

MEDIA MENTION

Wiley Rein Attorneys Discuss Tactful Ways to Disagree with a Judge

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Attison L. Barnes III and Richard W. Smith, co-chairs of Wiley Rein's Litigation Practice, were quoted extensively in a *Law360* article published yesterday about appropriate ways to convince a judge to reconsider an adverse ruling.

According to the article, attorneys are advised to use good judgment and humility when openly disagreeing with a judge in court.

"We've seen — and cringed — at briefs other lawyers have filed where they're very critical of the judge," Mr. Barnes said. "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."

Mr. Smith said that one possible remedy to avoid the situation altogether is to draft bench memos on potentially confusing areas which can be presented to the judge if necessary.

"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," Mr. Smith said. "I have never seen a judge decline that opportunity to take a moment and read a very short memo."

He added that a lawyer should not grandstand for fear of angering the judge and alienating the jury. "In many instances, the judge is the only person whom the jury believes is there to protect them," Mr. Smith said. "If you undermine the judge or give her justification to lash out at you in anger, you do so at your own peril."

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It's also advisable to gather information as to how a judge arrived at their conclusion when formulating arguments, Mr. Smith said. "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.

When drafting a motion for rehearing or reconsideration, Mr. Barnes said one 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.

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