

Top tips on writing "points & authorities"

Practical advice on getting your brief done more efficiently.

By Michael Mortimer

If you have 10 lawyers writing the same points and authorities, at the end you will have 10 different ways to make the same argument, with each lawyer swearing that his or her papers say it best. I don't profess that my way is the best way. The techniques that I describe here are what have worked for me.

Because this is not a treatise on motion writing, I am going to give you my top secrets, tips and tricks in bulleted paragraphs. If you need more information than what is offered here, I suggest you take one of the advanced writing courses I mention below.

Top Tips and Tricks

• ***Sample pleading in Word format:*** A good place to start *before* reading this article is to download and print out my sample pleading. Much of what I talk about in this article makes more sense if you follow along on a pleading. Enter this URL into your browser to download a sample motion in limine that contains most all the tips I mention in this article: http://tinyurl.com/q58qal.

• ***Initial format:*** Starting with page one, get the captions right. For example, the federal rules require that each page have a footer with the case name, identification of the paper filed and the case number. Be aware of what information is required on the caption page (depending on what court you are in). For example, federal courts require lawyers to include their e-mail addresses because cases are handled electronically and papers are served by e-mail.

> This is a continuation of my February 2009 article,"Top Tips on Writing Points and Authorities." As mentioned before, over the years I have developed a writing style that has worked for me. I also have a defined format and technique that I have fine-tuned over the years.
>
> My disclaimer set forth in my other motion articles applies herein too.

• ***Stylistic touches:*** Your points and authorities are akin to a roadmap that should show the judge how to get where you want him or her to go, which is to make a ruling in your favor. Remember those crappy roadmaps from gas stations and road stop markets? I guess they are still around, but with GPS navigation systems and Google maps, nowadays, few people bother looking at confusing paper maps to figure out where they need to go.

With your computer and Net access for information, you can now produce a great roadmap for the judge. On the other hand, your papers can be akin to handing the judge a convoluted folding map. The choice is yours.

"Stylistic touches" refers to paying attention to how your points and authorities look. Your papers must be easy to follow so that within the first few pages a hurried judge knows: who you are; what you want; why you should get it; and why the opposition's papers do not support their position.

"Stylistic touches" include:

• Use of quality paper (don't use cheap copy paper).

• Laser printing;

• Proper 12 point font;

• Precise, well-written headings, titles or captions;

• Numbered, lettered and bulleted lists or items;

• Conservative and precise use of bold, italics, and underlining;

• Use of short paragraphs (each paragraph should address one major point); and

• Use of indentations and pay attention to widows/orphans (avoid single sentences at bottom of pages).

• ***Avoid "copypasteitis":*** With computers, it is very easy to allow laziness to overtake common sense, especially when inserting quoted text into your points and authorities. What is "copypasteitis"?

Imagine there's a lengthy statute that has a sentence or two relevant to the point you are making in your papers. Instead of limiting your copy and paste to the text relevant to your argument, you copy and paste the entire paragraph on to a page. To make matters worse, you don't even emphasize (highlight, bold or underline) the parts relevant to your argument. You naïvely think the judge or law clerk will figure it all out.

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The reasons lawyers suffer "copypasteitis" are varied, but typically:

• To some, it's great for filling pages, especially when there's little else to say or the lawyer subscribes to the outdated notion that the more pages the pleading, the more worthy it must be;

• For the lazy lawyer it comes naturally; they are born with "copypasteitis"; or

• Some lawyers are simply incompetent, so much so that they are incapable of writing a convincing argument. To them, papers chocked full of large blocks of case citations and statutes looks impressive.

So be careful. If only a portion of a case or statute is important, copy and paste the relevant parts into your papers and nothing else.

Warning: Copy and pasting an entire paragraph usually results in the court disregarding the point you are trying to make. Judges have no patience for those suffering "copypasteitis" (and it's not a recognized disability.)

• ***Citations (The non-traffic kind):*** True confession: The last time I looked at "that" citation book was in law school. I think it was called the "Blue Book" or "Uniform System of Citation." And then there was the "California Style Manual." (Many apologies to Ms. Lawrence, my nationally recognized legal research and writing professor.)

But hey, with deadlines and other pressures, who has time to pay attention to look up how to cite cases, statutes, treatises or authority. So what did I do? It is quite simple, actually. I logged on to Westlaw and downloaded some appellate cases from my federal and state judicial districts (in Word format). I then copied the various citations from those cases and pasted them into a Word file I named "phrases and citations."

I also did the same thing with pleadings from opposing counsel, pleadings typically from the nation's largest law firms.

From then on, whenever I needed to cite a case, statute or authority, depo transcripts, exhibits, declarations or whatever, I would open my Word "phrases and citations" file to get the correct format.

Bottom line: If the citation style set forth in cases is good enough for appellate justices, it's sure as hell good enough for me.

Bonus Tip: I often set up citations and references to evidence/exhibits in my MS Word "AutoCorrect" feature. Once set up, I then type the AutoCorrect abbreviation that then automatically inserts the full citation. For example: I might type <Rufo v. Simpson (2001) 86 Cal.App.4th 573, 607> (including the periods) which will then automatically type into my Word document the correct citation format for a California appellate case: <*Rufo v. Simpson* (2001) 86 Cal.App.4th 573>.

The Microsoft Word AutoCorrect feature is really handy when having to repeatedly type common names, terms, or sentences. You can see a screen shot of the feature here: http://tinyurl.com/q7fghf.

• ***Know the judge****:* Remember who you are writing for: *The Judge*! You are not writing to impress the client or opposing counsel. The judge is the only person who matters in all this, so try to find out as much as you can about the judge who will be deciding your matter. Do this *before* writing your points and authorities. After your "investigation," write your papers with that judge in mind.

Regardless of which federal or state judge is assigned to your case, the reality is that all judges are extremely busy and overworked. Simply put, judges don't have a lot of time to spend on individual cases, even when the judge has two or three law clerks helping out. You have to keep this in mind when drafting your points and authorities.

Bonus Tip: I always assume that a judge will not have read my papers until the morning of a hearing or a half-hour before issuing a tentative ruling the day before. When I write my points and authorities, I imagine the judge saying, "You have 20 minutes to make your point." When I do this, it helps me keep my papers brief and to the point, something that might take a judge 20 minutes to get through in chambers.

Other ways to get to know the judge assigned to your matter (so that you can write points and authorities tailored for the judge) include:

• Attend the judge's law and motion calendar to observe the proceedings. Has the judge read the papers submitted by the lawyers? Listen to how the judge questions the lawyers and find out if the judge affirms most, if not all, of his or her tentative rulings.

• Read the judge's prior rulings, including any tentative rulings. A big score is to find rulings by the judge on issues similar to yours. That's as close as you are going to get to inside information on how the judge might rule on your matter.

• If you are in federal court, try to find out if the judge rules on motions without requiring a hearing. Federal judges are known for doing this quite often. In my humble opinion, if you are in federal court, you have to assume that you won't get an opportunity to be heard (in federal court there is no right to be heard on a motion). This is important when writing your papers because if you do a crappy job, that's it. You won't have a second bite of the apple, so to speak, to rehabilitate yourself. So you had better make sure your points and authorities are perfect.

• ***Evidence****:* Support every argument made in your papers with *admissible* evidence. This means that every substantive factual issue raised in your points and authorities must be supported by reference to evidence attached to the pleading.

Whether in federal or state court, judges demand that all relevant, substantive and material factual statements contained in your points and authorities must have evidentiary support, which is usually contained in declarations and attached exhibits.

Don't get this concept mixed up with legal issues the court may be decid-

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ing. Matters that are a question of law don't usually require production of evidence in support of a legal argument. For example, demurrers are decided as a matter of law; evidence is not submitted to the court since the court will sustain or overrule the demurrer by looking at "the four corners of the complaint."

In contrast, if a dispute involves any substantive and material factual issue, a court cannot and will not rule in your favor if you fail to submit *admissible* evidence to support what is argued in your points and authorities. This is because of that rule carved in stone long ago: "Statements made by an attorney in a memorandum of points and authorities are not evidence, the statements are argument irrelevant to deciding a material factual issue."

Bottom line on evidence: I teach students that in the stack of papers submitted to the court nothing is more important than *admissible* evidence. Without *admissible* evidence to support a substantive, material factual position, it does not matter how well-written your points and authorities appear – you are going to lose.

• ***Objections****:* Many times I have defeated well-written motions because opposing counsel failed to support factual statements made in his or her points and authorities with admissible evidence. Keep in mind that admissibility can be defeated through varied evidentiary objections, such as "lacks foundation," "hearsay," "relevance," "competence" and "assumes facts not in evidence," to name a few.

Bonus Tip: When drafting your points and authorities, *always* assume opposing counsel will be filing written objections to your submitted evidence. Think of how you would object to your proffered evidence. If there is a problem with admissibility, then fix the problem *before* filing your papers. Oftentimes, it is simply a matter of laying a proper foundation for an exhibit via a declaration. Or perhaps it is assuring hearsay evidence, for example, is admissible through a business-records exception.

I have provided an objections' sample and template for your use. It is in Word format. I recommend the two-column format as I provide in the template. In the left column you insert the purported evidence proffered by the opposition. On the right column you set forth your evidentiary objection. This format works very well and allows the judge to easily follow your objections and to rule on them. You can see it here: http://tinyurl.com/pzj8vb.

Bonus Tip: Don't object to all evidence on which there might be an objection. Don't overload the judge nor create the impression that you are being a picayunish jerk. Use your objections wisely, almost like a sniper who has a limited number of shots he or she can take.

Ideally, you want to have it end up to where *after* your objections are sustained, the moving party lacks admissible evidence to support the motion. There are few pleasures in life better than the feeling one gets after a judge denies a motion due to lack of evidence to support it, the result of your evidentiary objections being sustained.

• ***Pecking order****:* Lawyers have trouble dealing with the pecking order of statutes, case law, treatises, federal/state courts, judicial districts and jurisdiction. While I can't talk at length about this, your papers must deal with authority pecking order. (Perhaps the most common error lawyers make is citing the Rutter series as if it is authority a court must follow. While Rutter can be cited as guidance, it is a legal mortal sin to cite Rutter as binding legal authority to the court.

An extremely general rule on pecking order of authority is: Statutes trump all. Then State Supreme Court cases. If there are none, look to the appellate cases in your court's district. If there are none, then look at cases within the state (if you are in state court.)

Be careful of dicta (best defined as "passing comments by a court," for example, in a footnote). Remember the California Supreme Court rule: An appellate case cannot be cited as authority for an issue not specifically before the court and not actually decided.

• ***Be brief – case theme:*** From the 1990s forward, when writing motion papers, the rule is no longer a contest to see which side can submit the thickest pleading. Instead, lawyers are realizing that the number of pages submitted is not an accurate measure on the merit of a pleading. Instead, it is the content of the pleadings that counts.

That's good news for some; bad for others. Those who don't want to put much thought into their writing will be dismayed that puffing up their papers with half-page quotes of statutes or cases and other smoke and mirror tactics does not assure a motion win.

In contrast, those who put thought into what they write and who can craft legal arguments will appreciate that they don't have to write as much as they did in the old days, back when one had to respond in kind to the opposition's voluminous filings.

The best advice I can give to convince you that your papers can be whittled down to half of what you currently write is to just try it out. That is what I did in the early 1990s. I wrote a motion opposition that was three pages, including the caption page. It just didn't look right, so thin and all. But I won. The defendant's motion was denied. After that, I was hooked.

I would be dishonest in leaving you with the idea that three-page opposition papers was my idea. Nope, the credit goes to Gary Kinder (writing counsel to the legal profession) of KinderLegal.com. See http://www.kinderlegal.com/#.

Back in the early 1990s, I attended an all-day seminar presented by Gary. Back then, the seminar was called something like "The Twenty Minute Motion." The thrust of the course was that lawyers had to stop writing like lawyers; cease

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thinking they had to write voluminous pleadings for them to mean something; and develop a case theme that one would stick with throughout the case, with only minor tweaks to the theme being allowed over the life of the case.

That seminar and Gary's teachings made me a lot of money over the years because my writing improved. I wrote winning motion papers, and I saved thousands of hours by avoiding having to write page upon page of useless legal mumbo jumbo.

I recommend you check out Mr. Kinder's Web site and if he has a seminar near you, attend it. It's a great program, plus you get a bucketload of MCLE credit.

• ***Use distinct sections identified by headings****:* This helps the judge easily determine what the paragraphs following each heading will be talking about. Because headings are important, be precise in your word choice for each heading.

• ***Formatting example:*** I like to italicize case names in citations because I underline my words for emphasis. If both case names and emphasized words or sentences are underlined in a pleading, that's too much. My emphasized words don't stand out as much. Obviously, this is an example of preference on style and just one way to do things.

• ***Dick surgery****:* Be careful with spell checker. The attorney named in the cited motion received worldwide attention because of his spell-checking error (probably made by a paralegal or legal secretary.) Query: was the error intentional, made by an angry employee who wanted to embarrass the lawyer? See http://tinyurl.com/plm8qa.

One technique I use to prevent common mistakes (in addition to misspellings) is to use MS Word's AutoCorrect feature to change words that I may misspell, but are still words that won't be picked up as incorrect by MS Word spell checker. For example, I will tell Word to automatically change "statue" to "statute" or "trail" to "trial." Paste this link into your browser URL to see that feature in use: http://tinyurl.com/q4usow.

• ***Judicial notice****:* Know what is required for the Court to take judicial notice. A brief request in your points and authorities is *not* a proper request and the court will most likely deny your request. For example in federal court, the proper form is to file under separate cover a request for judicial notice. Your request must be very specific. Judges *do not* allow broad requests such as "Plaintiff requests the Court take judicial of the complete file and record in this case!"

• ***Lodging cases****:* This is an important procedure that many lawyers forget to follow. "Lodging cases" means that *under separate cover* you provide a court with copies of all cases cited in your points and authorities that are outside the Court's jurisdiction.

Warning: If you fail to lodge cases, a court is allowed to *ignore* the cases that you cited in your points and authorities but did not lodge.

• ***Amending pleadings****:* If you make an error on your pleadings (whether it is critical or simply is bugging you), look up the rules on filing an "amendment to" or an amended pleading. Such corrective pleadings can usually be filed. However, it is up to the judge as to whether to permit the correction or not.

Conclusion

I have only scratched the surface of my tips and tricks. I could write a book on the subject and just might do that. What I suggest is that you go to Plaintiff's Web site and download my other motion tips. See http://www.plaintiffmagazine.com/.

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