

Best Practices For Motions Brief Writing: Part 1

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This two-part series is a “primer” for effective brief writing when making a motion. It suggests practical considerations — “do’s” and “don’ts” — when you put pen to paper for the brief. The diligent brief writer should focus on these best practices from cover to conclusion. Part 1 addresses the sections of a brief through the statement of facts. Part 2 addresses the rest of the brief, also offering some thoughts about opposition and reply briefs.

A litigator’s standard fare is making motions. Before, during or after trial, we ask the court to do something — to dismiss the other side’s case, grant our client summary judgment, order discovery from an opposing party, preclude certain evidence from being admitted at trial, grant a new trial, and a host of other things. Motions are an indispensable tool in bringing victory to our client’s cause. But all too often lawyers prepare them haphazardly, without sufficient clarity and lacking compelling advocacy. Some motions, such as one for summary judgment, require an evidentiary showing based on affidavits, deposition testimony and exhibits, while others, such as a motion to dismiss, often do not. However, a brief, or what is often called a “memorandum of

law” in the trial court, is usually necessary — to present the facts (be they evidentiary or assumed), describe the law, and apply that law to the case at hand. A strong brief is essential for succeeding on the motion. How can you make it as effective as possible?

Brief writing is assuredly more art than science. Equally able lawyers prepare briefs differently. No one size fits all, and there can be exceptions to the norm for a particular motion. But certain “best practices” exist for the vast majority of motions briefs that a lawyer will file. Indeed, much of best practices is basic to a persuasive brief, yet often these advocacy techniques are overlooked. This article offers a checklist for younger litigators and a refresher for more experienced ones.

The “Cosmetic” Preliminaries

Unless your brief is very short, it should have a cover page, table of contents and table of authorities. In fact, court rules or judges’ individual practices often require that these be included in a brief, or otherwise require them for a brief of a certain length, say 10 pages or more. But even if not required, including them is good advocacy, not merely cosmetics. Appearance counts. Show professionalism. Let the court know from the very beginning that you are a careful — and therefore credible — advocate. After all, credibility with the court is a key ingredient for success. Although it sounds elementary, the cover should include the caption (there should be no confusion as to which case is involved); a title for the motion (in the shortest-possible description, such as “Plaintiff’s Memorandum of Law in Support of Its Motion for X”); and the names and contact information of the parties’ counsel (including, now, email addresses for the attorneys listed).

The table of contents, while often given the bum’s rush by many lawyers, is in reality a very important part of the brief. The headings comprising the table of contents are the outline for your motion. That is, the headings throughout your brief — and particularly for the Argument section — are a key to persuading the court of your position. The table of contents itself should be

completed when your brief is done. (The current word processing programs can generate it automatically.) But at the start of drafting the brief, you should develop an outline, paying careful attention to headings as the roadmap of your brief that will become the table of contents. Usually it makes sense to outline your brief generally before you begin drafting; but once you begin drafting, craft all sections of the brief (including the Statement of Facts) with headings.

Strive to make your headings short and sweet. One or two lines work well. Three should be the longest. Overly long headings can lose the roadmap effect you want to create. Revise the headings as you draft the text beneath them. Read the headings from one to the next and craft them so that, where feasible, they advance the progression of your story or argument. Use the same syntax and structure from one heading to the next. Remember that headings are your “formal” outline of the motion. You should use “I.”, “A.”, “1.” “(a)”, for example, in the Argument section. Importantly, unless the brief is short (say 10 pages or less), you should always incorporate sub- and sub-subheadings. This kind of breakdown greatly helps the judge follow your reasoning. A good rule of thumb is to avoid writing more than about three or four pages without including a heading (whether sub or sub-sub). While this might sound impractical, try it. After writing many pages of text, re-read that text to discern subheadings; if your text flows logically, you likely will find appropriate subheadings that encapsulate the text, breaking up your points in a way that helps the judge follow your positions.

Continue to pay attention to your headings and revise them as your brief evolves through successive drafts. You should continue to hone your headings to present your position as cogently and convincingly as possible. And be sure to use headings (and subheadings, etc., where appropriate) in the factual section of your brief. The roadmap here is of “the story” you want the court to understand. A well-told story, just like a legal argument, should unfold logically and concisely, putting the best foot forward for your client on the facts; thoughtful headings will help greatly on that score.

The table of authorities (TOA) is a helpful tool to both the judge and you. It, too, is often required. So, even if your brief is short and contains few authorities, check whether it's nonetheless required. The TOA is a handy way to check on the cases used in your brief and to make sure that none of the cases or other authorities you intended to cite are omitted; and the TOA in your opponent's brief gives you or your staff a quick way to identify and locate the other side's authorities. The TOA also gives your brief a further air of professionalism.

Body of the Moving Brief

Introduction

Although sometimes omitted for the sake of brevity, generally the body of the brief should begin with, for example, "Plaintiff Jones submits this memorandum of law in support of his motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure." A straightforward "who's who" and "what's what" to orient the judge immediately.

Preliminary Statement

Every brief should have an up-front summary of your overall position on the motion, typically called the "Preliminary Statement." It is perhaps the most important part of the brief. It should be clear, crisp and concise, while still sufficiently describing your position and lucidly explaining why your client should prevail. The Preliminary Statement should be only the big picture. Often lawyers get carried away and become too detailed. Avoid giving specific dates, amounts and other factual particulars, unless doing so is essential to understanding your story. Don't cite authorities, unless (similarly) everything turns on one key case or statute. Too much detail up front will produce an "eyes glaze over" reaction, rather than one that begins the persuasion process. Remember that typically the judge knows little about the motion and might not even be up to speed on the case itself. Even where the judge knows the case, and perhaps has had a

preview of the motion from a pre-motion conference, you always want to synthesize your position so the judge knows where you are headed when you flesh out your points.

No matter how complex your case and how complicated the motion, the Preliminary Statement usually should be three to four pages, or possibly five as the maximum. Often lawyers go on and on at the very beginning. A 10-page Preliminary Statement, for example, will invariably come across as trying to do too much, is unlikely to persuade, and probably will leave the judge confused. An effective Preliminary Statement should describe the cast of characters (i.e., the parties and their relationships); the main story line from your perspective (the broad factual context); the parties' dispute (the claims and issues to be decided); why the court should rule in your favor (the argument points, by broad theme); and, as a result, what you want the court to do (the relief sought). After that, "say no more." Often it is best to draft the Preliminary Statement as the last or near-last part of the drafting process. By then, you will have crystallized your arguments, and the key points (both factual and legal) should be apparent. You should endeavor to transform the detail from your facts and argument into a short narrative telling the gist of your story and why you should win.

Drafting a persuasive Preliminary Statement is one of the hardest tasks a litigator faces in written advocacy. It should be revised unabashedly and crafted carefully. Nonetheless, the Preliminary Statement is often given short shrift. It shouldn't be — the Preliminary Statement must be the opening salvo for persuading the court to rule in your client's favor.

Statement of Facts (or Statement of the Case)

For most cases, and most motions, the facts are key. While sometimes we litigate a pure question of law, in most instances facts determine the results of cases. In motion practice, the "facts" might be the allegations of a complaint (such as for a motion to dismiss), the evidence adduced through discovery or submitted by witness affidavit (a summary judgment motion), the circumstances of a document production dispute (a discovery motion), the evidence admitted

(or excluded) at trial (a new trial motion), and the like. Whatever the context, the factual presentation should present the facts 100 percent accurately, provide solid support for your facts, and give an accurate recitation that nonetheless depicts the facts as favorably as possible to your client's cause.

Accuracy/Support. Virtually everything presented in the Statement of Facts should have a citation or reference. For a motion to dismiss, generally that means citing to an allegation of the complaint by specific paragraph. Or, for a summary judgment motion, each fact must be cited to admissible evidence. Indeed, many courts, such as the district courts within the Second Circuit, require by local rule that the movant on a summary judgment motion submit a separate statement of material facts supposedly not in dispute for trial; and the opposing party must respond in kind with countervailing evidence to show disputed issues of fact. For an effective brief in support of most motions, the Statement of Facts should cite support sentence-by-sentence.

Including specific support for the facts has an added benefit. By focusing support fact-by-fact, a conscientious brief writer is better able to describe the facts with precise accuracy. In other words, review the supporting materials that will comprise your record for the motion as you draft the Statement of Facts. While this seems obvious, all too often lawyers prepare a Statement of Facts from memory, general familiarity with the record, or without carefully examining the support to be used, then leaving it to another lawyer or a paralegal to fill in the citations. That is a recipe for disaster. Your Statement of Facts must adhere scrupulously to the supporting materials it relies on. It should, of course, be cite-checked with the rest of the brief, but cite-checking is not foolproof and errors can get by. Don't take the chance. To assure accuracy, drafting should go hand-in-hand with review of factual materials. Because credibility and trustworthiness are the touchstone of effective advocacy, nothing is more detrimental than misstating a fact.

The same holds true for ignoring a bad fact, as lawyers are sometimes wont to do. Your fact statement should never ignore a bad fact. It assuredly will come back to bite you when the other side relies on the fact, no doubt emphasizing that you omitted it. Bad facts, for example, might be addressed in a broader context that is favorable, juxtaposed against good facts, or cast as not determining the issue at hand or otherwise of little consequence. Similarly, add details from the record that soften the bad fact. Focus on the temporal, if timing will lessen the import of a bad fact. In other words, look for ways to de-emphasize the negative. As some simple illustrations (where a defendant's guilty plea is important for the other side's case), consider:

- “Although Smith pled guilty to a crime, he has led an exemplary life since then.” (OR “Smith has led an exemplary life since pleading guilty to a crime ten years ago.”)
- “Although Smith pled guilty to a crime, that crime was unrelated to his conduct at issue here.”
- “Although Smith pled guilty to a crime, that crime occurred almost ten years ago.”
- “Although Smith pled guilty to a crime, the crime was a misdemeanor.” (OR “The crime that Smith pled guilty to some years ago was a misdemeanor.”)
- “Although Smith pled guilty to a crime, the judge sentenced him to probation only.”

Accentuate the positive. Downplay the negative. But bad facts must be addressed, never ignored.

Favorable Presentation. The Statement of Facts tells a story. Advocacy for your position should be part of the story, but the advocacy must be implicit. That is, the facts should tell the story objectively, without overt characterization, but presented to best tell your side of the story. Emphasize and de-emphasize the facts to present your story favorably. Arrange the facts in the best possible light. Do not use adjectives or adverbs; they are characterization that often injects hyperbole and does not persuade. A familiar refrain is not to use “clearly” in a brief, and the same holds true for similar words (e.g., “egregious,” “baldly,” “blatant”). Use expressive verbs

and, where possible, descriptive nouns. The effective brief, like advocacy in general, should evoke a response favoring your client, not demand it — you want to show the judge how to come out your way, not tell her to do so. Evocative, not preachy, language accomplishes this. Consider:

“The defendant committed a blatant misrepresentation by knowingly failing to disclose an active grand jury investigation into its pricing practices when it issued its annual report on January 30, 2016.”

OR

“On December 31, 2015, the Department of Justice served a grand jury subpoena on Acme Company for its documents related to pricing practices. Acme’s general counsel contacted DOJ that day and learned that the government had initiated a criminal investigation. On January 30, 2016, Acme issued its annual report. The annual report did not include any information about the criminal investigation.”

Let the facts speak for themselves. Let the judge draw his own conclusion. Don’t dictate the conclusion you want.

Also consider the following language choice: “Acme Company did not misrepresent its expected performance in its annual report because no business can [state vs. divine] its future earnings.” The evocative verb “divine” impliedly supports Acme’s position whereas “state” does not.

Remember that the Statement of Facts should be prose-like, narrating the events that matter for deciding the motion. There should be plot to your narrative. Simplistically, the characters (the parties) in your story had dealings with one another (the facts in issue) that led to conflict (the claims) and caused harm (damages). Often describing the key events chronologically is effective. Winnow out immaterial facts — those that do not matter for convincing the court that

your position is correct. Be judicious. Omit extraneous details about the important facts because they, too, are unlikely to advance the ball and instead can distract the reader. A story is best told by using the players' names or positions (such as "Smith"), rather than "plaintiff" and "defendant" (or by legal jargon such as "assignee"/"assignor," "grantor/grantee"). Identify individuals by last name and entities by descriptor, such as the "Bank," the "Law Firm," "Acme" and the like. Think about a short form that communicates covertly — for example, in a wrongful death action, you might identify the deceased's wife as the "Widow."

The Statement of Facts must set the stage for the legal arguments to follow. You should already have outlined the legal arguments, based on the law, when crafting the factual statement. What facts are particularly important to the legal claims at issue and the legal arguments to be made? They should be emphasized in your factual statement. Your argument down the road will highlight those facts in the context of the principles of law that apply.

The bottom line is that the Statement of Facts — with nothing more — should make the court want to rule in your favor. In most instances, the facts will drive the result, not the law, and you want the story to move the judge to apply the law in order to reach the result you want. After perhaps the Preliminary Statement, the Statement of Facts is the most important part of your brief.

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