**A VIEW FROM THE BENCH: DOs AND DON’Ts OF COURT PRACTICE AND PROCEDURE**

**STACY L. NOWICKI-ELDRIDGE, JUDGE**

25th Judicial Circuit (for now)

Circuit Court of Boone and Lincoln Counties

**DOs**

1. **KNOW THE COURT RULES AND BE COURTEOUS TO THE JUDGE’S STAFF.** Social media is changing the way most people communicate, but it’s still all about relating to people. Nothing can replace the significance of picking up the phone or stopping by to talk with the judge’s staff about courtroom rules before your court appearance. Although court staff can’t provide legal advice, if you’re nice, they can give you helpful tips about rules that can help you avoid traps. Check with your judge regarding procedures and personal preferences. Most counties are now e-file, so all proposed orders should be e-filed. (Will address this more later). Also, learn if there are any forms (e.g., plea forms and pre-trial information sheet for civil and criminal) or other documents the Court expects to be used.
2. **CHECK YOUR CITATIONS—AND THEN CHECK THEM AGAIN.** There is nothing that drives a law clerk—or a judge—crazier than an incorrect citation. It’s difficult to take an argument, and the lawyer giving the argument, seriously when we can’t find your case. Also, make sure that the case is still good law and make sure that you are relying upon the correct version of the statute or rule.
3. **SETTING A HEARING ON YOUR MOTION.** When you file a motion, contact my office to set a hearing on that motion. This seems simple and should generally be understood by local counsel. However, my office does occasionally receive calls from counsel wanting to know when their motion will be heard or if the Court has ruled on the motion. Unless you contact my office to obtain a hearing date, I may not even be aware that a motion has been filed. One of the very few exceptions is a motion for default judgment for a sum certain. The best practice is to contact my office prior to filing your motion to obtain a hearing date. If you file a Notice of hearing- those do not show up in the Judge’s pleading queue, so please make sure you send a copy to the secretary! This applies to criminal and civil. Check with opposing counsel to ensure that he or she will be available on that date. Then, file a Notice of Hearing when you file the motion.
4. **BE ORGANIZED**. Be on time to Court and make sure you meet all the filing deadlines. If you’re late to a hearing or miss a filing deadline, you hurt your client and your own credibility as a practitioner. We understand that things happen, and you may be late occasionally due to circumstances you didn’t anticipate, but if you are going to be, CALL!
5. **BE PREPARED**. Make sure you know the case inside and out. Make sure you’ve got it all together before you walk into court. If you don’t know the answer, own it! Know the relevancy of the cases you rely on. It’s very convenient when you can use prior case law or arguments in new litigation. But it is embarrassing when you don’t know that the case you’re relying on has been overturned, modified, vacated, or remanded, or another case with an identical fact pattern exists that better supports your position, and you missed your opportunity to use it. Always confirm whether the case you’re citing is good law before citing it. Anticipate and address cases that weaken your argument by highlighting factual differences and relevancy. Also, prepare your witnesses before the hearing or trial and understand how the witness’ testimony to the relevant to the contested issues.
6. **USE SCHEDULED COURT DATES EFFECTIVELY**. The Court calendar is full. With JDC/ADC/FTC, I have 4 days to do 5 days’ worth of work on the rest of the docket. Continuances of hearing dates should be few and far between and based upon good cause. These time slots are valuable. Use the hearing date effectively. If you must continue a hearing for any reason, there is no guarantee that we will be able to reschedule it as soon as you need it.
7. **BE PROFESSIONAL AND CIVIL.** Lawyers always should be zealous and passionate advocates for their clients, but to be effective, the zeal and passion must be properly channeled. Too often in the heat of battle, lawyers devolve from arguing about issues to arguing about personalities, attacking an opposing party or opposing lawyer's character, sometimes rudely. Don't do it! Address your arguments professionally AND to the court, **NOT EACH OTHER**! Snide comments and snarky remarks may seem clever when you write them, but they rarely look good in print, and they never impress a court. In fact, more often such tactics backfire against the attacker, hurting that lawyer's most precious asset – credibility. As the old saying goes, “you catch more flies with honey than with vinegar.” This applies to interactions with the Court’s staff too.
8. **BE SELECTIVE.** Think strategically. Motion practice, like any other pretrial procedure, is a tactic and should be thought of as a means to an end–the successful resolution of the case for your client. For any tactic to be successful, you must always focus on the bigger picture: will a "win" in the short-term help or hurt your chances for ultimate success? Just because you can file a motion does not mean that you should. Carefully choosing when and when not to engage in motion practice can be the difference between moving a case forward quickly toward a successful end and an expensive and wholly ineffective boondoggle. Again, such choices often directly affect the lawyer’s most-prized asset – credibility. Also, this frequently causes unnecessary work for the law clerk and the judge.
9. **BE FOCUSED**. If you choose to file a motion, focus on the most important bases for relief. Generally, you should focus on no more than two to three themes for any motion (irrespective how many grounds for relief you may have). Too many themes dilute the power of your best themes and often distract and confuse the audience - the judge. Lawyers too often feel the need to raise every single argument no matter how tangential or likely to contribute to ultimate success. Often this is borne of fear that omitting or minimizing any point, no matter how trivial, could leave them open to later criticism if the motion is not successful. But, let's face it, if the fifth or sixth most important point is the one that ultimately carries the day (assuming the court actually reads and meaningfully considers it), your prioritization was probably off from the start. Don’t just throw everything you can at the wall to see what sticks.
10. **BE CONCISE.**
11. **PREPARE SOUND ORDERS.** When directed by the court, prepare orders reflective of the judge’s findings and conclusions. They should read like an Order, not like a brief. In ***Taylor v. Dept. of Health and Human Res., 237 W., Va. 549, 788 S.E.2d 295, 303-04 (2016),*** the State Supreme Court had harsh words for the trial court for signing an order submitted by counsel which was, let’s say, “inartfully drafted.” I won’t sign an Order like that so don’t submit it, and you sure don’t want to be the lawyer that did. Pertinent language from that opinion follows:

***We pause before we begin our analysis of the foregoing to address the circuit court's June 13, 2014, omnibus order, which primarily forms the basis of this appeal and the difficulties which the order presents. Recognizing of course that this order was prepared by respondents' counsel and merely executed and entered by the circuit court, we would be remiss if we failed to caution the lower courts regarding the risks attendant to adopting and entering—wholesale—orders prepared by counsel. We recognize the common practice of requesting attorneys to prepare proposed orders for consideration by the court while a matter is under advisement and, in general, find nothing untoward about this process. We caution circuit courts, however, that the burden of issuing an order which meets this Court's requirements, which requirements are designed to permit meaningful appellate review, ultimately remains on the circuit court. It is incumbent on the trial court to determine if the submitted order accurately reflects the court ruling given that it is well-established that “[a] court of record speaks only through its orders [.]” State ex rel. Erlewine v. Thompson, 156 W.Va. 714, 718, 207 S.E.2d 105, 107 (1973). With respect to summary judgment, this Court has stated that “the circuit court's order must provide clear notice to all parties and the reviewing court as to the rationale applied in granting or denying summary judgment.” Fayette Cty. Nat'l Bank v. Lilly, 199 W.Va. 349, 354, 484 S.E.2d 232, 237 (1997), overruled on other grounds by Sostaric v. Marshall, 234 W.Va. 449, 766 S.E.2d 396 (2014).***

***Having reminded our lower courts of their obligations relative to entry of an order granting or denying summary judgment, we find it necessary to admonish counsel regarding preparing and tendering over-reaching orders which fail to succinctly identify and address the critical factual and legal issues. The order prepared by respondents contains seventy pages and 105 separately delineated paragraphs which contain, in large part, nothing more than a thicket of argumentative rhetoric. Respondents' tendered order consists entirely of their version of the disputed facts and advocated inferences, upon which what little legal analysis it contains teeters precariously. Sections entitled “conclusions of law” are little more than one-sided rhetorical diatribes.***

***The order is similarly scattershot on the legal issues presented and concomitant legal analysis. Imbedded throughout the order are multiple legal determinations, any one of which may dispositive of a particular claim, notwithstanding the fact that the order summarily concludes that summary judgment was granted simply due to the absence of a genuine issue of material fact and the presence of qualified immunity. Parties do themselves little favor by tendering such heavily partisan orders to the circuit court which fail so demonstrably to articulate a cogent outline of the claims subject to disposition, the undisputed facts pertinent to the analysis, and the legal basis therefor. This Court strongly disfavors such “kitchen sink” orders inasmuch as they present a substantial impediment to comprehensive appellate review.***

***The order tendered by respondents is so confounding that the effect is to leave this Court struggling to comprehensively discern upon which specific bases the summary disposition was awarded such as to guide our discussion. Accordingly, in addressing petitioners' assignments of error, we find it expedient to approach each cause of action separately and place the myriad issues before the Court into their proper context relative to the causes of action asserted.***

(footnote omitted). *See also* Syl. Pt. 3, *Fayette County Nat. Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997) (“[A] circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed.”).

1. **PROOFREAD!** Sure, we all make mistakes, and typos and misspellings inevitably happen. But don’t rely on spell-check or your dictation software to clean up errors. If you proofread, you won’t submit a “kitchen sink” order that is a “thicket of argumentative rhetoric.” ***See #11, supra***.
2. **EMBRACE TECHNOLOGY.** These are powerful tools. We would not have made it through the pandemic without it. Also, don’t be afraid to **GET OUTSIDE YOUR COMFORT ZONE** and get comfortable with virtual formats that are now essential to the practice of law. If you’re not familiar with a judge’s practice in the post-COVID world regarding a preference for in-person or virtual hearings, call the judge’s office. For me, it depends on the type of hearing which is scheduled. Too many times the equipment or connect fails, or someone can’t hear the other side of the proceeding. I am willing to handle some hearings by Teams, but never evidentiary hearings, or hearings with complex arguments. For criminal, pleas and sentencings need to be in person. It is my belief that the 6th amendment provides that access to counsel is essential, and it is cumbersome to clear the courtroom if a defendant has questions for his or her attorney. More issues also exist, as highlighted in *State v. Byers* 247 W. Va. 168, 875 S.E.2d 306 (2022) (overturning sentence when circuit court compelled the defendant to do the sentencing by video even though the defendant objected and desired to be present in open court for the sentencing).
3. **UNDERSTAND COURTROOM TECHNOLOGY**. If you need to use it for a hearing or trial, try it out in advance. Contact my office and they will work with you to get you access to the courtroom technology. Also, if you have video or audio that is at issue during a hearing (e.g., motion in limine), please provide a copy of that video or audio file in advance. Please be aware however, that the Court equipment does not always work. Be prepared to proceed without it if necessary.
4. **PAY ATTENTION TO CHANGES IN THE LAW**. Law is like a living body. It changes, evolves, and adapts with developments from the Legislature/Congress and decisions from the United States Supreme Court, the Supreme Court of Appeals, and the Intermediate Court. Pay attention to the bills that are passed during the Legislative session and check the Supreme Court’s website for new opinions. This will help you stay current.
5. **USE PLAIN ENGLISH**. While I see mostly plain English in briefs from the attorneys, the proposed orders still frequently use old, archaic words or phrases. The simpler the language, the better.
6. **BE READY FOR TRIAL**: See Addendum: *Policies and Procedures*
	1. **Jury Panel List**: Available upon request at the Clerk’s Office.
	2. **First Day**: Arrive at 8:30 am on the first day to deal with any remaining issues or questions. I will also go over my checklist of items.
	3. **Voir Dire**: These should be submitted prior to the trial, pursuant to the scheduling order. I will ask the questions, and permit individual voir dire, dependent upon prospective jurors answers to the original questions asked. It is important to remember, this is to eliminate prejudice, not to “get to know” the jurors in detail.
	4. **Trial Continuances**. This is an issue that continues to cause my docket to always be behind. In the past, I have been too generous with continuances, hoping that the additional time will help resolve the matter. FOR CRIMINAL CASES, trials for **first term** indictments may only be continued after (a) the defendant has consented and waived speedy trial rights in writing; or (b) defendant appears in court and waives speedy trial rights on the record.

**Further continuances need to be applied for in writing, and a hearing must be noticed.**

1. **INFORM THE COURT OF CHANGE IN STATUS**. After the status conference, keep the court advised of changes to the status of the case (e.g., whether ready for trial on the scheduled day, settlement agreements have been reached, or decision to plea). We have 30-60 cases that essentially have to be addressed in one month based on how the term works.
2. **WHEN REQUESTING A TRANSCRIPT CONFIRM YOUR REQUEST WITH THE COURT REPORTER BY EMAIL OR LETTER**. If filing an appeal, let the Court Reporter know that you plan on filing one. This gives the Court Reporter extra time to prepare transcripts before the Supreme Court deadline, which is especially important in abuse and neglect cases where deadlines are usually within just two weeks. If a transcript is ordered, pay the invoice promptly.

**DON’Ts**

1. **DON’T BE RUDE TO COURT STAFF**. See DO #1. Also, don’t try to play the secretary off the law clerk and vice versa. This makes them both upset.
2. **DON’T UNLOCK THE COURTROOM DOOR**. On occasion, attorneys will enter through the hallway when the courtroom is locked. If you enter this way and the courtroom is locked, please do not unlock the courtroom door. This creates security concerns. The bailiff will unlock the door.
3. **DON’T BE LATE.** I repeat this to highlight its importance. The judge may be late. You cannot be. It sets a bad precedent if you can’t make a court proceeding on time. Even better—be 10 minutes early. On time is late and early is on time. If you have an issue, like a wreck or a sick child, please call the office and let us know.
4. **DON’T PROCRASTINATE.** Be mindful of your scheduling order and any briefing schedule as well as rules regarding the timing of filing responses and replies and follow them. Don’t fax or email responses the night before or even worse, the morning of the hearing. Also, if you E-FILE a late response or reply, I may not see it before the hearing depending on when I prepared.
5. **DON’T ASK THE LAW CLERK FOR LEGAL ADVICE OR AN OPINION.** A question for a law clerk should never start, “Should I…” In all likelihood not only will the law clerk be unable to give you an answer, he or she could be annoyed that you have even asked the question. Do your homework before you make the call. Law clerks do not want to hear from you until you have exhausted all other possible avenues. Still, they want to be helpful and if you’re professional and courteous, they will be.
6. **DON’T INTERRUPT THE JUDGE, OPPOSING COUNSEL, OR WITNESSES**. This may seem obvious, but it's something that I consistently see. Constant interruption not only delays the proceeding but agitates the judge and prevents him or her from doing the job—whether it is fact-finding, deciding a motion or making any type of judicial determination. In jury trials, I think it negatively influences the jury. Lawyers are passionate about their clients and the legal issues of the case by nature, but you need to learn to curb that passion when someone else, whether the judge, your adversary, or a witness, is speaking. Mutual respect can take you a long way in a court of law. Also, taking turns helps the court reporter. She may have to transcribe the record of the hearing someday. Here are some further tips from Tania, my court reporter:
	1. **In Open Court**: Speak loudly and clearly, especially when not using the microphone. Do not talk over the Court, parties, or other counsel. Otherwise, crosstalk will be noted in the transcript. Give spellings on the record as needed for the Court Reporter. This will save much time in going through the filings to find correct spellings for transcripts. The morning of trial the parties shall give copies of witness and exhibit lists to the Clerk and Court Reporter.
	2. **Teams**: During Teams hearings, when speaking please identify yourself if you are not often before this Court. It is imperative that you do not interrupt each other or the Court during Teams hearings. If there is a Teams hearing conducted in the courtroom and you are waiting on the next hearing, do not speak with others in the courtroom.
7. **DON’T PUSH IT.** Don’t ask for more than what has been ruled by the court or more than what you requested in proposed orders. Resist the urge to include simple words like “with prejudice,” “without prejudice,” or voluntarily award yourself attorneys’ fees and court costs in a judgment order. If you didn’t specifically address the issue with the Judge, don’t assume that it’s ok to ask for extra relief just because you think it’s important. The court record serves numerous purposes, including protecting litigants from selfish or last-minute requests. Make a list of all relief sought from the court and make sure it is put on the record in open court. This will protect your client, the judge, and your reputation. (Remember, if I have questions, I can get a transcript from the court reporter). If you don’t like a ruling, politely state your objections on the record, and move on. Arguing with the Judge will get you nowhere and will not result in a different ruling.
8. **DON’T TACK ON ADDITIONAL MOTIONS TO ALREADY SCHEDULED HEARINGS**. Once you have set a hearing on a motion, do not add other motions unless you have contacted my office first to see whether enough time has been set aside for that hearing. Doing this also affects the timeliness of notice related to the other motion. If you contact my office, we may be able to include the extra motion IF there is sufficient notice for the other side to respond prior to the hearing but don’t just assume so.
9. **DON’T CITE WEB ADDRESSES IN LIEU OF PROVIDING COPIES OF DOCUMENTS.** There is no guarantee that we can access the site or that the site won’t disappear/change before the Court has a chance to review it. Attach it as an exhibit.
10. **DISCOVERY DISPUTES: DON’T SAY YOU MET AND CONFERRED UNLESS YOU MEANINGFULLY CONFERRED WITH EACH OTHER**. I frequently see discovery disputes where the other side states that they sent a follow up letter or email months prior to the filing of the motion. In those instances, I frequently direct the counsel for the parties to meet personally or have a telephone/video call to address the issues in the motion before I will set the case for a hearing. Several times, the motion has been withdrawn after this. Don’t set a hearing until you can certify in good faith that you have in fact met and conferred.
11. **DON’T E-FILE PDF PROPOSED ORDERS.** Since we transitioned to E-FILING, pdf proposed orders are not very helpful. If pdfs are submitted, the court must print, sign, and then upload the order to be filed. After the court enters the signed order, the court must reject the pdf propose order to remove it from the queue. RTF format should be used for orders instead. RTFs allow the court to edit and revise the order if needed. Please place the attorney prepared by line below the judge’s signature block.
12. **DON’T ADDRESS “GENERAL” INSTRUCTIONS IN PROPOSED JURY INSTRUCTIONS**. The Court uses a “general” charge for civil and criminal cases. It is important for the lawyers to submit case-specific instructions related to the issues presented in the trial. I recently revised the “general” charge to make it simpler and easier to read. You do not need to provide “general” instructions for the jury.

**CALLS FOR HELP**

1. We need more panel attorneys who are willing to handle abuse and neglect proceedings, habeas proceedings, and criminal appeals.
2. I would like to see a functioning, formal bar organization in Boone and Lincoln Counties again.