Handling Delicate Courtroom Situations

I. Know your audience

a. Too often, defense attorneys go into an environment without knowing their audience.
    i. Three general ways to learn what you're going to encounter.
        1. Listserves – either WACDL, defendernet or NACDL (to a lesser extent)
        2. Courttracker – discuss how it works, what it can do
        3. Calling local practitioners – SPD is usually your best bet
    ii. Create an outline/template of important questions
        1. How does this judge treat unfamiliar lawyers
        2. Does judge follow joint agreements
        3. Does she read written submissions
        4. Does she like data when it comes to sentencing
        5. How will this judge handle young, female, male, old, senile lawyers.

b. Judicial Archetypes
    i. The Bully
        1. Everyone has encountered this judge
        2. Treating the defense with utter disdain
        3. His remarks at sentencing are often directed at you personally, instead of at your client.
        4. To this judge, there is little difference between you and your client
        5. Solutions
            a. Substitute
            b. Never be late, always make your presence known
            c. Know your file inside and out and be prepared for the hostility
            d. As much as possible, get agreements from the State on various issues (scheduling for example) off the record before the judge takes the bench.
            e. File sentencing memoranda in advance, submit as much in writing as possible.
            f. Consider whether the court's temperament might change if you have a partner or associate appear for you at certain hearings.
    ii. The Obstructionist
        1. This judge tries to make your case more difficult
            a. The judge may demand that you make "offers of proof" regarding certain witnesses
            b. This judge may arbitrarily enforce scheduling orders against one side.

c. He or she will try to find ways to dispose of your motions without witness testimony
    i. Or even worse, she will set your motion for the morning of trial, thereby making it less useful.
2. Solutions
    a. Substitute
    b. Never lose your cool – recall that Eric Brittain stipulated to committing professional misconduct in 2013. He admitted to
        i. OLR found that he engaged in abusive and belligerent conduct with Jean DiMotto
    c. Have witnesses available who can observe or testify to the conduct/behavior

iii. The "nothing is more important than my calendar" Judge.
1. Scheduling is the be all, end all, for this judge.
2. Your case will be put on the trial calendar as soon as humanly possible.
3. This judge won't care much for things like your need to investigate, your need for more time, your need to find expert witnesses.
4. This judge will impose scheduling orders, over objection, which are unreasonable given the complexity of the case.
5. Solutions?
    a. First, make your record – either by written submission or orally.
    b. Be careful about in-chambers meetings without court reporters and be mindful that some judges don't record sidebars at trial. In the event of these situations, make your record when the court reporter is present.
    c. File your motion to continue at the earliest possible date.
        i. If the judge tries to put the motion off until later in the case, submit a supplemental filing
        ii. Make your filing as detailed as possible.
        iii. Nothing should be boilerplate.
    d. Consider whether filing an affidavit from your client would be useful – i.e. waiving speedy trial rights, or specifically joining in whatever request you are making for her.
    e. Recusal motion?

c. Requesting Your Continuance
    i. See Detailed Sample With Materials.
    ii. Some Important Legal Points:
        1. 7th Circuit has ID'd 7 factors court should consider when deciding continuance motion – See *United States v. Crowder*, 599 F.3d 929, 936 (2009)
            a. Amount of time available for preparation

b. Likelihood of prejudice from the denial of the continuance
c. Defendant's role in shortening the effective preparation time
d. The degree of complexity of the case
e. The availability of discovery from the prosecution
f. The likelihood that a continuance will satisfy the movant's needs
g. The inconvenience and burden to the court and its pending case load.

2. SCOTUS – A trial Court's insistence upon expeditiousness in the face of a defendant's justifiable request for delay can violate the defendant's right to due process. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). See Also *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)
3. The Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984).
4. *Phifer v. State*, 64 Wis. 2d 24, 29, 218 N.W.2d 354 (1974).
    a. This is a State case, but offers similar factors to consider as the 7th Circuit did in *Crowder*
5. Few rights are more fundamental than of an accused's right to present witnesses in his own defense; the ability to do so is an essential attribute of the adversary criminal system itself. *Taylor v. Illinois*, 484 U.S. 400, 408 (1988).

iii. What does the ABA have to say?
1. Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the proseuction and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's desire to plea guilty. See ABA Guidelines 4-4.1(a)

d. When all Else Fails, Think About the Appellate Courts
i. Habeas Corpus
1. It's a remedy, but most of us probably won't be using this option unless your client is illegally held and the criminal court won't do anything to release him or her. If you're doing this, call an attorney who has litigated one before.
ii. Interlocutory Appeal
1. 808.03(2) directs an appellate court to grant an appeal from a non-final order if the court determines that the appeal will:
    a. Materially advance the termination of the litigation or materially clarify further proceedings in the litigation

b. Protect the petitioner from substantial or irreparable injury or
c. Clarify an issue of general importance in the administration of justice.

2. What types of non-final orders do we deal with?
    a. A trial court's refusal to adjourn a trial
        i. In particularly complex cases or one of witness unavailability, an interlocutory appeal might be necessary.
    b. A trial court's exclusion of witnesses – for any reason (failure to timely notify, failure to follow scheduling order, newly discovered need for witness)
    c. A trial court's refusal to permit testimony by video.
        i. Sometimes we see this in the context of Daubert hearings.
        ii. Other times, an out of state expert may only be available by video during the time the court has set the trial.
3. Any other example of a non-final order you can think of – even a court's refusal to recuse itself.
4. See interlocutory template in materials for successful outcome
    a. A court's decision to grant a motion to enlarge time is reviewed under an erroneous exercise of discretion – *Rutan v. Miller*, 213 Wis. 2d 94, 570 N.W.2d 54 (Ct. App. 1997).
    b. Once the petition is granted, a briefing schedule gets set.
        i. If you are seeking a continuance of the trial, this will effectively guarantee that outcome, because the appeals court will direct the trial court to postpone the trial.

e. Never forget the types of appellate challenges that could be raised down the road – make your record and hope for the best on appeal.
f. Never forget that the judges are making records too, with the things they say.
    i. Examples in federal court of the 7th Circuit striking down certain Randa decisions over improper sentencing remarks – Castro, Mexico, Chavez, Hezbollah, Iran etc.