Best Practices For Motions Brief Writing: Part 2

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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. Part 1 of this series, espousing practical considerations for effective brief writing, discussed the early sections of the brief. Picking up where we left off, Part 2 addresses the Argument through Conclusion sections, and also briefly suggests tips for the opposition and reply briefs.

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Body of the Moving Brief (Continued)

Argument

The Argument section is the meat of your persuasion. Here you put flesh on the bones of your legal position. Several considerations recur:

Multiple Legal Arguments. Unless your motion is pretty simple, you will have more than one argument to justify the relief sought. Resist the inevitable temptation to make every argument,

weed out the weak ones, and use sound judgment. If in doubt, ask a colleague for a reaction to an argument. Including a losing argument will detract from stronger ones. If you don't have at least one strong argument, consider not making the motion. Granted, sometimes there are strategic reasons for filing a motion, such as educating the judge about the case for trial or forcing the other side to flesh out a position/theory. The reasons, however, should be important, and you must have at least colorable grounds for the motion.

Typically, you should begin with your strongest legal argument. Sometimes the circumstances will suggest a logical order to the arguments; for example, on a motion to dismiss, your Argument points typically will address the claims in their order in the complaint. If you have multiple standalone arguments, try to finish on a strong one. And if you are including your last argument as a "throw-away" one, well, throw it away.

Legal Standard. Lawyers frequently begin the Argument section of a brief with a recitation of the legal standard or the standard of review. Often this is unnecessary, and certainly so for the common motions. Judges can recite in their sleep the standard, for example, on motions to dismiss or for summary judgment. Address the legal standard if your motion is a less common one or the standard is uniquely relevant to your argument. As an example, on a motion in federal court to vacate an injunction, it could be appropriate to spell out the several-element legal standard and then apply those elements to your case. For a widely known standard, instead of rote recitation, think about incorporating it into your position. For instance: "The complaint is so devoid of factual allegations of Mr. Smith's scienter that the complaint does not meet even the lenient standard on a motion to dismiss," or "... the Twombly plausibility requirement is not satisfied."

Structure. There is no one-size-fits-all roadmap for an effective Argument. But often a solid approach is to:

- Concisely state the governing principle of law, citing a leading, and if possible recent, binding appellate case or an applicable statute, quoting the case/statute if

workable (“As the Second Circuit has explained, ‘a complaint alleging securities fraud must satisfy Rule 9(b), which requires ...’”; “Section 10(b) makes it unlawful ‘to ...’”)

- Then flesh out the law by describing your best case — typically one most similar to your case — with its facts, the court’s reasoning, and the outcome (“Smith v. Jones is illustrative. There, plaintiff claimed ... .”)

- Finally, discuss your case in the context of the law just described — the proverbial “apply the law to the facts” (“So too here. ...") — thereby highlighting the facts that mesh with your legal argument as foreshadowed by your Statement of Facts.

This approach is basic. All too often, however, a brief’s argument does not adequately spell out the law, or emphasize how it has been applied in similar cases, or (most importantly) it fails to drive home your facts that compel the court to come out your way.

Quotations. You should largely quote from authorities in the Argument section addressing the law. Don’t paraphrase. Using quotes “feeds” the law to the judge. With quotations, she can better rely on your cases, rather than feeling the need to review a case itself when your brief only paraphrases from it. But, importantly, you should rarely use block quotations. When it comes to lengthy single-spaced quotations, eyes often glaze over. Instead, you should weave quotations from the cases (or other authorities) into your sentences, keying on the most important language. Quotations make your authorities more accessible, and the judge’s job easier. Quoting the law, rather than telling the judge what it is, persuades better.

String Cites. In presenting the law, avoid string cites. Using the many similar cases that your research has found is tempting, but doing so is unnecessary and even annoying to the judge. One or two recent appellate cases, quoted, are sufficient to make your point. In some instances, citations with explanatory parentheticals might be called for, or similar decisions from other courts might add persuasion, but resist the impulse to lard the legal discussion with multiple cases that say the same thing. Nonetheless, for your best case (or cases), more than a cite is

called for — you should explain the facts, the court's reasoning and its holding to show the judge that this precedent supports your position.

Footnotes. Also avoid footnotes. Every footnote is a detour that distracts from your argument or narrative. Approach drafting with the mantra "I do not need any footnotes." Most briefs of significant length will likely end up with footnotes, but include them sparingly. They are best used for explaining procedural details, describing short-form references in the text, raising a noncritical argument because you anticipate developing it in reply, distinguishing the other side's less important cases, and the like. Almost always, the Preliminary Statement should not contain footnotes, because the opening needs to be punchy and easily followed. Again, there's no formula for when to use a footnote. The footnote should "feel right." Be sure there's a solid reason for including it. When your brief is near finished, review it just for the footnotes. You will often see, if being judicious, that you can delete many of them.

The placement of a footnote is important. Again, you want to avoid disturbing the flow for the reader. Avoid putting a footnote in the middle of a sentence, and, if possible, also try not to put one at the end of a sentence in the midst of text. Footnotes are best placed at the end of a paragraph. That is where a logical thought-break occurs, and the footnote, being an interruption of the text, generally works best there. While sometimes the instinct is to drop the footnote elsewhere in a paragraph because it seems to fit best there, you can often tinker with the last sentence of the paragraph's text or the first sentence of the footnote to make the footnoted point flow logically from the text at the paragraph's end. A brief reads more easily, and therefore persuades better, if it has only a few footnotes placed at the end of paragraphs.

Active/Passive Voice. We all know to write in active voice. Of course, this applies for all parts of the brief, not just the Argument. But remember that passive voice, precisely because it is weak, can serve to de-emphasize or shift focus. Passive voice, combined with wordsmithing, can work well for presenting bad facts or addressing a bad case. A brief should not ignore "what hurts," but you should carefully craft your sentences to downplay the negative. For example, "Smith

pled guilty in his 2010 case" becomes "In Smith's 2010 case, a guilty plea was entered." The distinction may be subtle, but a thoughtful brief writer should use drafting techniques to weaken the harmful, and passive voice is one of them.

Headings. As noted, headings are important everywhere in your brief, and especially so in the Argument. They should outline your legal arguments step-by-step. Here, in particular, look to break down the argument into subheadings (and sub-subheadings, etc.) Often after you've written several pages of an argument, you can turn back and add subheadings. They will help lead the judge through your argument. For example, on a motion to dismiss, a heading that says a claim fails can then be presented through subheadings that explain why each of the elements of the claim is not sufficiently pled.

Headings typically should be in active voice. Keep them as short as possible. They should be pithy and yet forceful. Generically, headings should describe a "what" — what the court should do ("The Court Should Dismiss Plaintiff's Fraud Claim") — or a "why" — why the court should give the relief you want ("The Fraud Claim's Scienter Allegations Are Deficient"). Headings should tell your "legal story" in an organized and logical way. They are very important to persuasion.

Conclusion

Most often the Conclusion should be very short and pointed. It is not the time to persuade the court. If you have not accomplished this by the time the judge comes to the end of the brief, the Conclusion won't help. Court rules typically limit the length of a motion brief (often 25 pages), which must always be met (unless enlargement is granted); so when space is tight, it is better spent on the facts and argument, not a rehash in a Conclusion.

The Conclusion should succinctly tell the court what it should do for your client. "The Court should grant Mr. Smith's motion for summary judgment." Period. Your Conclusion should recap only in rare instances, such as where a brief is particularly long or complicated. In a particularly

emotional or disturbing case, it might be appropriate to close with some rhetorical flourish, such as a witty quote or reference, but that is by far the exception, and any silver-tongued advocacy should be on-point and not come off as pretentious. If your brief has worked, the Conclusion tells the judge precisely how to rule, and how to frame that ruling at the outset of her opinion.

The Reply Brief

The reply brief should reply to the other side's contentions, both factually and legally. All too often lawyers rehash their moving brief without honing in on the opposition brief. You will lose the judge quickly (and lose credibility) with that approach. Frequently it is appropriate to reiterate your initial position ("As shown in our moving papers, the breach of contract claim fails because ..."). However, you should move quickly to refuting your adversary's argument. Specifically explain, for example, how the other side presents the facts wrongly; why a legal contention misstates the law; why your opponent's main case does not support his position; or how the law does not apply to your case's facts.

Once again, headings help greatly. Tailor them to focus on the other side's position. "Plaintiff's Effort to Save Its Contract Claim is Unavailing." Or, "The Government Does Not Refute Defendant's Showing That the Indictment Fails." Approaching headings this way will also help focus your drafting on the other side's arguments.

The reply should show the court that you are aiming squarely at the other side's position. This crystallizes the issues for the court, while simultaneously getting your arguments across. Done well, the reply brief effectively moves the ball forward on your position in the face of the opposing argument. It is a very significant part of your motion advocacy.

A Word About the Opposing Brief

Virtually everything described about a moving brief holds true for an opposition brief. And the opposition brief is like a reply — it must squarely confront the moving papers. In most instances, you will want a counter-statement of the facts (or of the case). Tell your story. Cast your Argument section as rebutting the moving party's legal contentions and law. This is your one written opportunity to prevent the relief being sought, so use it wisely by countering your adversary.

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The suggestions here will advance the persuasive power of a motions brief. They are often lost in the typical rush to get the motion filed. But step back and try to incorporate these thoughts. Doing so will pay off. And while brief writing is unique to lawyering, always keep in mind that effective brief writing is simply effective writing. That, too, will pay off in winning your motions.

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