Note to the Viewer

Some of the material in today's presentation is excerpted from an article titled *Five Tips for a More Effective Motions Practice* by Attorney Robert Will, cited below. Thanks to the American Bar Association for providing the Court Improvement Program permission to share excerpts from *Five Tips for a More Effective Motions Practice* in this training.

- **Citation: Will, R. (2017). Five Tips for a More Effective Motions Practice. American Bar Association. Available at https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/articles/2017/winter2017-five-tips-for-a-more-effective-motion-practice/**
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In Re Neveah H. Tennessee Supreme Court December 10, 2020

- Therefore, we conclude that section 36-1-113(g)(14) places a conjunctive obligation on a parent or guardian to manifest both an ability and willingness to personally assume legal and physical custody or financial responsibility for the child. If a person seeking to terminate parental rights proves by clear and convincing proof that a parent or guardian has failed to manifest either ability or willingness, then the first prong of the statute is satisfied. In re Amynn K., 2018 WL 3058280, at *13.

Rule 105 – Tennessee Rules of Juvenile Procedure

- **Motion.**
- **(1)** An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be in writing, shall state with particularity the grounds relied upon, and shall set forth the relief or order sought.
- **(2)** Upon the filing of the motion, the clerk shall schedule a tentative date for the motion to be heard.
- **(3)** All motions shall include the date upon which the motion is expected to be heard and shall be served on the parties a reasonable time prior to that date.
- **(4)** A written response to a motion shall not be required.

Local Rules of Practice – Davidson County Juvenile Court

- Motion is filed – response is optional
- Motion is docketed before it is filed
- At initial hearing, no proof is presented – only legal argument
- If proof is necessary, a second hearing is set
- Judicial officer may ask for briefs by the parties

Motions that Must be filed prior to trial in delinquency cases

- Motion to suppress statements or evidence
- Motions to sever
- Discovery motions

- Requests to depose witnesses in abuse or neglect proceedings must give notice to the District Attorney's office if counsel knows that criminal proceedings have been instituted regarding the conduct

- Ask for what you want and explain why you are entitled to it
- Judges are busy – be clear, be concise and tell your story convincingly
- Do not waste time on outdated, unnecessary language (e.g., “comes now the petitioner....”
- Just because you put it in your motion does not mean it is proof that the court can utilize to make its decision

Be selective

- Think strategically. Motion practice, like any other pretrial procedure, is a tactic and should be thought of as a means to an end–the successful resolution of the case for your client, however success may be defined. For any tactic to be successful, you must always focus on the bigger picture: Will a "win" In the short term help or hurt your chances for ultimate success? Just because you can file a motion does not mean that you should. Carefully choosing when and when not to engage in motion practice can be the difference between moving a case forward quickly toward a successful end and an expensive and wholly ineffective boondoggle. Perhaps most importantly, such choices often directly affect the credibility of the lawyer-your most prized asset as an advocate.

Be focused.

- If you choose to file a motion, focus on the most important bases for relief. As a general rule, you should focus on no more than two to three themes for any motion (irrespective how many grounds for relief you may have). Too many themes dilute the power of your best themes and often distract and confuse the audience-in this case, the judge. Lawyers too often engage in an exercise similar to the much-derided practice of "defensive medicine," in which they feel the need to raise every single argument no matter how tangential or likely to contribute to ultimate success. Often this is borne of fear that omitting or minimizing any point, no matter how trivial, could leave them open to later criticism if the motion is not successful. But, let's face it, if the fifth or sixth most important point is the one that ultimately carries the day (assuming the court actually reads and meaningfully considers it), perhaps your prioritization was off from the outset.

Be concise.

- Judges are very busy. One way to show judges that you respect their time and the difficulty of their job is by taking great care to write motions and related briefs in a clear and concise manner. Show your judge that you understand and appreciate the difficulty of her job by spending the extra time to express your points succinctly and effectively. To grab the reader's attention, lead with strength. State why you should be entitled to the relief you seek (or why your opponent should not) right up front, on the first page and preferably in the first paragraph. Write in the active voice, using short and simple sentences and concise paragraphs. Avoid lengthy block quotes and string cites. Avoid use of footnotes except when absolutely necessary. If you cannot express your theme points clearly and coherently in a medium-length paragraph, reconsider your approach. Presenting complex points In a simple, straightforward manner is an art, but one well worth trying to master. Great lawyers are able to do it. So can you. Less is more.

Be professional.

- Lawyers always should be zealous and impassioned advocates for their clients, but, to be effective, such zeal and passion must be properly channeled. Too often in the heat of battle, lawyers devolve from arguing about issues to arguing about personalities-attacking an opposing party or opposing lawyer's character, sometimes savagely. Don't do it! One of the most universally expressed judicial pet peeves I've heard through the years has been the increasing level of incivility and disrespect that lawyers express against opposing parties and one another. For too many advocates, it is not enough merely to point out the flaws and weaknesses of an opponent's legal position. Instead, they feel the need to convince the judge that their opponent and/or their counsel are bad (even evil). Yet, even if considerable evidence exists to justify what is inherently a subjective point of view, personalized attacks are not an effective tactic. Snide comments and snarky remarks may seem incredibly clever when you write them, but they rarely look good in print, and they never impress a court. In fact, far more often such tactics tend to boomerang against the attacker, hurting that lawyer's standing in the eyes of the court, thereby diminishing his most precious asset-credibility.

- You can effectively point out weaknesses in an opponent's case, or even improper or ethically questionable behavior by opposing counsel, without resorting to ad hominem attacks. Indeed, one of the most effective advocacy tactics that you can deploy is an argument that inevitably leads your audience–in this case, the judge–to arrive at your desired conclusion without you ever having to state it. Judges are often keenly aware of lawyers whose reputation (bad or good) precedes them. They also have eyes and ears and can (and often do) draw their own inferences from the conduct that they observe, all without self-serving "help" from counsel. Judges appreciate restraint in the face of bad behavior and really appreciate the lawyer who can call out such behavior without resorting to personal attacks. In sum, always take the high road.

ABA Standards for the Representation of Children

- The child's attorney should file petitions, motions, responses or objections as necessary to represent the child. Relief requested may include, but is not limited to: (1) A mental or physical examination of a party or the child; (2) A parenting, custody or visitation evaluation; (3) An increase, decrease, or termination of contact or visitation; (4) Restraining or enjoining a change of placement; (5) Contempt for non-compliance with a court order; (6) Termination of the parent-child relationship; (7) Child support; (8) A protective order concerning the child's privileged communications or tangible or intangible property; (9) Request services for child or family; and (10) Dismissal of petitions or motions. Commentary Filing and arguing necessary motions is an essential part of the

- Consistent with the child's wishes, the child's attorney should seek appropriate services (by court order if necessary) to access entitlements, to protect the child's interests and to implement a service plan. These services may include, but not be limited to: (1) Family preservation-related prevention or reunification services; (2) Sibling and family visitation; (3) Child support; (4) Domestic violence prevention, intervention, and treatment; (5) Medical and mental health care; (6) Drug and alcohol treatment; (7) Parenting education; (8) Semi-independent and independent living services; 10 (9) Long-term foster care; (10) Termination of parental rights action; (11) Adoption services; (12) Education; (13) Recreational or social services; and (14) Housing.

- Do you want your client to testify in a motion hearing?
  - The accused does not by testifying upon a preliminary matter become subject to cross-examination as to other issues in the case. Tennessee Rule of Evidence 106
- But is it a good idea?

Motions in Limine

- Why do you need them in a judge-tried case?
  - Affects how you try the case
  - Resolves issues early
  - May affect pre-trial resolution of the case
- What issues can you raise?