



# Top tips on writing “points and authorities”

*Self-assessment leads to success [if you can think of anything better, that's fine.]*

BY MICHAEL MORTIMER

Lawyers are often trapped and end up writing points and authorities at the last minute (literally within minutes if it's a federal court online filing deadline.) One reason this happens is that the lawyer failed to accurately estimate the time required for him or her to draft the opposition papers.

To accurately estimate the time needed to prepare P's&A's I submit that you need to conduct a self-assessment of your abilities, capabilities, work habits, faults and deficiencies. Since this is a personal and private assessment, it must be realistic and truthful. Because you have to be honest with yourself, as difficult as it is to do, you must take into account past failings and deficiencies.

The self-assessment is conducted *before* tapping a computer key or researching a subject. You cannot flippantly guesstimate the time need to complete the project. You cannot risk discovering 10 hours before a filing is due that you grossly underestimated the time needed to complete all of the necessary tasks. That is how filing deadlines are blown and malpractice is committed.

Those of you who have been in this situation know what I mean. For example, assume there are 10 hours remaining before your opposition to the defendant's motion is due (to the inexperienced that seems a lot of time.) Alas, you are bogged down because you are experiencing writer's block.

You have slammed your office door shut, put your phone on DND (do not

disturb), and you are white as a sheet because you still have to finalize the declarations, gather and get in proper order

This is the third article in my motion opposition series: drafting points and authorities (P's&A's) in opposition to a defendant's motion.

My initial article talked about tasks to perform the day a motion arrives at your office [See, Plaintiff Magazine, December 2008.] The article provided tips on logistics because there is a lot that you must do to make sure you don't blow it before you start writing your papers.

My second article discussed personal attacks: your points and authorities must NEVER contain personal attacks against opposing counsel (e.g., insults, ridicule, deriding comments, etc.) [See, Plaintiff Magazine, January 2009.] Personal attacks in your P's&A's risks sanctions; unprofessional writings detract, distract and dilute what might otherwise be a well-written paper.

I will present tips on preparing your points and authorities (P's&A's) in three parts. Parts two and three will be in subsequent issues. This is necessary because there is so much to talk about, but so few pages within which to discuss the subject. So make sure to check out the March and April issues of Plaintiff. (Note: I do not profess to have the secret to writing winning papers, but over the years, these techniques have worked for me. There are thousands of tricks and tips out there to help you with the task. Cull through them and use those that work best for you.)

the exhibits and then double check everything before filing. You briefly flirt with the idea of asking defense counsel for an extension of time but don't bother because you know you won't get one. Can you picture this scene? Have you been in this pickle before? This is not the time to conduct my self-assessment technique.

So how do you conduct a self-assessment? You simply go back in time, to your blissful law school days. I firmly believe that how you tackled law school tasks, such as writing papers and taking exams, is a good indicator of how well you will handle the rigors and stress of drafting P's&A's and dealing with motion matters.

Here are some things you should consider when taking stock of your abilities and limitations. This is something you do privately. I do not recommend you ask anyone about these things.

- **Writing ability:** What was the level of your writing skill in law school? Were you a good writer, where you fairly quickly organized thoughts, used proper English and were able to put everything on paper in proper format? In contrast, as a lawyer does it take you hours to hammer out a one-page letter? On the P's&A's, is the end product chock full of spelling, punctuation and grammar errors? Is the substance disjointed and is the paper lacking a smooth flow?

- **Energy:** In college, were you able to pull all-nighters and despite doing so, still be working efficiently at 8:00 a.m. the next day? Or were you near collapse if you did not go to bed by the late evening news? If you cannot work long hours under emergency conditions, you had better make darn sure that you do not un-



derestimate the time needed to write your P's&A's.

• **Pressure:** How do you work under pressure? In law school, were you able to pace yourself during exams so that you were not freaking out when you only had 30 minutes remaining in a three-hour exam?

On the day a major pleading is due, lawyers can often be observed in a state of panic, rushing around like chickens with their heads cut off. How do you work under such conditions? If you are the type of person who makes mistakes when under the gun, it is imperative that you factor in *extra time* to get the motion or opposition completed. You want to avoid being that headless chicken.

• **Complexities and organization:** Does your pleading involve complex issues where your P's&A's will require significant research, the need to obtain detailed declarations and a discussion of numerous exhibits? Are you opposing a summary judgment, which means dealing with the additional burdens of evidence submission, objections and strict pleading requirements? How good are you at multitasking? Do you have trouble focusing if you are constantly distracted?

If faced with such circumstances, you need to add significant additional hours so that you can complete your task. This is especially true if you are not an organized person. The reason you want to set aside more time is that you will need to expend extra effort to deal with complex and time-consuming matters.

• **Experience:** On observing how different attorneys work, and from my experience, I estimate that your first 30 or so motions will take much more time to complete than the motions you will do after having years of writing experience under your belt. Until you have dealt with the substance and mechanics of motions, even the most basic tasks will take a long time to complete. There are no shortcuts to having actual hands-on experience.

• **Competence:** In law school did you have trouble with civil procedure and classes that dealt with substantive and abstract concepts? Did your writing have superficial appeal, but break down on closer examination? Did you have trouble with IRAC or CREAC? (Google it!)

If so, you need to allocate more time for preparing your P's&A's. Truth be told, even routine law and motion matters can take a long time if one has trouble with substantive and procedural issues. That's just the way it goes. If you have trouble with the intellectual aspect of P's&A's, deal with it by giving yourself enough extra time to compensate for this trait.

• **Attitude:** A positive attitude is everything, especially when you are drafting or opposing motions. When you are opposing motions, you need to love a good fight and enjoy doing battle. Have you been frequently heard shouting to your staff, "I love the smell of toner in the morning!" If so, great! You have the right attitude.

In contrast, if you don't like dealing with case law, you consider motions a big hassle, you are a lawyer only in it for the money or if you don't take phone calls from clients because you have more fun things to do . . . find another line of work. You are a danger to the client and a disgrace to the profession.

• **Understanding the harm:** I teach law students that in school, one can afford to blow it. Write a lousy paper, the worst-case scenario is that you get a bad grade and your GPA suffers. In contrast, as a lawyer, you have clients for whom you want to obtain justice. If you file a poorly written pleading, you may cause significant harm to your client. Take this into account when deciding how much effort to put into your papers.

### **Pretend you are the judge - Think and write like one**

Over the years, I have found this to be one of the most useful techniques to use when dealing with motions. The con-

cept is simple. Before I start writing my P's&A's, I sit on my office chair, relax and then pretend I am the judge who will be deciding the motion. Here is how I do this and why.

• Obtain a judicial profile that might provide hints about the judge's temperament. If you have never heard of a judicial profile, you should visit your local law library and find out what it is.

If you have appeared in front of the judge you won't need a judicial profile because you should be familiar with the judge's style. Other things to consider: are you dealing with a federal or state judge? Federal judges tend to be stricter on the rules. Is the judge a stickler for detail? What are the judge's politics; is that something that will require you to style your arguments accordingly? Did the judge come from a major defense firm? Is the judge known for enforcing the rules and sanctioning attorneys?

• Being in the judge's shoes reminds me to *keep it short and get to the point*. The reason you must do this is because judges have huge caseloads and have little time to devote to your situation.

Judges are extremely overworked and do not have the time to sift through and comprehend 600 pages of law and motion material each day (600 pages assumes a state court law and motion judge hears about 12 matters a day and each motion has at least 50 pages of material submitted by the attorneys.)

Note: Even if a judge has law clerks to help, that does not lessen the significant burden a judge faces when dealing with law and motion matters.

I can attest to the fact that judges are overworked and often do not read all the papers submitted by the attorneys.

On the first point, a federal judge told us that he was limiting the days we had to try the case because he had over 500 cases on his docket. Also, in the legal community, many lawyers refer to daily law and motion court as "cattle call."



On not reading our papers until the day of a hearing, I have seen judges flipping through our papers, *for the first time*, as our matter is called for hearing.

Nothing is more disheartening than to eagerly show up for oral argument only to hear the judge say, “Hold on a minute” as he reads the first few pages of each side’s pleadings.

Moreover, many of you have seen judges exhibit behavior on the bench indicating they do not know the facts of the case, what the declarations say nor what exhibits have been submitted. That is why you have to make sure your P’s&A’s are a quick read and be ready to provide the judge a roadmap of where you want him or her to go, sometimes while standing in front of the judge the day of the hearing.

- Wearing my judge’s robe (figuratively) forces me to think as judges do. The judge knows that the moving party wants something and you oppose giving it to them. But other than those basics, the judge does not know you from Adam.

When the judge reads your papers and sees you in court he thinks: 1) What is this case about? 2) What does moving counsel want? 3) What law and evidence supports what the moving party wants me to do? 4) Why is the responding counsel opposing the motion? and 5) What law and evidence has opposing counsel provided to justify my denying the motion?

- Staying in character helps avoid personal attacks. Have you ever seen a judge’s order or decision calling counsel a moron, asshat, liar or saying that the attorney is a disgrace to the profession and should be disbarred? I haven’t.

Judges don’t engage in personal attacks when writing a decision. When you write your P’s&A’s in “chambers” (a.k.a. your office) you too should not engage in personal attacks.

- When beginning your papers, and throughout the writing process, always wear your judge’s robe. In fact, if you can get a law school graduation gown from a

second hand store, snap it up. Wear your nifty judicial robe as you are writing. It will help you to stay in character when you are in your chambers (office.) Wait – I’m just kidding! Don’t buy a graduation gown. You will look like a moron, and your staff will probably have you committed.

Seriously, though, always assume that you only have a few pages to make your point. If you maintain this thought, you will find yourself making every sentence and paragraph count. You will eliminate legalese, string cites and cure your “copy and paste syndrome” (more on this in a future article.)

### Write a proposed order or decision

This is another technique that has helped me tremendously over the years. I thought of it about 15 years ago and have used it effectively since. The technique is simple. The first thing I do on most motions is to create an MS Word document titled “Proposed Order” or “Proposed Decision.” I use this document and work backwards from it when writing my P’s&A’s.

When do you draft a proposed order or decision? Although most lawyers prepare the proposed order after everything is done, sometimes even as an afterthought, *preparing the proposed order first* has enabled my writing to be clear and my arguments to be succinct. It has made the writing process smoother because the proposed order serves as an outline for my P’s&A’s.

Another benefit is that when I have a bout of writer’s block, referring to or adding to my proposed order or decision has snapped me out of it. If I get confused at any time, I refer to my proposed order, get into the mind of the judge and I am back on track.

As to writing an order or decision, I usually make it a “decision” since writing an order that says “motion granted” defeats the purpose of this technique. The format I use follows the rule that California judges are required to issue a

detailed decision to the parties on a granted summary judgment. I sometimes use judges’ summary judgment decisions as a template for my proposed order in the current case.

(Note: I use this technique even if I am not required to submit a proposed order on a motion opposition (some courts require both sides to submit brief proposed orders.) Sometimes the actual order that I must submit to the court is just a few sentences. If that is the circumstance, I still draft a proposed decision as if it were coming from the court because it really helps in my writing.)

**Bonus tip:** I try to talk like a judge in my proposed decision or order. This helps me stay in character. For example, in the section I titled “Facts,” that title reminds me to insert the facts that are necessary for the judge to render a decision or order. This is what judges do, so I should do it too. The technique also helps me control my tendency to be wordy, and it eliminates repetition.

**Bonus tip:** How long are my proposed orders or decisions? I have no set rule. Usually I restrict them in length to what a judge would submit to the attorneys. On a long, complex summary judgment motion, a judge might issue a ten-page decision. But on other motions (e.g., a change of venue) a decision or order might be two pages. A general rule of thumb for me is one page for each legal point relevant for the judge to rule on the motion. If there were eight issues, I would try to keep my “ruling” to eight pages.

**Bonus Tip:** Your proposed orders or decisions force you to focus only on the issues before the court and the ruling that you seek. Often lawyers’ papers are convoluted, disjointed and wordy, so much so that judges cannot figure out what the moving party wants or to what the responding counsel opposes.

Writing a proposed order or decision forces you to be brief and to the point. It forces you to discuss that which is relevant to the case and to dispense with irrelevant page-filling text.



## Conclusion

As discussed above, the most important goal of the P's&A's is to give the judge an easy-to-read road map of where you want him or her to go. In this day and age of computers, the Internet and Google Maps, the preferred roadmap you should be giving the judge is one

that makes the judge feel as though he or she is reading a Google Map of your P's&A's, rather than a large folding map from the gas station.

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