

TRIAL TECHNIQUES AND TACTICS

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In this issue we resume the series of articles authored by Michael Upchurch intended to provide practical tips and guidance to the younger members of our IADC member firms. This article was originally published in the Alabama Defense Lawyers Association Journal.

Tips for Young Lawyers: How to Handle a Hearing

ABOUT THE AUTHOR



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ABOUT THE COMMITTEE

The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice. Learn more about the Committee at www.iadclaw.org.

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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Most of a young lawyer's court time is motion practice. Young lawyers who are professional and effective in oral argument develop confidence and good reputations among the judges. Lawyers who are sloppy and incoherent are painful to watch.

The first rule of motion practice is to know your judge and tailor your approach at the hearing accordingly. Some judges read motions and briefs before the hearing, and do not need to be spoon-fed the facts and issues. Judges who do not read pleadings carefully will need more background information. Some judges enjoy analyzing the nuances of the law, and others take a superficial view. Do not emphasize subtleties to a big-picture judge. If you have a patient judge, you can flesh-out details. If your judge is not blessed with patience, get right to the point, and condense your argument.

Some judges tip-off their attitude about a motion in the way they question the lawyers. Plan ahead. If your judge tends to show her leanings, stop talking when she indicates you have convinced her. If you keep talking, you might lose ground. (Beware; however, of the judges who grill the lawyer advancing the position the judge thinks is correct, just to make sure.) Finally, some (thankfully, very few) judges are sarcastic and even a little mean occasionally. Knowing what to expect can prevent you from feeling inadequate or singled-out in such cases; you will know going in that the judge treats everyone that way. If you do not have experience with your judge, talk to someone who does. At the very least, watch the judge handle other hearings.

Knowing the judge is only part of the preparation. You also need to think through what you will say to that judge. Prior to the hearing, outline your opponent's main points. This will help bring your own argument into focus. Then, outline your argument. If there are decisions that you or the other side will discuss, read them carefully, understand them, and be prepared to discuss them. Consider bringing to the hearing (with a copy to the other lawyer) a one page hand-out for the judge that can be understood at a glance. It might list the three or four big points that demonstrate why you win, or quote the key language of the holding from the dispositive case. If the sequence of events in your case is important, bring the judge an easy to follow time-line. (When you bring the judge a case, have a copy for the other side. If the judge's copy has highlights, make sure your opponent's copy has the same highlighting.)

Now, the hearing itself. It is important to be respectful to the judge at all times. Before you address the judge, stand up. Your hands should be out of your pockets. Do not start talking until you are upright, are making eye contact with the judge, and the judge appears ready to begin. Say "sir or "ma'am" or "Your Honor" when you address the Court. If the motion is yours, and there is a printed docket, tell the judge what number your motion is. If one sentence, give the judge the type of case you have and exactly what your motion is. Next, you should tell the judge the key fact and/or legal rule that will determine the result. Then explain in a logical, organized fashion why your motion should be granted. Take, for example, a motion for summary judgment on a fraud claim: "Judge, under *Smith v. Jones*, the

plaintiff must have evidence of reliance. Here, the plaintiff testified in her deposition that she did not believe anything the defendant told her, because she could tell he was a crook. Summary judgment should be entered because there is no reliance.” (The judge has the plaintiff’s testimony and the Smith case in front of him, because you gave them to him before you started talking). In other words, be specific, and be clear. Do not ramble, and do not make statements that are vague. Effective arguments are simple and easy to understand. If you find yourself talking nonsense (you might start out nervous), pause and gather yourself before you resume speaking. If the motion is yours and you talk first, before you finish, tell the judge what you expect the other side to argue and why it is not correct.

If the judge tells you at any point to stop talking, stop immediately. Do not talk over her. If the judge asks you a question, answer it directly. Do not be evasive. If the answer hurts your position, so be it. If you believe that the judge’s question misses the point, answer it anyway. Then tell the judge why her ruling should not turn on that issue.

If you are defending the motion, or are responding to the plaintiff’s lawyer’s argument against your motion, the first sentences out of your mouth should go straight to the issue: “Witness Green was employed by Company X, not by my client. Her statement after the accident that my client knew the elevator was out of adjustment therefore was not an admission. Her statement is hearsay. It is inadmissible because no hearsay exception applies. Witness Green’s testimony therefore does not create a genuine issue

of material fact.” Do not begin with filler (“We disagree with the plaintiff’s position”). What you say at the start sets the tone. Make is substantive.

There are some basic rules that apply whether the motion is yours or not.

First, second and third, never, ever, interrupt the judge.

Never interrupt your opponent. Wait until it is your turn to talk. When you do talk, talk only to the judge. Never address your comments to the other lawyer. Judges hate squabbles between counsel.

If the judge interrupts you, grin and bear it. Then try your best to get your point across before the hearing concludes, even if you have to give your argument piecemeal.

Never belittle your opponent, or your opponent’s position. If you disagree, disagree with gusto, but do not be condescending, sarcastic or rude. Do not accuse your opponent of anything, including misstating or deliberately omitting key facts. Do not call his argument silly or ridiculous. (It is easy to get carried away in the heat of the moment, so you must develop discipline. Do not let your competitive zeal override your brain.)

If the other lawyer acts inappropriately, or says something that is untrue, do not get mad and blurt out a protest. (Don’t whine “That’s not true, Judge!” in the middle of the other side’s argument.) It is always tempting, but is never helpful, to respond to someone else’s bad behavior with some of your own. That lawyer has given you an opportunity to show your maturity and

professionalism. Ignore the insults, maintain your poise and wait your turn. Then politely explain to the judge why your opponent's position is incorrect.

If a decision is against you, acknowledge that to the judge. Tell the judge why you believe the case is wrong or distinguishable, and why the judge should rule differently. Do not, however, ignore or gloss-over the negative precedent.

Do not misstate, exaggerate or otherwise distort what a holding is in a case, good or bad. Be careful to be precisely accurate in telling the Court what the holding is. The judge is relying on you to have studied the case and to describe the decision fairly and correctly. Do not betray that trust.

In your career, you may find yourself arguing a motion and discover that your opponent is not aware of the key case against you. Remember that you have a duty to tell the judge about the case, even if the other side does not.

Sometimes the judge will make what you perceive as a premature and wrong-headed ruling before you have had your say. This happens to all lawyers, and there is not an easy remedy. Be politely persistent. Respectfully ask the judge if you can finish your argument, or bring something important to the judge's attention. If the judge does not indulge you, after the hearing send him a letter fully arguing your position. You also can file a motion to reconsider, if your judge allows reconsideration motions.

When a judge rules against you, do not grimace or complain. If you do, you will lose more than the motion. You will lose the judge, and not just for that one case. When a judge rules for you, do not thank him or her. The judge was not doing you a favor by ruling your way.

Make sure the judge's ruling is recorded on the docket sheet and is embodied in a written order that has been filed with the clerk. You cannot enforce or appeal from a memory. It usually is a good idea to have a proposed order with you if the motion is yours. You then can offer it to the judge at the conclusion of the hearing, depending on the judge and they type of hearing. If you do present a proposed order to the judge at the hearing, make sure you have a copy for the other side.

If the judge tells you to prepare an order, send it to the other side no later than when you send it to the judge. If you hand-deliver the order to the judge, have it hand delivered, e-mailed or faxed to the other side at least a little before it is delivered to the judge, never after, so the other side can object to or comment on the order. If the judge tells your opponent to prepare the order, make sure you will receive the order no later than when the judge gets it, and preferably before. Read it carefully and make any objections immediately, because many judges will sign an order as soon as it is received.

Arguing motions is the meat and potatoes of a young lawyer's practice. If you argue motions effectively, odds are you will perform well in trial too.

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