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WHAT NOT TO DO: A LITIGATOR'S PERSPECTIVE

As a relatively new litigator, I have been fortunate to have spent a significant amount of time in the courtroom, given the stage in my career. One particular afternoon, I was opposing a motion for summary judgment filed by a well-respected local practitioner. I prepared for this hearing as usual, checking items off my to-do list. Make sure the file is in chronological order. Check. Review the motion, the response in opposition, and all accompanying documents. Check. Review the memoranda in support and opposition. Check. Refine notes for argument. Check. Make sure to have copies available for counsel and the judge. Check. Make sure the client has arrived on time. Check. Walk over to the courthouse early. Check.

In fact, I was feeling pretty confident as I arrived in the courtroom because my argument was solid and well-supported by the law. I neatly laid everything out on the counsel table and took my seat, waiting for the hearing to begin. After the judge walked in, I recall him first asking opposing counsel why the motion should not be denied. I was excited, and the adrenaline began pumping as I furiously scribbled notes on my legal pad. It was apparent that the judge had spent time with the file and, in particular, with our briefs. As an experienced practitioner once told me, you should never "count your chickens before they hatch," but as luck would have it, the discussion appeared favorable to my client. The judge and I were having a cerebral connection. We were on the same wavelength. However you want to put it, I was pleased with the direction the hearing was headed. That is when I made "The Mistake." Without even being aware, I began nodding my head. As the judge inquired of opposing counsel and counsel responded, I nodded repeatedly, subconsciously expressing my understanding and agreement.

Apparently, my continued head bobbing became a distraction of which I was completely ignorant until the judge brought the same to my attention, stating that my nodding did not assist his understanding and was, in fact, very distracting. I. Was. Mortified. I held my composure as I sat at the counsel table with my senior partner at the time. Our client and the firm's greenest associate were also in attendance. At that moment, I wanted the floor to kindly swallow me whole and put me out of my misery. I held it together. I was the polished, consummate professional. As I took the podium, the judge unnecessarily apologized. I thanked him for having brought the issue to my attention and quickly moved on to my argument, which was ultimately successful.

Although I was embarrassed by the judge's correction, I was sincere when I thanked him that afternoon. I am now keenly aware of my demeanor in court and am exceedingly careful to avoid nervous habits of any kind. Although I realize that those details do not impact how a judge decides a given case, they most certainly impact how judges perceive us as advocates on behalf of our clients. Such details also impact how clients gauge our representation of them. Fortunately for me, I was successful in opposing the motion that day, so all was (hopefully) forgotten. From now on, if you happen to be lucky (or unlucky depending on your perspective) enough to be litigating a case with me, I promise to be on my best courtroom behavior.

Have a story to share?

Lane McCarty (lanemccarty@gmail.com) is coordinating this monthly column for DICTA. If you can look back and laugh at those moments that made you cringe, we'd love for you to share your story.



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