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PERSPECTIVE

Killer Motion Practice
Part 1

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Of course, actually winning the motion is the main goal, and it may have strategic importance to the case. But motion practice is also a valuable opportunity for lawyers to educate the court about their case and their client, to build their credibility, and their client's credibility with the court, and to set up helpful themes.

Way too often, I see otherwise excellent lawyers squander their time, their client's money, and most importantly, the credibility of their client and their own credibility, with weak performance on motion practice. Viewing motion practice so narrowly is shortsighted. Of course, actually winning the motion is the main goal, and it may have strategic importance to the case. But motion practice is also a valuable opportunity for lawyers to educate the court about their case and their client, to build their credibility, and their client's credibility with the court, and to set up helpful themes. On occasion, it may reveal the disingenuousness or dishonesty of the adverse party or lawyers which can become a powerful theme in itself. Ineffective motion practice can cost a client far more than the subject of the lost motion.

Truly effective motion practice is not difficult. It requires careful planning and a good measure of judgment. This article shares some "best practices" for motion practice, which apply whether it's a dispositive, procedural, discovery or any other motion or application for relief.

Setting Up the Dispute

Not all disputes should be pursued, but some are critical. Motions for summary judgment, motions to compel the discovery of key evidence, and Rule 12 motions, are all examples of issues whose resolution would likely and materially advance the case. Other issues, like setting a briefing schedule, can and should usually be worked out between counsel to the extent possible, and presented to the court as resolved. These are generalizations, but when approaching this issue, counsel should ask themselves whether they truly have a good basis for their position, or whether the issue is one that should be worked out. Courts appreciate counsel that resolve most litigation disputes on their own. And even when that proves impossible, evidence of serious meet and confer efforts makes it less likely that the court will declare "pox on both houses."

Several factors play into whether or not an issue is a "good" one for motion practice.

• Counsel should consider whether bringing the motion will highlight the client's own similar or worse conduct, or whether the relief being sought is something the client would not want to have to do on its side. In this situations, it might be better to pursue a negotiated result.

• Thorough research is important to fully understanding the legal merits of the dispute. Is the law supporting the position truly on point, or is the authority being stretched beyond reason? Creative arguments for the extension of existing law are wonderful until they make counsel and client look shady and/or desperate.

• Common sense and good judgment should be applied. If one must argue prejudice will occur if the relief is denied, will there really be prejudice that cannot otherwise be addressed? Is there some creative solution that the parties can agree upon to resolve or narrow the dispute?

• Also, there might be some other motion that would be better to bring. Choosing wisely may demonstrate that your client does not just move for or oppose everything, but in fact makes reasonable arguments where it is appropriate to do so.

Sometimes clients are keen to press a dispute despite having a weak position. Here patient counseling skills can go a long way. The client should be made aware of the merits of the motion, but also should understand where the motion stands among other opportunities in the case. For example, if there are multiple theoretical defenses to the pleadings, by explaining each one and how the facts of the case apply (or not), the client can understand why one defense is stronger and should be pursued, and others are weaker and will make her appear desperate or lose credibility. Sometimes the client's legal position will strengthen over time, in which case counsel might explain why it is beneficial to wait — for example, to gather more information or evidence before bringing a motion for sanctions.

If a client still insists on pursuing a motion (or opposition) that counsel believes would have been better to concede, compromise or delay, counsel can mitigate the damage by giving some thought to how to position the motion or opposition. For example, recently, a foreign opponent who had received actual notice of our lawsuit many times over vigorously opposed a Rule 4(f)(3) motion for alternative service in a way that was counterproductive to its interests. While actually citing to

our complaint, this litigant made arguments contrary to 9th Circuit law, and maligned me and our clients personally, both of which ultimately helped to show why alternative service was very necessary. The aggressive tone of the opposition briefing also supported the allegations we have made against that party in the case and therefore advanced our theme.

Meeting and Conferring

I cannot overemphasize the importance of the meet and confer process. Not only do courts want to see serious and legitimate efforts to resolve the issue out of court, but proper meeting and conferring can narrow or resolve the dispute, or clarify the dispute and improve the quality of the briefing.

As the moving party, I usually prepare a thoughtful and fairly detailed pre-meet and confer letter that takes a fair shot at actually convincing the opponent of the error of his ways. I will also try to provide a reasonable period for counsel to develop a response (say, a week) and offer an ample time range for meeting and conferring (a two-day open window). Putting opposing counsel on fair notice of the issue makes it more likely I will learn about their actual opposition points. The open window makes it difficult for them to avoid meeting and conferring in a timely way. It also shows the court that we honestly tried to resolve the issue, including giving the other side ample opportunity to prepare.

Counsel may insist on writing a response letter before meeting and conferring. I generally want to see the opponent's position in writing, but an extended letter writing campaign just wastes time. Offering a large window of time to meet and confer right after the response letter can move things along because opposing counsel cannot suggest she is unprepared to meet and confer. Where moving counsel can show that non-movant's counsel has delayed or become unresponsive despite having plenty of opportunity to meaningfully engage, she may be able to bring the motion without meeting and conferring. Before doing so, I will still apprise the opponent that I plan to proceed, in a last effort to force the meet and confer.

The meet and confer itself is not just a box-check, although many lawyers seem to treat it that way. Talking through the issues may be the best opportunity to understand the opponent's position, even after receiving a response letter. The response sometimes suggests the parties are somehow misunderstanding, or missing, each other, in which case the meet-and-confer can be an opportunity to clarify their positions. The written response may also reveal a weakness or strength in one's own position, which can then be used at the meet and confer to negotiate a resolution to part of the dispute and narrow the dispute's scope. Narrowing what is at issue often strengthens the motion, which is then focused on the more vigorously contested issues.

At the meet and confer, I try to discuss the merits of my client's position in detail, and take the time to counter my opponent's statements, testing the merits of both side's positions and revealing weaknesses or strengths in those positions. (Do not be dismayed if opposing counsel, who would prefer not to engage at that level, attacks you for this.) I also come prepared to narrow the requested relief where I can. By the time I bring or oppose the motion, my position should be as defensible as possible; if I have failed to narrow the scope of the dispute to something reasonable, the court may reject my position. By the same token, I propose reasonable solutions so if opposing counsel unreasonably resists, the resulting briefing will reveal that his client, not mine, is the problem.

Where opposing counsel is difficult, consider having meet and confers recorded by a court reporter, or suggest that the court order it. In one recent case, our court suggested this, and we approached these sessions as if preparing for a deposition. We elicited our opponent's unreasonable positions and proposed reasonable solutions for him to knock down. We then quoted his statements so effectively in the resulting briefing that eventually he was removed from that position on his team, which the court noticed and commented on. Over several months, that party's continuing pattern of resistance eventually demonstrated that it lacked support for its position in the case and paved the way for settlement.

Much can be learned at and from the meet and confer process, and smart counsel takes full advantage of these opportunities.

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