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Seven Habits for Effective Law & Motion Practice

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Intellectually challenging and emotionally stimulating, motion practice is the most common courtroom experience in a legal services practice. Most civil actions involve several pre-trial motions — from seeking preliminary injunctive relief to requesting discovery sanctions. And more civil cases are decided on the merits by motions — such as motions to dismiss or for summary judgment — than by trial.

At its most basic, a motion is a request for an order. Most procedural laws and rules require that pre-trial motions—
- be set for a court hearing,
- be written,
- be supported by memoranda of law,
- be supported by written testimony where facts must be proved,
- include a proposed order.

The usual scenario goes something like this: After preparing written papers, counsel arranges for a hearing date, files the papers with the court and serves them on opposing parties. Opposing party prepares its response, files its papers with the court and serves them on the moving party. In many courts, the moving party may file a reply brief in response to opposing party papers.

Most courts provide an opportunity for an oral hearing on the motion — where counsel may argue, explain and answer questions. Oral argument usually is heard in open court along with other motions calendared for that day. Sometimes motions may be heard in the judge's chambers. In many jurisdictions, the court may decide a motion without oral argument or by telephone conference call.

In some courts, such as the federal district courts, one judge presides over a case for all purposes — from its filing through its final disposition. Federal courts employ magistrate judges who hear discovery motions and other matters as the judge or court rules direct. In other courts, including many state courts, the judge who decides motions may not be the judge who presides over settlement or trial in a case. In larger jurisdictions, such as Los Angeles and San Francisco, judges sitting in law and motion departments decide motions only.

The Seven Habits

Judges have much to say on what constitutes good law and motion practice. Here, culled from judge standing orders, court rules and writings, are the seven habits for effective law and motion practice.

1. **Know the Rules.**
2. **Know Your Judge.**
3. **Know Your Opponent.**
4. **Write Effectively.**
5. **Prepare for Oral Argument.**
6. **Practice!**
7. **Make Your Oral Argument Count.**

Habit One: Know the Rules

When making or responding to a motion, the first thing to do is to read the rules — rules of civil procedure, court rules, and standing orders of the judge who will decide the motion.

And then read them again.

Rules of Civil Procedure
Federal Rules of Civil Procedure (FRCP) and their state equivalents delineate the basic procedures for civil litigation. These rules are either statutes enacted by legislative bodies or rules issued by a jurisdiction's highest court.

28 U.S.C. § 2072 authorizes the Supreme Court to prescribe rules of procedure for federal district courts. The Federal Rules also serve as models for state civil procedure rules. A few states have adopted the FRCP outright; several other states have adapted federal rules to state practice.

Civil procedure rules governing motions include the types of motions that may be brought, the grounds upon which they may be brought, who may bring them and how they may be brought including timing and amount of notice required.

Court rules
Many courts — from the highest appellate court to the first level trial court — issue rules to regulate their practices and procedures. These rules must be consistent with other laws and rules of civil procedure.

Court rules specify in more detail how a motion may be brought. Court rules regulate motions in areas such as form and format of legal memoranda, declarations and exhibits; notice requirements; motion hearing procedures; and stipulations.

Standing Orders
Most federal and some state judges have standing orders or procedures that govern matters in their court rooms not covered by civil procedure rules or other court rules. These can include rules on dates for setting motions, continuances on motion hearings, and special procedures for discovery motions.

Look out for unwritten customs and courtesies that operate as rules. Although you can't be subjected to sanctions for violating these unwritten "how we do things around here," deciphering what's expected from you is time well spent.

Trends
• More and more courts are requiring parties to meet and confer before filing any formal motions.

• In lieu of formal motions to compel, some federal judges require parties to meet and confer in person and to submit a joint letter to the court specifying disagreements.

• Almost no motion is truly ex parte; all courts require some sort of notice to all parties affected by the motion.

• Most courts allow motions to be served and filed electronically; some require it.

• Many courts are allowing telephone and video appearances on motions. To facilitate the process, federal and state courts in California and other states including Florida, Hawaii, Illinois, Indiana, Louisiana, Maryland, Mississippi, New Jersey, New Mexico, New York, Oregon Texas, Utah, Washington and West Virginia use the private vendor, CourtCall. Court Call's **Participating Courts List** is updated monthly and posted on its web site. http://www.courtcall.com/ccallp/main?c=CCHOME

Federal Courts
Federal Rules of Civil Procedure 7, 10, I1, and 12 set forth the form, content, and types of federal court motions. Rules that cover particular motions include Rule 37 (Discovery Motions), Rule 55 (Setting Aside Defaults), Rule 56 (Summary Judgment), and Rule 65 (Injunctions). FRCP with Advisory Committee Notes http://www.law.cornell.edu/rules/frcp/overview.htm

FRCP 83 authorizes federal courts to prescribe rules for the conduct of their business. These local rules must be consistent with federal law and the federal rules of practice and procedure. 28 U.S.C. § 2071(a).

All 94 federal districts have local rules governing motion practice in their courts. Links to all of the courts are found on the U.S. Courts web site at http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-

website-links You can find the local rules on each court's website.

All local rules must conform to a uniform numbering system based on the most relevant Federal Rule of Civil Procedure. For example, all local rules dealing with Rule 7: Form of Motions should be numbered 7 -, those with Rule 65: lnjunctions, 65 -. As you might guess, this system is far from exact science; courts differ as to where they list the rules. To be safe, check all rules that could be relevant to the motion at hand.

Federal Courts in California
Each of the four federal district courts in California has a web site where you can find court rules and judges' standing orders or Chamber's Rules.

• Central District
L.R. 7-1 through 7-20; 36, 37, 56, 65
www.cacd.uscourts.gov
Local Rules; Judges' Procedures and Schedules

• Eastern District
L.R. 7-130 and 78-230; 37-251, 50-291, 56-260, 59-291.
www.caed.uscourts.gov
Local Rules

• Northern District
Civil L.R. 7-1 through 7-13; 37, 56, 65
www.cand.uscourts.gov
Rules; Judges

• Southern District
CivLR 7.1; 26.1
www.casd.uscourts.gov
Rules — Local Rules; Chambers' Rules

Federal Practice Manual For Legal Aid Attorneys (updated 2015)
http://federalpracticemanual.org/
contains a chapter on Motion Practice in federal court. http://federalpracticemanual.org/node/35

State Courts
Less uniform than federal system, more and more state court systems have formalized the rules for pre-trial motion sessions. Each state has Rules of Civil Procedure; some states have additional court rules. Often separate sets of rules exist for particular categories of cases such as family, probate or domestic violence matters.

Find Court Rules, Forms and Dockets for all Federal and State Courts here:
http://www.llrx.com/courtrules

Cornell Legal Information Institute links to each state civil procedure rules at
https://www.law.cornell.edu/wex/table_civil_procedure

California
Rules governing motion practice in California include California Code of Civil Procedure, California Rules of Court, and local court rules in each of California's 58 county court systems.

California Code of Civil Procedure
Code of Civil Procedure §§ 1003 - 1020 govern motion orders, notices, filing and serving requirements. Code of Civil Procedure also sets forth the grounds for substantive rules affecting motions, such as § 418.10 (quash service of summons), §§ 430.10, 430.30 (demurrer), §§ 435- 437 (strike), § 437c (summary judgment), §473 (setting aside defaults), and §§ 2016.010 et seq. (discovery).

California Rules of Court
California Rules of Court govern —
• specifics of motion form, format and filing (3.1110-3.1302) including points and authorities (3.1113), and hearing procedures (3.1304-3.1308) for all motions.

• the requirements of the following motions in more particularity:
- pleading (3.1320-3.1382);
- discovery (3.1000-3.1030);
- summary judgment (3.1350-3.1354);
- writs and receivers (3.1140, 3.1142);
- injunctions (3.1150-3.1153); and
- miscellaneous motions (3.1360-3.1384).

• requirements for ex parte applications and orders (3.1200-3.1207), bonds and undertakings (3.1130), default judgments (3.1800), and preparation of orders (3.1312).

California is serious about parties adhering to its court rules. California Rule of Court 2.30 provides sanctions for failing to follow the rules. They include "reasonable monetary sanctions" including attorney fees and costs. Sanctions may be imposed only upon notice and opportunity to be heard. Either a party or the court may move for sanctions.

Find the California Rules of Court at http://www.courts.ca.gov/rules.htm

Local Court Rules
Each of the 58 court systems in California has local court rules.

All local rules relating to pleadings, demurrers, ex parte applications, motions, discovery, provisional remedies, and form and format of papers have been preempted by the California Rules of Court. California Rule of Court 3.20.

But wait! Local rules still operate in law and motion matters in areas where California Court Rules either are silent or direct trial courts to issue local rules. For example, local rules govern areas such as:

• procedures for setting motion hearings

• where motions should be filed and heard

• number of copies of documents that must be submitted to the court

• availability of telephone conferences for oral argument

• procedure for tentative rulings — preliminary rulings made available to counsel before the motion hearing

Rules on tentative rulings ("tentatives") illustrate the relationship between the California Rules and local rules and why you must be familiar with them. California Rule of Court 3.1308 allows local courts that use tentative rulings to choose one of two procedures.

Rule 3.1308(a)(1) requires the court to issue its tentative ruling no later than 3:00 p.m. the court day before the hearing. After considering the tentative ruling, if either party wishes to appear and argue the motion, that party must give notice of its intent to all parties and the court by 4 p.m. the day before the hearing. The tentative ruling becomes the court's ruling if notice to appear has not been given.

The second option, set out in 3.1308(a)(2), does not require that parties give notice to appear. Under this procedure, the tentative ruling becomes final at the hearing.
Rule 3.1308(b) directs that local courts may not use any tentative ruling system other than the two described above. Rule 3.1308(b) does allow local courts to post tentative rulings on motion hearing day or announce them at oral argument.

Each court's website contains local court rules. These websites can be found via the California Judicial Council site
http://www.courts.ca.gov/6168.htm

Standing Orders
Besides the local rules, make sure that you obtain any standing orders that govern motion practice in the hearing judge's courtroom. These orders must be consistent with California and local court rules. They should be available from the judge's staff and are sometimes posted on the court website.

Habit Two: Know Your Judge

Motion judges must reach correct legal decisions, yet have enormous substantive and procedural discretion. You should research the judge as vigorously as you research the law. It's a task that can pay great dividends.

Know your judges; know their predilections. Try to determine what they look for, are bothered by. Some judges have unusual procedural preferences; some are likely to entertain certain arguments more readily than others. Look for case specific knowledge, unearth potential biases and assess the court's flexibility.

Forum shopping is not unethical and failing to do so may be fatal. Some judges, for example,

are philosophically adverse to civil rights claims or low-income people's rights in general.

Sometimes you must make the difficult decision to disqualify the judge. All courts have a procedure to disqualify judges for cause. *See*, for example, California Code of Civil Procedure § 170 *et seq.*

Most courts also allow peremptory challenges—a procedure that permits parties to change the judge assigned to a case once as a matter of right. *See*, for example, California Code of Civil Procedure § 170.6. Sometimes this procedure is referred to as "affidaviting a judge," *i.e.*, filing the affidavit that states that you wish to change the judge."

In researching your judge:
1. Check out the judge with your colleagues.
There's good information within your program and the greater legal services community. A program wide e-mail or e-mail to a list-serv can produce some useful information. Several of our lawyers have been law clerks, interns or research attorneys and have seen how judges decide motions up close and personal.

2. Read judicial profiles.
Judicial profiles can be found on web sites and other print resources.
• Google the judge

• Court Web Sites
Many courts have biographies and sometimes court opinions written by their judges. Short biographies of federal judges are found at the Federal Judicial Center web site
http://www.fjc.gov/public/home.nsf/hisj

• Bar Association Web Sites
Many local and specialty bar associations have judicial profiles on their web sites. To access them, you usually have to join the association. This is well worth the price.

Any search engine should turn up local bar association web sites. Local and state bar association web sites are also listed at
http://california.lp.findlaw.com/ca03_associations/cabar.html

• General Research Guides
Guides on how to find biographical information on judges on the web and in print include:

- Law Library Resource Xchange
http://www.llrx.com/columns/reference29.htm

- *California Courts and Judges* by Deborah Bogen, Mark Thompson and Elizabeth Smith
http://www.jamespublishing.com/books/cj.htm

• Legal Newspapers
Check to see if your office subscribes.

- LA/SF Daily Journal
http://www.dailyjournal.com/

- The Recorder (Northern California)
http://www.therecorder.com/

3. Attend (at least one) motion hearing.
By far the best way to get a feel for how a judge hears motions is to observe a motion session.

4. Ask the judge's staff
Reliable information sources on judge likes and dislikes about procedure and oral argument are their staff members. Introduce yourself to these folks. The secretary, court clerk, law clerk, research attorney, courtroom deputy, and court reporter each have certain expertise that you can tap into. When approached respectfully as peers, most will offer helpful insight.

Habit Three: Know Your Opposition

Knowing your opposition is also important. Any insight that allows you to anticipate arguments countering your position will help. Once you understand your opponent, you are in a better position to develop more persuasive papers and oral presentations.

1. Check out your opposing counsel with your colleagues.
As with judges, people within your program and the greater legal services community may have experience with opposing counsel. A program wide e-mail or e-mail to a list-serv can produce

some useful information.

2. Read attorney profiles.
Attorney profiles can be found on web sites and other print resources. Find out basic information about your opponent and whether discipline charges have ever been filed against them at state bar web sites. Many sites are open to the public. Google.

Link to all state bars in the United States at http://shop.americanbar.org/ebus/ABAGroups/DivisionforBarServices/BarAssociationDirectories/StateLocalBarAssociations.aspx

State Bar of California lists members at http://members.calbar.ca.gov/search/member.aspx

LexisNexis has "CourtLink Strategic Profiles" that allow you to find out about a public company's litigation history, attorney experience on a particular nature or suit as well as compile judicial profiles.
http://www.lexisnexis.com/courtlink/online/strategicprofiles.asp

Habit Four: Write Effectively

In motion practice, just as in trial, the key to success is thorough preparation. In effect, most motions are won long before they are argued; they are won by careful and thoughtful preparation and planning.

Persuasive writing is a veritable topic unto itself. Nevertheless, we couldn't resist listing some tips ripped from the rules and standing orders of practicing judges.

General Writing
1. Brevity is best. To this end, many courts impose page limitations. Writing is labor intensive; take time to write beyond the first draft. Consider Blaise Pascal (1623-1662), French scientist, philosopher, who in *Lettres Provinciales*, letter 16 (1657) wrote:
"I have only made this [letter] longer because I have not had the time to make it shorter."

2. Begin with what you want and why you should get it. Your very first words should inform and persuade and assure the judge that it will be worthwhile to read what follows.

3. Follow the rules of primacy and recency — people remember best what they read first and last. Lead with your strongest argument. Sandwich your weakest points in the middle. Conclude with your strongest argument.

4. Check all citations and verify the validity of the decisions relied on. Avoid string citations.

5. Include the facts and a quote from significant cases. Explain the context upon which cited cases have come before the court.

6. Be candid; address difficult issues head on. Cite adverse authority and explain why it does not support a ruling against you. Never mislead the court.

7. Avoid invective and vituperation — argument advances your case far less than exposition and analysis. Adjectives and adverbs, other than those having independent legal significance, do not make a brief persuasive; avoid them.

Responding Papers
8. In responding papers, try to follow your opponent's organization. Often, briefs are read horizontally, compared issue by issue instead of on separate readings of moving papers, opposition and reply briefs. Poorly organized moving papers however, present a challenge and may force you to deviate from this practice.

Declarations
9. Affidavits are written declarations under oath, sworn before an officer usually a notary public. Declarations are statements in which a declarant recites that the statement is made under penalty of perjury. In most courts, they are used interchangeably. Check the court rules.

10. Any time you must prove facts to support your motion or opposition, you must include declarations. Applications for temporary restraining orders, motions for preliminary injunctions, motions to quash, motions to set aside defaults are examples of motions that require factual showings.

11. Think of declarations as live testimony in writing. Rarely, and only with good cause, will you be able to introduce oral testimony at motion hearings. If the evidence you need to support a motion is not in the declaration; it does not exist for the court.

12. Make sure that declarations are properly executed — signed and dated.

13. Follow the evidence rules. Declaration contents must meet the same test of admissibility as live testimony. If the evidence would be inadmissible on the witness stand, it cannot be considered in a declaration. Court rules require that you object to inadmissible evidence in writing.

14. Declarations are not kitchen sinks. Include only evidentiary facts that support your factual contentions. Conclusions, inadmissible opinion and ultimate facts should not be included.

15. Use the declarant's words and voice. Write as you imagine your declarant testifying on the witness stand. It's more persuasive and accurate. Exhibits written in a foreign language should be accompanied by an English translation, certified under oath by a qualified interpreter.

Exhibits

16. Exhibits include documentary exhibits such as contracts, leases and photographs; deposition testimony; interrogatories; and court opinions and statutes from other states and countries.

17. Court rules detail how exhibits must be presented, *e.g.*, separated by hard-paper dividers that are tabbed at the bottom and indexed. Follow them.

18. Go beyond the court rules to make it easy for the court to get your point. Using color-coded tabs, colored markers to highlight certain issues make voluminous or lengthy exhibits comprehensible. If you're nervous about doing something creative, check with the appropriate member of the judge's staff.

Habit Five: Prepare for Oral Argument

Effective oral arguments—
-Get to the heart of the matter quickly
-Convey their points succinctly
-Are structured around key facts
-Deal with tough issues candidly
-Are energetically delivered

Your oral argument should be designed with the same care and precision that went into drafting your moving papers. Keep in mind that most courts have time limits for argument, and judges, like the rest of us, have limited attention spans.

For every argument, you should prepare a short set piece that frames the case in the light most favorable to your client and hits the most important issues for the judge to decide. It should not rehash your papers.

Over time, all of us develop our own approach to preparing for oral argument. Here's one way we've found to be helpful:

1. Answer these questions:

• Are any arguments in favor or against the motion omitted from the memoranda?

• Is new evidence available or needed?

• What points in your own papers need to be highlighted?

• What points in the opponent's documents are easily or surely refutable?

• What reasons might give the judge difficulty in reaching a favorable conclusion?

• Are there points of compromise that might be suggested if the judge seems to be leaning the other way? Construct a variety of fallback positions and plan when you might introduce them.

2. Play the devil's advocate.
Attack your argument as you believe a skilled opponent would. Pull no punches. If you find weak spots, expect your opponent to find them too. Don't ignore weaknesses — embrace them. Find the law or the facts that help lessen weaknesses and work them into your argument until you're satisfied it can withstand the tough questions and attacks sure to come. This exercise takes time and energy, but it is far better to recognize a flaw in your argument when you still have an opportunity to fix it than on law and motion day in front of the judge.

3. Be the judge.
Analyze the case from the judge's perspective. Focus on the judge's concerns given his or her predilections on the issues. Use your past experiences as well as your research on the judge.

4. Outline your argument.
From the information above, organize your key points. Put the most important points at the beginning.

5. Prepare your first moments so that the judge knows: (1) whom you represent, (2) what it is you want, and (3) why it would be unjust not to give it to you.

6. Prepare a demonstrative exhibit when it can simplify issues or persuade better than words. In our multimedia age, people are conditioned to accept and welcome visual aids as effective communication tools. Judges are no different. If you have a demonstrative exhibit that illustrates your point, don't be afraid to use it.

7. Index your own case-file for ready reference during the hearing on the motions.

8. Tab portions of declarations or exhibits documents to which reference may be necessary.
Mention of a statute or case should include the page where the judge can find the citation in the motion or opposition papers.

9. Always obtain advance approval to submit additional factual and/or legal information after the hearing.

10. If you need a written record, arrange for a court reporter. Ordinarily, no transcript will be made of oral argument motion unless a party arranges before the hearing for a court reporter to be present.

Habit Six: Practice!

Your mother said it and so do we — practice makes perfect.

Memorize your first moments — who you represent, what you want, and why it would be unjust not to give it to you. Memorize your concluding moments — who you represent, what you want, and why it would be unjust not to give it to you.

Don't memorize the rest of your presentation. Rehearse it using notes. Rehearsal helps anchor your presentation in memory. Research on how people learn and common sense says that your delivery improves each time you repeat it.

It's best to practice your set presentation out loud to the mirror or better yet, to a live person or group. Many legal services programs moot court appellate arguments and complex law and motion matters. We suggest you do it in any event, no matter how simple, if you go to court infrequently or you're new at argument. If you do, we promise that you will perform better at the actual event and improve your skills for the next time.

Mental rehearsal or practicing in your mind is also very powerful. All types of athletes and performers have been doing it for years. Envision the setting where you will argue your motion in as much detail as possible. Engage all your senses: "see," "hear," "taste," and "smell" what's going on. Hear yourself making your argument, feel yourself skillfully handling the judge's questions, see yourself dealing well with your opponent.

Practice builds confidence. And who knows? You may grow to enjoy, even relish oral argument.

Habit Seven: Make Your Oral Argument Count

Oral argument is your opportunity to persuade the judge to decide the motion in your client's favor. It also permits you to see how the judge and opposing counsel perceive particular aspects of the case, and to clear up any confusion and misconception.

Each judge has preferences for what they like in oral argument. That's why researching the judge is so important. Pay special attention to any preliminary or "tentative" ruling since it flags the issues the judge is interested in. Some judges don't use them. Judges who do may issue them anywhere from days before the hearing to the beginning of the hearing itself. Check the court rules for the court's procedure.

Customs and Protocol

• Know the court's customs and protocol, how the motion calendar works — from the check-in procedure to announcing appearances. Each court has its own procedure; this is where your research on customs and rituals pays off.

• Arrive early. Check in with the clerk as soon as possible. Have your business cards ready. Make sure that the court's case file contains your papers along with any other relevant pleading and/or papers.

• Bring copies of your papers as back-up — just in case.

• Seek out opposing counsel. Use this time to find out what you can about them, their style, their argument.

• Give counsel copies of any papers you will present to the court. This courtesy avoids passing reams of paper during argument, disrupting your flow and triggering the judge's suggestion that opposing counsel might need some time to review your "surprise." A better practice is notifying the court and other side about anything you are offering at the hearing. Most court rules require it; if you find no court rule, ask the judge's staff. If opposing counsel presents you with such surprises, ask for time to review, or invoke any court rule or rule of fairness to ask for a continuance.

• Be familiar with calendar call practices. First call usually constitutes "taking attendance." Second call may ask for a time estimate. Be honest and realistic; make sure you've researched what the court considers a "realistic" time allotment. A packed calendar and judicial temperament may mean that 15 minutes is reserved only for the most complex cases.

• If opposing counsel has not appeared, try calling them as a matter of courtesy and tactics. Most judges will ask you if you've done so. Saying yes can only enhance your reputation as courteous and professional.

• Try not to be the first one on the calendar .You can use that time to observe the judge's style, see how well the judge is prepared, and whether the court relies more on the papers or on oral argument.

Argument Begins

• When the matter is called, approach counsel table. If there are "moving party" and "responding party" designations, be sure you're standing behind the right one.

• Address the person behind the bench as "your honor," not "Judge," and never "you."

• Introduce yourself. Tell the judge who you are, who you represent and their status as moving or responding party: *Good morning, your honor, Ramona Rivera for the moving party and defendant, Jack Davis.*

Beginning Scenario Number 1
The court may begin with a series of procedural questions such as:

• Who are the parties and their attorneys?

• Have all parties been served?

• Has an at-issue memorandum or certificate of readiness been filed? What is the status of a trial setting, settlement, or pretrial conference? Is the case set for trial?

• Does the order sought affect the case's procedural status?

• Have all court rules applicable to the motion been complied with?

• Have all proofs of service and declarations or affidavits been properly executed?

• Has discovery been completed or is case within 30 days of trial?

• Is there any reason such as other motions, trial setting, settlement conference why the file or any part of it may be unavailable to the court?

Beginning Scenario Number 2
The court says, "Counsel, proceed."
• The judge may have just heard 15 motions to compel, so your first few sentences must convey the legal remedy that you want and the practical effect an incorrect ruling will have on the parties and the court.

• Give context — who is suing whom for what -- to provide succinct factual perspective, especially when the judge must assess factual relevancy, *e.g*., discovery sanctions. If the fact pattern is especially complex, remember that the judge is probably hearing the case for the first time. Most judges in that position would welcome a demonstrative aid that graphically sets out the context which the judge must understand in order to determine the appropriateness of the relief requested.

• Even if it is not your motion, you might seize the opportunity to speak first if you represent plaintiff in order to put the judge in factual perspective.

• Controlling the issue and framing it in a light most favorable to your client is often the key to victory. Limit your argument to the heart of the matter. Hit your high points first, since you may not have time to address the others.

• Deal with adverse authority or whatever you believe to be obstacles to ruling in your favor.

• Don't overstate your case.

• Don't concede a good point.

• Don't raise, at least orally, weak or inconsequential arguments that detract from your main arguments.

• Let the judge indicate what she or he wants next. Again this is where your research and observation will payoff.

• Very often in motion session less is more. Judges appreciate counsel who indicate that they have "X" points to make, who then make those points briefly, and who then sit down.

• If facts favorable to the relief you seek have emotional content, a little emotion, if not overdone, shouldn't hurt. A legitimate critique is that an argument displayed much organization but little energy.

Beginning Scenario Number 3
The court says, "Counsel, I have some questions."
Whether the judge begins the hearing with questions or interrupts within a minute or two after you've begun:

• Be flexible, prepared to answer questions when they are asked, and ready to shift to issues that the judge wants discussed.

• When the judge interrupts, don't put him or her off. Listen carefully. Respond and turn into the judge's skid to regain control if the judge has taken it away from you.

• "I'11 get to that point a little later" is insulting. Instead, consider why the judge is asking that question. Often the judge is trying to telegraph the point you need to convince them on.

• Evasive answers signal that you're afraid of your case. If you're faced with a tough question, answer it. A damaging, but short, response with a cogent explanation is better than a long-winded, nonresponsive answer.

• Argue your case; don't argue with the judge. Arguing your case is how you win your motion; arguing with the judge is how you lose it.

Beginning Scenario Number 4
The court has issued a tentative ruling.

• If the tentative ruling is against you, consider respectfully asking the court for the basis of its ruling. Then respond to the court's concerns. *"Your honor, may I inquire about the basis of the court's ruling on …"?*

• If you think you can get vital information or evidence that would change the tentative, ask for a short continuance.

• If the tentative ruling is in your favor, respectfully greet the court and reiterate why the court's tentative ruling is well taken.

• Listen! Don't snatch defeat from the jaws of victory. Pay close attention to the judge's reaction to opposing counsel's argument. Often through words, questions, or tone judges will indicate that they are persuaded by your argument or that your opponent has failed to persuade. Close your mouth and leave well enough alone.

Credibility with the Judge
• Appear reasonable and willing to compromise. This will impress most judges and go a long way to judicial discretion being exercised in your favor.

• Avoid sarcasm or any demeanor disrespectful to the judge, opposing counsel, or courtroom personnel.

• Show respect without undue deference.

• Look for receptive nonverbal postures and reinforce the points that stimulated them. Show open, receptive nonverbal postures.

• Avoid looking "up to" the judge by keeping your distance during interactions with the bench.

• Use plain and direct language. Legal jargon, while sometimes necessary, is not compelling. And your well-reasoned argument won't persuade the judge if he or she can't find the way out of your grammatical labyrinth.

• Do not interrupt the judge. This bears repeating. Do not interrupt the judge

• Any reference to the judge, especially when challenging his or her authority, should be impersonal, *e.g.*, "Your honor, respectfully, the court lacks jurisdiction here."

• Don't interject your personal opinions.

• Maintain eye contact with the judge; don't read your notes verbatim.

Opposing Counsel
• Don't interrupt opposing counsel even if he or she is playing fast and loose with the facts or law — bite your tongue.

• Don't engage in colloquy or argument with opposing counsel, it usually appears childish.

• Most judges have a bias in favor of permitting a party to have his or her say in court.

Candor
• Be candid about any fact and/or law problems you have. Don't be afraid to concede a point or two on occasion.

• Bring up problems in your case first, *i.e.*, defusing them in advance always undercuts opposing counsel's use of those problems against you.

• Do not state half-truths. If, for example, after you mailed a notice and it was returned with the notation "no such address," don't omit that it was returned.

Concluding Your Argument
• Conclude on a high note. If appropriate, offer to provide any assistance, such as a supplemental memorandum of law, which the judge might require to facilitate decision-making.

• Know the court rules concerning notice and recording of the court's rulings

• Prepare and offer a proposed order even if not required by court rules.

• In most instances, a judge will either decide your motion on the spot or by the day's end. Motions taken under submission or advisement are usually decided in a week or so. If two or three weeks go by without a decision, telephone the session clerk to make a gentle inquiry.

• Court rules usually direct that motions for rehearing and reconsideration be brought before the judge who made the decision. However, some judges are generally unwilling to rehear and/or reconsider and an inquiry to the clerk may save you time and effort better allocated to an appeal.

Professionalism
Finally, advice from "Arguing Motions Effectively," *California Lawyer (October 2002):*

"No matter how meticulously planned your argument, no matter how confident your attitude, you run a high risk of failure if you lack credibility, honesty, or professionalism. Honesty is the currency with which you purchase credibility. Credibility is perhaps the lawyer's greatest asset in attempting to persuade. Professional conduct should be manifest in every action a lawyer takes, both inside and outside the courtroom — our oath demands it, and our clients benefit from it. A succinct, well-founded argument, persuasively conveyed with credibility, honesty, and professionalism, will more often than not carry the day as well as well as the motion."

We couldn't have said it better.

Other Resources

Ten Tips for Presenting Better Oral Argument by Judge Loren McMaster
Sacramento Civil Law & Motion Notes March / April 2005
Judge McMaster addresses his ten tips to the situation when you receive an unfavorable tentative ruling and are convinced that you stand a good chance of having the tentative reversed.

1. Be concise.
2. Have a plan.
3. Avoid needless banter.
4. Welcome (and don't avoid) questions from the Bench.
5. Disagreement is okay.
6. Do not lose credibility.
7. Avoid ad hominem attacks.
8. Comments to avoid.
9. Do not whine.
10. Be aware of your body language.

Rule 1: When the Judge Agrees With You, Stop Talking by Bruce Carton (October 22, 2009)
http://goo.gl/FSJ5EE