the judges, on our personal experience, and the input of other judges and lawyers. No statements in this outline can be attributed to any judge participating in the program.

This outline has three basic interrelated themes:

1. What are the best practices to persuade judges in local government cases?
2. How are local government cases different from (or the same as) other cases?
3. How do judges make difficult decisions in local government cases?

A. <u>Theme 1: Best Practices for Persuading Judges in Local Government Cases.</u>

1. Make sure the judge has the opportunity to understand the law and how the local government works.

a. Judges often will have only one or two local government cases each year. The judge is unlikely to have a full understanding of the nuances of local government law. Do not assume that the judge has a working knowledge of the specific area of local government law at issue. The judge may also not be aware of some of the practical issues involved in the local government's actions.

b. To accomplish this best practice: Make sure your litigation materials explain the issues that will be of interest to the court:

i. The statutory framework.
ii. The ordinances adopted implementing the statutory framework.
iii. The procedural requirements prior to the plaintiff's action against the local government.
iv. The statutory limits on the remedy.
v. How the local government administers or enforces the applicable statutes/ordinances.
vi. How the local government decision making process works.
vii. A working explanation of how the local government project implementation process works in the real world.
viii. The limited scope of review given the type of decision at issue. The standard of review applied in different types of local government cases is discussed below in section (B)(6).

c. Explain what decisions the locality made; what the alternatives were; and why the locality made the decision.

2. Make it easy on the court.

a. Frame the issue correctly. For example: "The Complaint challenges the legislative act of the Board of Supervisors. The validity of a legislative act is evaluated using the fairly debatable standard. Under the fairly debatable standard…."

b. File clear and direct pleadings. Identify the controlling statutes, ordinances, contract documents, and the standard of review. Expressly state what the locality is asking the court to do or why the relief requested by the opposing party should be denied.

c. **Hearing notebooks**. Use a key document notebook to support motions and special plea practice. Include the following:

i. Key statutes
ii. The applicable ordinances
iii. Contract documents
iv. Legislative documents (such as ordinances and resolutions)
v. Letters, correspondence and emails.
vi. Case law.

Notebooks should be tabbed and highlighted when appropriate. Provide copies of the key documents notebook to everyone at an early point.

d. **Courtesy copy to chambers**. When appropriate, counsel should provide a courtesy copy of any briefs, notebooks, etc. to the judge's chambers. One judge noted that counsel can file materials with the Clerk's Office and the judge does not see the materials until the last minute. It is also helpful to the

court to have a copy of the materials in advance that can be marked up and thrown away later.

e. A lawyer's level of preparation is itself persuasive to the court.

3. **High quality pleadings**.

a. File high quality pleadings that identify the issues and explain the correct result.

b. Identify the applicable statutes, ordinances, policies, contract documents and other key factors.

c. Identify the applicable standard of review.

d. Frame the questions correctly.

e. Explain the facts, the law, and the application of the law to the facts.

f. **Address the other side's argument**. Anticipate and address the arguments the other side will make. Judges appreciate when counsel states in briefs and at oral argument that opposing counsel likely will argue X, and the reason that is wrong and/or should not be followed is Y. In other words, counsel should explain why doing what opposing counsel is requesting would be the wrong thing to do.

g. The pleadings should anticipate and counter the arguments the other side will make. If there is an adverse case, the LGA should address the case and distinguish the case from the issue presented. Common bases for distinguishing cases include factual differences, legal posture differences, and differences in the relevant public policy considerations.

h. Counsel should keep in mind that the judge may write an opinion on the issue presented. The brief should cover all elements necessary for the court to reach a decision and prepare an opinion.

i. Explain why the relief requested by the local government is both legally correct and the right thing to do.

j. Shorter briefs are often more persuasive than longer briefs. A lawyer should be able to make the argument in twenty pages.

k. Do not use sarcastic or disparaging language in your briefs. Do not cast aspersions on opposing counsel.

4. **The record**.

Make sure you have the record together and organize all the following materials so they can be presented to the court at the appropriate time.

a. The legislative record.

b. The administrative record.

c. The important contract documents.

d. Correspondence and emails. Invoices, etc.

5. Special pleas and motions practice.

a. Be aggressive in using special pleas and motions practice. This can be most effective in cases involving sovereign immunity, qualified immunity, public official immunity, procedural compliance with litigation prerequisites, and statute of limitations issues.

b. In many instances, a party is entitled to a pre-trial hearing on a special plea; including the opportunity to present evidence to prove the facts necessary to establish the single issue defense. Kroger Co. v. Appalachian Power Co., 244 Va. 560 (1992). See also Virginia Code § 8.01-336(b) (providing a right to a jury trial when a plea is filed to an equitable claim and plaintiff denies the allegations of the plea).

c. Defenses that can be asserted by special plea and/or by motion include:

i. Sovereign immunity. Hawthorn v. VanMarter, 276 Va. 566 (2010).
ii. Official immunity. Board of Supervisors v. Davenport & Co. LLC, 285 Va. 580 (2013).
iii. Qualified immunity. Andrews v. Ring, 266 Va. 311 (2003).
iv. Statute of limitations. See Virginia Code § 8.01-235.
v. Failure to comply with a prerequisite in bringing the action. Morrison v. Bestler, 239 Va. 166 (1990).

d. **Motion craving oyer**. In cases involving the fairly debatable standard and challenges to legislative decisions, consider using a motion craving oyer to incorporate the legislative record as part of the plaintiff's complaint. See Eagle Harbor v. Board of Supervisors; 271 Va. 603 (2006) (Supreme Court affirms dismissal of complaint on demurrer based on plaintiff including a consultant's report on a utility rate issue as an exhibit. The consultant's report presented facts showing the rate ordinances were fair and reasonable.); Resk v. Roanoke County, 73 Va. Cir. 272, 2007 Va. Cir. LEXIS 226 (2007) (court sustains demurrer after motion craving oyer bringing legislative record of challenged zoning decision into the case record).

e. The artful use of motions to dismiss, demurrers, special pleas and motions for summary judgment can be crucial. Sometimes a motion craving oyer or requests for admissions for documents is appropriate to bring the legislative or administrative record into the litigation record at any early stage.

A local government can sometimes establish the fairly debatable nature of a challenge decision on demurrer, special plea or motion, based on the record of the challenge legislative or administrative decision. At worst, the local government has an opportunity to educate the court on the controlling legal principals and the facts.

This type of defense approach often requires the local government to make strategic choices at an early point as to how the issues are framed and what the theory of the case will be. These issues need to be carefully considered. Nevertheless, decisive action early in the litigation is necessary and can be successful.

f. Argue to the court that the general proposition that a court must be reluctant to grant a demurrer or motion for summary judgment may not be applicable in local government cases given the limited standard of review, the limited remedies available, or the procedural prerequisites to the plaintiff seeking relief against the local government.

g. Use motions in limine and trial memoranda as additional opportunities to persuade the court. Take advantage of all aspects of motions practice to educate the court.

6. **Timeliness/Rule 4:15/Scheduling Orders**.

a. File motions in a timely manner whenever possible. As discussed above, counsel should consider providing courtesy copies of motion papers to the judge's chambers.

b. **Rule 4:15**. Comply with the timeliness and other requirements of Rule 4:15 of the Supreme Court of Virginia, including the requirement that counsel must confer with opposing counsel in good faith before filing any motion.

c. **Scheduling Orders**. Comply with the Scheduling Order. Counsel must calendar all deadlines and have a tickler system in place.

i. If you are in danger of missing a deadline, act immediately. Request that opposing counsel agree to a reasonable extension (with a reciprocal extension going the other way). Confirm with the court that the extension is allowed.

ii. If the opposing counsel will not agree to an extension, ask the court for an extension by formal motion (or informally when appropriate). In

our experience, opposing counsel will generally agree to a reasonable extension. Some judges will grant extensions for expert disclosures and some will not.

iii. If you miss a Scheduling Order deadline, throw yourself at the mercy of the court as quickly as you can.

d. Whenever possible, avoid filing last minute memoranda. Judges pride themselves on being prepared. It annoys judges when a lawyer files a pleading at the last minute.

e. Consider requesting modifications to the standard Scheduling Order to address the characteristics of the case.

i. Make sure the plaintiff has to disclose expert testimony first.

ii. Adjust the expert disclosure deadlines as appropriate.

iii. Consider including a pretrial conference provision to make sure you have an opportunity to address pretrial issues with the court.

7. **Oral Argument**.

a. Listen to the judge and craft your arguments to respond to the judge's comments.

b. **Add context**. In your oral argument, do not just restate the arguments in your brief – particularly if the judge has already indicated that he or she has reviewed all the materials. Take the opportunity to add context, explain more facts, and to give interpretation and insights.

c. Explain to the court why the locality's requested relief is not just legally correct, but will also be a just result. Similarly, explain why the requested relief is not appropriate or available.

d. Tell the story, do not just cite cases and documents.

e. If the court asks questions, celebrate the opportunity to clarify the key arguments with the court. Address the court's questions directly.

f. Be mindful of your body language, including facial expressions and gestures. The judge will see any reaction to the other side's arguments. Do not make sarcastic or disparaging comments.

8. **Think about the court**.

We asked the judges: What would you do differently as a lawyer now that you have been on the other side of the bench?

The responses included: As a lawyer, I was working to get the best possible result for my client. As a judge, I am trying to get the right result.

Also, one judge recalled advice that he had received from a senior judge that a judge will never stray too far from the correct decision if he or she did what he or she felt was the right answer.

So, how should trial counsel address the court's desire in getting the right answer? The answer is to craft your arguments to address not only the legal and factual issues, but also what is the right answer that will be just in the facts presented.

Another suggestion was for counsel to be more selective in deciding what issues to emphasize; a rifle shot rather than a shot gun. Pick the right battles.

9. **Substance matters**.

   The quality of a local government's substantive, legislative and transactional documents can carry the day in litigation. For example, a good staff report and well drafted resolution can support a legislative decision. The documents themselves can establish the fairly debatable nature of a decision.

10. **Procedure matters**.

    If a local government follows the required procedures for a legislative or administrative act, a court is more likely to give broad deference to the legislative or administrative decision. If the local government fails to follow required procedures, that failure may invalidate a legislative or discretionary act.

11. **Expertise**.

    Local government attorneys live and breathe local government law issues every day. Judges, other lawyers, staff, experts and others involved in litigation may not have the same depth of knowledge and experience. Local government attorneys should capitalize on this advantage and establish themselves as the expert on the law with mastery of the facts.

12. **The plain meaning rule**.

    Courts will read statutes and ordinances according to their plain meanings to implement identified policy goals. This sounds obvious, but many lawyers have presented tortured interpretations of statutes and ordinances to courts.

13. **Seizing the high ground**.

    Local governments may have the high ground in some litigation situations. Courts may perceive the local government as pursuing the public interest rather than some narrower entity interest. A local government attorney can reinforce that perception by emphasizing the positive qualities of the locality and its decision making process.

Counsel should emphasize the choices available to the local government and how the decision reached ultimately furthers the identified public interest. Trial counsel can explain to the court what the alternative choices were and how the rejected alternatives would have been less desirable to address the public interest.

14. **The last refuge…public policy**.

    The local government attorney should explain the public policies underlying both the regulatory scheme and the particular local government decision or action at issue.

15. **Using technology**.

    Using presentation technology can be helpful but its use should be carefully planned.

    a. Confirm with the court when possible that the use of the technology will be allowed.

    b. When appropriate, advise the opposing party of what presentation technology will be used.

16. **Entity Representative**.

    When appropriate, bring a manager/representative of the locality to a hearing. The interest of the locality's management in the litigation may be important to how the court views some aspects of the case.

    a. Question for the judges. Does it ever make any difference whether there is an entity or corporate representative present?

17. **Judicial discretion**.

    Judges make dozens if not hundreds of decisions every working day. This discussion is focused on major decisions with a substantial effect on the outcome of the case.

    With respect to lesser issues, the court will often have a broad range of discretion. Persuading the court to exercise its discretion in favor of the locality will often involve the application of evidentiary rules or the court's pragmatic judgment in the progress of the case. If trial counsel disagrees with the court's discretionary decision because the proposed evidence or issue is linked to some issue that will be addressed at a later stage, trial counsel can (respectfully) ask the court to reconsider the issue.

B. <u>Theme 2: How Local Government Cases are Different from (or the same as) Other Cases.</u>

1. Local government activities involve necessary risks and effects on private activities, rights, and citizens. Stated differently, disputes are inevitable because of the impact of local government activities on private rights.

2. Local government litigation involves comprehensive statutory and regulatory frameworks. There are often interactions among local government, state, and federal law and regulations which need to be explained to the court.

3. Litigation involving legislative and administrative decisions will generally be resolved by bench trials. These matters may involve a specific standard of review (the fairly debatable standard, the arbitrary and capricious standard, the procedural correctness standard), may involve limitations on what record or evidence may be presented to the court, and may involve limited remedies.

4. Litigation involving personal injuries, deprivations of rights, property damage, and contract disputes may be resolved by jury trials.

    a. In some cases, trial counsel may wish to emphasize that the local government (or its officials) is a party. In other cases, trial counsel will minimize the governmental nature of the local government party.

5. **Experts**.

    Many local government cases are expert driven. The key is to get the right experts on the right issues. Stickley v. Board of Supervisors, 263 Va. 1 (2002). In Stickley, the local governing body denied a special use permit to raise and release game birds on a farm as part of a "shooting reserve." At trial, the applicant presented multiple expert witnesses seeking to establish that releasing exotic game birds did not present any risk of disease to the poultry industry in the area. The county presented a single expert who testified there was a risk of disease transmission. The trial court held that the denial of the application was arbitrary. The Supreme Court reversed stating that, in a "battle of the experts" case, the question is not who presented the greater number of expert witnesses or even who won the battle of experts. Rather, the question was whether there was any evidence in the record sufficiently probative to make a fairly debatable issue of the county's denial of the permit. The Court held that the testimony of the lone expert supporting the County's decision was enough to make the decision fairly debatable.

6. **Limited Standard of Review**.

    a. **Fairly Debatable Standard**. The fairly debatable standard is applicable to the review of legislative decisions. Town of Leesburg v. Giordano, 280 Va. 597 (2010) (utility rate decision in which the Supreme Court reversed the trial court ruling in favor of plaintiff; applying the fairly debatable standard to determine the reasonableness of sewer and water rates); Board of Supervisors v. Robertson, 266 Va. 528 (2003) (land use decision in favor of the local government applying the fairly debatable standard).

    b. **Reasonable selection of method rule**. Tidewater Association of Homebuilders v. City of Virginia Beach, 241 Va. 114 (1991) (Supreme Court affirmed utility fee ordinance holding that the city had the statutory authority

to finance its water system and the utility fee ordinance satisfied the "reasonable selection rule" requiring that the method chosen by the city was reasonable and consistent with legislative intent).

c. **Deference to the legislative interpretation of an ordinance**. Richardson v. City of Suffolk, 252 Va. 336 (1996) (the plaintiffs challenged the ordinance arguing that the language of the ordinance did not permit the decision reached by the local government, however, the court applied the fairly debatable standard to conclude that the local government satisfied the burden of producing sufficient evidence of reasonableness to make the issue fairly debatable).

d. **Deference to the administrative construction of an ordinance**. Lamar Company v. City of Lynchburg, 270 Va. 540, 547 (2005) (court affirmed the decision of the board of zoning appeals applying the deference to administrative construction rule).

e. **Arbitrary and capricious standard. Procurement decisions**. Va. Code Ann. § 2.2-4364(A).

f. **Standard of review for decisions of a board of zoning appeals; presumption of correctness**. Va. Code Ann. § 15.2-2314.

g. **Vested Rights Determination**. Va. Code Ann. § 15.2-2307. Hale v. BZA of Town of Blacksburg, 277 Va. 250 (2009) (Court reverses circuit court and affirms determination by the zoning administrator that the developer did not have a vested right to a specific use in facts presented as a matter of law).

h. **Tax assessments. Presumption of correctness/validity**. Va. Code Ann. § 58.1-3984. West Creek Associates, LLC v. County of Goochland, 276 Va. 393 (2008) (giving deference to the local taxing authority's determination of assessment).

i. **Subdivision decisions**. Board of Supervisors v. Greengael, 271 Va. 266 (2006) (in reviewing the denial of a subdivision plan, the court will sustain the local government's decision unless the local government failed to comply with the applicable ordinances or acted arbitrarily and capriciously in denying the subdivision).

j. **Procedural correctness rule**. Miller v. Highland County, 274 Va. 355 (2007) (case was dismissed as plaintiff failed to name local governing body as a party under Va. Code § 15.2-2285(F)).

7. **Standard of Review on Appeal**.

a. Trial counsel should consider the applicable standard of review on appeal.

b. Decisions applying the fairly debatable standard are reviewed *de novo*. See Eagle Harbor v. Board of Supervisors, 271 Va. 603 (2006); Covel v. Town of Vienna, 280 Va. 151 (2010).

8. **Procedural requirements prior to initiating litigation against a locality**.

Counsel should make sure that the plaintiff has complied with all procedural requirements prior to the initiation of litigation against a locality:

a. **Claims against counties**. Virginia Code § 15.2-1245 through 15.2-1248 (claim or demand against counties must be presented to governing body prior to initiating legal action). Nuckols v. Moore, 234 Va. 478 (1987); Dominion Chevrolet Co. v. County of Henrico, 217 Va. 243 (1976).

b. **Negligence claims against localities**. Virginia Code § 15.2-209 (A party seeking to assert a negligence claim against a locality must file a written statement of claim within six months after the cause of action accrued).

c. **Subdivision denial**. Virginia Code § 15.2-2259(D) and 15.2-2260(E) (sixty day period to appeal denial of approval of subdivision plat to circuit court).

d. **Zoning decisions/Local governing body**. Virginia Code § 15.2-2285(F) (A party challenging a local governing body action adopting or failing to adopt a proposed zoning ordinance amendment or granting or failing to grant a special exception/conditional use permit must be filed with the circuit court within thirty days of the decision).

e. **BZA decisions**. Virginia Code § 15.2-2314 (an action challenging a decision of a board of zoning appeals on an administrative appeal of a zoning enforcement or administrative decision or a variance decision must be filed within thirty days of the BZA's decision).

f. **Contract claims**. Contractual claims under the Virginia Public Procurement Act must be submitted in writing to the public body no later than sixty days after final payment. Written notice of the contractor's intent to file a claim shall be given at the time of the occurrence or beginning of the work upon which the claim is based. Va. Code Ann. §§ 2.2-4362(A) and (C)(1). Carnell Construction Corp. v. Danville Redevelopment and Housing Authority, 745 F.3d 703, 721-2 (4th Cir. 2014).

A contractor must appeal the decision of a public body on a contract claim by filing an action in circuit court within six months of the date of the final decision. Va. Code § 2.2-4363(E).

g. **Bid Protests**. A bidder or offeror must protest a public contract award or decision to award a contract no later than ten days after the award or the announcement of the decision to award. Va. Code § 2.2-4360(A).

A bidder or offeror must file an action in circuit court pursuant to Va. Code § 2.2-4364 within ten days of receipt of the public body's written decision on a protest. Va. Code § 2.2-4360(A).

9. **Limited Remedies**.

Counsel should make sure that the court understands the limited remedies available in claims asserted against local governments.

a. A court has no power to rezone property. Board of Supervisors v. Allman, 215 Va. 434, (1975); *see also* Boggs v. Board of Supervisors, 211 Va. 488, 178 S.E.2d 508 (1971) (courts must remand the case to the governing body for reconsideration).

b. The administration and enforcement of a subdivision ordinance is vested solely in the locality. The subdivision enabling statutes do not authorize an appeal to the approval of a subdivision plat. A stranger to the subdivision review process, such as a nearby property owner, cannot bring an action challenging a locality's approval of a subdivision. Logan v. City of Roanoke, 275 Va. 483 (2008). Based on Va. Code § 15.2-2258, this rule may apply to the locality's approvals of site plans and plans of development.

c. A court generally has no power to award a public contract to a bid protester. Va. Code Ann. § 2.2-4360. Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc., 259 Va. 92 (2000) (decided under prior corresponding law). But see, Va. Code § 2.2-4364(A) (authorizing court to direct the public body to award a contract to the apparent low bidder in certain circumstances).

d. An award on a claim for extra work is limited to twenty-five percent of the amount of the contract. Va. Code Ann. § 2.2-4309(A); Carnell Construction v. Danville Redevelopment and Housing Authority, 745 F.3d 703, 723-4 (4th Cir. 2014) (affirming district court's decision to reduce the amount of damages awarded on a contract claim).

10. **Mitigating Bad Facts**.

Local government litigation sometimes offers opportunities to mitigate bad facts by presenting evidence of good procedures and outcomes in related matters. For example, if a plaintiff is complaining about being treated poorly in an employment dispute, the local government can present evidence of other interactions between the employee and the locality showing overall competence and good procedures and practices. Stated differently, the locality can essentially argue that, if we messed up in this specific instance, we behaved well everywhere else.

C. How Judges Make Difficult Decisions in Local Government Cases.

1. As discussed above, judges want to get the right answer.

2. As discussed above, judges want to reach a decision that is "the right thing to do" and one that is consistent with precedent.

3. **Sleepless nights**.

   In response to the question, how do you make a difficult decision, one judge answered:

   I do a lot of research and have a lot of sleepless nights. I try to write opinions that go both ways. The proof is sometimes in the writing of an opinion. Sometimes the writing of an opinion just won't flow. I try to take the law back a long way and then bring it forward. How did the law develop? That process can bring you to the correct answer, but sometimes I still am not sure. I also specifically address the arguments of both sides so neither side feels its arguments were ignored or overlooked.

4. One judge commented that the court has to go where the law takes it.

5. Judges will also discuss difficult questions with other judges and sometimes with their law clerks.

6. Judges will try to make sure both sides understand that he or she has carefully considered all of the arguments. The losing party may not agree with the court's decision, but it will know that its arguments were fairly considered.

7. **Burden of proof**.

   Another alternative for the judge in a close case is to go back to the burden of proof. In a real close case, the party with the burden of proof may lose; because of that burden.

   a. In litigation involving localities, the local government is usually the defendant and the plaintiff has the burden of proof. The locality's counsel, therefore, will often want to cite the appropriate burden of proof case and argue that point at every available opportunity.

8. Finally, the court will sometimes recognize the necessity of making a decision. The parties are before the court, the arguments made, and the evidence presented; the judge then has to decide; right or wrong.

9. In a close case, the judge may comment to the parties suggesting that the case should be settled with a more pointed reference to one side or the other. These types of ambiguous comments can be hard to decipher, but counsel should listen carefully. In some cases, the court may be saying that there is enough of a fact dispute to survive a motion for summary judgment, but the dispute will probably not get to the jury. In such cases, the party on the receiving end of such comments should think hard about settling if that is possible.

D. Closing Thoughts.

1. In a nutshell, your job from beginning to end is to present the judge with enough clear and concise factual and legal information to make the court's job easier and to persuade the court to rule in your favor.

TIPS FOR ADVOCACY[1]

Generally:

Be courteous to all court staff and personnel. Not only is it a good practice for human beings generally, but it serves your own self-interest.

In written motions practice:

1. If you are relying upon or challenging a statute or ordinance, set forth the statute or ordinance.

2. If your motion is made pursuant to a rule of civil procedure or evidence, state under which rule you are making your motion.

3. State the standard applicable to the court's review.

4. Spend time researching and putting your best case forward in your written submissions. It is the court's first impression of your case, and it can make a lasting impression. It can be so strong or weak that oral argument may not be necessary. Organize your thoughts, and use descriptive headings if they aid in the organization of the motion/brief.

5. Be careful not to misrepresent the record or to misrepresent the holding of a case or other legal authority. Be careful, as well, not to fail to cite or address contrary binding authority. You lose credibility and the court will not trust the remainder of what you have written.

6. Try to be as concise as possible without sacrificing key arguments or clarity. It is more difficult to write a shorter memorandum than a long one, but brevity is appreciated.
   Lead with your strongest arguments, and, remember, it is not necessary to include every possible argument. If you only have weak arguments, consider whether the motion should be made at all.

[1] Prepared by Elizabeth Dillon. Christine D'Elicio and Justin Simmons significantly contributed to this document. I thank them for their wisdom and assistance.

7. On summary judgment, and if opposing summary judgment, cite with precision to the portions of the record on which you are relying or attach them to your motion. Include the facts supporting your argument within your argument instead of relying upon the court to determine which facts in the statement of facts and in the record support each argument.

At motions hearings:

1. PREPARE, PREPARE, PREPARE. Be thoroughly familiar with the factual record and the procedural background of your case. Know the facts of the key cases on which you rely and how the other side has tried to distinguish them.

2. Even if the court is familiar with the record, do not be afraid to provide some minimal background if it is important to your case. But do so in moderation; there is no need to devote a large portion of your argument to factual background if the court is familiar with it.

3. Listen to the questions and answer the question asked. Often an attorney is so focused on his own "key points" that he ignores or does not take the time to understand the question being asked. The court is not trying to trick you with questions.

4. When you are asked for a concession, concede what you can, but know—ahead of time—what you can and cannot concede in each case.

5. As in your writing, try to be concise.

6. If the court indicates that it is favors your argument, do not persuade the court otherwise.

7. Rely on your written submissions if oral argument will not add much to what you have already presented.

At evidentiary hearings and trials:

1. Use exhibits efficiently and effectively, and keep the jury, or judge, in mind. You should be organized with exhibits, and your exhibits should serve a purpose.

2. You do not have to present all of the evidence that you have. Support your case without confusing or distracting the jury with irrelevant information.

3. State the basis of any objection briefly.

4. Plan ahead for use of deposition testimony at trial by objecting to the form of the question.

JUDGES' OBSERVATIONS ABOUT LITIGATION PRACTICES THAT DO NOT HELP A LAWYER'S CASE

At a judicial panel CLE on Friday, October 9, 2015, the participating judges made the following comments concerning their observations about events in a courtroom that do not help an attorney's case.

A. The Obvious Points that Bear Repeating.

1. Know your case.

2. Once you have made your point move on, do not be repetitive. Be careful with "To summarize. . ." questions.

3. There are no "routine" cases for your clients.

4. Do not read from a prepared opening statement. Reading anything puts a barrier between you and the jury.

5. Do not "cross talk" between counsel. All comments should be directed to the Court.

6. Make sure your writing is of good quality and free of typographical and grammatical errors.

7. Handle exhibits properly. Have the exhibits ready for marking. Use the proper liturgy of admission to identify the exhibit, establish a foundation for admission, and then admit the exhibit.

8. Understand the rules of evidence and make timely objections.

9. Customize jury instructions to the facts of the case. Make it possible to revise the jury instructions as needed by emailing the Word document to the Court or bringing a laptop or thumb drive.

B. Handling Clients.

1. Make sure your clients show respect for the Court and for themselves.

2. Client dress should be neat; like going to church. No shorts, cutoffs, or flip flops.

C. Demeanor.

1. Rudeness is bad.

2. Making gestures and faces is bad.

3. Avoid flippant comments to the Court.

4. Show respect for the formality of courtroom proceedings.

5. Show respect to witnesses and fellow attorneys.

6. Avoid raising your voice or being disdainful to a witness in any way (except when absolutely necessary).

D. Juror Comments from Judge Carson's Questionnaires *(See attached slides).*

1. Attorney appearance matters.

2. Witness appearance matters.

3. Attorney mannerisms and body language matter.

4. Witness mannerisms and body language matter.

5. Juries like it when attorneys show respect for the Court and the jury.

6. Always stand up when you speak. Standing up is important.

7. A lawyer's passions are not as important as you think.

8. Jury instructions are important.

9. An expert witness' fee is less important than you think.

E. <u>Motion to Reconsider</u>.

1. Motions to Reconsider can be helpful when there is a significant legal issue that was not addressed or the Court got wrong.

2. Motions to Reconsider are not helpful to ask the Court to reconsider a discretionary decision.

3. Motions to Reconsider are not helpful to ask a judge taking over a case from a prior judge to change rulings made by the prior judge.

Respect

Respondents used the word "respect" in

61 of the 72 responses.

Standing

- "It makes it easier to hear and shows respect . ."
- "People will listen more when they can easily see and hear the attorney."
- "The attorneys appear more engaged and respectful."
- "Unless he is disabled, standing is professional."
- "Makes it appear he's doing his best for his client."

Appearance

- "The attorney was disorganized and looked like he just rolled out of bed. I'm sorry, I held it against him."
- "The main witness looked disheveled and mumbled. That made a difference to me."

Manner

- "Feigned displays of disgust were childish . . ."
- "I was put off by the attorney with the attitude."
- "The attorney kept joking, and besides the disrespect, the jokes didn't even make sense."
- "Overly emphatic/aggressive arguments were counter-productive."
- "He kept cutting people off, which was disrespectful."

Examination of Witnesses

- "The longer the examination, the less I listened . . ."
- "Bring the witness in person. Non-verbal cues are important and the video made me think, 'what else are they hiding'?"
- "They showed a video, but I wanted to see the guy when they were taking the video."
- "I didn't like the length of the examinations and returning to the same thing – repeatedly."

Exhibits

- "There were times I felt like we were at a Star Wars convention."
- "I liked the posterboards better, but there were too many and they were hard to read."
- "There were WAY too many, and we didn't need most of them."

Opening Statement

- "The openings helped me understand quickly why I was there."
- "The openings set the stage for the rest of the trial, including the one attorney who talked too much."
- "We got to meet the attorneys – first impressions are VERY important."

Objections

- "They were fine, as long as the reason made sense and they were respectful."
- "The one attorney would frighten me when he would object."
- "I appreciated the objections being talked about outside the courtroom – you can't 'un-ring' the bell."
