



EFFECTIVE LAW AND MOTION PRACTICE

By Hon. James L. Warren (Ret.)

For three years before my retirement from the California Superior Court in June 2006, I ran one of San Francisco's two Law and Motion Departments. The workload was staggering, but it was one of the most enjoyable jobs I ever had. I was concerned recently when State budget cuts forced the Court to eliminate one of those Departments. Things got worse when the remaining Law and Motion Judge was also given the work of the now-terminated Discovery Magistrates. How could any one Judge handle that? What would be the effect on attorneys who practiced in Law and Motion, which means just about every attorney who litigates in California? What would be the effect on the Court's work product, both in terms of timeliness and quality?

I recently served on a panel about successful motion practice with judges still doing this kind of work. It should come as no surprise that, despite some administrative changes and an increased workload for the Law and Motion judge, what works and what doesn't is pretty much the same as when I was ruling on motions and demurrers six years ago. It still rings true today that lawyers are often their own worst enemies when it comes to effective Law and Motion practice. When I left the Court to become an arbitrator and mediator with JAMS, I visited law firms whose attorneys had appeared before me and presented to them my views on what worked in Law and Motion. That advice is as pertinent today as it was then.

“LESS IS MORE”

This was my mantra on the bench and it remains so in private mediation and arbitration. Blaise Pascal is credited with apologizing for writing a long letter “because I didn't have the time to make it shorter.” Those are wise words: shortening a document makes

you work. You must think, you must organize, you must delete — but most of all, you must know what you want and you must know how to ask for it clearly. If you don't do this work, the Judge will be forced to do it for you. Given the staggering amount of paperwork that the Judge must slog through each day, that's not a good alternative.

“MORE IS LESS”

This is not restating the former principle in reverse. In a way, it is more important. The more you give me to review, the less likely that I will be able to read it thoroughly, to understand it or, in extreme cases, to get to it at all. On the bench I would sometimes get four summary judgment motions in a day, each over a foot thick. That's 48 inches — four feet! — of paperwork, not counting all the other motions up for resolution. This is scary stuff, and I had a staff of three full time law clerks and six volunteer law students to help me get through it.

An average calendar might have 24 matters on it. After a full morning of oral argument, I was left with about three hours to review motions for the next day. Three hours to do 24 motions equals 7 ½ minutes per motion. What if half of them go off calendar? Now the judge has twice as much time to consider your motion. There's your Warholian 15 minutes of fame. You've worked weeks or months on your motion, and the judge is under that kind of time pressure to evaluate it. Make it easier for the court: Less is More, and More is Less!

DEMURRERS – THINK BEFORE YOU FILE

Demurrers are the locusts of Law and Motion practice: they're everywhere. In my experience, however, most are filed as a knee-jerk response to being served with

1.800.352.JAMS | www.jamsadr.com

This article was originally published by ABTL Report and is reprinted with their permission.

THE RESOLUTION EXPERTS



a pleading. Very few lawyers stop to ask the basic preliminary question: “What happens if I win?”

Here’s what happens. You read through a complaint and conclude that you could do a better job.

What to do? Teach your adversary a lesson, of course. The demurrer is the perfect vehicle to inform the Court — and your opponent — that the correct way to sue your client is yadda, yadda, yadda. If you’re good, you draw a pretty clear road map for counsel to use when he or she re-files the complaint. (Don’t even dream of having an early demurrer sustained without leave to amend.) First Amended Complaint still doesn’t pass your muster? Keep going. In the end, thanks to your persistence, your client will end up facing Joe Six Pack instead of the wishywashy initial effort. The lesson here? Think before you file!

“WHY CAN’T THE ENGLISH...”

The Broadway musical *My Fair Lady* features a song that asks “Why Can’t the English Learn to Speak?” In the Law and Motion Department, the lyric would be “Why Can’t the Lawyers Learn to Write?” There are many techniques that lawyers could use to make their writing more persuasive. Here are four of my favorites:

- *Avoid Adjectives and Adverbs.* Lawyers love to dress up nouns and verbs with adjectives and adverbs. A “despicable breach of contract” is more descriptive than a “breach of contract;” a “brazen attempt to circumvent the Court’s order” carries more weight than a “failure to comply;” counsel “yet again wantonly ignores his discovery obligations” imposes a moral failure on a lawyer’s response to interrogatories. Get over it! You’re not fooling anyone, you’re making your brief too long, and you’re weakening the point you’re trying to make. This is not to say that adjectives and adverbs don’t have a place in good writing. They do; they just need to be used sparingly.

Try this. Write your next brief the way you normally would, then go through and delete all adjectives, invective phrases, and adverbs. You’ll be holding the written equivalent of pabulum. Read the brief again, but this time add adjectives or adverbs only where you need them for clarity or punch. Your brief will sing.

- *Use the Active Voice.* The active voice propels your brief forward; the passive voice hinders it. It also hides the person responsible and the details of what happened: “The legislation was

passed;” “The perpetrator was apprehended according to accepted procedures;” “The contract was breached.” Tell the Court who did what and why they did it.

- *Short Words Work.* Lawyers love long words. They seem to believe that the more florid and ostentatious their rhetoric, the more effective their argument. Hyperbole persuades. Not so. Short words are good. They have power. They persuade. They take up less space. They get to the point. Convoluted, multisyllabic words confound, create misunderstandings, result in misperceptions, derail and disorganize the reader, and circumvent the very conclusion they’re trying to create.
- *Don’t Count the Commas.* With years of brief writing experience under their belts, many lawyers believe that dependent clauses, when used judiciously, actually help the reader, who, being less familiar with the case than counsel, will be better able to understand the arguments, both legal and factual, if they are presented in a stream of consciousness sort of way, kind of like reading William Faulkner, but, with all due respect to such experience, and to Mr. Faulkner, who was one of my favorite authors in college, although I haven’t read his work recently, I personally believe this approach has its disadvantages, the chief one of which is that by the time I get to the end of the paragraph, if I ever get that far, I have lost the point of what the author was trying to say, which is a big problem if my job, as a deciding judge, is to be persuaded that the author’s point, whatever it might have been, is correct.

Hey, look. I’m human. My attention span is limited. I’m also very busy. I’ll give it my best shot, but when you toss me into the comma quicksand, I’m going to get lost.

I titled this subsection “Don’t Count the Commas.” Maybe that was wrong. Count them. If you hit three, you’ve got too many.

COURTESY COPIES COUNT

Our local rules require that counsel file a courtesy copy of motion papers directly with the Law and Motion Department. You wouldn’t believe how often this rule is violated. It may seem trivial, but in practice this is a big deal. When Law and Motion processes a motion, we put notes and underscoring on the papers, we dog-ear them, sometimes we even cut them up or take them apart. When I was there, getting a motion ready for

hearing was a very tactile experience. The Department can't do that with the papers that you file with the Clerk.

The effectiveness of courtesy copies is not limited to Law and Motion. My Inn of Court recently presented a tutorial that addressed the challenges faced by the Court in the wake of budget reductions. In preparation, I wrote to every judge running a civil department in San Francisco, and asked each what attorneys could do to make things run more smoothly in his or her court. Eighty percent (80%) put filing courtesy copies on the list, frequently as Item 1. Take a lesson from this response.

“FOUNDATION, FOUNDATION, FOUNDATION”

In real estate, it's "Location;" in motion practice, it's "Foundation." You would be surprised to learn how many motions are lost because counsel fails to lay the proper foundation for an exhibit, an interrogatory answer, or a deposition transcript. If the foundation isn't there, the court will sustain an objection to the exhibit. If we're talking about a summary judgment motion, which is always filed at the last possible moment, the motion is lost and there's no time to re-file. Take the extra time you need to ensure that your document is properly authenticated and the foundation for it is accurately laid. These are two different concerns, and they both need to be done correctly.

SPELLCHECK DOESN'T CUT IT

Before you file your papers with the Court, read them—for content. Running the brief through Spellcheck isn't enough. Here are two examples of what can happen.

In the middle of a somewhat novel but interesting legal argument, an associate had inserted the editorial parenthetical: "[Does this pass the smell test?]" It was filed that way with the Court, but there were no misspellings. The next is my personal favorite. At oral argument, I had granted a motion for summary judgment filed by one of the City's larger law firms. I asked counsel for his form of order. A fairly senior attorney strode grandly up to the bench and handed me a piece of paper. The proposed order properly granted the motion, but it did so with the following signature line: "Hon. James L. Warren, Judas of the Superior Court." Counsel didn't have a very good answer when I asked why he hadn't simply filed a 170.6? This lawyer departed the courtroom with substantially less spring in his step than when he approached, most probably because his thoughts were focused on a soon-to-be-very-unhappy associate.

ORAL ARGUMENT ISN'T AN INVITATION TO ARGUE

I enjoy the oral argument part of motion practice, yet it is often the most frustrating. For some reason counsel often view the opportunity to talk to the judge as an invitation to disparage opposing counsel. Rather than speak directly to the court, counsel frequently turn and talk face to face with the opposition. If feelings between the two are strained, finger pointing is sure to follow. Interruptions are common, usually with a raised voice. Why do some counsel view oral argument as an opportunity to engage in shenanigans?

While the other side is arguing, I've seen counsel slap their forehead and twirl around in mock desperation when they hear an argument they don't like. I've seen counsel move furniture, start whispering to their colleagues (usually with words that contain a lot of "sssss"), get a glass of water and, when they return, balance it on the edge of the table where it looks like it will soon fall over. I've seen — and heard — lawyers bang sheaves of paper together on the table to get them into a neatly aligned bundle. But my most memorable experience was one lawyer who, as soon as the opposition started to argue, reached into his pocket, withdrew an emery board, and proceeded to file his fingernails. I don't remember the issue being argued, I don't remember the other counsel, I don't even remember the name of the case. But I will never forget the lawyer!

I hope you'll give at least a few of these pointers a shot. You'll find that your practice in Law and Motion becomes more productive and — here's the zinger — you'll make the judge's life much easier! ■

The Hon. James L. Warren (Ret.) is a former judge of the San Francisco Superior Court, and is now a full time neutral at JAMS in San Francisco.
jwarren@jamsadr.com.