Motion Practice:

Pitching your case from start to finish

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Craig Mastantuono & Rebecca Coffee

Mastantuono & Coffee SC

Integrated Motion Practice

Motions & Theory of Defense

Motions not separate from or in addition to theory of defense

Strategic insertion of self – the lawyer - into the process:

Not Just Doing Job; Not Reacting; Making Something Happen

Truth-seeking; Set-up; Looking good

Motions require our best litigation skills:

- Know your audience (Judge) – Petros: “the Cookbook Judge”
  - prepare your argument to that audience
- Use chapters of cross like in trial
- Present questioning and argument in most persuasive order
- Provide copies of helpful/relevant case law, or mini-brief before hearing

Know your case – your argument will depend on what type of issue your motion presents:

- Does your issue implicate a long-standing principal of law?
- Is your issue case-specific?

Define your goal:

- Is this a motion that is a winner?
- Is this a motion that is dispositive of the case?
- Is this a motion that sets up witnesses for their trial testimony?
- Does this motion test a potential theory of defense?
- Is this a motion that sets up the court to make rulings affecting trial?

Identify a stratagem, or plan to accomplish that goal. Prepare examinations and arguments accordingly

Some motions implicate more than one stratagem

Agency : DST
DateTime : 3/4/2013 4:06:00 PM
Vehicle : 17

Speed : 27 mph
Latitude : 43°04'57" N
Longitude : 87°56'25" W

LightBar : Activated
Siren : Not Activated

Brakes : Activated
Door : Not Activated

Stratagem #1:

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

1. I'm not just standing here trying to look good, this is for real

(or, We're all dressed up, we may as well do our %$@!$#^-ing jobs!)

The object is to find some way to let the Judge know that this motion is for real:

- conducting an aggressive and well-prepared cross of the officer,
- calling an expert witness, or
- finding something that the prosecution didn't produce

Whatever it is, its purpose is to present something to the Judge that cannot be ignored, something that they do not see in every other motion hearing

Example:
Compel discovery – video in POCS case
Motion brief for HGN suppression

Stratagem #2: Squirrelling

2. Squirreling

Put something away, an acorn, at a motion hearing for later use

Can be divorced from particular purpose of motion –a nut to save for later.

- A ruling that comes back to haunt the prosecutor, or help the defendant in the end
- Hearing testimony that provides impeachment

Creating a record is very important here –

- lock in testimony at motion hearings
- order transcripts
- clarify rulings

Example:
CCW jury instruction

Stratagem #3: The Colombo Approach or, Go And Be Curious

3. The Colombo Approach or, Go And Be Curious
Self-explanatory

Get information that you want but don't have. Most often: PX

Get information that you don't know you needed

"Good things flow from litigation"

Example:
Drug case – recorded consent – motion suppress – no video

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.
-Arthur Ashe

4: No One Knows This Case Better Than Me

Message to prosecutor or judge: defense knows its case very well

Put prosecutor's case on trial:
- calls into question strength of their evidence throughout pre-trial process, not just at prelim, then trial

Goal: better result once prosecutor sees how much you know about your case, depth of preparation

Warning*:* Know your case and prosecutor – don't want to tip your hand if you are headed to trial. Some things you may want to hold back on so prosecution caught by surprise at trial

Example:
Homicide – motions to dismiss

Stratagem # 5: Stiletting

5: Stiletting

The switch:

Aggressive approach with witness at motion hearing

A softer approach at trial. Witness is angry for no apparent reason
Jury wonders why, witnesses' credibility suffers as a result

Example:

Video - POCS case MKE county

Stratagem # 6: If We Go, You Had Better Watch Yourself

6. If we go, you had better watch yourself

Similar to no one knows this case better than me

Usually Motion in Limine restricting testimony on/reference to certain subjects

May lose the battle, but sends a message to prosecution that you are watching them, so play fair

Example:
Chester the Molester

Stratagem # 7: I'm Glad We're Doing This Now, Because this Doesn't Sound As Good As I Thought It Would

7. I'm glad we're doing this now because this doesn't sound as good as I thought it would.

May not realize you're taking this approach until during the motion hearing, invaluable nonetheless because pre-trial

Witness testifies differently than you expected
Victim or Officer seems credible
Client sees the light – the way testimony would come in, what the jury would hear

Good news is, can still changed your strategy in the case, your theory of defense

Example:

Sadly, sometimes too many of our cases.

Stratagem # 8: I May Lose This Hearing, But Wait Until You Hear This Stuff Later

8. **I May Lose This Hearing, But Wait Until You Hear This Stuff Later**

OWI case - Officer testimony: client cooperative on tests, respectful, not cuffed, etc.

Viable motion issue, one that you may very well lose, but also good facts about your client/the incident

Or facts that Judge is unlikely to hear about unless a motion is filed

Example:
Motion to Dismiss – selective prosecution. MKE county

Stratagem # 9: Memo To The Other Side: Please Do Your Job Better

9. **Memo To The Other Side: Please Do Your Job Better**

Sloppy or overzealous prosecutions, over-charged complaint

Sometimes can do without a formal motion, but formal motion may be necessary, and sends a message to prosecutor and Judge – I'm paying careful attention to what you are doing, and the prosecutor is being overly aggressive

Example:
Racine complaint charges something that's not a crime
Wrong habitual offender
Neglect on drug case – dismiss instead of read-in

Our traffic stop video – motion denied – trial (gutted).

But, our jurors are not as biased as our judges and prosecutors.

JUSTICE

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