

FROM MY SIDE OF THE BENCH

The Oral Hearing

BY HON. RANDY WILSON

YOU'VE FILED YOUR MOTION, WRITTEN YOUR BRIEF, and now it's time to argue before the trial judge. I did this hundreds of times as a lawyer and have listened to thousands of oral arguments as a judge. Curiously, my perspective has now changed. I offer the following suggestions.

- It does no good whatsoever to file a brief the morning of the hearing or the night before. Most judges have 20 to 30 motions set at 9 a.m. on motion day, and we're unlikely even to see a brief filed the morning of the hearing, much less read it. You've generally wasted your client's money by waiting so long to file your brief.
- Make sure you have extra copies of your papers, briefs and exhibits handy. You never know whether the judge's file is complete. If the judge can't put his hands on a particular brief or exhibit, be prepared to hand the judge an extra copy immediately.
- Have highlighted copies of the two or three important cases or statutes ready to hand to the judge, along with highlighted copies to hand to opposing counsel. I recently reviewed the Houston Bar Association Bench Book for the Harris County District Courts. Virtually every civil district judge prefers to have highlighted copies of cases at the hearing. Why? While we've probably read your brief, we may or may not have read the underlying cases. We'd much rather see the printed words from the cases ourselves than read them in the brief. That way, we can read the case ourselves, make sure the case stands for the proposition cited, and make sure it's not taken out of context. Frankly, reading a paragraph out of a decision is more persuasive than in a brief.
- The tricky part is figuring out whether the judge is familiar with your case or has read your papers. Be prepared to argue both ways. The safest approach is to start by saying, "To refresh the Court, this case involves..." Be prepared to give a full recitation of the facts. But, if you learn that the judge has

read the papers and is familiar with the case, be prepared to pivot immediately to Plan B, which is a short summary of the reasons why the Court should grant your motion, e.g., "Judge, my motion to dismiss should be granted for three reasons—two reasons as a matter of law, and one reason as a matter of fact."

- Be prepared to hand crucial exhibits or pleadings to the judge. If there's a concession in a pleading, deposition or email that's fatal to the other side, have that page ready to hand to the Court with highlighting. Always hand a highlighted copy to your opponent at the same time.
- Use handouts to give to the judge rather than foam board blowups. If the judge takes the matter under advisement, the judge will still have the handouts in the file when he reviews the matter again. If all you used were blowups, they will be a distant memory.
- If an issue arises during the argument for which you are unprepared, always ask if you can submit a two to three page response in a couple of days. It's rare that a judge would deny you the opportunity to submit a brief post-hearing memorandum. Don't take longer than two or three days to submit the memorandum, however. You want it to be fresh in the judge's mind.
- Always have an order ready.

Judge Randy Wilson is judge of the 157th District Court in Harris County, Texas. Judge Wilson tried cases at Susman Godfrey for 27 years and taught young lawyers at that firm before joining the bench. He now offers his suggestions of how lawyers can improve now that he has moved to a different perspective.★