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Questions to Ask to Win the Next Hearing

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BENCHTOBAR

Though it should go without saying, judges are busy. They can spend only a fraction of the time attorneys do preparing for each hearing. To zero in on what the judge wants to know to resolve the dispute in a client's favor, counsel should be prepared to answer four questions, regardless of the type of motion or plea he is presenting: What do you want? How badly do you want it? Why should you win? What will you do if you win — or lose?

To be fully prepared, diligent attorneys should put themselves in opposing counsel's shoes and answer these questions from their adversary's perspective. An attorney who is fully prepared to answer these questions before filing a motion and before going to court also will be prepared to win that next important hearing.

• *What do you want?* Identifying the desired outcome sounds simple, but most lawyers who show up for a hearing don't know exactly what they want to happen.

An attorney's understanding of what he wants has two components: What factual scenario will occur if the client wins, and what is the proper procedural device to accomplish that goal? Answering these two questions tells a lawyer exactly what motion or plea to file, what evidentiary or notice requirements to meet, and what the pleadings should request.

Usually, the attorney wants the judge to sign an order granting or denying the motion. Depending on the motion or plea, counsel might want or need the order to make factual findings or meet other legal requirements.

My time on the state district court bench taught me that successful lawyers begin with the end in mind. That is, when they approach the court, they begin by identifying the relief they want (i.e., "I want the judge to sign this order with this language").

• *How badly do you want it?* Attorneys don't always have to be docile when making their arguments. Judges want to know that the advocates before them are passionate — but not emotional — about their arguments. That shows the lawyers have thought things through and are ready to talk about the issues. Counsel should tell the judge, in a respectful way, when she feels strongly about an issue.

In every case, counsel must know the legal and factual deal-breakers. Acting as if everything is an emergency or a deal-breaker destroys credibility with the court. An easy way to analyze how hard to push the judge is to check the standard of review. Will the smart advocate push more or less when the standard of review is abuse of discretion than if it is de novo?

• *Why should you win?* The answer to this question also has two parts. The judge must first

understand the facts relevant to this particular dispute. But more importantly, counsel should help the judge understand how her decision in this hearing will impact the case as a whole.

The second part requires an attorney to put the court's decision in the context of the suit by arguing the purpose of the applicable rule or statute. For example, the legal reason why a temporary restraining order is not subject to review by an appellate court in most circumstances is because the court is exercising its substantial discretion to protect the status quo, often on an *ex parte* basis, for a very short period of time.

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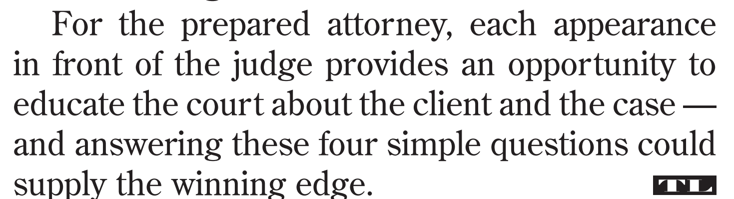
Supporting the facts of the case at hand with the legal policy behind the applicable rule and statute makes an argument more persuasive to the judge. In the context of the temporary restraining order example, it encourages the judge to use the substantial discretion afforded to a trial court for the short period of time until a full evidentiary hearing.

After counsel answers the question for his side, he should answer it for the opponent; this enables him to anticipate and overcome the other party's best arguments. Answering this question from an opponent's perspective makes an attorney a more credible voice to the court, because he can acknowledge counterarguments while still explaining why his client should win.

Remember, the judge has heard dozens (or more) versions of the motion being argued. An attorney sounds wiser and more convincing when he presents the facts of the case, demonstrates an understanding of the legal policy and acknowledges the opponent's best arguments.

• *What will you do if you win — or lose?* If the judge is leaning toward signing the order, an attorney should be prepared to demonstrate that he is ready to defend it on appeal by knowing the standard of review, whether the order is subject to interlocutory or mandamus review, the necessary recitals in the order and whether success depends upon the court making specific findings. If the judge is on the fence about her decision, an attorney can earn credibility by demonstrating knowledge of what to do next.

If the judge rules against the desired motion, counsel should start laying the groundwork for the next hearing. Counsel should tell the judge what procedural steps he will take to move the case forward and preview his anticipated strategy. The judge's response may indicate if the proposed plan of attack will go over well or meet resistance.



For the prepared attorney, each appearance in front of the judge provides an opportunity to educate the court about the client and the case — and answering these four simple questions could supply the winning edge. TL

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