TWENTY-FIVE WAYS YOU CAN IMPROVE YOUR CHANCERY TRIAL PRACTICE

Judge Larry Primeaux[*]

BEFORE YOU GET TO TRIAL

1. Counsel Your Client

Elihu Root, long-time lawyer and Nobel Prize winner, said, "About half the practice of a decent lawyer consists of telling would-be clients that they are damned fools and should stop."[1] As a lawyer you are in a unique position to provide not only legal advice, but also wise counsel for your client. Is a lawsuit the most fruitful way to approach the problem, or are there alternatives? Is your client "wearing the white hat" in this case? Remember that you are more than your client's tool. You are a professional with independent judgment. If all you do is what your client tells you to do, you are a clerk-typist, not a lawyer.

2. Buy and Use a Copy of Deborah Bell's Book.

There is no better reference for family lawyers in this state than *Bell on Mississippi Family Law*.[2]

3. Know What You are Agreeing to

Many return trips to court could be avoided if the lawyers would simply take time to read the agreement or agreed judgment carefully. The best practice is to read it, make notes, put it aside for at least twenty-four hours; read it again and make more notes;

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[1] 1 PHILIP C. JESSUP, ELIHU ROOT 133 (1938). Elihu Root won the Nobel Peace Prize in 1912 for his leadership in international law and arbitration to encourage peace between nations. *The Nobel Peace Prize 1912: Elihu Root*, NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/peace/laureates/1912/root-bio.html (last visited Apr. 5, 2013).

[2] DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW (2nd ed. 2011).

then read it a final time. Imagine you are a judge who knows nothing about these parties but is being asked to divine its meaning. Are there ambiguities? Can a particular provision be understood more than one way? Can unnecessary language be pared out?

4. Make Your Discovery do the Heavy Lifting

Use interrogatories to identify all the assets in a divorce, requests for production to get all the account information you can, and requests for admission to establish admissibility of documents as well as values. Think of discovery as an effective way to eliminate some of the hard work at trial and tailor it accordingly.

5. Get Discovery Objections Addressed Before Trial

Discovery objections can be a nettlesome proposition. Some lawyers strew them through their discovery responses like spores from a puffball. Then, when you try at trial to object to something not disclosed or produced in discovery, they fall back on their objections. Instead, file a motion to compel and ask the judge to rule on the disputed matters while you are still in the discovery phase. Some judges do not like to have to spend their time on such matters, but remember that opposing counsel, not you, created the problem.

6. Make Sure you Timely Designate Your Experts and Supplement Your Answers

Uniform Chancery Court Rule (UCCR) 1.10 requires you to identify your experts no later than sixty days before trial,[3] and the case law uniformly enforces that requirement.[4] When you designate an expert, be sure to supplement any responses to discovery requests. Failure to provide the requested information has been held to bar the witness's testimony.[5]

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[3] MISS. UNIF. CH. CT. R. 1.10.

[4] *See, e.g.*, Hammers v. Hammers, 890 So. 2d 944, 956 (Miss. Ct. App. 2004) (upholding a chancellor's decision to deny a party a continuance when the party attempted to add an expert one week before trial).

[5] Ballard Realty Co. v. Ohazurike, 97 So. 3d 52, 58 (Miss. 2012) (holding that the trial court abused its discretion in allowing a party's expert to testify "despite

7. Pay Particular Attention to Valuation in Equitable Distribution Cases

Encourage your client to pony up the money for professional appraisals of real property and businesses. Work with your client to arrive at reasonable valuations of personal property. The usual practice of valuing everything that the other party will get at astronomical values and everything your client will get at next to nothing is unhelpful to the court, undermines your client's credibility, and may provoke the judge—unhappily—to order expensive personal property appraisals.

8. Prepare Your Witnesses

When your client is going to testify, spend some time going over what it is you are out to prove and go over the testimony. Teach him or her to testify in terms of what was seen, heard, or perceived with the senses, rather than putting labels on everything. Which is more effective: "He threw the kitchen chair through the window, smashed a ketchup bottle against the stove, and put his fist through the wall," or "He was acting crazy"? Explain how hearsay works. You can ethically tell a witness *how* to say it, but you cannot tell the witness *what* to say.[6] In other words, tell the witness phrases or words to avoid, but emphasize that the witness must tell the truth. Always advise the witness that it is better to be hurt by the truth than to be caught in a lie. "I don't know," is a legitimate answer. Never volunteer anything.

9. Take Time to Prepare an Effective 8.05 Statement

The Court of Appeals recently said that the 8.05[7] statement is the "gold standard" of proof in chancery court.[8] Yet from some of

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numerous discovery violations, including failure to timely disclose . . . and supplement discovery responses").

[6] Joseph D. Piorkowski, Jr., Note, *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching,"* 1 GEO. J. LEGAL ETHICS 389, 390 (1987).

[7] MISS. UNIF. CH. CT. R. 8.05 ("[E]very party in every domestic case involving economic issues and/or property division shall provide the opposite party or counsel, if known, the following disclosures: (a) A detailed written statement of actual income and expenses and assets and liabilities, . . . copies of the preceding year's Federal and State Income Tax returns, in full form as filed, or copies of W-2s if the return has not yet

the financial statements I see, I wonder whether they would be worth even a plug nickel. An accurate, well presented 8.05 statement makes the judge's job more agreeable. Go over it with the client before trial. Does your client know what is included in each category and how she or he arrived at the figures? Can your client defend figures that appear extravagant? If your client cannot defend the figures, suggest that maybe they are not accurate and need to be looked at more closely.

10. Make Sure Your Pleadings are Right

Sometime during your meandering journey from filing to trial, it is a good idea to look again at the pleadings you filed. Has discovery changed anything? Are there any prayers for relief that need to be added? Are all the jurisdictional and venue bases covered?

IN THE COURTROOM

11. Comply with Uniform Chancery Court Rule 3.5[9]

Read it for yourself. If you keep taking the exhibits out of the judge's hands to present to the witness, the judge will have no idea what the witness is testifying about.

12. Present Your Case in Logical Order

Sometimes when a trial starts out, I wonder whether I might have read the wrong set of pleadings, because the proof is about something "way off the mark." I find my attention wandering and, when the lawyer brings the case back into focus, I find the witness

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been filed; and, a general statement of the providing party describing employment history and earnings from the inception of the marriage or from the date of divorce, whichever is applicable; or (b) By agreement of the parties, or on motion and by order of the Court, or on the Court's own motion, a more detailed statement on the form . . . .").

[8] Collins v. Collins, No. 2010-CA-01909-COA, 2012 Miss. App. LEXIS 521, at *16 (Miss. Ct. App. Aug. 21, 2012).

[9] MISS. UNIF. CH. CT. R. 3.05 ("Unless excused by the Court, it shall be the duty of an attorney to distribute copies of any exhibits to the Court and opposing counsel when offered. If a party is to make a substitution of a copy for any exhibit introduced into evidence, the copy shall be presented at the time the original is presented unless it could not be reasonably anticipated that the exhibit was to be offered.").

is finally talking about something important. Don't let your case suffer that way. Hit the most important points early, get them out of the way, and take a swipe at them again before you sit down, as far as objections to repetition will permit. Don't put the judge to sleep with things that won't even remotely help the judge write an opinion.

13. Use Compilations, Charts, Tables, and Summaries

Mississippi Rule of Evidence 1006 is a wonderful rule.[10] Read it and use it. Judges love it.

14. Make Effective Objections

Object when failure to do so might hurt your case. Otherwise, keep them to yourself. Even when a question is clearly objectionable, sometimes an objection is pointless. Will it really advance your case to object repeatedly to the other attorney's leading? On the other hand, if opposing counsel is merely testifying for the witness, pull the trigger. And make sure your objection makes sense. Objecting to the form of the question, for example, really does not tell the judge anything. Is the question leading, compound, confusing, argumentative, badgering, or what? Say what it is. And avoid speaking objections. Some judges hate them like the devil himself.

15. Know and Use the Trial Factors

The appellate courts have set out the factors that chancellors are supposed to consider when making decisions about certain issues. If you fail to provide proof for each factor in the record that the judge is required to consider, your case may fail on that point. Child custody,[11] grandparent visitation,[12] award of attorney's

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[10] MISS. R. EVID. 1006 ("The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.").

[11] Hollon v. Hollon, 784 So. 2d 943, 947 (Miss. 2001) ("The *Albright* factors used to determine what is . . . in the 'best interests' of a child in regard to custody are as follows: 1) age, health and sex of the child; 2) determination of the parent that had the continuity of care prior to the separation; 3) which has the best parenting skills and

fees,[13] adverse possession,[14] modification of child support,[15] alimony,[16] equitable distribution,[17] income tax dependency

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which has the willingness and capacity to provide primary child care; 4) the employment of the parent and responsibilities of that employment; 5) physical and mental health and age of the parents; 6) emotional ties of parent and child; 7) moral fitness of parents; 8) the home, school and community record of the child; 9) the preference of the child at the age sufficient to express a preference by law; 10) stability of home environment and employment of each parent; and 11) other factors relevant to the parent-child relationship.").

[12] Martin v. Coop, 693 So. 2d 912, 916 (Miss. 1997) ("The following factors should be considered by the chancery court in determining grandparent visitation . . . (1) The amount of disruption that extensive visitation will have on the child's life. . . . (2) The suitability of the grandparents' home with respect to the amount of supervision received by the child. (3) The age of the child. (4) The age, and physical and mental health of the grandparents. (5) The emotional ties between the grandparents and the grandchild. (6) The moral fitness of the grandparents. (7) The distance of the grandparents' home from the child's home. (8) Any undermining of the parent's general discipline of the child. (9) Employment of the grandparents and the responsibilities associated with that employment. (10) The willingness of the grandparents to accept that the rearing of the child is the responsibility of the parent, and that the parent's manner of child rearing is not to be interfered with by the grandparents.").

[13] *See infra* notes 21-22 and accompanying text.

[14] Rice v. Pritchard, 611 So. 2d 869, 871 (Miss. 1992) ("[F]or possession to be adverse it must be (1) under claim of ownership; (2) actual or hostile; (3) open, notorious, and visible; (4) continuous and uninterrupted for a period of ten years; (5) exclusive; and (6) peaceful.").

[15] Johnson v. Gray, 859 So. 2d 1006, 1013 (Miss. 2003) ("In order for child custody to be modified, a non-custodial party must prove (1) there has been a substantial change in the circumstances affecting the child; (2) the change adversely affects the children's welfare; and (3) a change in custody is in the best interest of the child.").

[16] Yelverton v. Yelverton, 961 So. 2d 19, 25-26 (Miss. 2007) (When awarding lump sum alimony, judges should consider "1. Substantial contribution of the property. . . . 2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise. 3. The market value and the emotional value of the assets subject to distribution. 4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution . . . . 5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution. 6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties. 7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity . . . . 8. Any other factor which in equity should be considered.").

[17] Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994) ("[C]hacery courts [should] consider the following guidelines . . . when attempting to effect an equitable division of marital property: 1. Substantial contribution to the accumulation of the property . . . . 2. The degree to which each spouse has expended, withdrawn or otherwise disposed of capital assets and any prior distribution of such assets by agreement, decree or otherwise. 3. The market value and the emotional value of the assets subject to

exemption,[18] and separate maintenance[19] are all matters that require the judge to address each required factor.

16. Make an Adequate Record for Attorney's Fees

Your clients love you when you get the judge to order the other side to pay your attorney's fees. But the judge's discretion is not unfettered. Remember that, except in contempt cases, you must prove your client's inability to pay.[20] And you must put on proof of reasonableness addressing all the factors in *McKee v. McKee*.[21] You will need to offer evidence of your actual time spent in preparation and trial.[22]

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distribution. 4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse; 5. Tax and other economic consequences to third parties, of the proposed distribution; 6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties; 7. The needs of the parities for financial security with due regard to the combination of assets, income and earning capacity; and, 8. Any other factor which in equity should be considered.").

[18] Louk v. Louk, 761 So. 2d 878, 884 (Miss. 2000) ("[T]he judge should consider, at a minimum: (1) the value of the exemption at the marginal tax rate of each parent; (2) the income of each parent; (3) the age of the child(ren) and how long the exemption will be available; (4) the percentage of the cost of supporting the child(ren) borne by each parent; and (5) the financial burden assumed by each parent under the property settlement in the case."); *accord* Laird v. Blackburn, 788 So. 2d 844, 852 (Miss. Ct. App. 2001) (affirming the factors while recognizing that some incomes do not necessitate this analysis).

[19] Diehl v. Diehl, 29 So. 3d 153, 156 (Miss. Ct. App. 2010) ("In determining how much separate maintenance to award . . . , the chancellor [should] appl[y] the [following] factors . . . : (1) the health of the husband and the wife; (2) their combined earning capacity; (3) the reasonable needs of the wife and children; (4) the necessary living expenses of the husband; (5) the fact that the wife has free use of the home and furnishings; and (6) other such facts and circumstances.") (citation omitted) (internal quotation marks omitted).

[20] Voda v. Voda, 731 So. 2d 1152, 1157 (Miss. 1999); Pacheco v. Pacheco, 770 So. 2d 1007, 1012 (Miss. Ct. App. 2000).

[21] 418 So.2d 764, 767 (Miss. 1982) ("The fee depends on consideration of . . . the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, as well as the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case").

[22] *Id.* ("[T]he allowance of attorneys fees should be only in such amount as will compensate for the services rendered. It must be fair and just to all concerned after it

17. Be Conscious that You are Making a Record

If you end up having to appeal and the record is incomplete or vague, you have no one to blame but yourself. Always try a case with an eye to making a complete record. When you ask a witness about an exhibit, be sure to identify it for the record. When an objection to your question is sustained, consider whether you should make an offer of proof.

18. Be Wary of a Weary Judge

Scientific studies have found that decision-making is one of the most energy-sapping exercises in which humans engage.[23] As the energy is spent, blood sugar levels fall, and cognitive ability lessens.[24] As a trial progresses, and the judge is called upon to make snap decision after snap decision on a ridiculous number of objections, his or her cognitive ability becomes less and less acute.[25] By the end of the day, you may find that the judge's focus is somewhat blurred. Never ask the judge to render a bench opinion or to rule on anything very important to you at the end of an epic day. Even if the judge rules for you, the legal reasoning might be in error.

AFTER TRIAL

19. Use Proposed Findings of Fact and Conclusions of Law

This is your chance to write the judge's opinion and judgment for him. Offer to do it, knowing that if the judge orders it, both sides must have the opportunity to present their version. Remember that the judge will select the version (or pick parts from each, or do his own) that he considers closest to the way he

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has been determined that the legal work being compensated was reasonably required and necessary.").

[23] *See* Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PNAS 6889, 6889 (2011), *available at* http://www.pnas.org/content/108/17/6889.full.pdf; John Tierney, *Do You Suffer From Decision Fatigue?*, N.Y. TIMES MAG., Aug. 2011, at MM33, *available at* http://www.nytimes.com/2011/08/21/magazine/do-you-suffer-from-decision-fatigue.html?pagewanted=all&_r=0.

[24] *See* Danziger, *supra* note 23, at 6892.

[25] *See Id.*

sees the facts and the law.[26] If your draft is one-sided or outlandishly out of sync with the record and the law, you will not likely get another opportunity and you will lose credibility with the court. Done well, this can win the case for you and make a defensible opinion for appeal.

20. Is the Final Judgment Final?

If the judgment finally adjudicates fewer than all of the issues, make sure that the judge was clear that issues remain for adjudication or make sure that the judge certifies under Mississippi Rule of Civil Procedure 54[27] that it is final, because there is no just reason to hold up an appeal pending determination of the remaining issue(s).

ALWAYS

21. Safeguard Your Reputation with the Court

Treat your reputation with the court like precious gold. Spend it wisely and only for something of great value. Do not squander it by lying to the judge, being unprofessional, doing sloppy work, or by not tending to your business. Once you have lost the judge's trust, it may take years of effort and attention to get it back, and you may not be able to ever regain the judge's trust.

22. Know Your Judge

Read your judge's opinions in other lawyers' cases. Know how the judge is ruling on issues that you take to chancery court. Ask

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[26] *See* Bluewater Logistics, LLC v. Williford, 55 So. 3d 148, 157 (Miss. 2011) ("[W]e shall continue to apply the familiar abuse-of-discretion standard to a trial judge's factual findings, even where the judge adopts verbatim a party's proposed findings of fact. And should a party suspect and suggest that the judge's factual findings are somehow tainted or untrustworthy, we hold that the party—upon proper proof—may seek a new trial.").

[27] MISS. R. CIV. PRO. 54 (2013) ("When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination that there is no just reason for delay and upon an expressed direction for the entry of the judgment.").

your judge to explain why he or she ruled a given way in a completed case. The old saying that "A good lawyer knows the law, but a great lawyer knows the judge," refers precisely to this. When you know the judge in the sense of what the judge's predilections and preferences are, you are a long way down the road in being able to advise your clients.

23. Read the Rules

You would be astounded at the number of lawyers, some with considerable standing in the community, who never take the time or trouble to read the rules. There are the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence, of course, but there also are the Uniform Chancery Court Rules, which can have a drastic effect on your case.

24. Keep up With the Law

Court of Appeals decisions are handed down every Tuesday afternoon, and Supreme Court decisions come down on Thursday afternoons. They are on the Mississippi Judiciary web site—free.[28] Read them every week. Make copies of the cases that are useful and keep them in some order or make notes you can use later. I used to print out decisions that applied to pending cases of mine and stuck them in my client files for use at the appropriate time.

Read the legislative advance sheets. Ask your favorite legislator to give you the synopsis of signed bills at the end of every session.

Go through and highlight the statutes that affect your clients. Stay awake at CLE and take notes.

25. Do Right

Always do the right thing and always counsel your client to do the same.

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[28] *Supreme Court: Decisions*, STATE OF MISS. JUDICIARY, http://courts.ms.gov/appellate_courts/sc/scdecisions.html (last visited Apr. 5, 2013); *Court of Appeals: Decisions*, STATE OF MISS. JUDICIARY, http://courts.ms.gov/appellate_courts/coa/coadecisions.html (last visited Apr. 5, 2013).