

Reacting to cues in motion practice

By: Douglas H. Wilkins and Daniel I. Small ◉ May 16, 2019

The sixth of seven principles of motion practice.

You know your case and your argument. You've studied the law and the facts. You've discussed it with your client and colleagues. You have your outline for written or oral argument done. You are locked and loaded and ready to go! But wait ... haven't we forgotten someone in the process? What about the judge?



Excellence in motion practice is all about listening — not just speaking or writing. During argument, through writings of the judge, or during prior events such as scheduling conferences, events will occur.

The judge may ask questions or indicate an area of particular interest or concern; your adversary will focus or change its argument; the judge's facial expression or body language will indicate a possible reaction to particular arguments, or just plain lack of interest in hearing more on a particular subject.



Don't follow your outline slavishly and ignore what's going on around you.

Be on the lookout for these cues. They are valuable glimpses into the judge's thoughts. Adjust your argument. Just because you planned a particular argument doesn't mean that the most effective presentation will be the same one that you imagined. These cues are opportunities to craft a more persuasive argument.

Of course, preparing and having an outline are important. But don't follow your outline slavishly and ignore what's going on around you. Outlines should provide a guide, and an anchor to a place to return to when things go in a different direction. Preparation should provide the opportunity for spontaneity, not be an obstacle to it.

If the judge's skepticism about one of your arguments is palpable and unshakeable, you may want to reserve that issue for your brief and move on to another argument. There is a temptation to think that doing so is a concession, but you aren't conceding anything of value if, upon encountering judicial resistance despite your best pitch, you say: "I'll rely on my brief for my argument on the point, your honor," and shift to your next strongest point. Otherwise, you risk giving the impression that everything turns on that first argument and that you "don't get it."

On the other hand, some judges can be very flexible, so you can keep on pressing your point. Knowing the judge and reacting to cues in real time is the only way to make this call.

Sometimes, a judge may raise issues or questions that you feel miss the point and are distractions. Don't ignore them or neglect them out of hand. First, take a moment to consider whether the point has merit. Then, make clear that you are considering the judge's questions carefully. Finally, explain how or why they don't apply to this case. Don't ever fail to answer the question; it makes you appear evasive and implicitly suggests that an answer would be fatal to your position.

Important cues can lead in any direction. Listen. Adapt. Sometimes, it will be clear that your position is winning. If so, sit down (or move on, if you have to address another aspect of the relief you are seeking). Do not try to talk the court out of giving you a victory. It just might work.

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