

**MEMORANDUM**

TO: All Attorneys with Cases on my Docket

FROM: Pat E. Morgenstern-Clarren, U.S. Bankruptcy Judge, N.D. Ohio

DATE: 8 March 2017

SUBJECT: (One Last Set Of) Tips

\*\*\*\*\*

In December 1995 as I began my service as a United States Bankruptcy Judge, one of the first things I did was open a file labeled “Ideas for Speeches.” This came in handy over the years because the most frequently requested topic on which I’ve been invited to speak has been the all-purpose “View from the Bench.” Now as my May 1, 2017 retirement date approaches, I’ve been sorting through that file as well as others and have put together one last set of ideas to share with you that run the gamut from the day you meet a potential client to the day of trial.

**Tip #1: Intake, Intake, Intake**

You do not have to take every case that comes through the door. And in fact you *shouldn’t* take every case. This is true whether you are solo, affiliated with a few other lawyers, or part of a firm. But it’s even more important if you have a solo practice.

Why? Solos are directly responsible every day not only for practicing sound, ethical law but also for paying the bills. These financial pressures may push you to accept a case for the wrong reasons. Watch out for red flags:

- A potential client with unreasonable expectations;
- One who wants revenge;
- One who has had two or more lawyers on the same matter before coming to you;
- One who has an imminent deadline that will force you to make rushed decisions.

If your gut tells you that the case will be a problem, it probably will be. Turn it down, put the decision in writing, and hand the visitor a copy of the letter. Include any imminent deadlines that the potential client has shared with you or state that you are not making any representations about upcoming deadlines. Have the individual acknowledge receipt of the letter in writing and put it in your file.

Why do you want to put it in writing? Because the person may well be looking for someone to blame for his or her financial troubles and a lawyer with insurance can be an easy target for a missed deadline claim.

**Tip #2: Make a chart before you file a claim or defend against one**

I'm thinking of a very simple chart with five columns:

Elements of the Claim and Defenses to it	Who has burden of proof for each element?	What evidence do you have?	What evidence do you need to meet your burden of proof?	How will you get that information into evidence?

You can have the best case in the world on paper but if you can't get your documents or testimony into evidence, you will lose. For each piece of information, have at least one and preferably two ways to get it into evidence.

Revise the chart as you go along and keep the client informed about critical developments, such as the filing of a motion in limine or an admission by a party opponent. This will tell you in real time what parts of your case are solid and where you have holes to plug. And it will help build client confidence by avoiding surprises.

**Tip #3: Once you've accepted a case, maintain an emotional distance from your client and the case**

Of course you should care about your clients and be responsive to them. It's important to remember, though, that you've been retained as an advisor, not a social worker or therapist. If you dive headfirst into your client's misery, you will not be helping the client and you may well harm your own emotional health. Focus on being the counselor who listens calmly and provides options.

**Tip #4: Learn how to view settlement as a probability from the beginning**

There is a long-standing common misconception that the first person to raise the possibility of settlement shows weakness. The Federal Rules of Bankruptcy Procedure now focus on the possibility of settlement from the initial stages which is helpful in changing this perception.

Set up the possibility of settlement in an initial conversation with opposing counsel by saying something like: "We both know this is likely to settle at some point. Let's look for an early point to discuss it." That point might be when you've pinned down a critical fact, or won a

preliminary motion—or it might be when you realize that continuing with the case is like rearranging the deck chairs on the *Titanic*.

Pick up the phone, remind the other lawyer of your early comment, and continue the conversation.

**Tip #5: At trial, prove only what you have to prove and SIT DOWN**

The danger of proving less is obvious—you’ll lose. But there’s also a danger to trying to prove more than your case requires. You may go off “chasing rabbits” (as they say in NITA) and leave the judge wondering what you are doing. Or you may open the door to evidence that would otherwise be excluded.

To avoid this, use your chart. Tick off each element as you go along, and when you’ve proven everything on it—sit down!

**Tip #6: Try not to say “With all due respect”**

All judges have the same reaction to this phrase. Best to avoid it.

**Tip #7: Learn how to win with dignity and lose with grace**

You will need both skills in the course of your career. Save the high fives and dance of joy for later. Don’t stare daggers at the other side or at the judge. Don’t mutter to the courtroom about filing an appeal. Learn how to breathe evenly so that you can control your reaction. Tell your client in advance to do the same—no fits of anger or shouts of happiness.

Win or lose, shake hands with opposing counsel.

Congratulate the winning counsel.

If you’ve won, tell the other side they did a good job.

Remember, today’s adversary may be a co-counsel or referral source tomorrow.

\* \* \*

And with that, good luck and best wishes in the years ahead.