
Briefing Common Civil Motions: Common Pitfalls and a Few Common-Sense Suggestions

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To our grandparents' generation, letter writing was an art form. But it is an art that has now nearly disappeared. With the almost-universal availability of cell phones, voice mail, e-mail, texting and instant messaging, minimalist shorthand communication is the norm. Thoughtful composition is becoming a thing of the past.

For some of the same reasons, perhaps, good written advocacy in trial courts seems to be on its way to becoming an anachronism as well. Litigators are seemingly always pressed for time, so technological advances have allowed them – like everyone else – to do more work faster. But just as e-mail may be quicker but less thoughtful than a letter, many word-processed briefs appear to lose in substance what they gain in speed. Frequently, cut-and-pasted points and authorities seem as poorly fitted to the case as a one-size-fits-all suit. And the brief often lacks an overall perspective, as though it was prepared by an inexperienced associate with little supervision.

But there is a silver lining in this gray cloud. By spending a little more time and giving a little more thought to your written product, you can forcefully distinguish your presentation from that of your adversary and materially improve your chances of success. What follows are some general concepts applicable to motion practice generally, as well as some specific ideas to improve your advocacy on specific motions commonly filed in California state court. The suggestions are practical – some may be no more than common sense – but all are designed to enhance the overall effectiveness of your writing.



Concise, Clear ... and Interesting!

Judges and research attorneys in Civil IC departments – with more than 600 cases per department – are busy. In an average week, in addition to trials, case management conferences and ex parte applications, we review and rule on about 10-20 substantive motions – from demurrers to preliminary injunctions to anti-SLAPP motions. To be an effective advocate on a law-and-motion matter, it is not sufficient that you write well. You must also write concisely. Well-constructed brevity makes you lots of friends among judges. It also projects a sense of confidence in your argument.

“But,” you say, “I’m busy too.” To plagiarize Pascal, you would love to write a shorter brief if you only had the time, right? Good writers, however, never file their first draft and neither should you. Editing is part of the writing process. Take the time to distill your brief to its essence. Get rid of unnecessary words and redundant case citations. We probably don’t need a page and a half on the standards for reviewing a demurrer or a motion for summary judgment. Get rid of unnecessary arguments and have confidence in your good judgment. If you’re not going to win with your best or second-best argument, what are the chances that number eight is going to do it?

The only thing worse than reading a long and ponderous brief is reading it several times because it isn’t clear. Remember that judges and research attorneys are, for the most part, generalists. We may know a little about a lot of things, but we’re not steeped in the details of the case that you’ve been living with for the last six months. And if your case is unusual, factually or legally, you should start by assuming that we need to be educated. We probably don’t need a treatise (see “concise” supra), but you should lay it out simply and clearly. Take us from Point A to Point D without skipping B and C.

This shouldn't be as difficult as it may seem. After you've written a first draft, show it to someone who is not familiar with your case – perhaps your spouse; perhaps your teenager if you can pry him or her away from Facebook for a few minutes. If all else fails, impose on a colleague in the office who isn't working on the case. If they come back with lots of questions, you probably have some work to do on the brief.

It is particularly important that your statement of facts be understandable and compelling. I have always thought that the factual recitation is the most important part of any brief. After all, lawyers and judges are pretty good at researching the law. If you don't provide us with the right case citations, we may find them anyway. But we can't make up the facts. You have to give them to us in the allegations of the complaint, in exhibits, in declarations, or in testimony.

Most importantly, your brief should tell an interesting story. Think about writers you enjoy reading. There is a beginning, a middle, and an end to their stories. There is a flow. The sentences and paragraphs are likely shorter rather than longer. The style is active. The words evoke images and feelings. Legal writing doesn't have to be different; it doesn't have to be boring.

Many lawyers fall into the habit – “trap” is perhaps a better word – of beginning every sentence with a date, e.g., “On September 22, 2009, plaintiff signed a contract to purchase 2,000 widgets” Not only does your writing become repetitive, but you mislead the reader into thinking the date is critical. Unless dates are significant – for instance, if the issue involves the statute of limitations – leave them out. You can still tell the story chronologically. Try connecting the events with more generalized bridges like “In response to the letter, Acme cancelled the order,” or “Several weeks later, Ramirez returned the phone call.”

Legal jargon comes in many forms, but all tend to get in the way of communication. Think about what you would say if you were telling a story to a friend over lunch. You wouldn't say, “plaintiff exited the vehicle”; you would say, “Smith got out of the car.” You wouldn't say, “obstructed the easement created for ingress and egress”; you would say, “blocked the driveway.”

And if you were dashing off a quick e-mail, you surely wouldn't type, “After work I'm stopping by the SULLIVAN SHOE EMPORIUM (hereinafter referred to as ‘SULLIVAN’).” Stilted language and style distracts the reader and interferes with the flow of your story.

In the end, cases are about people, and people have interesting stories. You have to tell that story in a way that makes the reader want to continue reading. Find a hook. Find a compelling theme. As an effective advocate, it's your job to craft a page-turner. But make it a page-turner with a point: your client should win; your client is entitled to win.

A Word About Professionalism

Famed broadcaster and journalist Edward R. Murrow was not talking about legal advocacy when he said, “To be persuasive, we must be believable; to be believable, we must be credible; to be credible we must be truthful.” But he could have been. Your credibility is your most important asset. If the court believes you – if the bench trusts you – it enhances every aspect of your legal argument. And if it doesn't? You can probably surmise the answer.

So how can you create, maintain, and improve your credibility? Start by being scrupulously accurate in stating the facts and characterizing the law. Equally important, make it easy for the court to confirm the accuracy of your statements by providing clear cites to the record and authorities you are relying on.

Be fair to your opponents. Give them the benefit of the doubt. The court likely will, and you will seem more trustworthy if you do as well. If an ambiguous phrase in your opponent's brief can be taken two ways, give it the most reasonable construction and then address that argument. The court will learn to rely on your statement of the relevant issues.

Avoid pejorative characterizations of the opposing party or opposing counsel's argument, e.g., “despicable,” “meritless” or “disingenuous.” Instead, show the judge what the problem is and let him/her draw his/her own conclusion. People in general – and judges in particular – do not like to be told what to think. And we are much more committed to an idea if we think it's our

own. "Show" rather than "tell" is the mark of a successful advocate.

In addition to enhancing your professionalism, this approach has the added benefit of avoiding potential embarrassment. Let's assume the judge has just read your opponent's brief and found the argument, initially at least, interesting, intriguing, or perhaps even persuasive. Your response attacks with both guns blazing. The contention is unsupportable, ridiculous, even ludicrous. You suggest that only a fool could craft such an argument, strongly implying that only a fool could accept it as well. Inadvertently, you have just insulted your decision-maker. Even if the judge is ultimately convinced that his/her initial reaction was wrong, you may never completely assuage the insult and recover the ground you lost in that courtroom.

Demurrers

Believe it or not, there are judges who think most demurrers are a waste of the court's time and serve largely as billing opportunity for attorneys. So if you're a defense lawyer contemplating a demurrer to a complaint – much less a plaintiff's lawyer thinking about demurring to an answer – take a minute to ask yourself what you hope to accomplish. You may be creating an unintended impression in the mind of the judge that will follow you long after the pleadings are settled.

Putting aside situations where specificity is required – e.g., fraud claims, punitive damages – is the complaint so uncertain that you really can't respond? Is the pleading defect so serious that it can't be corrected? If the net result is likely going to be an easily amended complaint, the benefit to your client may be negligible. Worse yet, you may have provided opposing counsel with a roadmap for future success. A less-than-perfect complaint rarely prejudices a defendant as the case progresses. Consider foregoing the demurrer and starting to prepare your motion for summary judgment.

If demurrers in general are disfavored, a successive demurrer is doubly so. In most cases, having sustained a demurrer with leave to amend, the court will offer some clue as to what is necessary to adequately plead the claim. Often the judge is fairly specific in highlighting ar-

reas of concern and noting what is necessary to address them. If the amended pleading appears to address the identified defect(s), a second demurrer that merely repeats the arguments previously made has little chance of succeeding and runs a substantial risk of irritating the judge. Be particularly careful that your argument does not impliedly disparage reasoning that the judge may have found persuasive in granting the plaintiff leave to amend.

If it's worth filing the second demurrer, it's worth not simply regurgitating what you said the first time around. Focus on the court's prior ruling. It should be your starting point, because it certainly will be the judge's. Explain why the plaintiff has failed to meet the court's articulated standard. If you must repeat an argument you made the first time around that didn't make it into the court's first order, be prepared to say something new – cite a new case or attack the issue in a different way.

Discovery Motions

Needless to say, I cannot speak for the court as a whole or any of my colleagues individually. At the same time, I can honestly say I have never met a judge who enjoys hearing motions to compel responses to discovery. I think it has something to do with getting to the merits of a case, something most judges are fond of doing. Almost by definition, a discovery dispute is a distraction from the merits. For whatever reason, somebody is trying to withhold some information that someone else thinks is or may be relevant.

Of course, we all recognize that there are legitimate extrinsic policy considerations – privacy and privilege come quickly to mind – that sometimes justify the withholding of information. If the only motions to compel we heard involved those legitimate extrinsic policy considerations, we would decide them once in a blue moon. And our law-and-motion calendars would be much less congested.

The reality is that the vast majority of discovery disputes involve garden-variety disagreements about the mundane application of settled discovery principles where one party is – or sometimes both parties are – being unreasonable. So the preparation of a winning motion to

compel starts well before you ever put pen to paper or, more accurately, fingers to keyboard: Be reasonable!

If that advice doesn't provide much concrete assistance, consider this. Writing your motion begins when you write your first meet-and-confer letter or even the first confirmatory e-mail. You know – or at least you should – that this correspondence will be attached as an exhibit, either to your motion or to your opponent's opposition papers. If possible, start by acknowledging opposing counsel's legitimate concerns and explain clearly what you want and why you need it, or what you're willing to provide. I am continually amazed how often these missives are styled as the first salvo in a battle rather than as a constructive attempt to avoid and/or resolve conflict. Why wouldn't you write your meet-and-confer letter to make yourself look like the most reasonable and accommodating person in the world? If you do, and the other side responds with a barrage, you're well on your way to winning the motion to compel that hasn't even been written.

Motions for Summary Judgment and Summary Adjudication

Again speaking only for myself, I'm not a big fan of the separate statement of undisputed facts. I am sure it was conceived by someone with good intentions. And occasionally, particularly in simple cases, it can help isolate a key issue. But the reality is that the separate statement tries to make good lawyers out of mediocre ones by legislating structural orthodoxy. As is so often the case with attempts to mandate competence, the rules are generally followed by the people who didn't need help in the first place. The others find frustratingly creative ways to avoid following the rules or turn them into tools of waste and obfuscation.

A good brief on a motion for summary judgment or summary adjudication already identifies the undisputed facts. It then applies the relevant legal principles to the undisputed facts to reach a conclusion. If the brief is well written, there is no need for anything else. Which also means that if I'm spending a lot of time with your separate statement, that's probably not a good sign.

Summary judgment and summary adjudication tend to be among the most lengthy and complicated of motions. Particularly if you have a substantial record, your first thought should be how to simplify your presentation and avoid overwhelming your reader. This starts with the way you organize the evidence. The rules of court are not very specific about how to present evidence, so this gives you some flexibility. (See Cal. Rules of Ct., rule 3.1350(c)(4), (e)(3), and (g).) Especially in a document-intensive case, consider a sequentially paginated appendix of exhibits in support of or opposition to the motion, with multiple volumes if necessary. Citation to the exact page you want becomes simple, e.g., "2 Pltf.'s App. 162." Keep the volumes of manageable size, and pay attention to how they are bound. No one likes to be looking for a specific document and have the entire package come apart and land at your feet.

I often see numerous mini-excerpts from the deposition of the same witness, each consisting of 2-3 pages tabbed as a separate exhibit. Instead, consider submitting a single exhibit labeled "Excerpts from the Deposition of Joe Smith." It helps your reader learn where the depositions of the major players in the case are located. Later, if we want to locate something Joe Smith said, it's a much easier task.

Once you organize your evidence clearly and simply, spend a few minutes thinking about how your reader is going to find the important evidence. It may surprise you to know that we don't generally read your evidentiary exhibits and declarations from cover to cover just to see what's there. It is your job in your brief to direct us to the critical evidence. You do that by citing us to the relevant documents. Yet you would be amazed how often lawyers seemed determined to keep us away from the foundational evidence, i.e., deposition testimony, declarations, and evidentiary exhibits. Instead of citing to these documents, a lawyer will cite to the separate statement, which in turn cites the foundational source. When I'm reading one of these briefs, my desk is even more cluttered than it usually is and everything takes twice as long because I have to look at two documents instead of one. Remember – just as your opening statement at trial is not

evidence, neither is your separate statement in your motion for summary judgment or summary adjudication.

While we're on the subject of evidence, let's talk about evidentiary objections. They are exceedingly overused. No good trial lawyer would object to every piece of evidence offered by the other side at trial. You would completely alienate the jury inside half an hour. Why would you think knee-jerk boilerplate objections on a motion for summary judgment would be more successful? Ask yourself, "Does this piece of evidence really make a difference, and do I really have a legitimate objection?" If the answer to either question is "no," skip the objection.

And never make a relevance objection on a motion. Instead, just explain in your argument why the evidence isn't relevant, which you would have to do anyway in arguing your objection. You're not before a jury. It's not as though the court will be confused by evidence it considers irrelevant.

If you discover that you and your opponent are going to be filing cross-motions for summary judgment or summary adjudication, discuss the possibility of a special briefing schedule to avoid unnecessary and repetitive briefs. Typically you can reduce the usual six briefs to four: (1) opening brief on Motion #1; (2) combined opposition on Motion #1/opening on Motion #2; (3) combined reply on Motion #1/opposition on Motion #2; (4) reply on Motion #2. If you can agree on a schedule with opposing counsel, you can submit it as a stipulation. If the other side won't agree, at least consider proposing it to the court by way of an *ex parte* application.

Finally, keep the big picture in mind. Like demurrers, the rules applicable to motions for summary judgment favor the non-moving party. Don't just bring the motion as a matter of course. If you're considering it, think about whether you have a realistic chance of success. You may do no more than alert your opponent to the weaknesses of his/her case and provide an opportunity for them to be corrected before trial.

A Concluding Thought

For 95 percent of the motions filed in superior court, the result is determined by the briefs. So I have always found it slightly paradoxical that oral arguments on significant motions are reserved for senior partners, but briefing is often left to less experienced associates. Writing is a craft that requires time, preparation, and attention to detail. But if a successful motion practice is your ultimate goal, it is well worth the effort. ▲