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# The rules: know and follow them

By: Douglas H. Wilkins and Daniel I. Small June 6, 2019


*The last of seven principles of motion practice. Principles 1-6 can be found here.*

Judges live, by necessity, in a rules-based world. If you are trying to persuade them, stay clearly and firmly in that universe. Moreover, view the rules as aids, not obstacles.

The rules exist for a reason: mostly to force counsel to do what should come naturally, which is present the case in a way that helps the judge decide. So know them. Use them. Follow them.

You can get away with minimal compliance, of course. Who among us has not felt joy at discovering a way to squeeze a few pages or a few words into our briefs, or concocting a way to avoid seeming inconveniences, like the waiting time for responses under Superior Court Rule 9A. It's a time-honored tradition of lawyers.

Perhaps it reflects Justice Holmes' famous distinction between tax avoidance and evasion: being on the "safe side" of the line is enough to avoid taxes legally; we need only keep from being "on the wrong side of the line." But praising tax avoidance does not translate well to litigation. It does not imply that it is wise to comply with the letter of the procedural rules but avoid their spirit.

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Let's take a common problem: the overuse of the "emergency motion" exception in Superior Court Rule 9A to avoid having to wait for your opponent's response, and submitting a complete 9A package with motion, opposition and reply. Apparently, a sizable portion of the bar thinks that putting the label "emergency" on a motion justifies immediate filing, most likely because they view waiting for the opponent's response (or even calling for assent) inconvenient or unwise.

The problem runs deeper than the ethically questionable (but too common) practice of asserting an emergency without even a colorable basis for doing so. Lawyers are not thinking about why the rule exists in the first place.

Consider the perspective of the audience: the judges and clerks. Few judges are eager to decide motions without briefing from both sides. Calling your motion an "emergency" does not change that. Emergency motions make more work for clerks, as they try to figure out whether there is an opposition and what memos oppose which motions, and as they are forced at times to call opposing counsel to see whether there is an opposition and, if so, when the opposition is likely to be filed.

The problem is particularly acute in large counties. If, as is often the case, the emergency motion fails to explain why an emergency exists, the most rational course for a judge is to deny the motion without prejudice to refiling after compliance with 9A.

What does any of this accomplish? You are unlikely to gain any advantage, but you probably will convince the judge of your overzealousness and disregard for fair and orderly process. Worse still, claiming an emergency that doesn't exist may put at risk your most precious commodity before the judge: your credibility.

Your client may not be impressed, either, when the judge calls you out for non-compliance. Attorneys should recognize that the emergency exception exists only for the relatively rare cases in which compliance with Rule 9A would result in harm in the meantime.

Otherwise, the rule requires a procedure that enables the judge and clerks to handle motions in the most fair and efficient manner. Understanding the purpose of the rule should lead attorneys to realize that avoidance is counter-productive. Comply with the spirit of the rule.

Page limits are another prime example. As someone who once filed a 250-page brief in the Supreme Judicial Court in the pre-page-limit days, Judge Wilkins understands the temptation. But resistance to the limits in the Mass. R. App. P. soon yielded to the realization that trimming the fat, repetition and minor points from a brief makes it better.

The same is true of the page limits for motions. Superior Court Rule 9A has a 20-page limit. Rarely does a substantially longer brief result in a better, more persuasive or more useful brief. Yet, lawyers have tried all sorts of tricks — as though getting more words before the judge were the goal or a sign of success.

Wider margins, smaller type, putting captions and signature blocks on separate pages, extensive separate statements of "material" facts that aren't really material, argumentative responses to those statements, and other techniques soon appeared. Those practices resulted only in rule changes to outlaw them. Why? Because in this context, the audience — the court — has the ability to make the rules. That allows the rules to prescribe what the audience finds helpful (much as the ubiquitous customer surveys allow businesses to become more effective).

The courts have no interest in curtailing useful argument or in having trials over questions that could have been resolved by motion. They do have an interest in getting the most from attorneys' written and oral presentations. Why would you do something that the audience's rules have told you is not helpful?

There are many other examples of rules that require what common sense already dictates. Superior Court Rules 9A and 9C now require counsel actually to talk to each other before filing dispositive motions (believe it or not, this proposal met with some resistance); rules in the Superior Court and District Court require certain filings in advance of trial so that the court can identify important issues up front; delayed disclosure of experts has led to Superior Court Rule 30B requiring disclosure at the final pre-trial conference; requests for medical malpractice tribunals when an offer of proof clearly meets statutory criteria led to Rule 73. We could go on.

The point is that, through the rules, your audience is telling you what works. You might think you know better than the audience. But that's a risky bet.

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