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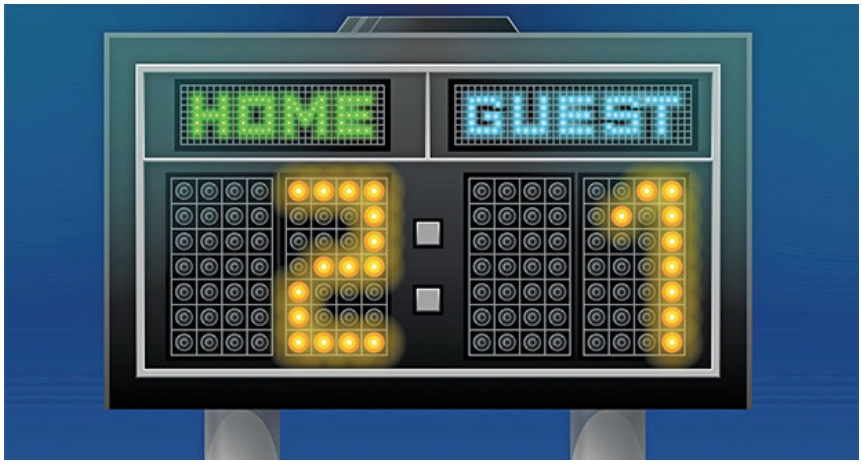

Even though court rules have become more uniform, there still is something at least slightly disconcerting about playing what is, in essence, an away game. Home-field advantage is intangible, but hard to deny. (Deposit Photos)

Briefly: When an attorney is a stranger in a strange land

By: Eric Magnuson November 25, 2020

We all like the comfort of home. We are used to things; we know what to expect, and in general, we are at ease.

For lawyers, that's true in court as well as at home. Appearing in front of judges who are familiar, whom we have seen before, and about whom we generally have a sense is comforting. The case may be tough, but at least we can concentrate on the issues, and not worry about the environment or the audience. It's not quite like being in your own living room, but it's close. You know who the characters are in the play, and how they are likely to act.

When you move to a new venue, it's not quite as comfortable. Early in my career, a journey across the river from Minneapolis into St. Paul was like going to another country. If you were not a St. Paul lawyer, the court knew it, and, more often than not, you got treated like an outsider. Common wisdom was St. Paul lawyers were needed to handle St. Paul cases.

That's not so true today, and not just because of the advent of light rail. Our state trial courts operate under unified direction from the Supreme Court and Judicial Council. The General Rules of Practice for District Courts have eliminated many of the sometimes idiosyncratic local rules that were at best inconvenient for transient lawyers, and sometimes problematic. I handled an appeal more than 30 years ago in which a defendant lost the right to a jury trial because it didn't comply with an unwritten rule of practice in the First Judicial District requiring the filing of a "note of issue" within 10 days of the other party's filing, asking for a jury trial. *Schweich v. Ziegler, Inc.*, 463 NW 2d 722 (Minn. 1990).

But even though the rules are more uniform, there still is something at least slightly disconcerting about playing what is, in essence, an away game. Home-field advantage is intangible, but hard to deny.

That lack of comfort can be particularly strong when you handle the case in a jurisdiction in which you are admitted only on a *pro hac vice* basis. Most courts require you to have a local lawyer by your side to act as a guide through this unknown territory.

So that brings us to appeals. I have argued in all of the appellate courts in Minnesota, and in many of the circuit courts of appeal across the country. I have also handled cases in a number of other state appellate courts. By the same token, I have been asked to handle cases in other jurisdictions, but have suggested that a local lawyer familiar with the case and the court might be a better choice. It all depends on the case, the court, and the lawyers. And there are a number of considerations.

First, you have to weigh the benefit versus the cost of having a new lawyer on appeal. That's true whether you are playing on your home field or are the visitor. A lot has been written about whether it is better to have the trial lawyer argue the appeal, or have an appellate specialist do so. There are pros and cons of both sides. *See* Eric J. Magnuson and Chelsea A Walcker, *Trial Lawyers on Appeal*, Minn. Lawyer (June 17, 2019); Margaret D. McGaughey, *May it Please the Court–or not: Appellate Judges' Preferences and Pet Peeves about Oral Argument*, 20 J. App. Prac. & Process 141 (Fall 2019); Deena Jo Schneider, *The Complete Appellate Advocate: Beyond Brief Writing*¸ ABA Appellate Issues (Summer 2019); Anna M. Manasco, *New Frontiers for the Appellate Lawyer at Trial*, ABA Appellate Issues (Summer 2019).

Second, you have to evaluate what message, if any, new counsel might be sending to the appellate court. In my experience, appellate judges appreciate seasoned appellate lawyers presenting arguments, because in many ways, they are speaking the same language. Because an appellate lawyer should have enough time to become intimately familiar with the record, and because the decision has to be based on the record, there is little disadvantage to not having been at the trial. In fact, in some ways it is an advantage because the appellate lawyer will know exactly what the court must base its decision on – the record.

So when you go to a new court, and are the visiting team, what can you do to even the playing field a bit? Some suggestions.

First, always secure strong local counsel. They should be more than a mail drop. They should be active partners in the prosecution of the case through the appellate court.

Second, get as much information as you can about the judges. There is some great technology available these days through Westlaw and Lexis that will give you extensive information on the background of the judges, the types of cases that they have handled in recent years, and how they have decided them. The software is sophisticated enough so that it can even tell you what cases the judges like to cite for differing legal propositions. And you can also call on colleagues familiar with the judges to supplement the electronic Intel.

It's also vital to take an extra day or so if possible to observe the court in action. Gaining some familiarity with the physical layout is almost as important as watching the procedures and protocols of the oral argument in any particular court. It differs greatly from jurisdiction to jurisdiction, despite the obvious similarities.

What you absolutely don't want to do as a visitor is cop an attitude. When I was first on the Minnesota Supreme Court, we heard a case involving an arcane principle of corporate law. The lawyer for one of the parties was from another state, and was clearly an expert in the topic. It was obvious from his every word and gesture that he thought the court, in general, and I, in particular, just weren't up to speed on the topic. I remember asking him a question

only to be told "that's really not the issue." Since I thought it was, I repeated my question. Rather than trying to help me, the lawyer again insisted (in so many words) that I didn't really understand what the issue actually was. When I tried a third time, I got a large sigh from the lawyer, and an answer that was the functional equivalent of "if I have to answer the question that stupid, I'll try my best." I didn't find that response helpful.

And that's really the bottom line. Regardless of what court you are in, when you are arguing an appeal, your real job is to help the court get to the right answer, not show how smart you are. I have written on more than one occasion that "argument" is a bit of a misnomer – the appellate advocate is really trying to be a guide to help the court find the right answer. Of course, as an advocate, the right answer is that your client wins. And to maximize the chances of your client's success, it helps immeasurably to not feel like a stranger to the extent that you can.

Eric J. Magnuson is a partner at Robins Kaplan LLP and served as Chief Justice of the Minnesota Supreme Court from 2008 to 2010.

ABOUT ERIC MAGNUSON