



MOTION STRATAGEMS: *PERSUADING JUDGES TO MAKE HARD DECISIONS*

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Agency : DST

Speed : 27 mph

DateTime : 3/4/2013 4:06:00 PM

Latitude : 43°04'57" N

Vehicle : 17

Longitude : 87°56'25" W



LightBar : Activated

Brakes : Activated

Siren : Not Activated

Door : Not Activated

Motion Practice: Being Right is Not Enough



(And Righteous Indignation
Rarely Carries the Day)

Winning in Litigation Practice / Getting to a Goal

Accept that **being right** is not the End, it's the Start.

Motions Require Your Best Litigation Skills:

Know your **audience** (Judge)

- research judge prepare your strategy for that audience

Know your **case**

- what are the facts, what is the law?
- investigated/drive the route/do a scene view, etc.

Know yourself in relation to that judge

- personal history, comparative backgrounds
- be self-aware

Build your **Brand** inside and outside the courtroom:
teach, shape debate, be involved in your community's
leadership – be someone the judge wants to agree with

Getting a Judge's to "Yes"

Motions & Theory of Defense

Motions are not separate from or in addition to the theory of defense – not extra

Timing matters – filing, disclosure, litigation, you vs. DA
Relationships matter

Prepare examinations and arguments

- use chapters of cross like in trial – don't wing it
- use most persuasive order of presentation in questioning and argument
- provide copies of relevant case law before hearing
- use props
- "quick hit" your message – language matters

Define your Goal

- Talk Therapy with your Client
- prepare a message and a stratagem to accomplish
- don't be a one-trick pony on this
- litigate when you must, collaborate if you can



Avoid Tunnel Vision.

Get Off The Prosecutor's Script

Get Off The Prosecutor's Script

Get On Your Script

Get On Your Script

Investigate

Investigate

Rinse, Repeat

Rinse, Repeat

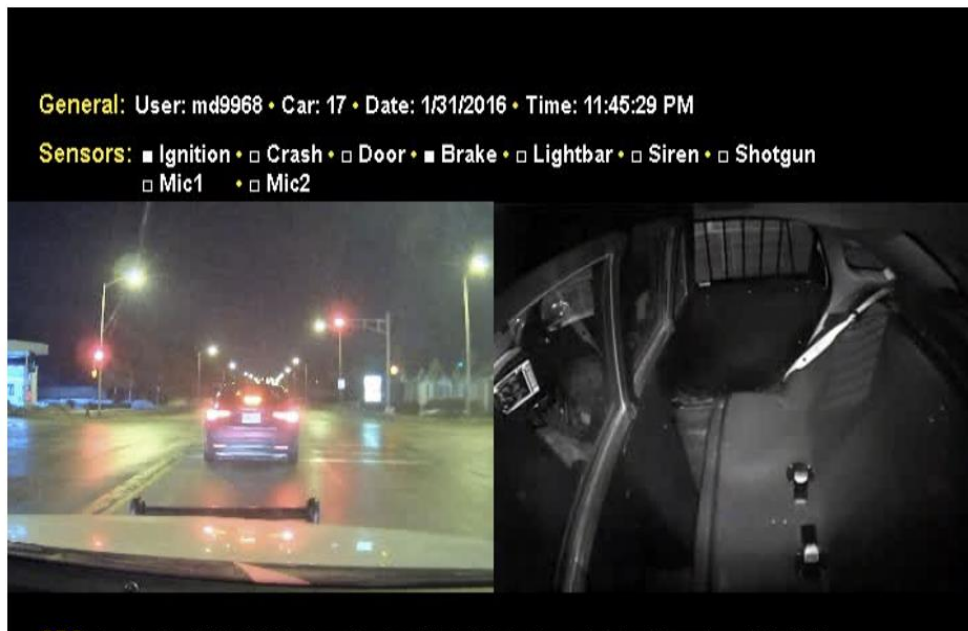
Stratagem #1:



I'm Not Just Standing Here Trying
to Look Good, This Is For Real

Make Something Different Happen

IT IS UNDISPUTED that the U.S. and Wisconsin Constitutions prohibit selective enforcement of the law on the basis of race. The defendant argues that the police officer singled out and followed the vehicle in which he was a passenger because its occupants were African American. The car and its occupants were not known to the officer, were not the subject of a report, were doing nothing illegal or suspicious, and had committed no traffic violations when the officer u-turned and followed them. The officer followed and waited until he observed the car stopped at a red light, partially above a solid white line demarking the pedestrian lane from vehicle traffic. There were no pedestrians or other vehicles present. No one was impeded while the car waited; its turn signal was on. This is what the car looked like:



Stratagem #2: Squirrelling



Store a nut for later, narrow a ruling, lock in testimony. Ex. Prelims.

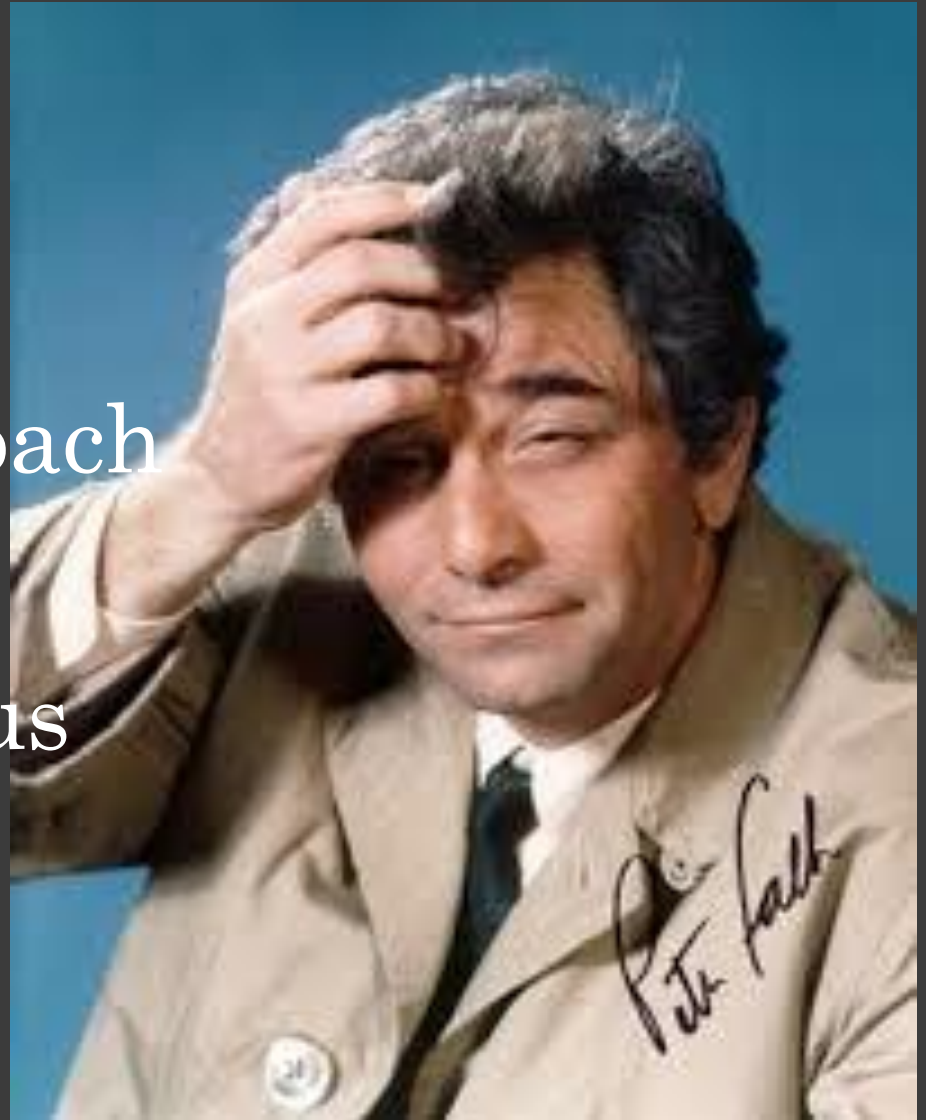
Stratagem #3:

The Columbo Approach

or

Go And Be Curious

*Learn something at every hearing
Works in investigations too. CP cases.*



Stratagem # 4:

No One Knows This Case Better Than Me



“One important key to success is self-confidence.
An important key to self-confidence is
preparation.”

*You may not win now but demonstrate your preparation.
Frame the issues for your Judge. Motions to Dismiss or Limit.
Be the thought leader. A word about Sentencing frame it.*

Stratagem # 5:

If We Go, You Better Watch Yourself

Limine motions, motions to limit, motion to admit other act evidence against state witnesses.



Stratagem # 6:

I'm Glad We're Doing This Now.
It Doesn't Sound As Good As I
Thought It Would.

Unanticipated testimony, Officer is credible, Client sees the light. Good news – strategy shift.



Stratagem # 7: Compromise / Offers to Compromise



Can you get a prosecutor to listen?

Can you agree?

If not, how can you use that?

Tell your judge. Frame the issues.

Compromise



Getting to the Whole Tomato – It's possible.

There are prosecutors who care about justice. Work with them. Judges will say yes.

Stratagem # 8:

I May Lose This Hearing, But Wait 'Til
You Hear This Later

Good things flow from litigation.



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Later: The Jury Knows Better

In Court:

In Conf:

Know Yourself

Know Your Adversary

Know Your Stuff

A white marble statue of the philosopher Socrates, shown from the waist up. He has a full beard and curly hair, and is wearing a draped garment. He is pointing his right index finger upwards. The background is a clear blue sky.

“Know thyself.”

- Socrates

Know Yourself:



Self-Awareness

Know Yourself:



Inner Reel vs. Outer Reel



Know Your Stuff.

Lead: Take control.
Be a Knowledge
Resource for Judge;
The Person They
Want to Hear From.

Preparation: Background
Work, Characters/Players,
Periphery, Technical Issues,
Terminology.

Translation: Define The
Facts & Break Them Down.
Frame the Issues for Each
Witness. Theory is throughout.

Pace: Choose Proper Amount
of Time, Tone, and Speed.

Know Your Adversary



His/her inner reel & outer reel.
His/her case / plan / theory of prosecution.

KNOW YOUR JUDGE

- Their inner reel & outer reel. (You can affect this.)
- Their background / habits / values / allies / enemies.
- Who or what do they care about? Fairness is universal.

Hint: being safe, liked,
respected

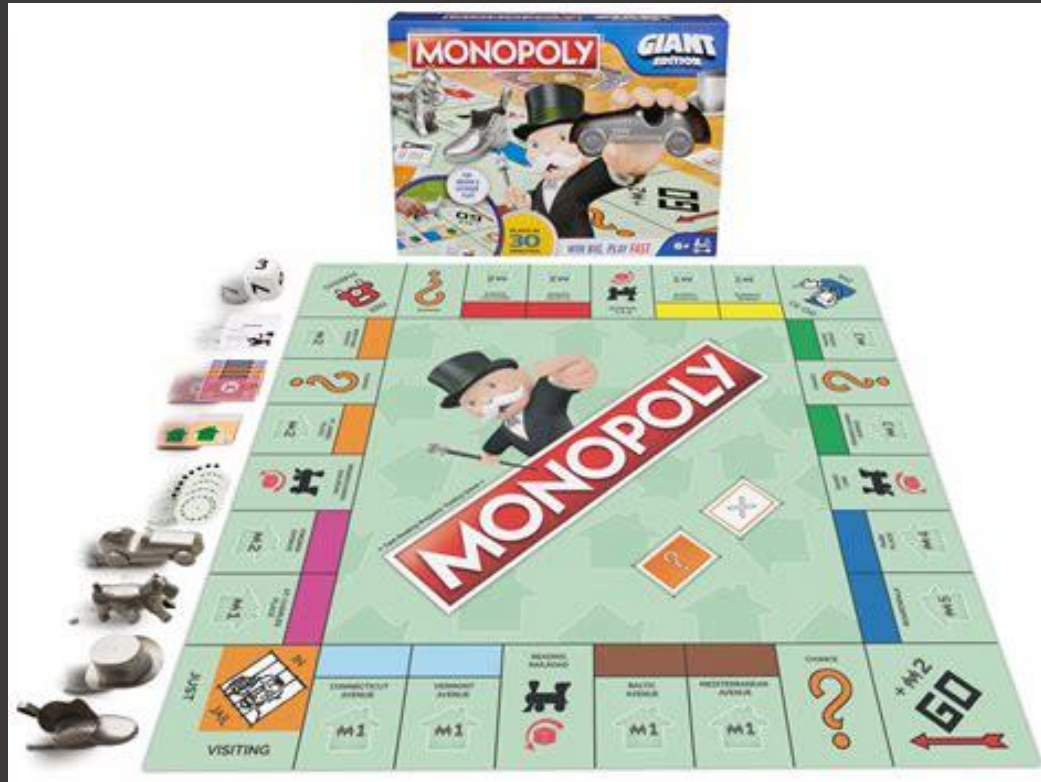


Being Right & Strategic **Still** Ain't Enough: Our Judge



Brice Aikens – Outcome-determined Judges

Being Right Isn't Enough: The Game Behind the Game: Judges (& DA's)



Who makes the decisions.

Fighting against two prosecutors – a rigged game.
Get involved. Elections, committees, judicial politics.
Other orgs. Civic communities.

No



No

Keep the Game, Change the Players



Judges, We're Looking at You

We're in a different world than 1992.

Be strategic about the change you wish to see.

Get in the Game. Get into the Room. Power structures re everywhere.

Affect the Choices Being Made. Work with others (and groups). You can do this.

The Criminal Justice Debate Has Shifted Dramatically. Use This.



Government is Broke, Inept / Our Justice System is Broken
Heroin is addiction / Right to Defend Ourselves, Go Armed
Racial Disparities / Mass Incarceration / Black Lives Matter
Next? Facts and Institutions – Do they matter?

Our Professional Values Matter

Our Values are Universal

Fairness

Equal Justice

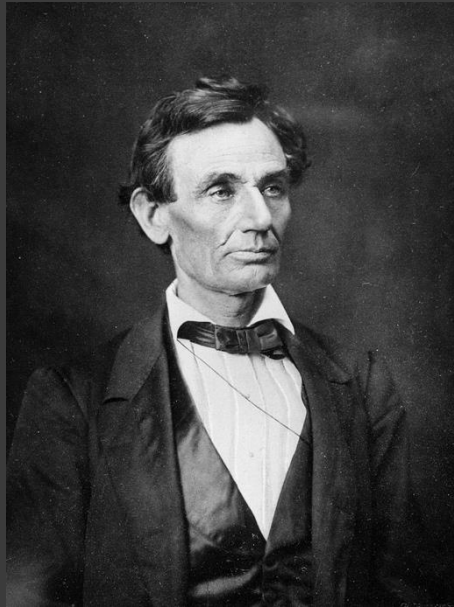
Empathy

Redemption

Fighting for the Underdog / Braveness / Zealous Advocacy

Judges that Reflect the Communities they Serve

Defenders of the Constitution



The Best of Us Should be the Best Judges

Thank you.



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