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PERSPECTIVE

Killer Motion Practice
Part 2

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Preparing Excellent Briefing

Killer briefs really deserve their own article, but here are a few big points:

A strong preliminary statement, not "introduction," is critical at the front. The statement should be reasonably succinct and should provide a fair summary of the main legal and factual points. Ideally, the court will understand the brief even if it only reads the preliminary statement.

Statements of facts should be completely accurate and well supported, compellingly but not too argumentatively described, and generally limited to facts relevant to the motion. Ensuring the court can understand the context of the motion may be accomplished through a first paragraph briefly describing the overall case and any helpful procedural history.

Not all facts needed in the brief should be included in the statement of facts. Some specifics better appear for the first time in the argument section. All material facts should be cited unless you want the court or your opponent to conclude it lacks support. On reply, a factual statement is often unnecessary.

Even if thorough research was done before the meet and confer, more research may be needed to deal with additional facts or arguments learned in the meet and confer. The argument should be organized around this research.

Using authority effectively includes reading all the cases cited and thoroughly understanding their facts and reasoning. Citing cases that can be persuasively distinguished is short sighted. Reading the cases may help identify or develop new supporting arguments, and allows counsel to select the best quotations for the brief. Routinely, I see brilliant lawyers use what I would consider reasonably decent quotations from their cases but omit many more powerful quotations. These are lost opportunities.

Never underestimate the mighty parenthetical. Accurate, smart and concise parentheticals, particularly in a string, quickly confirm to the reader the strength of the support for the proposition cited. Pairing a choice quotation with a few select words can show the quoted statement applies perfectly to the case at hand. A really great string cite results from several parentheticals that are clear, succinct and obviously and honestly on point.

Most briefs could be more concise. Keeping arguments that must be addressed well organized and uncluttered with responses to every other point raised, is important to help a busy court grant (or deny) the requested relief. Where irrelevant matter appears in an opposition brief, the reply should squarely address the arguments relevant to the dispute, and dispose of irrelevant arguments or factual points in some distinguishable way, or sometimes not at all. Where an irrelevant point may confuse issues, it should be rebutted to avoid a harmful conclusion being drawn. One might also address such a point to demonstrate the opponent's desperation or dishonesty. In such cases, responses may be made in footnotes to avoid interrupting the main argument.

Carefully reading the opposing brief and declarations permits you to take advantage of any admissions or other helpful statements. In many jurisdictions, judicial admissions may not be contradicted later through declarations or other evidence and thus may be determinative of all or a portion of the dispute. Sometimes a litigant's position as to the law or as to the relief requested may be objectively unreasonable on its face, or taken to its logical extreme.

Also consider what was not said in opposition. A conceded or waived point may even turn into the winning blow when highlighted in reply. Counsel should reread one's own brief alongside the opposition, see if her opponent responded to what was raised, and note any gaps. Counsel should also note qualifiers found in the opponent's briefing or supporting declarations. Be skeptical: why did counsel use that narrow wording? Was it not broader because the same conclusion could not be drawn?

The brief's tone should be professional. For example, counsel should accord the proper emphasis where it is warranted, rather than using hyperbole where unsupported by the facts. Overselling a point can cause the court to question whether counsel, or counsel's judgment, may be trusted.

Where points can be made about the opponent's misconduct or dishonesty, one should be very judicious in making those points at all, and always

avoid *ad hominem* attacks and characterizations. Let the facts speak for themselves. Sometimes, such facts must be packaged up before a conclusion may be appropriately drawn from them about the opponent's true position or motivation. Using the passive voice, removing several adverbs from one's early drafts, and making suggestions rather than accusations, are techniques that may make the point without looking like a bully.

Sur-replies are inappropriate unless something new came up on reply, or something truly new developed after the briefing process was complete. Consider whether this new information may be brought up instead in oral argument. Where that is the case, I often send the new information to my opponent a few days before the hearing, so that he cannot argue he was unprepared to address it.

Sharpening Oral Argument

Like a good cross examination, an effective oral argument in many instances can be boiled down to a "surgical strike" that destroys the rest of the opponent's credibility or shores up a few key points one wishes the court to remember. That said, the actual content of the oral argument depends a great deal on the style of the judge. Although it will benefit counsel to have an idea of the judge's analytical style and usual level of preparedness, one has to be prepared for anything.

Sometimes the judge was unable to read the briefing, or did read it, but would appreciate a quick summary of the points in the motion or opposition. For this circumstance, I create a simple summary of the material points in support of my client's position, and for key areas of dispute, a succinct and fair summary of the opponent's position with a short rebuttal.

Where there has been particularly spirited and/or voluminous briefing, it is helpful to have a short outline of the material points that are required to establish or eliminate the need for the requested relief, and where the parties landed on each of those points after all the briefing was completed. This may reveal where an important point was never rebutted. Or where it was rebutted, but with a supposed fact that had no declarative support even though it could easily have had that support, that failure of support should be pointed out. This analysis shows which facts or arguments that are essentially stipulated, and permits the court to focus its resources on the remaining contested points. I prepare bullets on key issues still in dispute, so as to easily discuss them if they arise.

Material new information that legitimately arose or became part of the dispute after reply should also be brought up before the hearing so that it can be considered. One may need to seek leave of court to present the new information, even if opposing counsel will stipulate to permit its introduction. Such information risks being excluded if presented as a surprise to opposing counsel or if the procedural rules are not followed.

Consider charts or other visual presentations that may summarize information, highlight key points, emphasize key contractual language or admissions, or put information presented into the greater context of the case.

Stepping back from the detail of the briefing, considering what has been briefed and how it has been briefed, can provide good points for oral argument. What is the subtext of the briefing? What demonstrates the hypocrisy of the opponent's position? Why does the opponent's position defy common sense? Why is the subject of the motion significant or insignificant in the context of the case? How will it impact factors the court is most concerned with, such as the possibility of being overturned; delays in the schedule that may result from granting or denying the motion; and the like?

Excellent preparation going into the hearing pays off in responding quickly, succinctly and persuasively to points that opposing counsel makes. Jotting down notes while listening to the opposing argument permits me to just glance down and rebut those arguments. Having a well prepared colleague there to assist can make it easier to marshal key rebuttal facts or arguments.

Conclusion

You do not want to win the battle and lose the war. The same skills and practices that we have seen make for great motion practice — thorough research, good judgment, thoughtful counseling, honest negotiation, insightful preparation, strategic thinking and the like — pay off at every stage in a litigation. While this article has highlighted certain techniques, litigation is ultimately a creative process, and readers can use these same core skills and practices to develop other effective techniques permitting them to deal with the various litigation challenges facing them.

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