# Tips From the Bench

## What Works in Civil Litigation

### *10 Ways to Improve Your Chances*

*by Judge Jerome LaBarre*
*Multnomah County Circuit Court*

I tried my first case over four decades ago. Since then I've been asking myself the question: "What works in trials and hearings?" Here are some answers to that question which have rung true for me over the years.

**1. Seek Simplicity** - The seeds that blossom into the successful handling of a case are planted long before the trial or dispositive hearing. Make the complex simple so it can be boiled down and presented to the decision maker in a persuasive manner. This is easier said than done. Two ways to achieve this are to select a theme and to tell a story.

**2. Select A Theme** - The law is but a tool to achieve justice. Again and again as a judge I see the quest for a just and fair solution driving successful presentations to the court or to the jury. The case needs to be clothed in a theme. It works the same way in arbitration and business litigation. A few examples of good themes I have recently seen are: "She got blindsided … she never had a chance"; "He was greedy and abused his power"; "It's all 20/20 hindsight"; "The contract wins."

**3. Tell A Story** - At our core we succeed members of our clan who sat in front of the campfire and told stories to each other. Judges, arbitrators and jurors are all hardwired to relate to facts which are presented in story form. That's why I believe it almost always works best to try to organize and present things in chronological order. This is how stories unfold.

**4. Strong Start/Strong Finish** - The first three minutes in openings and closings are critical. You have the attention of the decision maker and you need to make the most of it. Get out your theme and lay out your persuasion. Say where you are going. Long ago my debate coach spelled out the essence of a good speech: "Tell them what you are going to say, say it and tell them what you have said." Try to boil the content down to three major points. Signal that you are going to end by using words like "In conclusion" and then end on a high and persuasive note.

**5. Keep It Short** - I have come to believe that the ideal amount of time for most openings or closings is 20 minutes. Remember that it is really hard to hold someone's attention for even that long. When you start going a lot longer it is inevitable that the audience's attention will drift and your points will be lost.

**6. Take the Decision Maker on a Journey With You** - I believe in drawing charts, key words and concepts on an easel in front of the decision maker and then making that a demonstrative exhibit. To argue damages it also works best to add up the totals in front of them. This is a human touch. It connects them to you far better than a power point or prepared chart. Use whatever practical approaches will get the decision maker involved. Low tech can be best.

**7. Maximize Rebuttal** - In argument and in presenting evidence the party who has the right to present rebuttal has a real advantage. Again and again I see this opportunity wasted. Litigation is a polite form of combat. Rebuttal is a place you can deliver the knockout blow.

**8. Hand Out Copies of Key Exhibits** - Many civil cases have tons of exhibits. But almost always there are only a small number of really important ones. Try early on to get these admitted into evidence. Then put them into notebooks for the judge, jury or arbitrator. Throughout the hearing you can repeatedly refer back to these key exhibits.

**9. Focus On Damages** - Civil cases are about money. Yet repeatedly I see plaintiff's attorneys who seem afraid to deal with damages. Defense attorneys love this and are given the advantage. Admittedly this must be handled delicately and with planning. But all of us know that money does not grow on trees. Unless a compelling reason is presented to make an award it will be denied.

**10. Aim Toward the Verdict or Arbitration Award** - Not just in openings and closings but during the evidence phase remember your goal. It's all about having the decision maker fill out the form so that your side wins. It's good to draft out the verdict or arbitration award at an early stage in your case. You will be tempted to lose sight of this. But you do so at your peril.

# Multnomah County Probate Court

*by Hon. Katherine Tennyson, Chief Probate Judge, Multnomah County Circuit Court and Helga Barnes, Probate Supervisor*

Increased volume, more practitioners, and court budget cuts make it increasingly important that the probate bar stay updated on the rules and statutes that control probate practice. Getting it right the first time means a faster result. And the cases are complex, requiring skilled attention. Those new to the area would do well to develop mentoring relationships with the many experienced practitioners. Please keep the following in mind:

•These cases have time deadlines like no other area of the law. Specific events trigger obligations to the court and to your client. Lawyers can increase their efficiency with a case management system that alerts them to statutory deadlines. The last thing you want is to be summoned before the court to explain why you missed a deadline or have to explain to your client and/or the PLF why you missed the window for objections.

- Multnomah County prefers use of UTCR 9.160 form accountings. The asset schedule formatted in this document is very important to show the flow of the asset from the inventory to the first annual account and thereafter from accounting to accounting. Accountings should include an informative fact narrative that adequately advises the court of the issues confronted in the administration of the estate.
- To avoid the cost of a bond, lawyers frequently request to restrict accounts. Multnomah County requires an Acknowledgment of Restricted Asset that has the following language: "We agree to abide by the Order. We understand that if assets are removed from a restricted account without prior court order, this institution shall be required to pay the value of those assets to the estate/conservatorship." This language alerts the financial institutions that we hold them responsible as well as our fiduciary. Before opening accounts, confirm that the financial institution will sign the acknowledgement.
- Ex Parte and Special Set Matters. All probate ex parte must be scheduled in advance by calling the probate department. If a hearing on a matter in probate will be one day or longer, attorneys should contact the probate department to set the matter on the ex parte docket so a judge can be directly assigned.
- SLR 9.015 requires all documents pertaining to probate matters to be filed with the probate department. Proposed orders require audit of the court file before approval by the judge. Filing directly with a judge will add at least two days to the process and sometimes as much as a week if the judge is out at Juvenile Court.
- Trust Administration matters shall be filed in the probate department and heard by the chief probate judge or designee. (SLR 9.015(2)). Do not file cases involving trust administration in the civil department as it will simply necessitate transfer by the Court.
- Mediation is required in all probate, guardianship, conservatorship and trust matters in which an objection or document placing the matter in dispute has been filed. (SLR 9.016; SLR 12.045) "We don't think we can settle" is not an acceptable reason to waive mediation.
- Communication with the Court. The probate department is open to the public from 8-5 p.m., Monday through Friday, except holidays. **Due to budget cuts, the telephone hours are now 8:30-10:30 a.m. and 1:30-4:30 p.m.** The telephone number at the Multnomah County Courthouse is 503.988.3022, Option 4.

## 2013 MBA Professionalism Award Nominations Due November 2

The MBA Professionalism Award is one of the most highly regarded honors an attorney in our area can receive. Do you know a lawyer who is a pleasure to work with as both an ally or an adversary, who regularly goes well beyond minimum ethical and professionalism standards, who constantly mentors others and works to improve the quality of our practice as a whole? We strongly encourage you to nominate him or her for the 2013 MBA Professionalism Award.

Any MBA practicing attorney member, except a member of the MBA Professionalism Committee or the MBA Board of Directors, is eligible to receive this award.

Esteemed recipients include Raymond Conboy, Thomas H. Tongue, Randall B. Kester, Frank Noonan Jr., Donald W. McEwen, Don H. Marmaduke, Noreen K. Saltveit McGraw, Thomas E. Cooney, John D. Ryan, George H. Fraser, Barrie Herbold, Walter H. Sweek, Daniel E. O'Leary, Mark R. Wada, Sandra A. Hansberger, Robert C. Weaver, Walter H. Grebe, Susan M. Hammer, Carl R. Neil, Jeffrey M. Batchelor, Judy D. Snyder, Garry L. Kahn, Michael D. Schrunk and Edwin A. Harnden.

Former nominees may be and often are re-nominated. To propose an outstanding attorney for this year's award selection process, please complete and return the nomination form available at www.mbabar.org or contact Kathy Modie, Professionalism Committee staff liaison, kathy@mbabar.org for more information.

## League of Women Voters Present Voter Education Forum Series

With a $1,400 grant from the MBF, the League of Women Voters of Portland will present four voter education forums at the Multnomah County Building.

**Tuesday, September 18, 7 p.m.**
Ballot measure forum, state measures

**Tuesday, October 2, 7 p.m.**
Portland City Commissioner, Position 1

**Thursday, October 4, 7 p.m.**
Ballot measure forum, local measures

**Monday, October 8, 1 p.m.**
Portland Mayor

Contact Barbara Fredericks at 503.524.0835 or bhf8448@aracnet.com for details.

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**September is Open Enrollment Month for the MBA Health Plan – those not currently enrolled in the plan can sign up this month. See a summary of premiums and benefits at www.mbabar.org**