

ARTICLING STUDENTS AND MASTER'S MOTIONS FROM THE PARTNER'S PERSPECTIVE

By Samuel S. Marr¹

INTRODUCTION

Articling is difficult. Anyone who tells you differently is probably lying to you. It can also be exciting and rewarding. Master's motions are often your first real chance to get up on your feet and be an advocate, just like a "real lawyer". The thrill of victory and the agony of defeat are exciting. Do not forget to enjoy the experience.

I want to take this opportunity to give you a few (hopefully helpful) tips from my 20 years of practice, which may assist you in the getting the most out of the experience for yourself, the client and your firm. I have divided the discussion into two categories:

1. Tips for what to do while in the office;
2. Tips for Court.

TIPS IN THE OFFICE

A partner has just given you a memo instructing you to draft and argue your first motion.

How do you proceed? Here is what to do:

1. **Read the Pleadings.** I don't care how busy you are, or if you have been told this is a "simple motion". This is absolutely the first thing to do.
2. **Understand the Assignment.** Be sure you understand what the instructing lawyer wants you to do. Do you understand the relief being sought? Before you serve the motion record be sure the assignment makes sense. Once you have completed all the other tips come back to this one. If the assignment doesn't make sense pick a calm moment to discuss it with the instructing lawyer. Discuss the merits of the motion. If you are cannon fodder (for those who are not history buffs this is a term for expendable soldiers whose lives were sacrificed in order that the opposing army was forced to use up their cannon balls) it is helpful to know that is your role. If you lose no one will be disappointed, and who knows you may win. ***If it is a refusals motion make sure you ask the instructing lawyer his or her opinion as to which***

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paragraph(s) in the pleadings make the question relevant, and what relevant information the question will elicit.

3. **Know the Rules.** Do you know what the relevant rule is? Read the Rules. (The Rules of Civil Procedure are truly amazing. They are the ultimate how-to, self-help manual). Confirm that the assignment is a master's motion, and not exclusively in the jurisdiction of a judge (in Toronto this is a lawyer's motion). Do you know the rules relating to service, how many days, methods of service etc (**Remember the Master Sandler story Sam Marr told you**).
4. **Get a good precedent, but don't be a slave to the precedent.** Good precedents are invaluable, but think about how your motion is different from the precedent, and don't be afraid to "write your own script". You're not supposed to be a robot, use your brain.
5. **Discuss the motion with others.** Without violating privilege, discuss the motion with other junior lawyers or students. Pick their brain and make sure you are on the right track.
6. **Draft materials which are concise and persuasive.** Easier said than done. Number your pages. Include the pleadings. Try to organize the affidavit in a logical manner. Organizing chronologically is usually best.
 - I'm a huge fan of headings (capitalize the headings and type them in a bold font). **USE BOLD LETTERING and CAPITALS TO EMPHASIZE A POINT.** Talk colloquially. Identify the parties. Tell the court what stage in the proceedings you are at (ask lawyer or a secretary working on the file what stage the lawsuit is at). Is the trial date fixed? Are discoveries completed, etc? When did the cause of action arise? Really important points in the affidavit should stand out.
 - If you are bringing a refusals or undertaking motion you must prepare and include the charts required by rule 37.10(10) following Form 37C. **These charts should be completed well in advance of putting them in your motion record** (the instructing lawyer may not be familiar with this Rule but you must be familiar with it). The questions should be grouped by issue, taking the questions out of the order as they appear in the transcript, and placing them in a logical order **together with all other questions related to the same issue.**

- Once this is completed you must send the charts electronically to the responding party who will complete the column in the charts setting out the answer or the precise basis for the refusal and return the charts electronically to the moving party.
- Transcripts of the examination will also be required, and should be filed either in advance or at the hearing, unless a copy or relevant portions are included in the motion record.

TIPS IN COURT

1. **Get to Court early.** Get a seat and get yourself comfortable, and read everything over while waiting for your turn (as often as you can get into Court, and just watch. If you are in Court on a motion stick around after your motion is over and just watch. If your matter gets stood down don't rush off right away, watch a bit. I still try to watch if I'm Court, it is a great learning experience).
2. **Write out your entire argument in full or point form.** THEN DON'T READ IT (If possible show it to someone who knows something, and get their opinion on the argument). Don't be a slave to your argument. ***Listen to what the Master is saying to you.*** Listen to your opponent's argument. Improvise where necessary. Leave your prepared script to answer the Master's questions. You can't win if you ignore the Master's questions. If at all possible answer the question immediately, and don't say you will come back to the question later; you'll forget or the context will be missing if you answer later.
3. **Pay attention to the Master.** Make eye contact with the Master. **SLOW DOWN!** When speaking in public very few people speak too slowly, and most speak too quickly. Talk with a loud and clear voice. Mix up your intonation. Often there are clues as to how the argument is going; look for those clues.
4. **Be courteous.** When it is your turn to speak stand up. Never interrupt the Master when he or she is speaking, and if you do interrupt, apologize immediately! Don't speak out of turn. Don't interrupt opposing counsel. Make sure the Master is at the same place as you are in the argument. If you refer to a case or portions in transcripts don't continue talking until you are sure the Master has caught up to you. Remember the Master has to make notes as the argument proceeds. When you finish your argument thank the Master. Any time you leave the court room give a little nod or slight bow as a sign of respect to the Court. **Don't forget your reputation is everything.**

5. **Don't repeat the same argument over and over again.** Make your points clearly and convincingly. If it is a really important point you probably want to say it once and then a second time in your concluding comments. Saying every point three or four times is not going to help, and will probably hurt your argument.
6. **Know when to "fold 'em" and when to "hold 'em".** Sometimes a losing argument is just a losing argument, and if you just keep going past the point of utility that doesn't help, not on the motion you are arguing that day, or the next time you are in Court. On the other hand persistence does sometimes pay off, and you shouldn't give up too soon. Use your instincts. Unfortunately, your instincts are probably not that good right now. Fortunately, your instincts will get better over time as you gain experience. Since you are inexperienced at this stage of your career, you should probably err on the side of being too persistent. However, if you think you have hit a "brick wall" you probably have, and you should give up and move onto another point.
7. **Don't waist time regurgitating settled law.** On most procedural motions, the Masters know the Rules of Civil Procedure inside and out, and better than you (or for that matter I or any other lawyer) will ever know them. If it's a refusals motion don't waste time citing cases on the "semblance of relevance", just state the principle in one sentence and get onto explaining why the question is relevant. ***On a refusals motion, explain right away what information the question will elicit, and why that information is relevant to specific paragraph(s) in the pleadings (any case cited on a refusals' motion should be on "all four's" with the refusal you are arguing).***
8. **Be yourself.** Every successful lawyer has their own style. We cannot all be Eddie Greenspan or Johnny Cochrane (OJ Simpson's lawyer), or Denny Crane (played by the actor William T. Shanter on *Boston Legal*) or Perry Mason. Find your own style. You are not an actor playing a part. You are an advocate. Sincerity is your ally. Don't fear appearing to be young, eager and earnest. You should be young, eager and earnest! It's a little too early in your careers to be jaded. Enthusiasm is contagious, and it does not hurt for the Master to know that this motion is important to you.
9. **Enjoy yourself.** People (and Masters are people too!) generally do not react well to miserable people. If you appear miserable, you have less chance of succeeding (Additionally, scientific evidence suggests that if you are miserable you have a greater chance of dying young!). Enjoy yourself! While

winning is **way better** than losing, there is something genuinely exciting and pleasurable about participating in a vigorous well fought adversarial contest of intellectual debate, regardless of the outcome (although winning is **always better** than losing!)

Good luck!

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