

Avoid These Common Law-and-Motion Pitfalls

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New admittees and grizzled litigation veterans alike can benefit from a review of the basics of law and motion practice. The process seems straightforward: brief your position, and then answer a few questions in court. But actually the process is riddled with land mines.

Law and motion hearings have three fundamental aspects: What to do before the hearing, what to do during the hearing, what to do after the hearing.

The most important element of preparation for a hearing is to anticipate the hard questions the judge might ask, and to think through your responses. If you spend a half-hour to 45 minutes going over the issues in the briefs, and concocting a list of seven or eight questions the judge might ask — the hardest questions your side might face — you are virtually always going to be overprepared, and will be pleasantly surprised when only a fraction of the tough queries are served up to you.

Read every case cited by any party, and make notes regarding the facts and the holdings. During oral argument, judges often ask what a lawyer has to say about a controlling case. If you try to reprise your law school performance and "pass," you'll probably receive the judicial equivalent of an "F."

Develop a fallback or compromise position in the event the judge is not leaning in your favor. For example, if the court is inclined to grant a motion you oppose, ask that the matter be stayed, pending further discovery, or until further declarations can be obtained. If the court plans to deny your motion, ask that the denial be without prejudice. In other words, think about what might happen before you get there, so you don't have to rely on the chance that you'll come up with the correct response when the judge throws a curve at you.

Talk to other attorneys about your judge, to discover the judge's attitudes or tendencies regarding issues

that repeatedly arise in law and motion hearings. Because judges are often assigned to a law and motion courtroom for a year or more, you repeatedly see the same faces on the bench. Judges develop reputations about whether they're liable to grant summary judgment motions, and whether they're strict with attorneys when it comes to sanctions. If you talk to other lawyers, you can pick up on these tendencies.

Check the judge's background. In addition to talking with other lawyers, you can go to The Daily Journal's ju-

Future hearing dates are often set, and there's nothing more embarrassing than being the only person involved in the matter to have to say to the judge, "I don't know if Oct. 12 is good for me, because I don't have my calendar."

Bring with you the portion of the file you think will be useful. At a minimum, you should bring the moving and responsive papers, and the operative complaint, cross-complaints and answers. Also, bring any important correspondence pertaining to the subject of the motion, such as continu-

to the judge's reaction to the case. Don't read from a speech or an outline. Determine the issues that interest the judge, and address them.

Whatever you do, stop talking when the judge has indicated he or she has heard enough. A lawyer virtually never changes a judge's mind; the tentative ruling almost always stands. If the tentative ruling is against you, you've essentially spoken your piece, and the judge indicates he or she doesn't want to hear any more, don't bother to keep talking. It's surprising how often lawyers persist when everyone in the courtroom, most importantly the judge, knows it's a waste of the attorney's valuable breath.

Offer to give notice of the ruling during the hearing. Sometimes the notice of ruling, while it isn't an official part of the file, can help frame the debate if a dispute later arises over what the judge said.

Clarify how long a party has before a subsequent pleading must be filed. Usually, the judge will specify a deadline, but if one isn't mentioned, raise the issue.

Determine whether a party should prepare an order, or if the judge's minute order is doing to be sufficient.

Try to get the last word. Some judges have been known to decide in favor of the lawyer who speaks last.

Request a stay of the judge's order if you want to file a writ or an appeal. Without a stay, filing the writ or appeal may be moot, because the prevailing party might take action to carry out the judge's order so quickly that appellate review would be inadequate.

Immediately inform your client regarding the outcome of the hearing, good news or bad. If you client hears from someone else that he's out of business, your chances of being rehired when he's back on his feet will go from slim to none.

If you're required to prepare a notice of ruling or order, do so immediately, consulting your notes from the hearing.

If you lose, consider whether a motion for reconsideration, or a writ or an appeal would be appropriate. If so, immediately go back to your office and calendar your deadlines.

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dicial profiles, compiled in a loose-leaf binder. Columns describing hundreds of superior and municipal court judges, as well as appellate justices, are in this binder. In addition, "California Courts and Judges Handbook," a hardbound volume, provides further information.

Make arrangements in advance if you want a reporter's transcript of the hearing. If you feel an appeal or writ may be necessary, request a record of the proceeding.

Arrive at least 10 minutes early to check in, and to determine if the judge made a tentative ruling. Some law and motion departments have telephone numbers with recordings of tentative rulings, which are available the afternoon before the hearing. Other courts will post tentative rulings a few minutes before the judge takes the bench.

If there is a tentative ruling, you want to plan your response to that ruling, or decide how to take advantage of it. A tentative ruling can be extensive, citing authorities and the reasons for the ruling. The judge will not be pleased if you try to change a tentative ruling without having read it first.

Bring your calendar to the hearing.

ances that have been granted, and stipulations among counsel.

Request priority if you are engaged elsewhere. Sitting through a three-hour calendar can be tedious, so avoid it if you can legitimately ask for priority based on another court appearance.

If the judge hasn't read the papers, or has no questions for you, be prepared to talk anyway. Be prepared to give a one-minute discussion of the case explaining why you should prevail, as well as a three-minute, and a five-minute discussion. You never know how long the judge is going to let you go, and sooner or later you are going to run into a judge who is simply unfamiliar with the case.

When you introduce yourself, give your full name, give your firm's name, and the full name of the party you represent. In addition, indicate whether you represent the moving or responding party. Anyone who has put in a few years as a litigator has observed the embarrassing phenomenon of a lawyer stumbling over, or simply forgetting, the name of the client. The only consolation is that the client probably wasn't there to witness the lapse.

During oral argument, be sensitive

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