By J. Scott Bovitz

Memorable Legal Insults

I want to share a few memorable insults from the courts, lawyers and parties, so heed these lessons. As fictional attorney Saul Goodman[1] would say, "Your job is to avoid 'epic fail.'"

Lesson #1: Tell the Judge What You Want in Your Paperwork

On Feb. 21, 2006, Hon. **Leif M. Clark** (ret.) entered an order denying a motion for incomprehensibility.[2] Judge Clark made this memorable finding:

> The court cannot determine the substance, if any, of the Defendant's legal argument, nor can the court even ascertain the relief that the Defendant is requesting. The Defendant's motion is accordingly denied for being incomprehensible.

Judge Clark supported his finding with a quotation (in a footnote) from an Adam Sandler movie[3]:

> Mr. Madison, what you've just said is one of the most insanely idiotic things I've ever heard. At no point in your rambling, incoherent response was there anything that could even be considered a rational thought. Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul.

Judge Clark finished the footnote with a mini-lesson for bankruptcy lawyers:

> Deciphering motions like the one presented here wastes valuable chamber staff time, and invites this sort of footnote.

Ouch! So we are reminded to tell the judge what you want him to do, and why. Circuit Judge Ferdinand F. Fernandez reminds us to use crisp language in our briefs. Avoid the proverbial "slubby mass of words." Here is a quote from *N/S Corp. v. Liberty Mut. Ins. Co.*[4]:

> We will not spill ink detailing the substantive facts of this case because we need not discuss its merits. We are passing through a period in the history of this country when the pressures upon the courts are extremely high ... because of the volume of work as more and more people seek to have the courts resolve their disputes and vindicate their rights. But resources are limited. In order to give fair consideration to those who call upon us for justice, we must insist that parties not clog the system by presenting us with a slubby mass of words rather than a true brief. Hence we have briefing rules. *See* Fed. R. App. P. 28.... Enough is enough. We strike the N/S briefs and dismiss its appeal.

First Corollary: Don't Waste the Court's Time with Small Stuff

Look at the decision from Magistrate Judge Stephen L. Crocker in *Hyperphrase Techs. LLC v. Microsoft Corp.*[5]:

> Any electronic document may be e-filed until midnight on the due date. In a scandalous affront to this court's deadlines, Microsoft did not file its summary judgment motion until 12:04:27 a.m. on June 26, 2003, with some supporting documents trickling in as late as 1:11:15 a.m. I don't know this personally because I was home sleeping, but that's what the court's computer docketing program says, so I'll accept it as true.... Wounded though this court may be by Microsoft's four-minute and twenty-seven-second dereliction of duty, it will transcend the affront and forgive the tardiness. Indeed, to demonstrate the even-handedness of its magnanimity, the court will allow Hyperphrase on some future occasion in this case to e-file a motion four minutes and thirty seconds late, with supporting documents to follow up to seventy-two minutes later.

Second Corollary: Most Discovery Disputes Are Small Stuff

Judges are always reminding litigators that discovery disputes should be resolved between the lawyers, without court intervention. On June 6, 2006, Hon. Gregory A. Presnell of the U.S. District Court for the Middle District of Florida denied a motion[6] requesting that the court designate the location for a deposition. With tongue firmly in cheek, Judge Presnell chastised the lawyers and client for "the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts." Judge Presnell set up the following Nursery School procedure:

> ORDERED that said Motion is DENIED. Instead, the Court will fashion a new form of alternative dispute resolution, to wit: at

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1 "Breaking Bad" (Sony Pictures Television, 2008). This particular character was portrayed by Bob Odenkirk.
2 U.S. Bankruptcy Court, W.D. Tex. San Antonio Division, Adv. No. 05-5171-C.
3 "Billy Madison" (Universal Pictures, 1995).
4 127 F.3d 1145, 1146 (9th Cir. 1997).
5 2003 U.S. Dist. LEXIS 24345, 56 Fed. R. Serv. 3d (Callaghan) 467 (W.D. Wis. July 1, 2003).
6 Case No. 6:05-cv-1430-Orl-31JGG.

> 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of "rock, paper, scissors." The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the period [of] July 11-12, 2006. If either party disputes the outcome of this engagement, an appeal may be filed and a hearing will be held at 8:30 A.M. on Friday, July 7, 2006, before the undersigned in Courtroom 3, George C. Young United States Courthouse and Federal Building, 80 North Hughey Avenue, Orlando, Florida 32801.

Another approach to discovery — the meet, *eat meat* and confer — is outlined by Hon. Pendleton Gaines in his July 19, 2006, order[7]:

> The Court has rarely seen a motion with more merit. The motion will be granted.... Plaintiff's counsel extended a lunch invitation to Defendant's counsel "to have a discussion regarding discovery and other matters." Plaintiff's counsel offered to "pay for lunch." Defendant's counsel failed to respond until the motion was filed.... The lunch must be conducted and concluded not later than August 18, 2006. Each side may be represented by no more than two (2) lawyers of its own choosing, but the principal counsel on the pending motions must personally appear.

Judge Gaines put these two morsels in his footnotes.

> [Footnote 1] Everyone knows that Ruth's Chris, while open for dinner, is not open for lunch. This is a matter of which the Court may take judicial notice.... [Footnote 4] The Court suggests that serious discussion occur after counsel have eaten. The temperaments of the Court's children always improved after a meal.

Lesson #2: Don't Insult Your Trial Judge to His/Her Face

An attorney should not call a judge "a freak," "drunkard on the bench" or a "drunken idiot."[8] Enough said.

First Corollary: Don't Insult Your Trial Judge in the Papers

In *Kentucky Bar Ass'n. v. Waller*,[9] Chief Justice Robert F. Stephens of the Supreme Court of Kentucky reminded us that an attorney will not impress a trial judge by using the following title on his brief: "Memorandum in Defense of the Use of the Term 'As-Hole' (sic) to Draw the Attention of the Public to Corruption in Judicial Office." Nor should an attorney compliment a successor judge because he is "much better than that lying incompetent a**-hole [he] replaced."

Railing against the entire bankruptcy system will not help your case. Here is the summary from Circuit Judge Steven Colloton in *Isaacson v. Manty*[10]:

> In that memorandum, Isaacson leveled accusations of bigotry, prejudice, and conspiracy against both bankruptcy judges, trustee Manty, the [U.S. Trustee], and the entire judicial system. Among other things, Isaacson referred to the new bankruptcy judge as a "black-robed bigot" and "Catholic Knight Witch Hunter," described Manty's "track record of lies, deceit, treachery, and connivery," called the [U.S. Trustee] a "priest's boy," accused the judge and trustees of *ex parte* communications, and declared that "[a]cross the country, the court systems, and particularly the Bankruptcy Court in Minnesota, are composed of a bunch of ignoramus, bigoted Catholic beasts that carry the sword of the church." … Isaacson's written response to the order to show cause defended the veracity of all statements in her November 25 memorandum and made similar statements anew. Among other statements, Isaacson explained that her description of the bankruptcy judge as a "Catholic judge" did not refer to the Roman Catholic Church, but rather to "a mentality and an adherence to a universal creed of White Supremacy."

Second Corollary: On Appeal, Don't "Diss" the Judge Below — Unless You Are Sitting on the Supreme Court

My all-time favorite notice of appeal was handprinted by the appellant.[11] The notice of appeal simply said, "I am informing you that I am appealing the a**hole Ronald B. Leighton's decision in this matter. You [are] hereby served notice. You're not getting away with this s**t that easy." No slubby mass of words here! But no ground was gained by slamming Judge Leighton of the U.S. District Court for the Western District of Washington.

Every judge knows that the phrase "with all due respect" will be immediately followed by a not-so-subtle complaint about the irrationality of another lawyer or the judicial officer. So do not use this tired phrase, unless you are on the U.S. Supreme Court.[12]

Lesson #3: Don't Insult Opposing Counsel

After 34 years in the courtroom, I have concluded that it is only human nature for litigators to trade insults with the other side in correspondence and pleadings. After all, we share DNA with our warring Neanderthal ancestors.[13] However, you may want to follow a few simple rules:

- In a deposition, counsel should not refer to the other side's client as "goofy," a "dimwit," a "dingbat" or (my favorite) a "duffus" (dufus?);[14]

7 Ruling on Pending Motions, Superior Court of Arizona, Maricopa County, Case No. CV 2003-020242.

8 *See In re Patricia S. Ortiz*, In the Supreme Court of the State of New Mexico, Docket No. 33,829 (2013), pp. 2-3, *available at* www.nmcompcomm.us/nmcases/nmsc/slips/SC33,829.pdf (last visited Aug. 27, 2014).

9 929 S.W.2d 181, 182 (Ky. 1996).

10 721 F.3d 533, 536-537 (8th Cir. 2013).

11 *Swinger v. Cole*, C04-5348RB (W.D. Wash. July 12, 2006).

12 *Michoud v. Girod*, 45 U.S. 503, 4 How. 503, 11 L. Ed. 1076, 1846 U.S. LEXIS 412 (1846) ("But with all due respect for the learned judges who have so decided, we say that an executor or administrator is, in equity, a trustee for the next of kin, legatees, and creditors, and that we have been unable to find any one well considered decision, with other cases, or any one case in the books, to sustain the right of an executor to become the purchaser of the property [that] he represents, or any portion of it, [al]though he has done so for a fair price, without fraud, at a public sale.").

13 *See* Neanderthal genome project, *available at* http://en.wikipedia.org/wiki/Neanderthal_genome_project (last visited Aug. 27, 2014) (stating that "99.7% of the base pairs of the modern human and Neanderthal genomes are identical").

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• A lawyer should not insult an inexperienced lawyer by stating that it is "despicable to be so new to the profession";[15] and
• A lawyer should not engage in "a pattern of intemperate, disparaging, demeaning, insulting, threatening, uncomplimentary, and unprofessional use of language" or refer to her opponent as "eternal lying scum" or a "dumb b***h."[16]

In *In re First City Bancorporation*,[17] a unanimous panel of the U.S. Court of Appeals for the Fifth Circuit reminded us that a bankruptcy court has the power to sanction an attorney for "egregious, obnoxious, and insulting behavior," including

• characterizing other attorneys, including an assistant U.S. attorney, as (1) a "stooge"; (2) a "puppet"; (3) a "weak p**syfooting 'deadhead'" who "had been 'dead' mentally for ten years"; (4) "various incompetents"; (5) "inept"; (6) "clunks"; (7) "falling all over themselves, and wasting endless hours"; (8) "a bunch of starving slobs"; and (9) an "underling who graduated from a 29th-tier law school";
• calling the chairman of First City a "hayseed" and a "washed-up has been," as well as calling other First City directors "scoundrels";
• referring to one law firm, Carrington, Coleman, Sloman & Blumenthal LLP, as "stooges" of another law firm, Vinson & Elkins LLP;
• referring to the work of other attorneys as "garbage" that demonstrated "legal incompetence" while involving "ludicrous additional time and expense";
• asserting that Vinson & Elkins was using First City as a "private piggybank"; and
• describing an executive compensation plan approved by the bankruptcy court as a "bribe."

A bankruptcy practitioner should also refrain from using "creative" CM/ECF docket entries to slam the opposing counsel.[18]

Call to Action

Send me citations to your favorite orders and opinions at bovitz@bovitz-spitzer.com, and I may share them in a future Chapter 8 Humor column. abi

14 *In re Patricia S. Ortiz*, p. 2.
15 *Id.* This is a variation on the classic senior lawyer's putdown: "When you have been practicing as long as I have, you will agree with me on this point."
16 *Id.*
17 282 F.3d 864, 866 (5th Cir. 2002).

18 I thank **Gregory M. Salvato** (Salvato Law Offices; Los Angeles) for bringing this strategy to my attention.