**TIPS FROM THE TRIAL BENCH AND APPELLATE BENCH**

Charles G. Fitzgerald

Judge, Louisiana Third Circuit Court of Appeal

 1023 East St. Mary Boulevard

 Lafayette, Louisiana 70503

 Telephone: (337) 269-9686

|  |
| --- |
| **Table of Contents** |
|  **Description** | **Page** |
| I. Tips from the Trial Bench | 1 |
| II. Tips from the Appellate Bench | 8 |

**I.**

**Tips From the Trial Bench**

1. **Be Prepared**

This might be the most important tip of all. When I first took the trial bench in January 2015, I expected that every lawyer would be able to identify the matters before me and have a full command of the applicable law and relevant facts. My expectations were significantly diminished during the years that followed.

If you want to be a great lawyer, always—and I mean always—be prepared.

1. **Client Control**

In my opinion, client control is directly dependent on the quality and frequency of the communication between you (the lawyer) and your client. Client control begins on day one of your representation.

Most new clients know very little about the legal system. And what they do know is from movies and television, along with the horror stories told to them by family members, friends (and friends of friends), co-workers, hairdressers, waitresses, anyone in retail sales, anyone in the oilfield, anyone in adult tennis leagues, etc. New clients are also in distress patterns. Why is this important? Because they are not actively listening to what you are saying.

As a lawyer, you sell information (legal advice). If the client isn’t listening to you, stop selling it.

1. **Courtroom Behavior**

From the bench, there is nothing more distracting than an overly demonstrative party who is reacting to adverse evidence. I’ve seen it all: sighing, grunting, groaning, rolling eyes (or worse, the intimidating stare), flailing arms, subtle comments, not so subtle comments, and the list goes on.

While the above behavior is distracting, there is nothing more infuriating than lawyers who act as though they are auditioning for an episode of Judge Judy. Never engage in an impromptu argument with opposing counsel. Never talk over the trial judge. And never underestimate the power of being pleasant.

1. **Know Your Judge**

This is essential. Let me ask you a question. In a hearing to establish custody, is it important to know how the trial judge interprets Louisiana Revised Statute 9:335(A)(2)(b)?[[1]](#footnote-1) You bet it is. Why? Because some judges interpret this subsection as creating a rebuttal presumption in favor of shared physical custody. And this is just the beginning.

1. **Always Protect Your Client’s Credibility**

What happens during the early stages of a divorce proceeding can mean big bucks at the end of the case. The partition of the former community is typically litigated after all incidental matters to the divorce have been resolved. This means your client has many opportunities to destroy his or her credibility before the partition trial begins.

Let’s suppose for a moment that there is a dispute as to the fair market value of the community ownership interest in a very successful closely held company; all outstanding organizational units are registered in your client’s name but are nevertheless community property; and the other party (your client’s former spouse) has had no involvement in the business operations of this company. Let’s also suppose that your client destroyed his credibility during a previous hearing to establish custody. With the partition trial only a few weeks away, should you be worried? (At this point, you might want to stop at CVS for some Pepto-Bismol.)

In all seriousness, please remember that the trial court’s choice of one expert’s business valuation over that of another will not be overturned unless it is manifestly erroneous. When expert testimony differs, the trial judge who must determine the more credible evidence. And the effect and weight to be given to expert testimony depends upon the underlying facts. So, in the above hypothetical, what if the husband’s valuation analyst is relying primarily on information (underlying facts) given by the husband?

1. **Stipulations and Final Judgments**

Slow down and be thorough. Attention to detail is also appreciated when drafting an order setting a contradictory hearing or trial.

1. **Understanding Court Costs**

Let’s assume you are defending a client at hearing on a discovery motion. The lawyer for the moving party argues that various financial information has not been produced. In opposition, you point to a flash drive containing 50,000 pages of pdf documents. Any thoughts on court costs if the flash drive is admitted into evidence?

1. **Know Your Client’s Burden of Proof**

We live in a world of evidence and proof. This means that you must be able to answer two questions. First, what’s my client’s burden of proof? And second, what evidence do I have to satisfy that burden?

In answering the above questions, lawyers sometimes forget about evidentiary presumptions. An evidentiary presumption is “an inference [i.e., a conclusion that an evidentiary fact exists] created by legislation that the trier of fact must draw if it finds the existence of the predicate fact . . . .”

More simply stated, an evidentiary presumption is a conclusion about an unknown fact which the law draws from a known fact. Louisiana Civil Code article 2340 creates such a presumption, proving that “[t]hings in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property.”

1. **Mode and Order of Interrogation at Trial and Presentation of Evidence**

 The normal order of proof is (1) the plaintiff's case in chief, (2) the defendant’s case in chief, and (3) the plaintiff's case in rebuttal. La. Code Civ. Proc. art. 1632. Surrebuttal is within the discretion of the court, e.g., when new issues are raised in the plaintiff's rebuttal.

 Pay attention to La. Code Evid. art. 611. Paragraph A of Article 611 recognizes that the parties have the “primary responsibility of presenting the evidence and examining the witnesses.”

 Paragraph B preserves the “wide open” scope for cross-examination, meaning that a witness can be cross‑examined on any matter relevant to any issue in the case. However, when a party is called by an adverse party on direct, the judge should limit the scope of the cross examination to matters testified to on direct.

 Paragraph C addresses leading questions, which are generally not allowed on direct subject to the following exceptions:

1. Necessary to develop the testimony of a witness, e.g., young, nervous, English is the second language, etc.;
2. Unable or unwilling to respond to a proper question;
3. Examining an expert on opinions and inferences;
4. Hostile witness; and
5. Adverse party or person identified with an adverse party.

 And while leading questions are generally allowed during cross, such questions may not be used by counsel in the examination of his own client.

 Turning now to redirect. Here, you are generally limited to what was brought out on cross unless the trial court gives latitude. La. Code Evid. art. 611(D). If new matters come out on redirect, the other party should be able to recross.

 As to rebuttal evidence, the plaintiff has the right to rebut evidence adduced by the defendant. La. Code Evid. art. 611(E).

* Importantly, the trial court has the authority to allow a party to recall any witness. *State v. Bias*, 337 So. 2d 426 (La. 1976). Note, too, that an adverse witness cannot be held to a “yes” or “no” answer but is entitled to explain his answer. *State v. Baker*, 288 So. 2d 52 (La. 1973). However, an adverse witness should answer “yes” or “no” before attempting to give an explanation.

1. **Is Expert Testimony Needed?**

Expert testimony is essential in certain types of cases. In these cases, don’t delay in retaining the necessary expert. If your client has limited access to funds, file a motion for the trial court to appoint its own expert.

1. **Bases of Opinion Testimony by Experts**

Pursuant to La. Code Evid. art. 703, the facts or data underlying an expert’s opinion may be any of the following:

1. Information within the expert’s firsthand knowledge;
2. Information presented to the expert at trial, thus approving the use of hypothetical questions. However, evidence should come in to support the basis of the questions. *Combs v. Hartford Ins. Co.*, 544 So. 2d 583 (La. App. 1st Cir. 1989); and
3. Otherwise inadmissible evidence, such as hearsay, if it is of a type reasonably relied on by experts in the particular field in arriving at their opinions. For instance, a statement made to an expert mental health professional by a family member or friend concerning the fitness of a person to be a parent is the type of evidence that is reasonably relied upon by experts in that particular field in forming opinions as to the best interest of minor children.

Pay particular attention to Article 703(3). It permits parties to introduce inadmissible evidence not as substantive evidence, but to support the soundness (or reasonableness) of the expert’s opinion. This was addressed in *Judicial Commitment of J.M.*, 560 So. 2d 100 (La. App. 3d Cir. 1990). In that case, the third circuit held that the petitioner did not meet his burden of proving that the defendant should be judicially committed. The only evidence introduced by the petitioner was the testimony of an expert psychologist. The expert was allowed to relate the hearsay testimony of family members of the defendant as evidence “reasonably relied” upon by psychologists in forming their opinions. However, the statements were not admissible as substantive evidence to satisfy the plaintiff’s burden of proof.

1. **The Party Admission**

A statement by a party to a lawsuit may always be offered against that party by his opponent. La. Code Evid. art. 801(D)(2)(a). The statement may be oral or written. The only foundation required is to show that the statement was made by the adverse party. This party admission is an evidentiary admission which should be distinguished from a judicial admission. Unlike the latter, an evidentiary admission may be rebutted by the party against whom it is offered.

1. **Trial Exhibits**

For writings, recordings, and photographs, always have the original and four copies, especially in the new COVID era.

1. **The Formal Article 1551 Pretrial Conference**

This is an important tool in your procedural toolbox. There is only one formal pretrial conference, and it is addressed in La. Code Civ. Proc. art. 1551. That article gives the trial court the discretion to direct the attorneys for the parties to appear before it to consider numerous pretrial matters, including (1) the contested and uncontested issues, (2) the exhibits that may be offered and any objections thereto, and (3) the witnesses, including experts, who will be called to testify. La. Code Civ. Proc. art. 1551(A).

Paragraph D was added by 2018 La. Acts No. 254, § 1. It reads, in pertinent part: “If a suit has been pending for more than one year since the date of filing of the original petition and no trial date has been assigned, upon motion of any party, the court shall set the matter for conference for the purpose of resolving all matters subject to the provisions of this Article . . . .” La. Code Civ. Proc. art. 1551(D).

1. **The Motion for Continuance**

Louisiana Code of Civil Procedure article 1605 provides that “[e]very *contested* motion for a continuance shall be tried summarily and contradictorily with the opposite party.” (Emphasis added). Unless opposing counsel has expressly agreed to the continuance, the motion is contested and must be set for contradictory hearing. Do not submit an order that states otherwise.

1. **The Art of the Direct Examination**

I’ve seen it all—the good, the bad, and the truly awful. This is where trials are won. The best direct examinations are those in which the examining attorney almost goes unnoticed by asking short nonleading questions. This allows the client to become the storyteller. Conversely, the worst direct examinations are those in which the examining attorney attempts to testify for the client.

1. **The Art of the Cross-Examination**

Do not blunder the cross-examination. Effective cross-examinations are concise, purposeful, and almost always focused on the witness’s credibility—the truthfulness *or accuracy* of the testimony. The cross-examination is not a discovery deposition. You must listen to the witness’s response to each question. And never—and I mean never—allow a witness on cross to revisit harmful evidence.

**II.**

**Tips From the Appellate Bench**

1. **Record Evidence—What Exactly is it?**

Appellate courts are courts of record and may not review or consider evidence that has not first been properly and officially offered, introduced, and considered in the proceedings below. *Denoux v. Vessel Mgmt. Servs., Inc.*, 07-2143 (La. 5/21/08), 983 So.2d 84. Record evidence consists of witness testimony, exhibits admitted into evidence, stipulations of fact, and judicially noticed adjudicative facts or legal matters.

As a lawyer, it is your job to make a record for appeal. In other words, it is your job to call and examine witnesses; it is your job to ensure that exhibits are admitted into evidence by the trial court (don’t simply offer an exhibit and move on to the next question); it is your job to make an offer of proof for excluded evidence; it is your job to object to inadmissible evidence; it is your job to ensure that stipulations of fact are clear, deliberate, and unequivocal; and the list goes on.

Never submit a case for decision on briefs. In *Tankersley v. Kozielski*, 2010-540 (La. App. 3 Cir. 11/3/10), 50 So. 3d 962, the trial court rendered a child support judgment based only on the submission of briefs and the documents attached thereto. In vacating the judgment and remanding the case for an evidentiary hearing, the third circuit explained that “no evidence has been formally introduced in the trial court because there was never a proceeding at which the evidence could be introduced.” *Id*. at 964.

1. **The Offer of Proof**

 If a witness in your case is excluded from testifying at trial, you have the right to make an offer of proof, but the court prescribes the form in which the offer is made. La. Code Civ. Proc. art. 1636. Examining the excluded witness during a recess is preferable to simply summarizing what the witness would have said. Of course, the examination on the proffer takes place outside of the judge’s presence.

1. **Assignment of Errors**

Louisiana Code of Civil Procedure article 2129 states: “An assignment of errors is not necessary in any appeal. . . .”

Notwithstanding the above, the drafting of the assignments of alleged errors is perhaps the most critical part of the appeal. While success at trial depends on evidence and burdens of proof, success on appeal depends on the record and standards of appellate review. And which standard of appellate review is appropriate depends on the assignment of error.

 The standards of appellate review are (1) manifest error, (2) de novo review, and (3) abuse of discretion.

The manifest error standard of review is used for measuring the fact-finding function of the trial court. Under this standard, the trial court’s factual findings are given great weight, such that a factual finding cannot be set aside unless the appellate court finds that it is manifestly erroneous or clearly wrong. *Stobart v. State through Dept. of Transp. and Development*, 617 So. 2d 880, 882 (La. 1993). This means that an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. *Id.* The issue to be resolved in reviewing a trial court’s findings of fact is not whether the trier of fact was wrong but whether the factfinder’s conclusions were reasonable.

De novo review is used for pure legal questions or when one or more legal errors interdict the trial court’s fact-finding process. *Evans v. Lungrin*, 708 So. 2d 731, 735 (La. 1998). A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. *Id*. Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights. *Id*. Under the de novo standard of review, the appellate court makes an independent determination of the facts from the record on appeal. The appellate court then decides the case on the record facts without according any deference to the factual findings of the trial court.

The abuse of discretion standard is used to review factual findings in matters which the trial court is given great discretion, such as custody and visitation. *Bergeron v. Bergeron*, 492 So. 2d 1193 (La. 1986). Under this standard, a trial court’s determination can only be set aside if it arises from an abuse of discretion, such as when the factual finding is not supported by any fair interpretation of the record evidence. *Gibson v. Bossier City General Hosp.*, 594 So. 2d 1332, 1336 (La. App. 2d Cir. 1991).

1. **Brief Writing**

The main trait of excellent briefs is that they are easy to follow. Arguments are simple and straight forward, and paragraphs are linked together so that one paragraph flows into the next. A few other tips. Disjointed and unfocused arguments are not helpful. Only use long quotes to buttress your analysis, not to replace it. And avoid referring to the parties as Appellant and Appellee.

1. **Jurisdictional Issues**

In *Barnett & Associates, LLC. v. Whiteside*, 20-362, pp. 2-3 (La. App. 5th Cir. 2020), 308 So. 3d 1218, 1220-21, the fifth circuit distinguished appellate jurisdiction from supervisory jurisdiction, explaining as follows:

An appeal is the exercise of the right of a party to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court. La. C.C.P. Art. 2082. A final judgment is appealable in all cases in which appeals are given by law, while an interlocutory judgment is appealable only when expressly provided by law. La. C.C.P. Art. 2083; *Bank of New York v. Holden*, 15-466 (La. App. 5 Cir. 12/23/15), 182 So.3d 1206, 1208; *Holthausen v. DMartino*, L.L.C., 11-561 (La. App. 5 Cir. 01/4/12), 86 So.3d 639, 642. An interlocutory judgment does not determine the merits, but only preliminary matters in the course of the action, while a final judgment determine the merits in whole or in part. La. C.C.P. Art. 1841; *Bank of New York*, 182 So.3d at 1208.

Appeals are of right and may be taken only when appellate jurisdiction exists. Appeals involve certain procedures, schedules, mandates and prohibitions specified by law, and by the uniform and local rules. Opinions on appeal are the published jurisprudence which establish binding or persuasive precedents on the proper application of law. Moreover, appeals divest the trial court of jurisdiction over all matters reviewable on appeal. La. C.C.P. Art. 2088.

In contrast, supervisory jurisdiction, exercised upon the filing of applications for writs and rarely otherwise, is discretionary with the courts of appeal. Supervisory review generally does not provide precedents (other than “law of the case”), and is ordinarily more efficient and expeditious than appeals. Moreover, a court of appeal’s exercise of its supervisory jurisdiction does not divest the trial court of jurisdiction, or prevent the case from proceeding in the trial court, unless stayed.

The exercise of appellate jurisdiction and supervisory jurisdiction by a court of appeal are mutually exclusive. *See* La. C.C.P. Art. 2083 C and 2005 Comments. The procedures for appeals and writ applications are distinctively different, as are time limits, schedules, and the means of setting each. The procedures of appellate jurisdiction and supervisory jurisdiction are generally incompatible. Accordingly, the notice of intent filed by a party seeking review by a court of appeal may not be pled in the alternative.

1. **Oral Argument**

By the time you appear for oral argument, I have read your appellate brief several times. So tell me something I don’t know. Explain, expand, or otherwise clarify what is in your brief. Don’t simply repeat what is already written.

1. La. R.S. 9:335(A)(2)(b) states: “To the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally.” [↑](#footnote-ref-1)