


Getting It Right The First Time: Presenting A Persuasive Argument Without Relying On The Court's Familiarity With The Facts Or The Law

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 Even apart from the importance of assuring appellate review, properly preserving the record and carefully laying out one's argument can have an immediate impact at the trial level. Very often, a litigator comes across a set of facts that calls for an argument that has been made many times before. In that situation, you might believe you need only cite to the controlling case, and a favorable result is all but guaranteed. It is easy to assume the court will be familiar with an argument it has seen many times before, but resist giving short shrift to the law and facts in your filing. Courts deal with many different matters in many different areas of the law. If you simply rely on the court's expertise, or ready access to the record, you may very well end up with an order denying your motion. And while you generally have an opportunity to move for rehearing or reconsideration, getting the court to change its mind is an uphill battle. **Preservation Issues:**

- While your motion should always be as concise as possible, you should never assume the court is familiar with the facts or the law as they apply to the relief you are seeking.
- Make sure the court has ready access to the pertinent facts.

Tip: Always lay out your motion assuming that the reader has little or no familiarity with the facts of your case or the law that applies. While this does not mean talking down to the reader or belaboring your point, it does mean providing the court with everything it needs to grant relief in your favor. In modern litigation, with digital records and e-filing, making sure the court is familiar with the necessary facts presents a unique challenge. More judges than ever review filings on a computer or a tablet, which can make it difficult to toggle between the motion and an appendix. While reviewing

your filing, the court may not have ready access to the record, or may not have the time (or will) to examine your appendix in detail. To the extent possible, make it easy on the court. If, for example, an argument centers around a signature on a document, it probably makes sense to include a PDF of that signature in the motion itself. As they say, a picture is worth a thousand words. Taking the time to present your argument this way on the front end will hopefully avoid the need to move for rehearing or reconsideration on the back end. And, as we all know, once a judge has made a ruling, persuading him or her to take a different course is no easy feat.

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