Seven Essential Steps to Winning Your Motions

By Jim Wagstaffe

As a former judicial law clerk, teacher of judges and practice guide author, I am often asked: "How do you win motions that can win your client's case?" I always answer with the mantra that successful motion practice is comprised of two critical elements: first, telling the court *how* you should win and second, telling the court *why* you should win.

Since the "how" of wining motions is so dependent on substantive law and following the correct procedures, see *The Wagstaffe Group, Federal Civ. Pro. Before Trial* (LN 2020), let me share with you here what I consider to be the seven essential steps to winning your motion by underscoring "why" victory should come your client's way.

1. Understand Judicial Attention Spans: Write a Killer Introduction

Given the limited time judges and their clerks may have to digest the parties' briefs (a judge friend of mine calls them "longs"), you need to seize the court's attention at the start of your papers with a killer introduction. This introduction section should engagingly frame the issue(s), favorably summarize your client's take on the factual context and then state precisely what ruling you seek and the multiple reasons why such a ruling should issue.

Many, if not most, judges receive a bench memorandum from their staff attorney or law clerk providing a "USA Today version" of the motion and the arguments. I always write my introductions as if that is the only thing the court will read and in such a way that it could be incorporated word-for-word into the short summary part of the bench memo. And for what it's worth and space permitting, I usually also have a mini-summary in the conclusion and always state exactly what order my client is seeking and why.

2. Be Certain Your Brief and Arguments Tell the Story

The reader of the brief (be it judge and/or law clerk) wants and often needs a gestalt sense of the context of the case and motion. With this in mind, the best way to win the motion is to be sure your submission succinctly captures the story of the case. You start with your table of contents (often the very first thing the court reads) ensuring that it logically and persuasively tells the story of the case. Specifically, try to have the headings and subheadings read like a contents summary of your story—not one or two word captions.

Adherence to story, not titles, is equally important with the introduction and the oral argument. For example, in a brief I presented in an unsafe road conditions case, the statement of facts had the following story-based subheadings: a. The Fullers on Vacation to See Their Daughter; b. The Tragic Head-On Accident; c. The Witnesses Confirming Blind-Spot in Roadway; d. Investigating Officer's Testimony Confirming Road Condition Obscures Vision; e. Expert's Opinion Demonstrating Serpentine Roadway Created Dangerous Condition; and f. Devastating Aftermath of the Collision. You read the story in condensed and persuasive form.

3. Employ Innocence by Association

In persuading judges (and their law clerks) why your client should win significant motions it is critical to associate the desired result with positive values—innocence by association if you will. These values can include justice, fairness, predictability, compassion, economy, protection, credibility, stare decisis, and the like. Identify the core value and then emphasize the connection with that result and the identified positive attribute.

In writing and arguing for (or against) a motion before the court, always ask yourself why the judge should feel good about ruling in your client's favor. Certainly, this "innocence by association" values-grab embraces all three forms of Aristotelian proof: logos, ethos, and also pathos.

For example, if you are opposing a motion to seal documents, you could full-throatedly embrace the positive value of transparency as you argue for enhanced public access to the documents in question. In contrast, if you are making such a motion, you appeal to the positive value of privacy.

4. Avoid "Red Flag" Clues for the Judicial Reader

Many times attorneys writing legal briefs will attempt to gloss over argumentative weaknesses through adjectives, adverbs and overblown conclusions. For example, the writer may describe an equivocal proposition as "clearly established" or pejoratively describe the opposing side's position as "nonsensical" or "ridiculous." To the experienced (and sometimes even novice) judicial reader, such phrases can be perceived as indicators of weakness not strength.

Similarly, a not unusual mistake is to set forth abstract—albeit even black letter law—propositions that are not tied to the specific point in question. For example, attorneys often over utilize precious brief space on the governing standard (e.g. for summary judgment) when the court likely has addressed hundreds of such motions in the past. Spending too much time and string cites on obvious propositions is also a red flag for an argument's weaknesses.

Another "red flag" taught to judicial personnel reading your briefs is when the litigant cites to quite-dated or out-of-state authorities. This often will give the impression that, in fact, there is no current or governing authority on point. To the contrary, be sensible in your citations employing the following practices:

- *Avoid string cites (especially without parenthetical explanations).*
- *For controlling case law, break out the facts and holding, explain its governing significance and provide quote(s) from the case to confirm you got it right.*
- *Be straightforward about adverse authority, i.e., present the citation and distinguish its holding (especially if the other side has strongly relied on it).*
- *Eschew footnotes—meaning that judicial readers often skip their content and wonder why the point is placed outside the body of the argument.*

5. Avoid Ad Hominem Attacks and Language

In writing motions and presenting oral argument, you must never give the impression to the court that it is personal. Thus, you are to avoid ad hominem attacks and language, i.e., keep the arguments focused on the issues and not opposing counsel or the court.

Particularly when opposing counsel is quite annoying, you absolutely must refrain from personalizing the briefing and argument. Remember, that most judges lack the information and often desire to referee personal disputes between counsel. It's like the Godfather—it's business, not personal.

6. Argue to Win

While it is probably true that oral argument does not change the judge's mind in a high percentage of cases, you still want oral argument (i.e., rarely waive it) to see if you can change any predisposition that might be directed against your client's position. Thus, the most important rule for oral argument is to **listen to the judge** because that is who is going to decide the motion and what he or she cares about. Answering the judge's questions is the only thing that matters.

In this regard, do not rehash your papers or recite platitudes that are not directly responsive to the judge's concerns. Triage at argument to your most persuasive point, but go wherever the judge takes you. If you cite to a court decision, be prepared to advise the court of the facts of that case and address any adverse aspects of its holding.

7. Never Squander Credibility

Whether as a macro (your career) or a micro (this briefing and argument) your credibility is precious and can never be squandered. The cases you present must say what you say they say. By the same token, exaggeration or overreaching is your enemy.

The moment the judge or reader of your briefs distrusts even the smallest of points, that lack of credibility infects everything. Be a strong advocate but make arguments and present authorities that are credible. When I started my career as a judicial law clerk, on my first day on the job, the judge warned me that briefs from one particular firm simply could not be trusted and all cases cited must be read. That was a kiss of reputational death you absolutely must avoid.

Authority you can trust, James M. Wagstaffe

Renowned author James M. Wagstaffe is a preeminent litigator, law professor and expert on pretrial federal civil procedure. He has authored and co-authored a number of publications, including *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, which includes embedded videos directly within the content on Lexis Advance. As one of the nation's top authorities on federal civil procedure, Jim has been responsible for the development and delivery of federal law, and regularly educates federal judges and their respective clerk staffs. Jim also currently serves as the Chair of the Federal Judicial Center Foundation Board—a position appointed by the Chief Justice of the United States Supreme Court.

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