8 Ways To Tell A Judge She's Wrong
By Juan Carlos Rodriguez

Law360, New York (June 03, 2014, 7:30 PM ET) -- Lawyers traversing the minefield of litigation are well advised to be cautious when approaching a particularly hazardous area: openly disagreeing with the judge. Experts say it takes good judgment and a healthy sense of humility to successfully navigate this terrain — and it doesn’t hurt to be right, either.

While it’s easy to understand that judges are human and make mistakes, a lawyer must protect the client’s interest when a mistake hurts one side and benefits another. And despite the potential for a prickly situation, former judges and top litigators say there are ways to tell a judge she got it wrong and get the mistake fixed.

Former Supreme Court of Georgia Chief Justice Leah Ward Sears, a partner at Schiff Hardin LLP, says it’s important to remember that judges are often overburdened and, sometimes, when a case has a big record, don’t have as good a grasp on the facts as the attorneys.

“That’s why they want oral argument,” she said. “I was mistaken about things. And I appreciated when lawyers would bring it to my attention, because that was my job: to understand.”

Here are eight ways to make a disagreement with a judge as painless as possible:

Be Respectful

Jorge J. Perez, a former Miami-Dade Circuit Court judge who is now an attorney at Squire Patton Boggs, says the No. 1 rule when broaching a possible judicial error is to keep calm, cool and collected.

“Always use a respectful tone, use the passive voice, and avoid directly accusing the judge of making a mistake,” Perez said. “‘The court was mistaken’ should never appear in any pleading or any argument. ‘You’re wrong, judge,’ shouldn’t come out of any lawyer’s mouth.”

He says it’s important to understand that when entering this kind of debate, the opposing counsel already has a great advantage, as their counter-arguments will naturally flatter the judge. The only way to keep the playing field level is to be diplomatic and convincing.

And Robert M. Horkovich, a shareholder at Anderson Kill PC, said lawyers should go beyond respect.

“Be kind about the mistake,” Horkovich said. “Don’t be brash. And never be insulting to the judge.”
It’s important to be as professional in these situations as possible, says Attison L. Barnes III, a partner with Wiley Rein LLP and co-chair of its litigation group.

“We’ve seen — and cringed — at briefs other lawyers have filed where they’re very critical of the judge. The judge is trying to make the right decision. It’s a matter of presenting the information to the court in a helpful and professional way where the only choice for the judge is to go your way,” Barnes said.

**Be Succinct**

Claude Szyfer, a partner at Stroock & Stroock & Lavan LLP, recommended that motions for rehearing or reconsideration be kept brief, noting that a judge probably doesn’t want to read 20 or 30 pages on how she got it wrong. An overlong filing could cross the line into “sour grapes,” Szyfer said, as opposed to genuinely asserting that a mistake should be corrected.

And he noted that under the Federal Rules for Civil Procedure, the standards for this type of motion is clear.

“If you can’t articulate the mistake you think has been made in five to 10 pages, you’re probably not abiding by the standards,” he said.

Horkovich says brevity is important, as is clarity in explaining the judge's mistake in law or in fact. For example, sometimes new evidence needs to be brought to the judge's attention, and the brief should clearly state that, he says.

Sears says even a short, two- or three-page letter brief can do the trick.

**Don't Reargue the Same Points**

Horkovich says a mistake some lawyers make when trying to change a judge’s mind is not bringing anything new to the discussion.

“Being louder and more strident about the very same issue is going to do nothing except cost your client more money,” he said.

Former federal judge Stephen Orlofsky, who leads Blank Rome LLP’s appellate practice, says the standards for motions for reconsideration dictate that there be newly discovered evidence that wasn’t available when the issue was first raised, new law, or evidence that the court overlooked.

“These are tough standards,” Orlofsky said.

**Provide Solutions**

As part of any discussion over a judge’s ruling, lawyers should not stop at gathering the necessary facts and presenting a convincing argument; they should offer the judge avenues out of the prior decision, Szyfer says.

In one instance, Szyfer says he noticed the opposing counsel’s allegations in the complaint did not match what they were saying in their motion papers, and he petitioned the judge for reargument.
“So we said to the court, why not give them an opportunity to replead their complaint ... and we can go from there,” he said. “It provided the court with a reasonable way out.”

Orlofsky says if the mistake occurs during a trial, it’s best to avoid discussion in front of the jury, so a lawyer should suggest a hearing during lunch or before or after the jury’s service for the day.

**Know When to Walk Away**

Accurately gauging a mistake's impact in the context of the case at large is critical. If the mistake isn’t going to be of great importance, it is better to invest the time and energy that would have been used to rehash it on other things, Ward said.

“If it doesn’t have anything to do with the outcome of the case, I think you’ve got to let it go,” she said. “If it is relevant to the outcome, then you’re ethically bound to bring it to the attention of the court.”

Orlofsky says sometimes lawyers need to be careful what they wish for, because although an issue may be important, the trial court may not be the best place to argue it.

“You don’t need a motion for reconsideration for an appeal,” he said. “If the judge fixes the mistake, then you don’t have that issue for appeal.”

**Anticipate Problems**

Richard W. Smith, a partner at Wiley Rein and co-chair of the firm’s litigation group, says a judicial mistake can be averted before a case even starts by identifying potentially confusing or troublesome areas and drafting one- or two-page bench memos that can be presented to the judge in case they’re needed.

“Sometimes you can change the nature of the conversation with the court, if you see that a ruling might be going against you, by asking the judge if you can pass up a bench memo. I have never seen a judge decline that opportunity to take a moment and read a very short memo,” Smith said.

Horkovich said it’s also important to thoroughly prepare for oral argument, because it can frequently take unexpected twists and turns.

“Frequently, I’ve extensively briefed something and argued the brief, and found the court was interested in something completely different,” he said.

And Orlofsky says if a lawyer anticipates any type of evidentiary problem, it’s a good idea to file in an in limine motion to bring it to the judge’s attention and get the judge thinking about it before it comes up at trial.

**Know Your Audience**

Szyfer says if an issue comes up during trial, lawyers should remember how their conduct appears to the jury. Juries will respect a judge’s opinion and form strong opinions about attorneys, so it’s important to be discreet and poised.
“If a ruling goes against you, you shouldn’t let your emotions show, either to the judge or the jury,” he said. “You’ll want to ask for a sidebar.”

Smith echoed that view, saying grandstanding is a quick way to anger a judge and alienate the jury.

“In many instances, the judge is the only person whom the jury believes is there to protect them. If you undermine the judge or give her justification to lash out at you in anger, you do so at your own peril,” Smith said.

**Get the Judge Talking**

Smith says good lawyers will dig for more information about how a judge arrived at a decision before formulating their arguments.

“The more you can get the judge talking about how he’s approaching the issue, how he’s analyzing it, and what his decision is, the easier it can be to come back and to understand where the error took place in the analysis and to attack it,” he said.

And Barnes says if a lawyer is drafting a motion for rehearing or reconsideration, she should seek out previous decisions made by the judge on similar motions.

“The judge’s explanation of his or her ruling, if you are fortunate enough to get it, should help you decide whether to file a motion for reconsideration and what you want to include in your memorandum to correct any factual or legal misimpressions,” he said.

That can help convey that the lawyer is doing her due diligence and the judge is not being asked to tread new ground, and it can give the judge a comfort level that reconsidering the decision is the proper course, he says.

--Editing by Kat Laskowski and Richard McVay..

All Content © 2003-2014, Portfolio Media, Inc.