I Second THAT MOTION

WRITTEN BY **JOHN G. BROWNING**

MOTION PRACTICE IS IMPORTANT—I get that. Perhaps you're asking for the court's permission, so you file a motion for leave. Or you need more time, and you seek a motion for continuance. Perhaps you need to make the other side turn over documents or take certain action it would rather avoid, so you draft a motion to compel. But there are some lawyers out there whose wants or needs are somewhat more, shall we say, unconventional.

Take the "motion for a fist fight," for example, filed by criminal defense attorney Kirk Krutilla in the Montana Fourth Judicial District Court in Mineral County, Montana, in 2006. Krutilla represented a criminal defendant who had allegedly stabbed another man to death. He was asserting that it was a case of self-defense—that the victim was actually the aggressor who was beating up the much smaller defendant, and that in order to defend himself, the defendant took out a knife and stabbed the larger man to death. Interpreting the prosecution of his client as a tacit endorsement that bullying smaller, weaker persons was acceptable, Krutilla filed his "motion for a fist fight," offering the prosecution team the chance to enforce their beliefs in "the brutal humiliation and beating up of weaker human beings," and sought a court order permitting a fist fight pitting Krutilla and his co-counsel, Bill Buzzell, against prosecutors Shaun Donovan and John Conner. The prosecutors responded that while they "could acquit themselves respectably" if a physical contest were necessary, they nevertheless requested that the motion be denied. Not surprisingly, the judge felt that the courthouse was no place for fisticuffs.

Of course, not every motion filed on behalf of a defendant seeks permission to do violence; some just want to juggle—literally. Orlando Melendez, age 20, was facing trial in Springfield, Illinois, in 2017 for the attempted robbery of a convenience store. Melendez (representing himself after firing his court-appointed lawyer) asserted an unusual defense—he was just clowning around. Melendez, who had allegedly walked into a Cumberland Farms store at 3:15 a.m. with a toy gun and demanded money from the register, said he was a "clown," and to prove it, he filed a "motion to juggle." According to Melendez, the juggling act would be "not only the simplest, but the only possible proof that the defendant is a jester," and would show the jury that the attempted robbery was just a "misunderstanding." Judge Robert Murphy failed to see any humor and issued a one-word order: "Denied."

Now, a "motion to juggle" sounds fairly innocuous compared to our next motion, a "motion to spread death." As ominous as that may sound, it's actually a fairly standard term used in Illinois procedure to alert the court and all counsel of record that a party has died during the litigation and that a substitution for the decedent is necessary (such as the decedent's estate or personal representative). The motion is more fully described as one to "spread death of record." In Texas procedure, and the Federal Rules as well (F.R.C.P. 25(a)(3)), our counterpart is referred to as a "suggestion of death." In my opinion, though, "suggesting" death is little better than "spreading" it. After all, the "suggestion" of death sounds a bit uncertain—as though perhaps we need someone to take a peek in the casket just to make sure.

The "motion to spread death" filed by an Illinois lawyer in an Indiana court gave one trial judge the opportunity for a dose of humor. In a 2010 case, Elkhart Superior Court Judge Stephen R. Bowers entered an "Order Denying Motion to Spread Death," saying that "spreading death" was contrary to the constitutional guarantees of "life, liberty, and the pursuit of happiness," as well as "repugnant to the standards of civilized society." The judge then decided to treat the hapless Illinois counsel's motion as a "motion to suggest death" under Indiana's trial rules.

From a "motion for a fist fight" to a "motion to juggle" to a "motion to spread death," we come finally to the decidedly less contentious sounding "motion to compel defense counsel to wear appropriate shoes at trial" filed in a personal injury case in Palm Beach County, Florida, by plaintiff's counsel Bill Bone. This motion reflected Bone's frustration with his opposing counsel's (Michael Robb's) predilection for wearing shoes with holes in the soles at trial "as a ruse to impress the jury and make them believe that Mr. Robb is humble and simple, without sophistication." Bone sought to counter Robb's strategy to present himself and his client as "modest individuals who are so frugal that Mr. Robb has to wear shoes with holes in the soles," while suggesting that "Plaintiff's counsel and the Plaintiff are not as sincere and down to earth as Mr. Robb." The motion was denied by Circuit Judge Donald Hafele, and it only strengthened Robb's resolve to keep his ancient loafers "in play," saying "You ride that horse until it completely collapses."

Maybe Robb felt this was little more than a case of baring one's sole, but I think he comes across as a bit holier than thou. **TBJ**

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