

HON. DAVID J. NEWBLATT *View from the Bench*

How to Convince the Judge on Motion Day in Family Court

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t is motion day in family court, and your client's motion is one of many on the judge's long docket. You have a good argument and need a ruling in your client's favor. You only have a few moments to communicate and advocate. How to convince the judge?

As a family court judge who has been on the bench for less than three years, I still vividly remember trying to persuade judges as an attorney. Perhaps I can give some perspective that can help counsel—and, ultimately, my colleagues on the bench.

Let me explain my motion day mindset. I realize that each decision I make fundamentally impacts families and children, so I want to make the right calls. This is a very heavy burden that I take very seriously. On motion day, it is not uncommon to have over 100 matters scheduled for a single day; a great many cases and very little time. I want to address each case effectively and efficiently. I try to isolate the issues, consider the merits, decide, and move on to the next case. I try to make the best decision possible. This encompasses two concepts: making the right de-

cision and maximizing the benefit to both sides to the extent possible. Also, I want to minimize hurt feelings and make everyone feel that his or her position was thoroughly considered. This is especially important in family court, where people are emotionally fragile and going through very difficult times. I try to be fair. I try to help people. I try to do it quickly.

Consequently, lawyers should appear on motion day with the following mindset: "What can I do to help the judge help my client?" "Help" is the operative word, and it means assisting the judge in making the right decision efficiently. I have a few suggestions as to how to do this.

FIRST, make it clear to the judge that you are focused solely on persuading him or her as the decision maker. This seems like an

obvious point, but I occasionally wonder whether lawyers even care if they are persuading me or not. Sometimes it appears that they are trying to put on a "show" for their clients or the gallery. Other times, it seems to be more important just to "one up" the opponent. Remember that advocacy is all about persuading the decision maker. Know your audience! Judges are trained and experienced. Judges will not be persuaded by gratuitous personal attacks. Hyperbole lost its effect long ago. We can tell baloney from substance and can tell whether you know the law and the facts. Talk to the judge at the judge's level.

SECOND, build and maintain your credibility as much as possible. Persuasion is as much about the messenger as it is about the message. In other words, you can perform like Shakespeare, Dickens, and Darrow all rolled into one, and still be ineffective in persuasion if you are not credible. I believe that a good reputation for credibility is one of the most important assets an attorney can have. It is established over your career, and it is on the line every day. Once it is tarnished, it is very difficult to rehabilitate it. Understand that the judge has an opinion about your credibility every time you argue. This consists of your reputation, the judge's prior experience with you, and how you are performing on a given day.

Credibility is maintained, in part, by not taking unrealistic positions. While ours is an adversarial system, this does not mean that you should ask for unreasonable relief. The judge can tell if you are seeking unfair relief and will regard your entire position with skepticism. For example, do not ask for an order changing custody on motion day based on inflammatory allegations made by counsel. Rather, acknowledge the judge's duty to first make a threshold determination and conduct a subsequent evidentiary hearing. If a judge sees you as fair, he or she will trust you and give more credence to your argument. This, of course, means that you must set realistic goals for your client ahead of time. Over-promising the client will ultimately cause you tremendous problems with both the judge and the client.

HOW TO HELP THE JUDGE HELP YOUR CLIENT:

- Make it clear to the judge that you are focused solely on persuading him or her as the decision maker.
- Build and maintain your credibility as much as possible.
- Be prepared, clear, and concise.
- As a general rule, do not argue contested facts.
- Be civil to everyone in the courtroom.



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Rather, you should look at it like this: solve the judge's problem for him or her. Understand that the judge wants to be fair and maximize the benefit to all litigants, and to do it quickly. If you can present a fair solution, the judge will latch onto it and work from it. Do not just unload problems on the judge and force him or her to piece them together. Be the first to provide an easy and fair solution, and the judge will probably use it as a framework for the ruling.

You should also volunteer weaknesses before they are revealed by the opposing side. If

they are coming out anyway, "steal the thunder" by disclosing them first and on your own terms. This is very impressive to a judge. On the other hand, if you wait, a judge may wonder what else you do not want him or her to know.

THIRD, be prepared, clear, and concise. Assume the judge has read the written submissions, but briefly frame the issue anyway. Make it clear up front what you are asking the judge to do, and then argue the merits, point by point. Make it as easy as possible to "get" the essence of your position quickly.

This will make it easier to then anticipate opposing counsel's response and respond to the judge's concerns. It helps tremendously to narrow the issues for the judge by stipulating with opposing counsel beforehand. This will both remove clutter to allow concentration on the main issue and also earn the judge's gratitude. Discovery disputes must be especially narrowly focused.

FOURTH, as a general rule, do not argue contested facts; rather, make offers of proof where appropriate. It is obvious that the judge usually has no ability to conduct an evidentiary hearing on motion day. Such attempts to argue facts during a motion reveal that the lawyer is inexperienced, trying to secure an unfair advantage, being unnecessarily confrontational, or trying to impress someone other than the judge. For instance, don't stand in open court and unnecessarily provide a laundry list of adultery, domestic violence, drug abuse, etc. It inflames the litigants, wastes time, and frustrates the judge. Rather, you should isolate relevant issues that require separate evidentiary fact finding and offer to prove a set of facts at such a hearing. Of course, if you offer proof, make sure that you can back it up. Avoid embarrassing allegations that are gratuitous.

Finally, be civil to everyone in the courtroom. I am listing this last because it is obvious, not because it is unimportant. Uncivil behavior is a tremendous barrier to convincing the judge on motion day, especially in family court where litigants are already emotionally fragile.

In sum, arguing motions in family court is a skill in and of itself. These suggestions give you an idea of what will impress the judge, which is all that matters to your client on motion day. ♦



Judge David J. Newblatt was appointed as Genesee County Probate Court Judge by Governor Jennifer Granholm in February 2004. In November 2004, he was elected to the Seventh Judicial Circuit Court, where he is assigned to the family division. Before his service on the bench, he served as an assistant prosecutor in Genesee County for nine years and in private practice for five years.