Five Tips for a More Effective Motion Practice

With an ever-decreasing number of civil cases actually reaching trial (much less a jury trial), motion practice has become an increasingly vital part of the litigation process, particularly in federal courts. Because the stakes are so high and the potential expense so great, and because judicial workloads have never been heavier, effective motion practice should be at the forefront of the minds of judges and lawyers alike. To be an effective advocate for your client, you must have a solid command of this crucial component of pretrial practice.

CLE Programs

Beginning this spring, a series of informative continuing legal education (CLE) programs on how to be a better advocate through more effective motion practice will be presented across the country, thanks to a collaborative effort between the Federal Judicial Center and the ABA Section of Litigation. These programs will feature some of the best and brightest judges in our federal judiciary, as well as top-flight plaintiff and defense lawyers, all sharing their insights on how to engage in a more successful motion practice in today's busy federal judicial system. Watch for future announcements from the ABA Section of Litigation and your local federal court on dates and locations near you. Then sign up to attend.

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Five Tips for Improving Motion Practice

For its part, the Pretrial Practice and Discovery Committee is including articles in this newsletter focused on various aspects of federal motion practice. In that vein, I would like to share five simple tips that over the years have improved my own approach to motion practice in any court (though I've adapted them to federal practice here). As is often the case, these tips are a distillation of collective wisdom and practical advice that I've received over the years from lawyers far more talented and wise–partners and mentors who have advised me through the years, and other incredibly talented advocates with whom I have had the privilege to litigate–on *both* sides of a case.

Here are my five "Be's" to better federal motion practice:

1. Be selective. Think strategically. Motion practice, like any other pretrial procedure, is a tactic and should be thought of as a means to an end–the successful resolution of the case for your client, however *success* may be defined. For any tactic to be successful, you must always focus on the bigger picture: Will a "win" In the short term help or hurt your chances for ultimate success? Just because you can file a motion does not mean that you should. Carefully choosing when and when not to engage in motion practice can be the difference between moving a case forward quickly toward a successful end and an expensive and wholly ineffective boondoggle. Perhaps most importantly, such choices often directly affect the credibility of the lawyer-your most prized asset as an advocate.

For example, even after *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), successful motions to dismiss remain elusive creatures and have not become the panacea some originally

anticipated. Think carefully before filing. Discovery and expert witness (e.g.,Daubert) motions, likewise, can be effective if they are focused on issues that really matter. Like the boy who cried wolf, filing repeated or expansive discovery motions and seeking draconian sanctions for every perceived discovery slight or infraction will often diminish the movant's credibility to the point that a court may be far less inclined to grant relief (or may exercise its broad discretion to award narrower relief) than what might otherwise be fairly justified.

Lastly, when considering a summary judgment filing with all the attendant complexity and expense, you should carefully deliberate whether It will be an effective use of limited judicial resources with a strong likelihood of success or a waste of time or, even worse, a vehicle through which your opponents can display and exploit the weaknesses of your case and the strengths of their own.

2. Be focused. If you choose to file a motion, focus on the most important bases for relief. As a general rule, you should focus on no more than two to three themes for any motion (irrespective how many grounds for relief you may have). Too many themes dilute the power of your best themes and often distract and confuse the audience-in this case, the judge. Lawyers too often engage in an exercise similar to the much-derided practice of "defensive medicine," in which they feel the need to raise every single argument no matter how tangential or likely to contribute to ultimate success. Often this is borne of fear that omitting or minimizing any point, no matter how trivial, could leave them open to later criticism if the motion is not successful. But, let's face it, if the fifth or sixth most important point is the one that ultimately carries the day (assuming the court actually reads and meaningfully considers it), perhaps your prioritization was off from the outset.

3. Be concise. Judges are very busy. One way to show judges that you respect their time and the difficulty of their job is by taking great care to write motions and related briefs in a clear and concise manner.

Federal judges, even with the assistance of excellent law clerks, likely focus on far more cases every day than do the vast majority of practitioners. While they are very good at what they do, no one has the same familiarity with or passion for your case as you do, nor will they likely take the same time in considering your motion as you did in preparing it. Show your judge that you understand and appreciate the difficulty of her job by spending the extra time to express your points succinctly and effectively.

To grab the reader's attention, lead with strength. State why you should be entitled to the relief you seek (or why your opponent should not) right up front, on the first page and preferably in the first paragraph. Write in the active voice, using short and simple sentences and concise paragraphs. Avoid lengthy block quotes and string cites. Avoid use of footnotes except when absolutely necessary. If you cannot express your theme points clearly and coherently in a medium-length paragraph, reconsider your approach. Presenting complex points In a simple, straightforward manner is an art, but one well worth trying to master. Great lawyers are able to do it. So can you. Less is more.

4. Be professional. Lawyers always should be zealous and impassioned advocates for their clients, but, to be effective, such zeal and passion must be properly channeled. Too often in the heat of battle, lawyers devolve from arguing about issues to arguing about personalities-attacking an opposing party or opposing lawyer's character, sometimes savagely. Don't do it!

One of the most universally expressed judicial pet peeves I've heard through the years has been the increasing level of incivility and disrespect that lawyers express against opposing parties and one another. For too many advocates, it is not enough merely to point out the flaws and weaknesses of an opponent's legal position. Instead, they feel the need to

convince the judge that their opponent and/or their counsel are bad (even evil). Yet, even if considerable evidence exists to justify what is inherently a subjective point of view, personalized attacks are not an effective tactic. Snide comments and snarky remarks may seem incredibly clever when you write them, but they rarely look good in print, and they never impress a court. In fact, far more often such tactics tend to boomerang against the attacker, hurting that lawyer's standing in the eyes of the court, thereby diminishing his most precious asset-credibility.

You can effectively point out weaknesses in an opponent's case, or even improper or ethically questionable behavior by opposing counsel, without resorting to *ad hominem* attacks. Indeed, one of the most effective advocacy tactics that you can deploy is an argument that inevitably leads your audience–in this case, the judge–to arrive at your desired conclusion without you ever having to state it. Judges are often keenly aware of lawyers whose reputation (bad or good) precedes them. They also have eyes and ears and can (and often do) draw their own inferences from the conduct that they observe, all without self-serving "help" from counsel. Judges appreciate restraint in the face of bad behavior and really appreciate the lawyer who can call out such behavior *without* resorting to personal attacks. In sum, always take the high road.

5. Be careful. This is perhaps one of the more difficult tips to follow as it is so often hard to predict just how filing a given motion might affect your likelihood of ultimate success. Nonetheless, it is imperative to contemplate the potential consequences to your own client prior to filing any motion, no matter how inconsequential those consequences may seem. For example, if your client has its own issues with respect to document preservation (particularly electronically storied information), it may be unwise to be the first to "cast stones" by raising the issue against your opponent. Similarly, it may well be a strategic mistake to seek the imposition of certain standards on your opponent if those standards would be detrimental if applied to your own client.

It is not always easy to spot these types of mistakes before they are made. This is why to be a true master of the process, you must engage in an in-depth, strategic evaluation of your case–both its strengths and its weaknesses–as early as possible in a case. By envisioning the entire chessboard from the outset, you can often anticipate (and thus be prepared to counter) your opponent's moves, thereby increasing your chances of ultimate success. You can also foresee (and avoid) unforced errors by acting in ways that minimize opportunities for your opponent to gain the advantage.

Conclusion

It is our hope that you will find these five tips useful in your own practice–and that they will be a starting (not ending) point in what should be a never-ending desire to become a better and more effective advocate for your client.