TOP 10 MISTAKES LAWYERS MAKE

1. Confusing the existence of a fact with its significance.

   We can all stipulate that the temperature at 1:00 p.m. on November 4, 2016 was 48 degrees, even if we disagree as to whether that was cold enough to require a coat or not. Most facts in a lawsuit are not actually in dispute, although the inferences one should draw from them are. Stipulate to the fact, but argue the significance.

2. Misunderstanding the difference between a fact and a conclusion.

   Pleading and evidence require facts, not mere conclusions. "The Plaintiff was routinely harassed by her supervisor at work" is a conclusion. "The Plaintiff's supervisor would repeatedly tell the Plaintiff that she was 'ugly,' that she 'was the worst employee I've ever seen,' and that she was 'an anchor pulling down the rest of the staff'" is a fact.

3. Appeals to emotion instead of reason.

   Avoid adjectives and especially adverbs in briefing; stick to nouns and verbs. It is one thing to inform the court that you believe that witness is "incredible." It is another thing to inform the court that the witness is an "inveterate liar and con man." Judges are wary of appeals to their emotion. An argument that is trying to push emotional buttons will often cause a judge to assume that the attorney is resorting to an emotional argument because they cannot articulate a rational one.

4. Reasoning backwards

   Many attorneys conceive of a claim or argument by thinking about the result they want first, then trying to construct an argument that will lead to that result. Often, those arguments do not stand up to scrutiny when reasoned forward – that is, when one begins instead with the evidence and elements. A certain comment by a decisionmaker may seem damning if you are already operating from the perspective that the decisionmaker was biased, but if you start from the assumption that the decisionmaker was not – as the court will likely do-- that same comment may appear to be entirely innocent.

5. Issue spotting, rather than issue sorting.

   Law schools teach students to spot every conceivable issue or argument that could apply to a given set of facts, but few require students to then decide which of those issues or arguments are the strongest. Courts want your best argument or best claim, not every argument or claim you can come up with. If your best argument can't win, weaker ones won't either.

6. Arguing what you wish the evidence said, rather than what it actually says.

There is a difference between a witness saying "I don't recall if he told me about the meeting" and the attorney arguing in a brief that "He never told the witness about the meeting." Judges will check whether the record supports your assertions of fact and misrepresenting what the record says is one of the fastest ways to lose your credibility with the court.

7. Reflexively filing exhibits, especially those containing sensitive material.

   Exhibits should be used sparingly, and only when the fact to be established by the exhibit is in dispute. Don't assume that a document is more probative of something than testimony is. You need only attach that portion of an exhibit that is germane to the dispute. If the public filing of an exhibit will trigger a motion to restrict access, give extra attention to the question of whether the exhibit is necessary to establish a disputed fact and whether alternatives like summarization or redaction are appropriate.

8. Misunderstanding why you're citing cases.

   Know the difference between a holding and *dicta*. Know the difference between binding authority, persuasive authority, and a case that only serves as an example of something. String cites rarely provide additional value. Always read the whole case – the era of electronic research encourages "cite biting," where a case is cited because it contains a handy turn of a single phrase that popped up in a text search, but when read in full, the case stands for an entirely different proposition.

9. Not getting to the point.

   Courts rarely need to be informed of the summary judgment standard. They rarely need a lengthy factual or procedural recitation. Often, the critical part of a 10-20 page brief is as little as one or two sentences or a single paragraph.

10. Not knowing why you're using that deposition at trial.

    Are you impeaching? Refreshing recollection? Or did you just not like the answer the witness just gave? Impeaching and refreshing have specific foundational and procedural steps that you should know and follow. And be aware that impeaching with a deposition just attacks the witness' credibility; it doesn't constitute substantive proof of the fact recited in the deposition.