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Dicta

By Hon. Stacey G. C. Jernigan

Seven Phrases You Should Never Say in Court

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Some readers will remember the late stand-up comedian George Carlin. In 1972, Carlin first performed a monologue entitled, "The Seven Words You Can Never Say on Television." In the interest of good taste, I'll refrain from mentioning those forbidden words; suffice it to say, these words fell into the category of profanity, and were considered highly inappropriate for public broadcasts in the 1970s. But Carlin, in his unabashed way, addressed the absurdity (in his view) of certain words being banished by network and government bureaucrats, and went on to recite the seven taboo words, stating mockingly that these words might "infect your soul, curve your spine and keep the country from winning the war."[1]

Interestingly, Carlin's "Seven Words" monologue was eventually the subject of a U.S. Supreme Court decision that resulted after the Federal Communications Commission (FCC) sued the owner of a radio station that broadcast the entire Carlin monologue — uncensored — in 1973, and radio listeners complained. There was a declaratory judgment regarding the indecent words, and ultimately court appeals involving First Amendment issues and whether the FCC's definition of "indecency" was too vague to support criminal penalties. The Supreme Court decision (*FCC v. Pacifica Foundation*)[2] eventually established the extent to which the federal government may regulate speech in broadcast television and radio in the U.S.

It is against this backdrop that I now propose "Seven Phrases You Should Never Say in Court."[3] These phrases have nothing to do with obscenity or indecency — and there are not any rules that actually ban them. These phrases will not infect your soul, but they may curve the judge's spine or weaken winning arguments. On a serious note, this article exposes overused legal and business clichés that professionals tirelessly use in court. The purpose of this article is to make professionals think carefully about some of these timeworn metaphors that infect their presentations. Imagine being a judge and hearing these phrases multiple times a week.

Readers are encouraged to be fresh. Find your own original words. Speak like a regular human being — not like a wizard of Wall Street or a scripted politician. While adding some colorful, zesty language and clever wit can make for a more interesting and memorable courtroom presentation, and while sometimes a cliché can effectively and efficiently make a point, the overuse of trite clichés can be downright annoying. This article suggests that you strongly consider replacement words for some of the following clichés.

"Kicking the Can Down the Road"

This first saying has become a "ubiquitous phrase in American politics over the last few years."[4] The expression does not refer to a childhood neighborhood game, but rather procrastination: the postponing of conclusive action. It implies pursuing a shorter-term, less-drastic solution — in the hopes that a problem will eventually disappear or someone else will come along and fix it. Presumably, the metaphorical alternative is bending down and picking up the can and tossing it in the recycling bin. The phrase is most frequently used critically when referring to either (1) Congress and its failure to solve problems, or (2) the Federal Reserve and its long-running suppression of interest rates. But rest assured, restructuring professionals latched onto this phrase with a vengeance a few years ago, and utter it anytime a company proposes a reorganization plan that is likely to be followed by a further need for reorganization[5] or wants an extension of exclusivity[6] — among other chapter 11 contexts.

I submit that this metaphorical non-biodegradable container is now dented, rusted, unrecognizable and in the knapsack of a Boy Scout who is collecting them for his recycling merit badge. But please do not replace this phrase with "wash, rinse, repeat." It really is fine to simply argue that the debtor's plan is "not feasible" or that the debtor will likely default again soon. Try showing the court some real numbers or cross-examining the debtor on projections.

"The 30,000-Foot View"[7]

This phrase obviously refers to the view seen looking out from a commercial jet — a high-level aerial view. It is used to refer to a presentation that is "big picture" rather than minutely detailed. It is an abridged version of facts that is not overly specific. This is presumably quite different from the

1 One can easily find the Carlin monologue through an Internet search. But I would not advise doing this at work.
2 438 U.S. 726 (1978).
3 There are actually far more than seven overused courtroom phrases that are sprinkled throughout this article. If you are bored, count them! Better yet, use them to play a game of "Bankruptcy Courtroom Bingo" the next time you are sitting in court.
4 *See* grammarist.com/usage/kick-the-can-down-the-road/ (unless otherwise indicated, all links in this article were last visited on Feb. 22, 2016).
5 *See* 11 U.S.C. § 1129(a)(11).
6 *See* 11 U.S.C. § 1121.
7 Not to be confused with the 20,000-foot, 50,000-foot or "bird's-eye" view.

view seen by the "boots on the ground." Ugh! There goes another one. It is the opposite of "getting into the weeds" or getting into the "trenches." Yet more detailed than a simple "back-of-the-envelope" analysis. That does it. Time to throw my gavel at somebody!

In all fairness, judges usually appreciate getting a big-picture perspective at the beginning of a case. Since judges have hundreds of cases, it is helpful to get these overviews in a digestible, understandable manner, and this particular metaphor is actually peculiarly pleasant to the senses. My mind can drift when I hear it and make me think that I am Amelia Earhart for a brief moment. Earhart is quoted as having said, "You haven't seen a tree until you have seen its shadow from the sky."[8] I like that image. But again, think about whether there might be more original words to replace this overused business jargon! Also, do not forget that the judge ultimately needs to hear the details (*i.e.*, "drill down" and "peel back the onion") in the form of a thorough evidentiary presentation before the judge can make any ruling! An appellate court will not look fondly upon a ruling that was based on a lawyer's presentation of the "30,000-foot view" of things!

"The Devil Is in the Details"

This hackneyed phrase, when used in court, is typically expressed in a cautionary way. For example, lawyers frequently say this when announcing that a settlement has been reached, but the exact details have yet to be "hammered out" — foreshadowing that things could devolve into a drafting nightmare. Then several weeks later, those same lawyers return and use the devil-phrase again, this time to explain the delay in reducing the settlement from "agreement in principle" to term sheet, then to a final, signed agreement. Still further down the road, the lawyers appear gleefully announcing that things are getting "down to the lick-log"[9] and they know that it is getting to be the "eleventh hour," but they only have a few more "action items" (one of which is to "run everything up the flagpole" with the tax lawyers). They expect to have everything "buttoned up" soon, because they are "burning the midnight oil," "24/7." Wonder if the lawyers can ever hear me screaming inside my head? Oh well. "It is what it is."

To be sure, document drafting can be time-consuming and difficult. Reducing agreements to writing is one of the key tasks for which lawyers are trained and paid handsomely. If it were easy, clients would not need lawyers. Every time I hear this devil-phrase, I usually have one of two thoughts: (1) the parties' settlement is "made of Swiss cheese" and will soon be "unraveling"; or (2) oh boy, the lawyers are sure "fiddling while Rome burns" on this one!

The "Fishing Expedition"

Surely, every reader realizes that judges hear this phrase from "sun up 'til sundown": "Your Honor, the plaintiff is on a fishing expedition!" Translation: Someone is supposedly engaging in outlandish, intrusive and "scorched-earth" discovery tactics and is pursuing it with reckless abandon. The innuendo is that a lawyer is out of control, digging for something to embarrass or incriminate. The behavior is unfocused, harassing and burdensome. The lawyer is "grasping at straws." On a "witch hunt." Good grief! Will the metaphors never end?

It has been said that lawyers throw this phrase around like salmon at Pike Place Fish Market in Seattle.[10] "Reality check": Discovery rules in the federal courts are intended to be broadly and liberally applied, and in the bankruptcy courts, even more so.[11] "Open Kimono": Is the information reasonably calculated to lead to the discovery of admissible evidence (and not privileged)? If the answer is "yes," it is "fair game." And yes, no doubt some document discovered will later be shamelessly offered at a hearing as the proverbial "red herring."

"Where the Rubber Meets the Road"

Lawyers often preview to judges in chapter 11 cases that a certain pivotal event lies in the near future that is going to be "where the rubber meets the road." Whoa! What is that all about? Well, it seems to be referring to a point in a process where there will be challenges, issues or problems. The point where the effectiveness of a theory or idea will be put to a test. The "moment of truth," or "when push comes to shove." This is where opposing views finally clash, and where we will get down to the "nitty gritty." Where we will "toss it into the well and see what kind of splash it makes." "Follow it to the high grass and see if it eats." Perhaps you get the picture (and probably did several sentences ago). The phrase literally references where a vehicle's rubber tires make contact with the road. It originated from a Firestone Tire advertisement used in the 1940s — and later became a catch phrase.[12] But I'm weary of it, so put this phrase "out to pasture."

"Whose Ox Is Being Gored, Here?"

Now we are getting into the genre of metaphors that conjure up images of pastures, frontiers and wildlife. These types of clichés are wildly popular in my home state of Texas. If you do not have any idea what this ox expression means, think about animals with horns that fight and gore each other. When this happens, one rancher's ox usually wins the fight and is not badly injured, but the other ox is in sad shape. It arguably references "who is being hurt here the most?" In global settlements, lawyers use the phrase to reference who is giving up the most — who is "feeling the most pain" (the latter is the party whose "ox is being gored").

For example, when the court asks how the major constituencies feel about the settlement (including everyone from the "top of the food chain" to those at the "fulcrum security level")[13] — the answer is, "It depends upon whose ox is being gored." Also, there is some underlying connotation in this phrase that if someone must win, then someone

8 Harry Lawrence, *Aviation and the Role of Government* (Kendall Hunt, 2004) (quote appears in chapter 13, "The Founding of the Airlines," p. 94).

9 A lick-log is a "felled tree in which troughs are cut and filled with salt for cattle." *See* merriam-webster.com. "Down to the lick-log" refers to the last thing that cattle did before they died. Ranchers would take cattle to lick-logs for them to take a salt lick to increase their weight before slaughter. Readers may recall that the prosecutor in the movie *My Cousin Vinny* (20th Century Fox 1992) used this expression in his opening statement.

10 Anthony Lowenberg, "Filleting the Fishing Expedition Objection," *Texas Lawyer* (June 17, 2009).

11 *See* Fed. R. Bankr. P. 2004.

12 *See generally* Ken Greenwald, "Where the Rubber Meets the Road," Word Wizard (Aug. 3, 2010), *available at* wordwizard.com/phpbb3/viewtopic.php?f=7&t=22437.

13 In other words, all those with "skin in the game."

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must lose. After all, litigation can be "a zero-sum game." Ah, maybe the judge should just "split the baby."[14] In any event, this ox-themed expression (like the baby-splitting phrase) is tied to a Biblical scripture, Exodus 21:35-36.[15] For the record, other overused clichés in this pasture-genre include: "that dog won't hunt,"[16] "all hat and no cattle," and — a universal lawyer favorite — "what's good for the goose is good for the gander."

"Behind the Eight Ball"

Moving from pastures to pool halls, this idiom originates from the game of billiards. When the white cue ball is behind the black eight ball, a player has no ability to make a shot. This phrase is used when a party is in a difficult, awkward position and is likely going to lose.[17] Of course, in bankruptcy, sometimes a debtor is "behind the eight ball" from the "get-go" because, while the debtor still has some "core competencies," there has been a recent "paradigm shift" in its industry and the company has not been "nimble enough" to "weather the storm." No corrective strategies have "gained any traction," and the business is now a "melting ice cube." As chapter 11 gurus know, a quick § 363 sale is usually the only option in this situation — "right out of the box" — (likely a "going-out-of-business sale"), unless something happens that's a "game-changer." Sadly, the company has "legacy costs" that need shedding, is grossly "overleveraged," and its "burn rate" on cash is causing a "death spiral." It is "cannibalizing" on itself, and there's no "magic bullet" here. Everyone is hoping for a "soft landing" and looking for a "stalking horse" or "white knight" — either a financial or a strategic buyer that might capitalize on some "synergies" before the company "implodes."

"At the End of the Day": "The Takeaway"

Can you imagine a non-native English speaker trying to understand some of what we say in court? Please do not misunderstand; this article is mostly "tongue-in-cheek." Colorful language and sharp wit is often effective, and clichés can vividly make a point. My purpose has been to make you "double-down" and think about your words. "Don't drink the Kool-Aid."[18] Be original and not a follower. In closing, here's an excerpt from George Carlin's monologue:

I love words. I thank you for hearing my words. I want to tell you something about words that I think is important. They're my work, they're my play, they're my passion. Words are all we have, really....

Stick a fork in this. I'm done. abi

14 "Splitting the baby" should never be confused with "throwing out the baby with the bath water."

15 "However, if it was known that the bull had the habit of goring, yet the owner did not keep it penned up, the owner must pay, animal for animal, and take the dead animal in exchange." Exodus 21:36, *The Bible* (New International Version).

16 As I consider myself both a cat and a dog person, I should mention another perennial favorite, "Trying to work out this settlement has been like herding cats."

17 A definition of "behind the eight ball" is available at urbandictionary.com/define.php?term=behind+the+eight+ball.

18 This, of course, is a reference to the 1978 "Jonestown" suicides through cyanide poison in Kool-Aid (involving a religious cult at a commune in Guyana, South America).

Dicta

By Hon. Janice Miller Karlin

The "M" Word: Mediation Musings

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Hon. Janice Miller Karlin was appointed as a U.S. bankruptcy judge for the District of Kansas in 2002. She is also in her second five-year term on the Bankruptcy Appellate Panel for the U.S. Court of Appeals for the Tenth Circuit and became its chief judge on Sept. 4, 2015.

The judges of our court occasionally ask each other to mediate disputes in cases where (1) one or both parties clearly lack the resources to pay for a professional mediator; (2) the assets at issue do not warrant the time that has already been spent by the parties, let alone the amount of time necessary to fully litigate all remaining issues; and/or (3) the parties and/or their counsel have become so intractable that private mediation would not likely be as effective as mediation conducted by a judge the attorneys are likely to soon see again in court. Accordingly, it might be helpful for bankruptcy lawyers to get a peek inside a judge mediator's mind, as it hopefully will better prepare you to assist your clients in reaching a palatable settlement.[1]

Asking for Mediation

Counsel rarely utter the "M" word (mediation); in other words, few lawyers request mediation, perhaps believing that it signals some kind of weakness to opposing counsel. I do not see it that way. In fact, I commend an attorney who can quickly identify those unique cases where mediation would be helpful and who request mediation before expending unnecessary time and money. If your case falls into one of the aforementioned categories and the culture in your district is for bankruptcy judges to occasionally mediate cases, do not be reticent about asking for a mediation to be handled by another judge in the district rather than a paid mediator. We certainly will not be shy in telling you if it is not the kind of case that we want to ask our colleagues to mediate. Obviously, my colleagues' time is finite, and I limit my requests for them to mediate in recognition of their generosity in volunteering that time.

The flip side of this advice is this: "Don't agree to a mediation if it's not a good case for mediation." If your judge suggests mediation, be honest and open if you do not want to mediate the case. There is nothing more miserable than spending several hours preparing for a mediation, only to then waste five or more hours trying to bring the parties to a resolution before realizing that one party will simply never agree to a settlement because of an undisclosed issue. Be sure to note these issues up front so that we can make an informed decision about whether to order mediation.

Also tell us if the time is not right for a productive mediation. Second on the "miserable experience" scale is being told four hours into the mediation that you cannot settle because you have not taken Witness Jones's deposition or that you first need to receive the documents that are the subject of a request for production served 60 days earlier. Tell your judge if certain discovery needs to be completed before the mediation can be fruitful; we can and will stay deadlines to allow that limited discovery to be completed in appropriate cases.

There are many reasons why a case may not be appropriate for mediation. Cost could be one factor; maybe your clients cannot afford a paid mediator (but if so, how is that client paying you to litigate the case?). The need or desire to press an important legal principle is another: Perhaps you have found a good case to test the law, and you want/need the matter to go to a final order in order to use the case for precedential purposes. Perhaps you believe that the precedent set in your circuit is ill-advised and your current case will demonstrate that error. (in other words, you are itching for an appeal). The only caveat here is an ethical one. What if a quicker settlement via mediation is the best outcome for your clients? Can you really charge those clients to pursue a case on principle, through appeals, if they could achieve satisfactory results much earlier, and with much less angst?[2]

On this topic, one of my colleagues recently settled a case for me that had ballooned into several disputes, all centering around a decision that I had issued regarding an exemption. The decision was on appeal, and in the meantime, related disputes were brewing. The parties were in the throes of hiring valuation expert witnesses, taking depositions and preparing for trial — proceedings that appeared likely to cost more than the assets were worth. By crafting the settlement to allow the appeal to continue (so the appellant could preserve his hope of reversing a decision so as not to be stuck with that precedent in future cases), with the agreement dictating who gets what depending on what party prevails, everyone gets to have their cake and eat it, too. The parties get certainty; they get to stop spending money and time preparing for trial and trying the case. The appellant gets to preserve his appeal, and I will not need to try a case and write a decision on related issues that should be settled. Win. Win. Win.

1 There are dozens of great (and — unlike this article — actually scholarly) resources about mediation in this and other journals that you should read. Some include Michael S. Wilk, "Mediation of a Bankruptcy Case," 22 *ABI Journal* 12 (May 2003); Maryanne G. Jensen ed., *Mass. Continuing Legal Educ. Inc., Mediation: A Practice Guide for Mediators, Lawyers, and Other Professionals* (2013); Paul A. Rubin, "10 Tips for a Successful Mediation," XXXIII *ABI Journal* 11, 40-41, 66, November 2014. Both *ABI Journal* articles are available at abi.org/abi-journal.

2 *See* Model Rules of Prof'l Conduct R. 3.2 (2013) ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.").

Preparing for the Mediation

It is not wise to wing a mediation. Counsel must not only thoroughly prepare clients for the mediation process, they must also educate the mediator. First, let's talk about preparing the client. You do yourself no favors if you wait to have a frank discussion with your client about the weaknesses of the case until after the first session with the mediator. The mediator is most certainly going to focus on any weaknesses, and the client will feel like you betrayed him/her by not fully explaining those in advance.[3] You also do your client no favors by unfairly pumping up the value of the case. This will make it more difficult for the client to then contemplate a settlement that does not fit with an earlier perception of the chance of success. For example, if you have represented to your client that she has a 90 percent chance of receiving a $100,000 settlement, and thus enters the mediation thinking it is highly likely that she will walk out with at least an $80,000 settlement, it will be difficult for you and the mediator to then bring her to a new reality.

You must also prepare your client for the *process* of mediation — specifically, that the mediator will thoroughly test the client's theories, claims and evidence. Failing to do so may give your client the incorrect impression that the mediator is "against" him/her, or is being unfair. Since one of a mediator's prime tools is building trust throughout the mediation session so that the parties can come to believe that a jointly crafted settlement is in their best interests, it is very harmful to the process if your client does not understand how the mediation will be conducted, and the mediator's role during it.

You must also educate your mediator. I require the parties to provide me with a confidential mediation statement a week before mediation. This not only helps me understand the case, but (I hope) it also helps the lawyers focus on every facet of the case, including all pertinent facts and arguments, and to consider why they have been unable to settle on their own. You must do your homework both before and during mediation to get the best deal for your clients.

Here is what I want to know before the mediation starts: (1) the nature of the case and (if appropriate to the dispute) the amounts of claims, nature of liens securing the same, and value of property encumbered by such liens; (2) the present position of each party (*i.e.*, the latest offer and counteroffer); and (3) counsel's candid assessment of the (a) strongest and weakest points in your case (legal/factual), (b) strongest and weakest points in the opponents' case (legal/factual), (c) settlement proposals that you believe would be fair and/or settlement proposals that you would be willing to make in order to conclude the matter and stop litigation, and (d) an estimate of costs of future litigation including (but not limited to) the cost to prepare and try the case and pursue or defend any appeals.

Just so you know, it is extremely counterproductive to say that you have no weak points or to unduly minimize them. I am going to find out anyway, and it helps me help you when both parties are realistic about those weaknesses. When I know the weaknesses early on, it allows me to narrow in on the issues much more quickly. I also ask counsel to include a copy of any key exhibits, such as contracts or "silver bullet" evidence, or key testimony. It helps me to have read or seen this evidence before the mediation.

When I mediate a case, I like to predict what legal issues could be implicated so I can become familiar with the pertinent law. For example, in a recent mediation the defendant invoked his Fifth Amendment privilege not to testify on myriad matters during his deposition. I predicted that it would help me to know what criminal statutes might be implicated in the alleged acts, but more importantly, what the statutes of limitations were on any possible crimes. I also wanted to refresh my recollection on binding precedent in our circuit about whether a witness can invoke the Fifth Amendment during discovery but then testify on the same subjects at trial. You help your mediator by pointing out these legal issues in the mediation statement.

Finally, try to settle your case *before* you come to mediation. This may be the most irritating statement for a mediator to read in a mediation statement: "I made an offer, but they did not respond to it." Huh? Even if the offer is ridiculous, how much effort does it take to say "No, thank you?" Of course, it is better yet to get opposing counsel on the telephone to have a civil conversation outlining the reasons why you are rejecting the offer, and it is *even better yet* to make a reasoned counteroffer. Please, never enter mediation without fully exploring, and concluding, settlement talks on your own.

Conducting the Mediation

I get that you want the mediator to think that you have a great case. Mediation involves persuasion: You persuade the mediator of the strengths of your case and the weaknesses of your opponent's case, all while fueling the mediator with information to help lower the expectations of your opponent. This is all helpful and appropriate, but you need to remember that the mediator will be similarly fueled by your opponent. Talk is cheap; be ready to back it up with evidence and a discussion of any binding precedent.

The second-most important part of conducting the mediation, not only for your clients but for you, is to keep an open mind. This really comes into play when the mediator is trying to see if there are non-monetary concessions that a party can make that may have value to the opposition. The mediator is unlikely to know *why* your clients are insistent on a particular settlement, but you should know. Once those needs are identified, the mediator can help craft a solution to satisfy those needs. Is timing a cash payment paramount? Is preservation of some kind of relationship going forward key? Does your client need an apology in order to get down the road?

In addition, it does not help to keep repeating your closing argument. It does not advance the mediation and tends to further encourage any unrealistic expectations by your client who is also listening to it. What does help is for you to have told your client to engage in the mediation by actively listening to the mediator. By doing so, the client has the opportunity to learn what facts are

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3 *See* Model Rules of Prof'l Conduct R. 2.1 (2013) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); *id.* at cmt. [1] ("[A] lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.").

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influencing the other party's thought process — a very valuable thing, indeed.

Let's also briefly talk about confidentiality. I tell the parties that anything they say during our session is *not* confidential unless they expressly tell me it is — with the obvious exception of their negotiating strategy. If I cannot share your "gotcha" evidence, how can I persuade your opponent that he/she should accept a lesser settlement? Do not hamstring your mediator by not being ready to reveal the evidence that you have. This may influence your decision on timing; if you are not ready to reveal the evidence, maybe the time is not right to conduct mediation.

Finally, if the mediator requires (and they should) that persons with actual settlement authority be present throughout the mediation, do not come to the mediation and then try to break it to the mediator that the person with ultimate authority will be available, occasionally, but only by phone and only to his/her own lawyer during the mediation. I agreed to this once, and while I understand the concept of "never say never," I am *never* going to allow that again. Mediations are a dynamic process. Tiny points are continually made throughout the sessions, and it is the cumulative effect of all those tiny points, seen in a new light, that causes parties to continually reassess their original beliefs about the value of the case. It is this gradual process that makes a settlement possible. The person with authority, on the phone, doing things other than listening to how these seemingly inconsequential facts unfold, can never be fully brought up to speed in order to completely understand the risks and benefits of the settlement.[4]

Ask for Another Session

Lastly, if I have failed to successfully mediate your case, but intervening discovery has opened the parties' eyes or a disagreement on a legal issue has crystallized (*e.g.*, another court rules on the same issue), do not hesitate to go back to the mediation well. Few mediators will reject the opportunity to seal the deal. abi

Editor's Note: *Although this article focused on judges serving as mediators, ABI is co-hosting its 40-Hour Bankruptcy Mediation Training Program for all those interested in becoming mediators. The event takes place on Dec. 6-10 at St. John's University School of Law's Manhattan campus. Learn more and/or register at abi.org/events.*

4 That being said, I do understand that rare case when the U.S. Attorney General or the CEO of the mega-company cannot possibly be at every settlement conference around the nation. It is the exceedingly rare case, however, at least in my district, where this really comes into play. If yours is that case, seek a conference with the mediator and opposing counsel in advance of the mediation to hammer out how this should be handled.

WHAT DOES YOUR JUDGE REALLY THINK?

- Nine questions and Nine honest answers from judges around the country. From pet peeves to "worst objections."

1ST CIRCUIT JUDGE - LAWYERS REFUSING TO ANSWER THE QUESTION POSED, BUT INSTEAD ANSWER SOME OTHER QUESTION.

7TH CIRCUIT JUDGE - INTERRUPTING OTHER COUNSEL OR EVEN WORSE, INTERRUPTING THE JUDGE. NOT DISTINGUISHING CASE LAW THAT MAY BE CONTRARY TO YOUR POSITION

9TH CIRCUIT JUDGE - WHEN AN ATTORNEY BEGINS A PRESENTATION BY TELLING ME HE IS NOT A BANKRUPTCY ATTORNEY AND APOLOGIZING FOR IT—AS IF I AM GOING TO SHOW PITY ON HIM AND GO OUT OF MY WAY TO HELP HIM. DON'T START A PRESENTATION BY TELLING THE JUDGE YOU DON'T KNOW WHAT YOU ARE DOING. IT'S NOT A STRONG PLACE TO START—EVEN IF IT IS THE TRUTH.

11TH CIRCUIT JUDGE - A LAWYER WALKS UP TO THE LAWYER WHO IS ARGUING WHILE I AM ASKING A QUESTION OR MAKING A RULING OR OTHERWISE SPEAKING, AND BEGINS TO TALK TO HIM OR HER AT THE SAME TIME. RUDE!!!

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Name something that happens at oral argument that drives you crazy.

2ND CIRCUIT JUDGE - COUNSEL WON'T ANSWER A QUESTION FROM THE BENCH. COUNSEL CONTINUES WITH PREPARED SCRIPT.

7TH CIRCUIT JUDGE - WHEN A LAWYER DOESN'T CONFRONT A QUESTION HEAD-ON AND ANSWER IT DIRECTLY. OFTEN IT'S BECAUSE THEY DON'T KNOW THE ANSWER, OR THE ANSWER ISN'T FAVORABLE. BUT I'D MUCH RATHER HAVE SOMEONE SAY, "I DON'T KNOW THE ANSWER TO THAT, JUDGE, BUT I CAN FIND OUT," OR " YOU ARE RIGHT ABOUT THAT JUDGE, BUT I BELIEVE THIS CASE IS DIFFERENT BECAUSE . . .," THAN HAVE SOMEONE ANSWER BY DISCUSSING SOMETHING I DIDN'T ASK.

1ST CIRCUIT JUDGE - *COUNSEL INTERRUPTING EACH OTHER TO ARGUE WITH EACH OTHER INSTEAD OF WAITING THEIR TURN. * COUNSEL RESPONDING TO A QUESTION ABOUT A SPECIFIC ARGUMENT BY SAYING, "I'VE COVERED THAT IN MY PAPERS, YOUR HONOR" AND THEN NOT ANSWERING (OR EVASIVELY ANSWERING) THE QUESTION.

Name something that happens at oral argument that drives you crazy.

8TH CIRCUIT JUDGE - LAWYERS SIMPLY REGURGITATING WHAT IS IN THEIR FILINGS.

4TH CIRCUIT JUDGE - LAWYERS NOT HAVING TALKED TO EACH OTHER TO NARROW ISSUES

7TH CIRCUIT JUDGE - LAWYERS NOT ANSWERING THE JUDGES QUESTION

Name something that happens at oral argument that drives you crazy.

1ST CIRCUIT JUDGE - WRITE DOWN LIKELY QUESTIONS FOCUSING ON THE TWO OR THREE WEAKNESSES IN THEIR ARGUMENT (OR THE STRENGTHS OF THEIR OPPONENT'S ARGUMENTS) AND WRITE DOWN YOUR BEST ANSWERS TO THOSE QUESTIONS.

7TH CIRCUIT JUDGE - MAKE SURE YOU PROVIDE THE COURT WITH A BRIEF INTRODUCTION OF WHO YOU REPRESENT AND WHY YOU ARE MAKING THIS ARGUMENT (A BRIEF ROADMAP). THIS MAY HELP THE COURT THAT HAS READ THE PAPERS SEVERAL DAYS BEFORE JOG THEIR MEMORY.

9TH CIRCUIT JUDGE - READ YOUR OWN BRIEF AND THE CASES YOU CITE IN YOUR BRIEF. YOU MUST ASSUME THAT THE JUDGE HAS DONE SO ALSO.

11TH CIRCUIT JUDGE - ACTUALLY PREPARE.

Name something that lawyers should always do in preparing for oral argument.

2ND CIRCUIT JUDGE - ANTICIPATE POINTS DURING THE ARGUMENT THAT EITHER MAY BE OPENINGS TO INVITE SETTLEMENT OR INVITE PUSHBACK FROM THE JUDGE.

7TH CIRCUIT JUDGE - ANTICIPATE WHAT THE OTHER SIDE MIGHT ARGUE. NO MATTER HOW STRONG YOUR CASE IS, THE OTHER SIDE LIKELY WILL HAVE SOME ARGUMENT, AND YOU LIKELY WILL HAVE SOME IDEA WHAT IT IS. PREPARE FOR THAT--HOW WILL YOU RESPOND TO THE OTHER SIDE'S ARGUMENT, IN A REASONED, LOGICAL WAY?

1ST CIRCUIT JUDGE - IDENTIFY ANY WEAK POINTS IN THEIR ARGUMENT AND DEVELOP A STRATEGY FOR MEETING THEM HEAD ON.

8TH CIRCUIT JUDGE - THOROUGHLY REVIEW THE FILE AND KNOW THE CASE BETTER THAN THE JUDGE DOES.

Name something that happens at oral argument that drives you crazy.

4TH CIRCUIT JUDGE - CHECKLIST OF ELEMENTS OF CLAIM AND EVIDENCE WHICH PROVES ELEMENTS

7TH CIRCUIT JUDGE - UNDERSTAND THEIR OPPONENT'S ARGUMENT THOROUGHLY.

8TH CIRCUIT JUDGE - THOROUGHLY REVIEW THE FILE AND KNOW THE CASE BETTER THAN THE JUDGE DOES.

4TH CIRCUIT JUDGE - CHECKLIST OF ELEMENTS OF CLAIM AND EVIDENCE WHICH PROVES ELEMENTS

7TH CIRCUIT JUDGE - UNDERSTAND THEIR OPPONENT'S ARGUMENT THOROUGHLY.

Name something that happens at oral argument that drives you crazy.

1ST CIRCUIT JUDGE - "PREJUDICIAL." THAT'S THE WORST. FOLLOWED CLOSELY BY "THE DOCUMENT SPEAKS FOR ITSELF" AND ANY OBJECTION THAT IS NOT DIRECTED ROOTED IN A SPECIFIC RULE IN THE FEDERAL RULES OF EVIDENCE.

9TH CIRCUIT JUDGE - RELEVANCE. THIS IS RARELY AN EFFECTIVE EVIDENTIARY OBJECTION AND INTERRUPTS THE FLOW OF TESTIMONY. SAVE IT FOR ARGUMENT TO TELL ME THE OTHER SIDE WASTED MY TIME.

11TH CIRCUIT JUDGE - "OBJECTION TO FORM" SINCE THERE IS NO SUCH OBJECTION AT TRIAL; JUST FOR DEPOS.

2ND CIRCUIT JUDGE - ANY "SPEAKING" OBJECTION THAT, IN EFFECT, COACHES THE WITNESS.

Name the least helpful objection a lawyer can make at a hearing or at trial.

7TH CIRCUIT JUDGE - "OBJECTION, JUDGE--THAT'S PREJUDICIAL." OF COURSE IT IS. OTHERWISE, THE OTHER SIDE WOULDN'T WANT TO GET THE EVIDENCE IN.

1ST CIRCUIT JUDGE - * "OBJECTION, YOUR HONOR" (WITHOUT STATING THE BASIS FOR THE OBJECTION, WHICH MAY NOT BE AS OBVIOUS AS THEY THINK IT IS.) * "LEADING THE WITNESS" WHEN THE TESTIMONY IS SIMPLY BACKGROUND AND NON-PREJUDICIAL.

8TH CIRCUIT JUDGE - "THE DOCUMENT SPEAKS FOR ITSELF" OR "THAT IS NOT THE BEST EVIDENCE".

4TH CIRCUIT JUDGE - SELF-SERVING AND PREJUDICIAL

7TH CIRCUIT JUDGE - SPEAKING OBJECTIONS THAT SUGGEST AN ANSWER TO THE WITNESS.

Name the least helpful objection a lawyer can make at a hearing or at trial.

1ST CIRCUIT JUDGE - DIRECT ANSWERS TO QUESTIONS. 1ST CIRCUIT JUDGE - DIRECT ANSWERS TO QUESTIONS. ANSWERS THAT ARE EVASIVE CREATE SKEPTICISM AND DOUBT.

7TH CIRCUIT JUDGE - FOR AN EXPERT -- ABILITY TO TEACH IN A LANGUAGE I CAN UNDERSTAND.

9TH CIRCUIT JUDGE - CANDOR IN ACKNOWLEDGING THE BAD FACTS, AS WELL AS THE GOOD.

11TH CIRCUIT JUDGE - I LOOK TO SEE WHETHER THE WITNESS IS MUMBLING AND HOLDING HIS OR HER HEAD DOWN OR LOOKING UP - WHETHER AT ME OR AT THE QUESTIONER. I AM ALSO NOT IMPRESSED AND HAVE CONCERNS REGARDING CREDIBILITY WHEN THE LAWYER ESSENTIALLY TESTIFIES FOR THE WITNESS WITH LEADING QUESTIONS FOR EVERYTHING.

Name the most important thing you look for in assessing the credibility of a witness.

2ND CIRCUIT JUDGE - FOR EXPERTS: WILLINGNESS TO CONSIDER AND ADDRESS WEAKNESSES IN HIS OR HER OWN ANALYSIS. FOR FACT WITNESSES: EVASIVENESS, ROTE OR MEMORIZED RESPONSES, REFUSAL TO LISTEN TO AND ANSWER QUESTIONS.

7TH CIRCUIT JUDGE - THREE THINGS, REALLY: 1.) EYE CONTACT, 2.) BODY LANGUAGE, AND 3.) WILLINGNESS TO ADMIT THAT THE WITNESS ISN'T 100% CERTAIN ABOUT SOMETHING, OR TO SAY THAT THEY DON'T KNOW.

1ST CIRCUIT JUDGE - DIRECTLY ANSWERING QUESTIONS WITHOUT OFFERING SELF-SERVING OR GRATUITOUS COMMENTARY.

Name the most important thing you look for in assessing the credibility of a witness.

8TH CIRCUIT JUDGE - CANDOR: ADMITTING A MISTAKE WHEN IT IS IDENTIFIED RATHER THAN DOGGEDLY INSISTING THAT THEIR WORK IS PERFECT. PERHAPS ALSO A LITTLE HUMILITY, RECOGNIZING THAT THEIR AREA OF EXPERTISE MAY BE MORE OF AN ART THAN A SCIENCE.

4TH CIRCUIT JUDGE – DEMEANOR

7TH CIRCUIT JUDGE - CONSISTENCY WITH PRIOR TESTIMONY AND THE DOCUMENTARY EVIDENCE.

Name the most important thing you look for in assessing the credibility of a witness.

1ST CIRCUIT JUDGE - COMPLETE DISREGARD OF THE PARTIES' OBLIGATIONS UNDER RULE 26(F).

7TH CIRCUIT JUDGE - REFUSING TO WORK OUT PROBLEMS PRIOR TO COMING TO THE COURT. MAKING DISCOVERY REQUESTS OVERLY BROAD AND NOT THINKING ABOUT WHAT THEY ACTUALLY NEED TO REVIEW.

9TH CIRCUIT JUDGE - WHEN ONE SIDE WITHHOLDS ITS COOPERATION BASED ON THE OTHER SIDE'S LACK OF COOPERATION. THE COURT DOES NOT SEE DISCOVERY AS A TIT-FOR-TAT EXERCISE. BOTH SIDES HAVE AN *INDEPENDENT* DUTY TO FULFILL THEIR OBLIGATIONS TO COMPLY. IF THERE ARE NO GOOD REASONS FOR A FAILURE TO PERFORM, I WILL SANCTION YOU BOTH.

11TH CIRCUIT JUDGE - PLAYING GAMES WITH DISCOVERY OBJECTIONS, WHICH PRACTICE, I HOPE, WILL STOP NOW THAT THE FEDERAL RULES OF CIVIL PROCEDURE HAVE BEEN AMENDED.

Name a discovery practice that frustrates you.

2ND CIRCUIT JUDGE - NOTICING TOO MANY DEPOSITIONS. NOT PRODUCING DOCUMENTS UNTIL FORCED TO BY THE COURT. INCLUDING A SUBSET: REFUSING TO PRODUCE DOCUMENTS ON THE BASIS THAT THEY'RE CONFIDENTIAL

7TH CIRCUIT JUDGE - FIGHTING A DISCOVERY DEMAND "ON PRINCIPLE." IF PRODUCING THE DISCOVERY REALLY WOULD BE AN UNDUE BURDEN, OR WOULD REQUIRE PRODUCTION OF PRIVILEGED INFORMATION, THAT'S ONE THING. BUT SIMPLY REFUSING BECAUSE "WE JUST THINK THEY'RE TRYING TO HARASS US," OR "WE JUST DON'T THINK THEY SHOULD BE ABLE TO GET THAT STUFF," IS BEING UNDULY ADVERSARIAL.

Name a discovery practice that frustrates you.

1ST CIRCUIT JUDGE - I'M TRYING TO THINK OF ONE THAT DOESN'T.

8TH CIRCUIT JUDGE - BOILERPLATE OBJECTIONS UNSUPPORTED BY ANY FACTUAL DETAIL.

4TH CIRCUIT JUDGE - OBJECTIONS TO EVERYTHING FOLLOWED BY "SUBJECT TO THESE, WE WILL PRODUCE THE DOCUMENTS"

7TH CIRCUIT JUDGE - BOILERPLATE OBJECTIONS

Name a discovery practice that frustrates you.

1ST CIRCUIT JUDGE - THE SUMMARY OF THE ARGUMENT.

7TH CIRCUIT JUDGE - THE INTRODUCTION.

9TH CIRCUIT JUDGE - THE TABLE OF CONTENTS AND INTRODUCTION. ROADMAP, ROADMAP, ROADMAP.

11TH CIRCUIT JUDGE - A GOOD SUMMARY INTRODUCTION THAT PROVIDES A ROAD MAP TO THE ARGUMENTS.

What is the most helpful part of a brief?

2ND CIRCUIT JUDGE - THE PART THAT ANSWERS WHAT I NEED TO KNOW IN ORDER TO RULE. BECAUSE THIS IS INHERENTLY DIFFICULT AND REQUIRES THOUGHT (OTHERWISE THE MATTER WOULDN'T BE CONTESTED), LAWYERS OFTEN AVOID THIS PART, OR, RATHER, THEY ONLY FLEETINGLY ADDRESS IT, OFTEN IN A FOOTNOTE -- HENCE, MY "FOOTNOTE RULE." THIS IS THE RULE I TELL MY CLERKS ABOUT WHEN THEY START WORK: LOOK FOR FOOTNOTES THAT DO NOT SIMPLY CITE CASES BUT ADDRESS AN ARGUMENT. OFTEN, THAT ARGUMENT REALLY SHOULD HAVE DEALT WITH FRONT AND CENTER BECAUSE IT'S CRUCIAL TO THE ANALYSIS OF WHICH SIDE SHOULD WIN.

7TH CIRCUIT JUDGE - THE PART THAT SOMETIMES ISN'T IN THERE--"HERE'S WHAT I'M ASKING FOR, AND HERE ARE THE THREE REASONS I SHOULD GET IT: 1.) GOOD EXPLANATION, 2.) GOOD EXPLANATION, AND 3.) GOOD EXPLANATION."

What is the most helpful part of a brief?

1ST CIRCUIT JUDGE - * AN INTRODUCTION THAT CONCISELY SUMMARIZES WHAT I'M ABOUT TO READ, IN THE ORDER IN WHICH I'M ABOUT TO READ THEM. IT'S A SURE CURE FOR THE "WANDERING BRIEF" THAT READS LIKE IT WAS WRITTEN WITHOUT THINKING IT ALL THE WAY THROUGH FIRST.* THE PART THAT TELLS ME WHY I SHOULD DO WHAT THE PARTY WANTS ME TO DO.

8TH CIRCUIT JUDGE - A CONCISE SUMMARY OF POSITION, PREFERABLY AT THE BEGINNING.

4TH CIRCUIT JUDGE - CONCISE OPENING SECTION WHICH TELLS ME WHY YOU SHOULD WIN.

7TH CIRCUIT JUDGE - A CLEAR STATEMENT OF FACTS

What is the most helpful part of a brief?

1ST CIRCUIT JUDGE - “WITH ALL DUE RESPECT, YOUR HONOR. . .” IT’S LIKE NAILS ON A CHALKBOARD TO ME. WHEN I HEAR THAT, I HEAR “NO RESPECT IS DUE AND I’LL TELL YOU WHY.”

9TH CIRCUIT JUDGE - “YOU HONOR, I WILL BE BRIEF.” WHENEVER SOMEONE SAYS IT, IT’S RARELY TRUE. THERE IS ONLY DOWNSIDE TO PROMISING YOU ARE GOING TO BE BRIEF. . .

11TH CIRCUIT JUDGE - "WITH ALL DUE RESPECT"'

2ND CIRCUIT JUDGE - "WITH ALL DUE RESPECT," "WE'VE DONE A FULSOME ANALYSIS," THE CLICHE OF THE DAY.

7TH CIRCUIT JUDGE - "WITH ALL DUE RESPECT."

What word or phrase do you never want to hear in your courtroom?

1ST CIRCUIT JUDGE - "COUNSEL'S ARGUMENT IS RIDICULOUS" OR OTHER AD HOMINEM REMARKS.

8TH CIRCUIT JUDGE - "TO TELL THE TRUTH,...”

4TH CIRCUIT JUDGE - "IF THE TRUTH BE TOLD”

7TH CIRCUIT JUDGE - WITH ALL DUE RESPECT

What word or phrase do you never want to hear in your courtroom?

1ST CIRCUIT JUDGE - NOT UNDERSTANDING THE FACTS AND THE HOLDING OF CASES CITED BY THEM IN THEIR MOTIONS PAPERS AND BRIEFS. IT'S EASY TO PICK OUT A KEY SENTENCE OR PARAGRAPH THAT DESCRIBES A LEGAL PRINCIPLE. BUT UNDERSTANDING THE MATERIAL FACTS IN THE CASE, AND THE ACTUAL HOLDING IS CRITICAL. IT TAKES TIME, BECAUSE YOU NEED TO READ THE ENTIRE DECISION, NOT JUST THE HEADNOTES.

7TH CIRCUIT JUDGE - FOR MANY, IT IS NOT DRESSING, ACTING PROFESSIONALLY. I WOULD NEVER HAVE THOUGHT THIS WOULD BE A COMMENT I WOULD MAKE BUT IT IS BECOMING MORE AND MORE TRUE. IT IS ALSO IMPORTANT TO LISTEN TO THE COURT. THERE MAY BE HINTS ABOUT WHERE THE COURT IS LEANING THAT YOU CAN LEARN AND MAY HELP YOU SHAPE FUTURE ARGUMENTS.

9TH CIRCUIT JUDGE - ASKING FOR STUFF YOU DON'T NEED. I.E., WHY INSIST ON A RULING ON YOUR EVIDENTIARY OBJECTION IF I HAVE GRANTED YOUR MOTION?

Name the most common mistake made by new lawyers.

11TH CIRCUIT JUDGE - NEW LAWYERS TEND TO TAKE SHORTCUTS. THEY TRANSLATE THE WORLD OF SOUND BITES INTO EVERYTHING THEY DO, WHETHER IT IS LEGAL RESEARCH, OR PREPARING A MOTION, OR PREPARING A COMPLAINT OR AN ANSWER. AS I DESCRIBE IT TO MY LAW CLERKS, INSTEAD OF PREPARING A PATH FOR THE READER/LISTENER TO FOLLOW, CHUNKS OF SCATTERED ROCK ARE THROWN ABOUT WITH NO CONNECTIONS, FLIMSY FOOTHOLDS AND MINIMAL ORGANIZATION SO THAT ARRIVAL AT A CONCLUSION IS NOT ASSURED AND IS ALWAYS DIFFICULT AND PAINFUL.

2ND CIRCUIT JUDGE - NOT KNOWING THE FLAWS IN THEIR CASE. PAYING MORE ATTENTION TO WHAT THE CLIENT SAYS SHE WANTS AS OPPOSED TO THINKING ABOUT WHAT CAN REALISTICALLY BE ACHIEVED. LETTING ONESELF BE BULLIED. NOT SPEAKING UP TO THE SENIOR LAWYER ABOUT AN IDEA, STRATEGY, OVERLOOKED FACT OR ARGUMENT. NOT THINKING STRATEGICALLY.

7TH CIRCUIT JUDGE - FEELING THAT IN ORDER TO BE A GOOD LAWYER, THEY HAVE TO FIGHT THE OTHER SIDE ON EVERYTHING. PICKING YOUR BATTLES AND FIGHTING ONLY THOSE THAT NEED FIGHTING IS A GOOD THING--IT NEVER HURTS TO APPEAR TO BE THE MOST REASONABLE PERSON IN THE ROOM.

Name the most common mistake made by new lawyers.

Name the most common mistake made by new lawyers.

1ST CIRCUIT JUDGE - NOT ACKNOWLEDGING AND DEALING WITH WEAKNESSES IN THEIR ARGUMENTS OR POSITIONS.

8TH CIRCUIT JUDGE - NOT GETTING TUNED IN TO THE UNWRITTEN RULES. NOT HAVING A MENTOR.

4TH CIRCUIT JUDGE - FORGETTING TO TENDER DOCUMENTS

7TH CIRCUIT JUDGE - NOT KNOWING TRIAL PRACTICE SKILLS, LIKE HOW TO ASK NONLEADING QUESTIONS ON DIRECT

What behavior toward court staff most irritates you?

1ST CIRCUIT JUDGE - ANY SORT OF BEHAVIOR THAT IS DIFFERENT FROM THE BEHAVIOR THAT WOULD BE EXHIBITED TOWARD A JUDGE (OTHER THAN THE SALUTATION, OF COURSE). DON'T ACT TOWARD THE COURT STAFF OUTSIDE THE COURT ANY DIFFERENTLY THAN YOU WOULD ACT IN FRONT OF A JUDGE IN THE COURT.

7TH CIRCUIT JUDGE - ATTEMPTING TO HAVE EX PARTE CONVERSATIONS.

9TH CIRCUIT JUDGE - ANYTHING LESS THAN TOTAL RESPECT AND COURTESY. YOU SHOULD ASSUME THAT HOW YOU TREAT COURT STAFF GETS BACK TO THE JUDGES—ON A REGULAR BASIS.

11TH CIRCUIT JUDGE - RUDENESS. I MADE IT VERY CLEAR DAY ONE THAT ANYTHING ANYONE SAYS OR DOES TO MY STAFF IS THE SAME AS IF SAID OR DONE TO ME.

7TH CIRCUIT JUDGE - RUDENESS, OF COURSE, BUT ALSO ASKING A MEMBER OF THE COURT'S STAFF, "HOW'S THE JUDGE GOING TO RULE ON THIS MOTION OR THAT OBJECTION?" FIRST OF ALL, IF MY STAFF DID KNOW, THEY WOULDN'T TELL, AND MOST OF THE TIME THEY DON'T KNOW, BECAUSE I PROBABLY DON'T KNOW AT THAT POINT.

1ST CIRCUIT JUDGE - * COUNSEL BLAMING THEIR OWN MISTAKE ON SOMETHING THEY SAY "THE CLERK TOLD ME TO DO." *CALLING CHAMBERS TO ASK FOR LEGAL ADVICE.

8TH CIRCUIT JUDGE - LACK OF COURTESY AND RESPECT. UNREASONABLE DEMANDS.

4TH CIRCUIT JUDGE - TALKING TO OTHER COUNSEL WHEN THE COURT ASKS A QUESTION

7TH CIRCUIT JUDGE - ASKING FOR LEGAL RULINGS

What behavior toward court staff most irritates you?

2ND CIRCUIT JUDGE - SAYING TO THE JUDGE THAT COURT STAFF GAVE YOU ADVICE TO DO SOMETHING.

7TH CIRCUIT JUDGE - RUDENESS, OF COURSE, BUT ALSO ASKING A MEMBER OF THE COURT'S STAFF, "HOW'S THE JUDGE GOING TO RULE ON THIS MOTION OR THAT OBJECTION?" FIRST OF ALL, IF MY STAFF DID KNOW, THEY WOULDN'T TELL, AND MOST OF THE TIME THEY DON'T KNOW, BECAUSE I PROBABLY DON'T KNOW AT THAT POINT.

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