

In motion practice, don't lose sight of the equities

By: Douglas H. Wilkins and Daniel I. Small ◉ April 18, 2019



The fourth of seven principles of motion practice.

You don't have to be a lawyer to recognize the admonition attributed to various people over the years, including Oliver Wendell Holmes: "If you're weak on the facts and strong on the law, pound the law. If you're weak on the law and strong on the facts, pound the facts. If you're weak on both, pound the table."

As with so many old sayings, there is both error and wisdom here.

There are, indeed, three parts to any good argument. You know the law and the facts, but don't lose sight of the third part: the equities.

There are two principal things wrong with the saying. First, don't separate the equities from your case. If the law and facts really aren't with you, should you really be making the argument? Your credibility with the court may be far more valuable in the long run than your table-pounding skills. Make sure that your outrage is rooted in reality.

Second, don't pound the table too hard or too soon. Persuasion is usually more effective than pounding. It is easy to miscalculate the balance between legal principles and the equities. Judges are usually driven by the facts, where the law allows it. Argue the facts that support your side, present those facts in as persuasive a manner as possible, and let the facts do the talking.

Judges hear too much unsupported outrage. The judge isn't going to be outraged just because you talk or act as though you are. Let the judge form his or her own outrage from the facts. It will be more effective if the judge thinks he or she figured out the opponent's misdeeds him or herself.

Don't make a naked emotional appeal, but do frame the issues and facts with an eye to the considerations that the judge will use to determine which side the equities favor.

As to what is right with the saying, never forget the equities. Arguing in court — oral or written — is not some mechanical balancing act or digital scale. Judges generally want to do what is right. Help them to see what it is and to get there.

The equities won't override the law or change the facts, but rather than reach a seemingly unfair result, the judge may well question whether the law or facts really favor you after all. It's in your interest to make the judge comfortable with the fairness of your legal and factual arguments.

Trial and motion judges have a lot of discretion. They usually aren't there to make or announce new law — that's for the appellate courts (with some possible exceptions, such as the Business Litigation Session, which publishes many decisions on unresolved questions of business law). However, they usually are disposed to believe that the law gives them the ability to act in a fair and reasonable manner, although there are exceptions.

Why does it make sense for your side to win, and why is that fair? Before you start writing or speaking, consider the equities. Not world peace, but specific to your case: Why should this judge, in this case, on these facts and law, rule in your favor? Why is it the right thing to do? Then construct your argument to help the judge get there.

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