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Argue your position

Preparing for and delivering motion practice oral argument



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By Miles B. Cooper

The lawyer arrived early in the law and motion department. The tentative for defendant's summary judgment motion? "Parties to appear." Not a lot to go on. Stacked on the dais's edge were actual books. Squinting, the lawyer made out numbers on the California Appellate Reports spines. One applied to the lawyer's case, a clutch opinion that, if followed, would lead to the judge denying the motion. "That's the case to focus on," the lawyer noted.

It's all in the brief, Judge!

Motion practice, whether that be discovery, summary judgment, or anything else, hinges on well-written material. Writing a solid brief that aims to win on the first page helps. That's discussed in Plaintiff's December 2021, *Motion to Pass*: https://plaintiffmagazine.com/recent-issues/item/motion-to-pass. The entire argument should be laid out in the brief. What's the point of oral argument, then, if it is all in the brief? Let's examine an email or text thread as analog. When someone emails or texts, are you generally able to resolve complex matters with a moving email, an opposing email, and a reply email? Or does it tend to go back and forth, and back and forth, again and again? Nuance can get lost in written communication. Tangential tip: Once a thread reaches three communication iterations, consider picking up the phone. The takeaway? A robust discussion with all stakeholders present, i.e., oral argument, lets folks probe the positions and get to the heart of the matter. But we get ahead of ourselves. In order to argue, we need the tentative ruling.

Being a little tentative

Almost all courts now issue what is known as a tentative ruling. Unless someone objects, that tentative becomes the ruling. Because there's no California Rule of Court standardizing tentatives, local knowledge, local rules, and departmental peculiarities become important. Look up the local rules for tentative rulings, even if you think you know them, because they change. Additionally, in direct assignment courts consider asking the court clerk if the judge has any requirements beyond the local rules. One can be surprised by what one can learn. "I'm glad you asked. The court only hears arguments regarding trial continuances in person," was one recent example. The most common local rules are notifying the court and opposing party by a certain time that one will be contesting the tentative ruling. They also often require one to articulate specifically what portion of the tentative is being contested. Fail this step and the tentative becomes the ruling.

In the room where it happens

The post-pandemic legal practice, virtually eliminating commutes, can be fantastically productive. One can now appear telephonically and via Zoom for pretty much everything. What does one miss by doing so? Employing the five senses to read the room. Does this always make a difference? No. But subtle cues – a derisive comment between staff before the judge takes the bench, the presence of a research attorney who is more erudite, certain volumes or practice guides sitting on the dais – can provide distinct advantages. In clutch motions, like summary judgment, one wants every advantage one can get.

Which brings us to the argument itself. Mastering the material, including key cases or factual points, is a given. How does one do this? Having a preparation session with a colleague playing shadow counsel and getting peppered with the hard questions is one great way. Being able to answer tough questions directly and distinguish a case that is against one's position gets easier with practice. At the same time, practice emotional mastery and being in the moment. Argument can get one energized. Breathing rather than reacting helps. This can happen while the other side talks or in the space of a 2-3 second pause. That pause can effectively build tension and help emphasize a point. In all this, remember to be gracious while disagreeing. Judges hate kindergarten bickering. Avoid getting drawn into the sandbox, no matter what the opposition does. In resisting snark and sarcasm, remember the wonderful line from *A Lawyer's Prayer to St. Thomas More*, "…stand always beside me so that today I shall not, to win a point, lose my soul."

With all that preparation, our ego ofttimes requires we demonstrate mastery. That can help unless it doesn't. Take cues from the judge. The best argument, sometimes, is no argument. "I'm happy to address any questions you may have after the defense's presentation to the extent you are inclined to change your tentative. Otherwise, I know you have a busy calendar and don't want to take unnecessary time." Most of us have been present when a lawyer should have stopped, and instead snatched defeat from the jaws of victory.

Outro

Back to our lawyer in the law and motion department. A rousing oral argument, both sides well prepared. The lawyer argued the holding from the law book sitting on edge of the judge's dais. A few days later the judge issued the opinion, framed around that case. Summary judgment denied, paving the way for trial, or resolution.

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