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First basic principle of motion practice: know your audience

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The reality of litigation is that most cases don't go to trial. They are won or lost — or resolved successfully — through discovery and motion practice.

Yet litigation training often focuses on trials argued to a jury, not motions argued to a judge. Our experience as trial lawyers, affirmed by Judge Wilkins' years on the bench, leads us to seven basic principles for motion practice, oral and written. This column addresses the first one: know your audience. We'll look at the others in subsequent columns.

1. **Know your audience**

It's a basic principle of rhetoric and of life. If you want to communicate with someone — instead of just at them — it's better to know them first. The less you know, the greater the risk of miscommunication, or just poor communication. It's hard to give someone what they need, unless you know what they need.

So it is in litigation. Trial judges are busy, generally knowledgeable about the basic standards of review, and likely unaware of your particular case or issues. You are writing for, and arguing to, this person. All other rules flow from that.

For instance: What's this all about? Both your memorandum and your oral argument ought to deliver, early on, a two- to four-sentence summary of your argument. That's your safety valve, for a busy judge. There will be times when that may be the only thing the judge has time to read before going on the bench (or even while on the bench).

In oral argument, it also helps orient the judge and ultimately links back to your memo.

If you know in advance which judge will hear the motion, gather information on the judge's preferences and inclinations, if possible. Procedurally: where should lawyers stand; how formal or informal; how short or long; should you offer copies of cases, etc. Or, substantively: is he or she a strong law judge; a fireside equity judge; a practical judge; a judge who frequently/rarely grants the type of motion you are contemplating. What are his or her pet peeves?

Don't assume that you are saving the court time or doing the court a favor by presenting a motion (even a dispositive one). Most courts want to move cases along efficiently at a reasonable pace. Trial judges do trials. Discovery is good for trial preparation. Trial dates promote settlements. The only way to stop this normal process is by a compelling argument on the merits and, hopefully on the equities as well. Even then, the default mode may kick in.

It often saves time for the judge just to let the case go to trial. The judge doesn't have to write an opinion or risk the delay of appeal, possible reversal, and restarting the whole process in the trial court. Moreover, the case may settle, or some other judge may preside over the trial. Why would a person in the position of a motion judge grant/deny your motion? Understand the challenge in front of you.

Most judges don't have the time or inclination to get into personalities, ad hominem arguments, over-the-top rhetorical flourishes, or picky points that (while perhaps technically correct) do not matter or cause prejudice to the other side. They have heard it before. Worse, it dilutes focus and distracts from any serious argument that you may have. No one likes bickering or bloviating.

Similarly, judges usually have a preference for decisions on the merits, rather than on technicalities. With a touch of irony, Alexander Hamilton noted that, even in his day, the courts had acquired "some faint idea that the end of suits at law is to investigate the merits of the cause and not to entangle in the nets of technical terms."

Such entanglements have not gained in popularity with judges since that time. That's why we named this entire series after Hamilton's quote. Censuring your own hyper technical arguments before moving forward on them will pay dividends, save your clients money, and avoid loss of credibility with the court.

Of course, some technical rules do affect jurisdiction and may decide the merits. Some prominent examples come to mind: statutes of limitations, administrative appeals, land use permitting, etc. Counsel always need to distinguish between serious procedural missteps (those that preclude a decision on the merits) and ordinary oversights or rules violations that do not warrant a dispositive ruling.

But regardless of what the argument is, give careful consideration to who you are arguing it to.

Aristotle said, "The fool tells me his reasons. The wise man persuades me with my own." Motion practice is a key part in litigation, and the key to it is carefully considering who you are addressing and how you can best persuade them.

We'll talk about the other basic principles in our next columns.

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