

In motion practice, establish and maintain your credibility

By: Douglas H. Wilkins and Daniel I. Small ◉ May 2, 2019



The fifth of seven principles of motion practice.

Credibility is always important, but never more so than in a brief motion appearance. Trial judges are used to assessing credibility and may need to figure out which side they can trust, so as to facilitate their decision and move on to the next decision they need to make. The question becomes: how to establish and maintain credibility? A few thoughts:

- **Accuracy.** Accurate statements; reasonable positions and arguments; correct case citations, grammar and cite form; and thorough knowledge of the law will go a long way toward convincing the judge to listen to you and give you the best opportunity for your arguments to succeed.

Even if you can't come up with a way to make the bad facts or law work for you, you should acknowledge them, rebut them, and explain why they do not dictate a bad result.

Whether intentional or unintentional, missing the mark on accuracy and clarity can break the essential bond of trust. Once broken, that bond is hard to re-establish. To confirm the accuracy of your statements, be prepared to direct the court's attention to one or two specific, key parts of the record.

- **Respect.** The judge will expect you to respect him or her by not interrupting, answering questions directly and accurately, and not trying to pull the wool over the judge's eyes (let alone misleading the court).

You need to find your own personal style but one that also respects the court. You will be most credible if you are yourself.

- **Openness.** Perhaps most important, don't ignore key facts or cases that appear to hurt you, because that kills your credibility and implies that you can't win if you acknowledge them.

There are four approaches to bad facts or law. In increasing order of persuasiveness, they are:

- 1) not even recognizing them (gives your opponent a golden opportunity to highlight what you've hidden);
- 2) recognizing but ignoring them (leaves the judge wondering why);
- 3) rebutting them (a good start);
- 4) finding a theory of the case that makes those facts (or cases) work for you (a homerun).

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Some things do not enhance your credibility. Contrary to popular belief, the judge will not be impressed with statements like: "In all my years of practice ... " or "Judge X does it this way" or "It has always been standard practice in this county to do X, Y and Z."

You might be smarter or more experienced than the judge. But it's pompous to say so, even implicitly. The judge might even admit privately that you are more experienced or learned in a particular practice area.

The judge, however, also knows that you're an advocate with a duty to present your client's viewpoint. The fact that you have expertise or experience does not enhance your credibility unless you use your knowledge to educate the court in as even-handed a manner as an advocate can.

In other words, credibility is earned anew each time you appear in court. An accurate, open and respectful argument by a highly qualified attorney is highly persuasive, and not just because of who the attorney is.

The Oxford Dictionary defines "credibility" as "the quality of being trusted and believed in."

To define it is to see how important it is in front of a judge. Building that credibility is a key challenge for every trial lawyer. Without it, you, your case and your client are at a clear disadvantage.

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