

LITIGATION NUTS AND BOLTS

U.S. Magistrate Judges

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1. KNOW THE JUDGES: District Judge Versus Magistrate Judge

Understanding the role of Magistrate Judges, how they interact with District Judges, and how recent transitions in both groups and may impact litigants.

2. KNOW THE RULES: Federal Rules of Civil Procedure / Local Rules / Practice Standards

Understanding key differences in practice standards could have a meaningful impact on litigation. Judges will strike pleadings that don't conform, deny motions that don't meet their standards, and make other decisions that could be costly.

3. KNOW YOUR CASE: Think about the end, in order to properly plan the beginning.

Make the most of your Rule 26(f) conference. Set out a discovery plan. Consider ESI issues. Also, make the most of each appearance—even scheduling conferences—every time you're in front of the judge is an opportunity to educate.

4. DISCOVERY

- a. Take seriously your obligation to meet and confer.
- b. Know the court's discovery dispute resolution procedures.
- c. Be honest about your grounds for objecting.
- d. Think about:
 - i. What you really need.
 - ii. What the judge will likely give you (or force you to give up).
- e. Take time to understand the other side's argument and offer creative solutions/compromises. Build your reputation as a problem-solver.
- f. Attack the problem not the person.
- g. Be concise in everything- briefs, charts, and at hearings.
- h. Be specific in your request. What do you want the Judge to do?
- i. Always keep RPC 3.3 in mind: Candor to Tribunal (no false statements, must disclose controlling adverse authority, must correct/remediate any false evidence inadvertently offered)
- j. 30(b)(6) Deposition considerations. Under Rule 30(b)(6)—the notice "must describe with reasonable particularity the matters for examination." Sometimes defendants want to limit the number of topics. But it is in the defendant's (and the deposing party's) interest for the topics to be as precise as possible.
- k. Pick your battles. E.g., stipulate to authenticity!

5. FINAL PRE-TRIAL CONFERENCE

- a. Review presiding judge's practice standards so your FPTO is in compliance.
- b. If you have a pending dispute that has not been resolved and the case is not ready for trial, offer a plan for resolution.

6. SETTLEMENT DISCUSSIONS

- a. Have settlement discussions frequently/early. 95 % or more of all cases settle. If you wait too long to have the discussion, costs/fees become an impediment.
- b. Be realistic.
- c. Do not let your role as advocate interfere with your role as counselor to your client.
- d. If you think your client needs to hear something directly from the Court, ask the Judge if he/she would be willing to hold a status conference with clients present so they can hear directly from the Judge on the topic.
- e. Utility of third-party mediator—not automatic you will have settlement conference with U.S. Magistrate Judge. You must request and MJ and/or DJ must be satisfied there is a reasonable likelihood of resolution.

7. PROFESSIONALISM/COURTESY

Zealous Advocacy- what does it really mean? Lawyers often interpret their duty to represent clients with zeal as a duty to assert every claim/defense, employ every tactic available to them, ask for every piece of discovery, and never yield. But:

- a. RPC 1.3, note 1 says: “A lawyer must ... act with zeal in advocacy upon the client's behalf,” but “...is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.” Additionally, a “lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”
- b. From Colorado Oath of Admission: “...I will treat all persons whom I encounter through my practice of law with fairness, courtesy, respect and honesty...”
- c. From Colorado Supreme Court setting forth CLE professionalism requirements: “Legal professionalism is an activity or portion of an activity devoted to the values embodied in the Colorado Attorney Oath of Admission and the Colorado Rules of Professional Conduct, which require attorneys to act with civility, integrity, honesty, candor, fairness, trust, respect, dignity and courtesy.”