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Motion to pass

Winning law and motion practice through focused communication


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By Miles B. Cooper

The lawyer read the draft motion. Good, with the potential to be better. The lawyer spent some time, paring here and emphasizing there. The lawyer, a fan of winning on the first page, used a couple bullet points to draw the reader's eye in the introduction. With this, even a quick scan would hopefully hammer home the win. The lawyer finished and sent it to the lawyer's partner for a final set of eyes before filing.

Everything is a potential exhibit

Winning motions starts well before writing them. Motion practice commonly arises from disputes. Disputes can get one's ire up, and ire leads to heated exchanges. The difference between winning and losing can come down to maintaining equanimity. Think of the last time you observed (not participated in) a dispute. Which side was more credible? The one spitting venom or the one calmly explaining what happened? Compose every communication with the idea that it may become a motion's exhibit. Have trouble here? Wait a few hours (or a day) between writing a response and sending it. Review it again before sending. Still running into problems? Ask a colleague to read through materials and perform snark reduction. One doesn't want a meritorious position overshadowed by vitriol.

We lawyers tend to work long hours and oft-times take the edge off before our workday is over. Follow a simple rule to reduce boomerang communications: no work exchanges, particularly ones with opposing counsel, once any intoxicant is on board. No emails, texts, or calls. What might seem witty after a little heat can be anything but when read the next day. This pragmatism served me well during my rough and tumble drinking days.

First-page winner

After the caption, there's not much room left. That's a perfect opportunity to practice winning in the first paragraph. Brian Garner, whose legal writing programs and books should be mandatory, established the "statement–statement–question" introduction. That's a few incontestable facts strung together followed by a question that can only be answered one way – that one wins. "In a products liability case where the bicycle manufacturer has twenty failure reports involving the same bicycle fork as this case, and the manufacturer has refused to produce the failure reports, should the manufacturer be ordered to produce the reports in discovery?"

Sometimes the statement–statement–question is more nuanced. Make this nuance visually easy to follow. Baby step the reader with concise bullet points, each one logically flowing into the next. This visual simplicity gets carried through the rest of the brief. How? Break up text with section and subsection headers. These should be worded so that if the reader skips everything but the headers the motion is still a winner. Why?

Drowning in words

Because many departments read through hundreds of pages a day, particularly dedicated law and motion departments. Whether this be research attorneys, law clerks, or judges themselves, they are asked to process tremendous amounts. Reducing the content to its essence and making it easily navigable greatly increases one's chances. Nuanced multipage text blocks tend to be skimmed over, losing their impact. When drafting, remember Mark Twain's quote: "I didn't have time to write a short letter, so I wrote a long one instead."

The editing should take the department into account. Is it a direct calendar department with the same judge hearing everything through trial? Consider writing to tilt the advantage not just on the issue itself but in the overall case. Is it a law and motion department? One may need to provide more context to a referee dropped in to make one judgment call in an ongoing game.

Don't forget to consider the actual deciders. Some judges read everything themselves. Others have access to research attorneys or law clerks to review the papers and provide the judge with an analysis and direction. Every bit of understanding about how the department operates provides an advantage. One should never pander, and doubly so when one doesn't know who actually does the detail work.

Bits of flair

Brevity does not mean boring. The reader is along for the ride – might as well make it interesting. Analogies, quotes, bits that educate or bits that entertain can all draw in the reader to what can otherwise be some turgid stuff. Make sure these pieces focus the argument instead of distracting from it, however. Consider applying a variant of the fashion advice offered in 1991's *L.A. Story*: "But the best thing to do is, right before you go out, look in the mirror and turn around real fast, and the first thing that catches your eye, get rid of it." Too much can be too much.

Outro

Back to our lawyer and the motion. A few weeks later, the lawyer checked the tentative ruling and found the work put into the motion had helped carry the day. Next step: making sure defeat was not snatched out of the jaws of victory at the hearing…

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