Motion Potion:
Tips for Magical Memoranda

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TIME-TESTED TIPS TO TRANSFORM YOUR MEMORANDA INTO MAGICAL ONES

- **Use visual cues.** Some judges react more positively when you supplement or replace narrative text with a chart, graph, flow chart, or other visual aid. For example, consider the following set-up in a motion regarding a discovery dispute; assume you represent the plaintiff.

<table>
<thead>
<tr>
<th>P's Interrogatory</th>
<th>D's Objection</th>
<th>Reason Why Objection Should Be Denied</th>
</tr>
</thead>
<tbody>
<tr>
<td>Include verbatim text of interrogatory at issue.</td>
<td>Include the problem portions of the defendant’s response</td>
<td>Present your bullet-point reasoning and authority</td>
</tr>
</tbody>
</table>

- **Use roadmaps.** Help the reader by indicating where your argument is headed. This technique is called “roadmapping.” In one or two sentences, preview the arguments you intend to make: "Jackson, Inc. requests that the court deny XYZ Corporation’s motion for summary judgment for three reasons. First, _______; second, _______; and third, _______." In addition to a general roadmap at the beginning of the memorandum, also use roadmaps to open major sections of the argument.
Present facts accurately. Be accurate when presenting the facts. Do not overstate or misstate the facts. Do not omit relevant facts, even if they are adverse to your client’s position. Since the facts appear early in the brief, if you misstate the facts, you can irreparably damage your credibility with the court.

Provide accurate, sufficient, and complete record citations. Each factual statement — whether it appears in the facts, discussion, or other section — must be supported by evidence. When providing citations, be as specific as possible. Give the page number, and, when available, a line or paragraph number. Do not merely say, “See Document X.” When citing legal authority, provide a pinpoint citation that will lead the reader to the exact spot that supports your proposition. Some judges and clerks will ignore statements that lack specific support; others may comb through the record or the authority looking for the specific cite — but they will resent you as they are hunting.

Present quotations accurately and in context. Check quotations carefully and do not delete significant language that would alter the quotation’s meaning. “If counsel has inadvertently misquoted an authority, the error provides opposing counsel with the opportunity to seize upon the mistake and offer the mistake to the court as an example of the fallacious legal reasoning that permeates the opponent’s brief. The general rule is that a quotation improperly used is worse than saying nothing at all.”¹ As a general rule, judges do not like attorneys to quote, especially when the quotation is long. Numerous quotations signal either that the writer is lazy and just did not want to take the time to paraphrase, or that the writer did not understand the material well enough to paraphrase it.

Describe cases and other authorities accurately. When describing a case or other authority, describe it accurately. State what the authority actually says, not what you want it to say. Do not distort or mischaracterize holdings. The judge or law clerk likely will read many of the cases you cite. The first time the judge thinks you have played fast and loose, your credibility — and possibly your client’s case — will be lost.² Also, make certain the case you cite actually supports the related textual proposition. Too many times lawyers cite cases for support when the case has nothing to do with the matter at hand. This problem often results from attorneys reading only the headnotes — which can be wrong or can give a wrong impression about the case — or from lifting a description from another source without independently verifying the source. Read the cases you cite; read them completely. Make sure you understand what they say and accurately tell the court what they say. The court expects it; your client expects it; the procedural and ethics rules require it.


² Robert H. Jackson, Advocacy before the Supreme Court: Suggestions for Effective Case Presentations, 37 ABA J. 801, 804 (1951) (former U.S. Supreme Court Justice cautioning appellate counsel not to “ascribe a strained meaning to writings of a sitting judge. I have been, and I have seen other Justices, indignant at the distortion of some writing. It is hard to retrieve the confidence forfeited by seeking such an advantage.”).
Neutralize adverse facts and highlight favorable facts: Try using these techniques to enhance persuasiveness:

- **Space.** Just as radio listeners best remember the songs that get the most air time, readers best remember the facts that get the most play. Consequently, devote more space to favorable facts than to unfavorable ones.

- **Detail.** Readers also tend to remember events described in detail better than those described more generally. The more detail, the more vivid the picture. Use detail — or the absence of detail — to your advantage. Describe favorable facts in detail; use more general terms for unfavorable facts.

- **Placement.** Readers tend to best remember information presented at the beginning and at the end. Place favorable information at the beginning and end of the section and of paragraphs. Place less favorable information in the middle of the section and in the middle of paragraphs.

- **Voice.** Use active voice when you want to emphasize something and passive voice when you want to deflect the reader's attention.

- **Sentence length.** Short sentences tend to grab attention. Long sentences deflect attention.

**Streamline your writing.** Less is sometimes more. Below are just a few tips on cutting dead words. Consult Bryan Garner’s books for additional techniques.

- **Avoid nominalizations.** Nominalizations are verbs disguised as nouns. “Decide” is a verb. “Decision” is a nominalization. When you use nominalizations, you add unnecessary words to the sentence. *Example with nominalization:* The judge rendered a decision. *Without:* The judge decided.

- **Question every preposition.** First, question every “of”; many are unnecessary (this type of obligation . . . this obligation); often a possessive will help (the mother of the child . . . the child’s mother). Also avoid these bulky constructions:

<table>
<thead>
<tr>
<th>Instead of</th>
<th>Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>in the event of</td>
<td>if</td>
</tr>
<tr>
<td>in order to</td>
<td>to</td>
</tr>
<tr>
<td>for the purpose of</td>
<td>for</td>
</tr>
<tr>
<td>for the reason that</td>
<td>because</td>
</tr>
<tr>
<td>at this point in time</td>
<td>now</td>
</tr>
<tr>
<td>with regard to</td>
<td>about</td>
</tr>
</tbody>
</table>
• **Avoid legalese.** Just write in plain English.

<table>
<thead>
<tr>
<th>Instead of</th>
<th>Write</th>
</tr>
</thead>
<tbody>
<tr>
<td>at the time when</td>
<td>when</td>
</tr>
<tr>
<td>is able to</td>
<td>can</td>
</tr>
<tr>
<td>on grounds that</td>
<td>because</td>
</tr>
<tr>
<td>subsequent to</td>
<td>after</td>
</tr>
<tr>
<td>a large number of</td>
<td>many</td>
</tr>
<tr>
<td>for the duration of</td>
<td>during</td>
</tr>
<tr>
<td>during such time as</td>
<td>while</td>
</tr>
<tr>
<td>in cases in which</td>
<td>when</td>
</tr>
</tbody>
</table>

- **Proofread carefully.** Don't allow minor errors detract from you’re arguments.

• **Rule 1:** Ideally, proofread on a day you have not drafted anything. Even a small break will allow you to see new errors or changes.

• **Rule 2:** Your computer's spell-check program is only a beginning. Although spell checkers are a convenience and an embarrassment saver for all writers, it cannot detect wrong or missing words. For instance, it will not detect "the" typed "he" or "their" spelled "there."

• **Rule 3:** Proceed slowly. Speed reading and proofreading are mutually exclusive.

• **Rule 4:** Read every word; do not skim. If you do, you will anticipate and see things that do not exist or miss things that do and shouldn't. To avoid this problem, some writers start at the end of the paper and read each sentence in reverse order.

• **Rule 5:** Check all parts of the document. Remember to check block quotes, headings, page numbers, and appendices. Some simply skip these items — and thus miss the mistakes. Remember to proof for matching quotation marks, parentheses, and brackets. Use your word processing program’s search function to help with this task.

• **Rule 6:** Proofread for typographical consistency. Be sure all headings of equal weight are treated the same. Be sure names are capitalized consistently. Be that compound words are used consistently (for example, online versus on-line).

• **Rule 7:** Consider proofing the last third of your paper first. Chances are there are more errors in the last sections simply because you were probably more rushed or spent less time on them.

• **Rule 8:** When you are almost done, read it out loud. You'll be amazed at what you find.

• **Rule 9:** Proofread a hard copy, not the computer screen. Trust me, you will find errors in the hard copy that you read right over on the screen.
**Adhere to local rules.** Always read and follow local rules. Counsel’s failure to follow court rules, including court rules concerning preparing and filing briefs, can result in sanctions. Also ask to whether the jurisdiction has unwritten customs you should follow.

**Always take the high road.** Avoid ad hominem attacks and pejorative and inflammatory language. Learn to persuade with logic and analysis, not name calling and overblown rhetoric. No matter how much your client might enjoy these types of attacks on the opponent, judges typically are not amused. They believe that, if the best you can present are ad hominem, you must not have the law or facts on your side. In short, personal attacks and insults diminish a memorandum’s power of persuasiveness and damage an attorney’s credibility.

**PREPARING A PERSUASIVE BRIEF OR MEMORANDUM**

Remember: your brief introduces you and your case to the judge. It makes a lasting impression and can win or lose the case for you.

**Start at the beginning**

- Think about your case as you would explain it to someone who has never seen it before
- Focus on the issues, omit extraneous facts and arguments
- Tell the story in a logical way, emphasizing the facts that are truly relevant to the motion or issue before the court

**Don't speak in tongues**

- Don’t assume the judge knows the jargon in your legal area or, for that matter, the major case law.
- Break it down into pieces that are easy to digest, and explain what the terms mean.

**Explain the interaction of statutes and cases that are germane to the issues in the case**

- We understand issues and arguments much better if you put them in context.
- The reason for/policy behind a statute or case rationale gives it meaning rather than leaving it in a vacuum.

**If you are presenting a case in a complex or esoteric legal area, do a "Dick and Jane" presentation**

- Judges are the last living generalists, expected to know something about every area of the law.
- A presentation that orients the judge to the legal area, the function of the main statutes and cases, and tells him/her how your case fits in will make it much easier for you to communicate and the judge to understand the issues.

**Provide accurate, complete citations to the record, attached documents and cases; proofread and check your work**

- Nothing destroys your credibility more quickly and thoroughly than inaccurate cites and misleading interpretations of cases.
Once we catch an attorney misrepresenting the record, the facts or the law, it's very hard to believe anything that attorney says again.

Sloppy work may not destroy your credibility, but it makes us wonder about the accuracy of everything you do and say.

**TEN TIPS ON DRAFTING BETTER MOTIONS**

1. **Eschew the hence-the-title beginning**

Don’t waste your opening by repeating, verbatim, the words of the title. Instead, provide a concrete overview of the motion. Give sound, succinct reasons for the ruling you seek.

2. **For parties, use real names, not procedural labels**

Don’t use Plaintiff and Defendant — or Petitioner and Respondent. Use simple names such as Smith and Allstate. Or use descriptive terms such as “the bank” and “the borrower.”

3. **In the fact section, tell a compelling story**

Tell the story of a human transaction. Use a clean narrative line that progresses naturally. Make the story stand alone — independently conveying what the case is about. Without being argumentative, make the reader take your side.

4. **In the argument section, use argumentative headings**

Avoid abstract principles of law, such as:

A. The Question of Limitations

Instead, use a complete sentence, forcefully written, such as:

A. This suit is barred by limitations because it was filed over five years after the parties signed the contract.

5. **Discuss the critical cases by showing how and why they apply**

For each critical case, explain how the facts or the reasoning applies. Provide enough of the context to show why the case is relevant.

6. **Begin each block quotation with an informative lead-in**

State the upshot in your lead-in, making the reader want to verify your assertion. Don’t make the reader slog through the quotation without knowing why it’s relevant.

7. **Eliminate legalese and overparticularization**

Write simply and clearly. Judges have overwhelmingly said that they’d like lawyers to stop using legalese. Select the relevant facts; don’t swamp the judge with facts that don’t matter.
8. **Swear off superstitions about how to begin and end sentences**

Superstition 1: Never begin a sentence with But.

Superstition 2: Never begin a sentence with And.

Superstition 3: Never begin a sentence with Because.

Superstition 4: Never end a sentence with a preposition.

9. **After arguing the law, show that the ruling you seek is just**

Make the court feel either satisfied or dissatisfied with the status quo. Show that the rule you advocate should be applied in this type of situation. Show that the result you advocate is fair in this particular situation.

10. **End forcefully**

Don’t end with a formula, such as “Wherefore, premises considered . . .” End with a straightforward summary of the major points. Say what you want the court to do. With powerful words, appeal to the court’s best judicial instincts.
Winning Your Motion  
A Law and Motion Seminar  
David A. Garcia

ARTICLE II. THE ANATOMY OF A MOTION

A. A motion is an application for an order.

1. All pre-trial motions must be in writing.

2. They consist of:

   a. Notice of Motion, notice of hearing

   b. Motion (oftentimes combined with the notice of motion)

   c. Memorandum of Points and Authorities

   d. Evidence? Tabbed, highlight.

   e. Proposed Order

   f. Declaration (proof) of service.

B. Notice of Motion & Motion:

   1. This is the due process part of the motion. It tells the opposition that on a certain date, at a certain time & place, the moving party intends to ask the court to make a certain order (usually in the
client's favor though not always, e.g. motion of an attorney to withdraw). Every motion has its own rhythm, find the rhythm, the structure inherent in each motion.

a. CRC 311(a): The moving party must state both the grounds upon which the motion is made and the matters (papers) on which the motion is based. Contrary to boilerplate it is not based on the entire file.

b. Adequate Notice. Whatever is required by local code.

c. Regarding courtesy copies. The better practice is to lodge it with the department on the day of filing; earlier in the day is better than later in the day. Courtesy copies are necessary because files don't always make it to the department.

c. Serve the Notice -- correct addresses and include a declaration (proof) of service. [CCP §1013(a)]

C. Points and Authorities (BRIEFS)

1. In General:

   a. Observe the page limits if any exist under local practice.
b. Take care and pride in the written product. Use good, simple English:

   i. accuracy, brevity, clarity
   ii. Proofread. Spell check is insufficient.

2. Statement of the case:
   a. Include a concise factual statement from the client's viewpoint (statement of allegations if demurrer).
   b. Strive for a one-to-two sentence opening that is attention grabbing.
   c. Once you have developed a concise statement of the case, use it with appropriate revisions at the beginning of every brief. Refocus the judge (judge won't remember the prior brief and won't look back).

3. Order Sought:
   Let the Judge know what you want, what you want the judge to order.

4. Points and Authorities:
   a. The brief should be complete. But you don't need to explain what a demurrer or motion for summary judgment is. Don't assume the court is familiar with the leading case on point
even if discussed last month, last week. It is not the obligation of the law and motion judge to know all the law.

i. Be sure to address the critical issues.

ii. Avoid string cites. They are worthless: e.g. California *Auto Equity Sales*.

iii. One case on point is sufficient. Analyze that case in relationship to your case.

iv. Regarding conflicting authorities, take them on, analyze and distinguish them.

v. Quotations are persuasive. You are citing authority. Use the language of the case.

vi. Cite the official report, and page on which the proposition, or quote is found. [50 page case]

vii. Foreign cases, federal cases: supply a copy.

viii. Secondary authorities: They are useful research tools. But don't cite them exclusively unless there is no case on point.
ix. Closing Summary: “Make it easy for the court to rule in your favor.”

5. The opening and opposition briefs are the most critical. The reply brief is just that. It should be reserved to respond to new matters in the opposition brief. If opening brief is well conceived, there will be no need to reply. Don't hold your best arguments in reserve. Due Process requires that you not lie in wait.
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Networking Events
- Welcome and Outreach Reception
- International Human Rights Award and Passing of the Gavel Luncheon
- A Casablanca Night at the Historic Fox Theatre

Get all the details online
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