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Effective Pre-trial Motions: Persuading the Judge

by Maureen A. Howard



Victories won in pre-trial motions can significantly affect the direction and outcome of a trial. For this reason, successful trial lawyers prepare for motions with the same thoroughness that they employ for the trial itself. Arguing a motion to a trial judge, however, is different from arguing your case to a jury; to be effective, an advocate needs to be mindful of the difference.

Judges generally resist what they perceive as emotional manipulation, theatrics, or excessive rhetoric. Many judges expect lawyers to cleanly and succinctly argue the facts and the law without employing any appeal to emotion. That being said, judges are human. They want to do the right thing. They want their rulings to produce fair results, not just legally sound results. In this regard, judges are influenced by the same universal themes that speak to jurors. The advocate's goal is to incorporate a theme into her argument that emotionally hooks the judge without being off-putting. The most effective way to do this is to be extraordinarily well-prepared and organized. The advocate who demonstrates mastery of the facts and the law, whose presentation is tightly crafted and avoids repetition, and who is prepared to answer questions from the bench is in a better position to weave her theme throughout her presentation without irritating the judge.

Prepare, Prepare, Prepare! I recommend using a three-ring notebook organized to provide quick access to information needed to answer the judge's questions. Create separate tabbed sections for each point you intend to argue. The content should be pithy — virtual bullet points — with citations to the relevant section of your brief or other supporting materials provided to the court. This allows flexibility in oral argument, which is critical because the judge's questions may require you to change the order and emphasis of your arguments. It is advisable to prepare a section for each issue before the court, even if you don't plan on arguing it, because you do not have complete control

over the direction the oral argument will take. You can store these backup sections in the rear of the notebook as insurance. Then, if the judge asks about an issue you had not planned on arguing, you will be grateful to be able to quickly turn to one of these optional sections. Another tabbed section should include brief summaries of the key cases cited by both parties, with salient quotes noted.

"Moot" Your Argument. Practicing your oral argument will produce a smoother, more professional presentation. It will also free you from overreliance on your notes, allowing you to maintain crucial eye contact with the judge. This lets you evaluate the judge's response and adjust your argument if needed. The goal is to speak to the judge directly and not to read a pre-prepared statement — or, worse, repeat your written brief, which the judge has presumably read. This is the time to address the judge's lingering concerns and questions. Reading undermines an advocate's credibility because the words of a writer can hit a listener's ear as stilted or artificial, and thus disingenuous. Instead, use expanded bullet points to guide your argument, each bullet triggering the next point you want to make to the judge.

Anticipate Questions. Whether you practice your argument with someone else or alone, you should be thinking of possible questions you may need to field from the bench. Examine the issues not from the vantage point of an advocate, but from that of a third-party neutral: what questions might you have? The weaknesses of your position are particularly fertile grounds for questioning from the bench. Think these through in advance and prepare an answer to each question you dread. Then, create a tabbed section in your motions notebook labeled "Questions" where you set forth each anticipated question with notes outlining your proposed reply.

Start Strong. Begin by introducing yourself and your client. Ask to reserve time for rebuttal if you are the moving party. Summarize for the judge at the

outset what you are asking for and why the judge should give it to you. Get to the essence of the motion by identifying the issues the judge must decide for you to win. Remember to incorporate your theme from the outset, but use language and tone that communicate reason and integrity. Do not assume the judge has read everything you have submitted, but do not assume she has read nothing. The better practice is to begin with a polite, ambiguous inquiry along the lines of, "Has Your Honor had an opportunity to review the materials we submitted in support (or opposition) to the motion?" I have yet to see a judge admit to not reading the materials, but I have witnessed several judges invite counsel to provide them more background by saying something like, "I've had a chance to review them briefly, counsel," with a tone that invites a more detailed presentation that reviews the basics of the brief.

Embrace the Dialogue. Motions argument is not a pre-prepared opening statement or a closing argument: it is a dialogue between you and the judge. Although every advocate prepares to give an uninterrupted oral presentation (because there are those judges who will not ask a single question), the prepared advocate anticipates and welcomes a chance to converse with the judge. This means giving up a modicum of control. If the judge speaks, stop speaking and don't interrupt. If the judge asks a question, pause before answering and organize your thoughts. Judges' questions can communicate quite a bit about what is important to them: within their questions are hints about which issues they are debating with themselves as they decide an issue.

Answer the Question. Although law students are often trained to redirect an appellate judge's questions to an issue the advocate wants to talk about, this strategy is ill-advised in trial practice. If the judge asks a question, answer it directly and be scrupulously honest. In my experience, saying, "I'll be getting to that later" or "That's not the issue here" will only alienate the

judge and harm your case. Remember, you are arguing to the judge, not with the judge. Also, in answering questions from the bench, always be candid: it is perfectly acceptable to say you don't know the answer to a question. It is never proper to extemporaneously shoot from the hip and make a misrepresentation, no matter how unintended. Be scrupulously honest in any factual or legal representation — and if you make a mistake, fix it at the earliest opportunity. Also, if you are being legally creative and arguing for the extension of a rule beyond its present bounds, make sure to share this with the court.

Protect Your Credibility. As is true in all areas of trial practice, an advocate must protect her credibility at every turn, because it is the most critical asset to the work of a trial lawyer. In the context of motions practice, this means: make sure you know and follow the rules of evidence, procedure, and the local rules of practice; do not interrupt or visually react to opposing counsel's oral arguments; and do not make frivolous arguments. As noted trial scholar James McElhaney says, a frivolous argument only undercuts your valid arguments. ♦

"Off the Record" is a regular column on various aspects of trial practice by Professor Maureen Howard, director of trial advocacy at the University of Washington School of Law. She can be reached at mahoward@u.washington.edu. Visit her webpage at www.law.washington.edu/Directory/Profile.aspx?ID=110.

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Communicating Between Generations

by Lisa Voso



For the first time in history, we have four generations in the workforce. And there are more pronounced differences among the generations today than ever before, as our world has changed so much in the past 50 to 80 years. Being aware of generational differences can help you anticipate miscommunications and tailor your message for maximum effect — whether you're applying for a job, pitching a new idea to your boss, or dealing with clients.

Part of the basis for those pronounced differences has to do with the major events that took place during the generational span. Once a generation enters the workforce, we are better able to track trends in its members' behavior, decision-making, and communication techniques. While not everyone fits neatly into a box, the trend data collected over the past eight decades is compelling.

The four generations presently in the work force are: the Traditionalists (born 1922–43); the Baby Boomers (born 1943–60); Generation X (born 1960–80); and the Millennials (born 1980–2002).

The Traditionalists survived the Great Depression and WWII. These events were significant and critical in shaping their mindset — a mindset of hardship and survival. **Respect** is the Traditionalists' top psychological need. They place a high premium on formality and the top-down chain of command. How does this impact how you communicate with members of this generation? Over time, more relaxed rules have made their way into the workplace, but not for this generation. To earn Traditionalists' respect immediately, use formal titles and attire. After you meet someone from this generation for the first time and address him or her using the title

“Mr.” or “Mrs.,” a person of this generation may then invite you to use his or her first name. The way to maintain respect is to wait for that invitation. In addition, putting things in historical perspective also can help sell Traditionalists on your message, because they prefer to make decisions based on what has worked in the past. While technology has come to govern most of our work lives and our personal lives, for most of the Traditional generation it has not. As a generation, Traditionalists prefer face-to-face meetings. Trust is important to this generation, and members feel that the most effective way of evaluating a person is through face-to-face communication. Even if you need to keep the meeting short, let the Traditionalist know how much time you have to spend with them, and they will respect you for offering the in-person interaction. This generation is often offended by the direct approach and the assumption that they have an e-mail account or a cell phone.

The Baby Boomers were influenced by non-stop historical events taking place while they were growing up and as they migrated into the workforce. Some of these events include the Vietnam War, the Free Speech Movement, the Civil Rights Movement — and let's not forget Woodstock. This generation is credited with reshaping corporate culture with more casual dress codes and flexible schedules, which stemmed from the Woodstock mentality. Boomers are people who “live to work.” Working hard is the No. 1 focus of this generation. Its members worked hard to change corporate culture and to alter the laws governing this country and the perceptions of women and African-Americans in the workforce. For the first time, both parents were in the workforce, showing a commitment from both sexes to achieve