# Memoranda of Points and Authorities or Briefs in Support of or Opposition to Motions in the Trial Court

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## Roadmap

- The purpose of a memorandum of points and authorities ("MPA") or brief in support of or opposition to a motion in the trial court is to persuade the court to take or not take the action requested in the motion.

- To draft an effective MPA or brief in support of a motion, you must first know exactly what relief you are seeking or opposing; drafting a proposed order is one way to accomplish this end.

- Effective MPAs and briefs feature a message that is delivered well and a simple solution for the trial court to implement.

- MPAs and briefs are comprised of a caption, a preliminary statement, a statement of facts, a discussion or argument section, and a conclusion. Each portion has its distinct purpose.

- Drafting statements of fact involves accurate, compelling storytelling. Statements of fact should contain all relevant facts, even those that are unfavorable, which should be deemphasized. For each fact an accurate citation to the record or to an exhibits is critical.

- Drafting the discussion or argument section involves showing the court how to rule in your favor and why it should do so. The discussion section should be drafted in the form of a series of CRACs, one for each issue and sub-issue.

- The conclusion section of an MPA or brief in the trial court is a simple, short restatement of what you are asking the court to do. Typically one does not restate the reasons for doing so in any degree of detail.

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## A. Purpose, Audience, and Goals—Developing and Delivering Your Message

—The purpose of a motion and supporting MPA or brief is to request and persuade a court to do something. On the flip side, the purpose of a MPA or brief in opposition to a motion is to persuade the court to deny the request. Many different types of motions are filed in the trial court—ranging from the complex, *e.g.,* motions for summary judgment in civil cases and motions to exclude evidence on constitutional grounds in criminal cases, to the relatively simple, *e.g.*, a motion to compel responses to interrogatories. In all instances, though, a motion is a request that the court do something specific—from dismissing a complaint with prejudice to extending a discovery deadline.

The primary audience for trial court memoranda is the trial court judge, a law clerk, or court attorney. These persons and their roles vary from jurisdiction to jurisdiction. In some jurisdictions certain judges are assigned to hear motions in all cases prior to trial, while different judges are assigned to preside at trial. Thus, the judge that hears motions in a case may not be the same judge that tries the case. In other jurisdictions cases are assigned to specific judges who both hear motions and preside over trials in the cases they have been assigned. Or, particular types of motions will be assigned to certain

judges or other decision makers. For example, a case may be assigned to judge for trial, while discovery motions in the case are heard by a commissioner or magistrate.

Law clerks and court attorneys also fill different roles and have varied experience. Sometimes they are straight out of law school with a one- or two-year clerkship. Other times they are veteran attorneys with permanent positions. If the latter, the permanent law clerk or court attorney is likely to be the primary audience for memoranda in support of or opposition to a motion.

Thus, your readers will have a variety of different perspectives and experience. Assume, however, that all these persons in their various roles have one thing in common: they have a heavy workload and deal with a large number of cases and matters—only one of which is yours. They will have little time to read your supporting or opposing memoranda. Thus, you will need to be clear and concise regarding what you want the court to do and why it should do it. All too often attorneys lose sight of this goal and allow their motions and oppositions to become their "masterpieces," or receptacles for lengthy argument and blather.

Other people will also read trial court memoranda in support of or opposition to motions: co-counsel and opposing counsel, possibly the client, appellate court judges and their law clerks, or court attorneys. Good drafters focus on the primary audience—the very busy trial court judge, law clerk, or court attorney.

The goals in drafting memoranda in support of or opposition to a motion are to (1) make the court want to rule in your favor and (2) make it easy for the court to do so. Remember, the purpose of memoranda to the trial court is to *persuade* the court to act in a certain way. Persuading is different than wining an argument or proving that you are right. Think: sales and marketing versus arguing and rhetoric.

The first step in making the court want to rule in your favor and making it easy to do so is to have a clear understanding of exactly what relief you are seeking. If you represent the movant, an excellent way of doing this is to draft the proposed order you are seeking first, before the memorandum of points and authorities or brief. This focuses your thinking on exactly where you are going and ensures

that your supporting memorandum addresses all topics that you wish included in the court's order. The proposed order can even be used as an exhibit to the motion itself in order to make it clear to the court exactly what you are asking for.

*Developing a Message*: To effectively package and market your points and arguments, you need to develop a theory, theme, or pitch for your case. This is the message you send to the court that justifies your position and motivates the court to rule your way. Your message provides the framework for the discussion and focuses your drafting. A compelling message can be described in just one or two lines—similar to a slogan or tag line in advertising. Only instead of "Coke: it's the real thing" it could be "The plaintiff not only assumed the risks, he embraced them," or "The police did not honor the defendant's right to silence, they undermined it."

Messages are not pulled out of thin air. They evolve through research, review, and synthesis of cases and other authorities. Thus, as you research and analyze the law and facts, look for common threads and strengths that emerge, and be thinking of how your case should be packaged. When you start your first draft, have an idea of your theory, theme, or pitch and test it in the drafting process. This will help focus your writing and keep you alert to alternative, possibly more compelling, messages.

*Delivering your Message:* Delivering your message and making the court want to rule in your favor involve a combination of telling a compelling story in your statement of facts followed by a discussion of the law that sells and supports the message. The discussion section shows the court how and why the law and facts compel a ruling in your favor. You will focus on the strengths of your position, but also address, dispel, or minimize difficulties or weaknesses, *e.g.,* cases, facts, or arguments your opponent will use attempting to persuade the court in his favor. Ignoring weaknesses or difficulties will undermine your position. If you do not address them, the court will hear about them only from your adversary.

Making it easy for the court to rule in your favor will help make the court want to do so. Busy trial courts are drawn to clear, simple solutions. In other words, a persuasive memorandum solves problems rather than creates them. Present your message and make

your points as clearly and concisely as possible. This means spending extra time to make complex arguments appear as simple as possible and editing out unnecessary sentences and words. In other words, you need to work harder to make it easier for your reader.

Also make sure your memoranda are easy to read visually—that the font size is large enough, that the headings are clear and concise, and that there is enough white space between paragraphs. Tabulated format, numbered subparagraphs, and bullet point lists are often effective means of presenting individual points concisely. Proofing errors are also a distraction and make a document difficult to read.

## B. MPA or Brief Formats

Most courts have specific local rules regarding the format for memoranda of points and authorities or briefs in support or opposition to motions. Thus, always consult and follow local rules when drafting and filing any document in the trial court. In general, however, motion memoranda follow this format:

(1) a caption that includes the title of the document,
(2) a preliminary statement,
(3) a statement of facts (sometimes called "factual and procedural background" if both underlying and procedural facts are relevant to the motion or opposition),
(4) a discussion or argument section, and
(5) a conclusion.

## C. Motion Components

### 1. Preliminary Statement (if allowed)

Unless forbidden by local rules, an MPA or brief to the trial court should begin with a brief preliminary statement that sets the context and provides a road map for the document. Preliminary statements are similar to executive summaries in office memoranda, except that preliminary statements advocate a position rather than predict a

result. The preliminary statement should clearly communicate what the drafter would like the court to do, and why the court should do it. Optimally, the preliminary statement is one to one-and-a-half pages long. It is usually the first thing a judge law clerk or court attorney will read, and is the drafter's first opportunity to deliver the message. Like the introduction to a research memorandum, it is often most effective if drafted last, after the rest of the memorandum to the trial court.

In a memorandum in *support* of a motion, begin the preliminary statement with a specific request to the court, *e.g.*, to enter summary judgment dismissing the complaint, to exclude particular evidence, and the like. In a memorandum in *opposition,* begin the preliminary statement with an assertion (a polite one) that the court should deny the other side's request. Then in both cases state the grounds for the motion or the opposition, *i.e.*, very briefly explain the reasons the court should rule in your favor, along with citations to supporting authority. Set forth your supporting reasons in the same order as they are addressed in the discussion or argument section. Difficulties or weaknesses are usually not addressed in the preliminary statement unless they are central to your discussion. Finally, define terms for people and entities that will be referred to often in the memo. In doing so, avoid strings of initials that do not produce pronounceable words —instead, use one or two words from the full name that can be pronounced.

The following is a preliminary statement to a complex 20-page memorandum in support of motion for relief from stay in a bankruptcy court dealing with discharge and notice issues under case law based upon *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950):

> PRELIMINARY STATEMENT
>
> The Norton Towers Homeowners Association, Inc., ("Norton") and the individual plaintiffs request this Court to grant their Motion for Relief From Stay allowing them to pursue their state law claims and facilitate recovery against any applicable insurance policies. This motion should be granted for the following reasons:
>
> First, neither Norton nor the individual plaintiffs had a claim under 11 U.S.C. §101(5)(a) because they had no exposure to, or

relationship or contact with the debtor and its products prior to confirmation of the plan. *In re Rosenfeld*, 23 F.3d 833, 838 (4th Cir. 1994). Therefore, their state law claims were not discharged, barred, or otherwise compromised through the bankruptcy proceedings. *In re Rosenfeld*, 23 F.3d at 838. Moreover, even if their post-confirmation state law causes of action qualified as a claim under §101(5)(a), they were not discharged or barred through the bankruptcy proceedings because notice by publication is not constitutionally adequate notice to a potential future claimant. *See Bosiger v. U.S. Airways*, 510 F.3d 442, 451 (4th Cir. 2007). Finally, the discharge injunction does not apply for the purpose of collection against an insurer who is a non-debtor and is also liable for the debt. *See In re Mann*, 58 B.R. 953 (Bankr. W.D. Va. 1986). Norton and the individual plaintiff may still proceed nominally against the debtor in order to seek derivative recovery against the insurer. *In re Jason Pharm., Inc.*, 224 B.R. 315 (Bankr. D. Md. 1998). There being no prejudice to the estate, relief from stay should be granted.

This preliminary statement (1) identifies the three grounds supporting the request for relief; and (2) includes citations to relevant Fourth Circuit authorities as the matter was pending in a district within the Fourth Circuit where it was a matter of first impression.

## 2. Statement of Facts or Factual and Procedural Background

Next comes the statement of facts. If the motion touches on procedural issues or prior court rulings, you will include a description of procedural facts as well as underlying or client specific facts with a heading such as “Factual and Procedural Background.” For example, a motion to compel responses to interrogatories would detail when they were served and any extensions of time that were given. Prior court rulings that relate to the issues in the motion should also be included. Thus, a memorandum in support of or opposition to a motion for summary judgment would note if the court had denied a

motion to dismiss for failure to state a claim and the reasons given. It is important to be accurate when describing prior rulings and their basis. Attorneys lose credibility with decision makers when they appear to misconstrue prior rulings or put words in the court's mouth that were not originally there.

If the procedural facts and underlying facts are lengthy, each would go under separate headings, *e.g.*, "Procedural Background" and "Factual Background." If there are no prior rulings and the motion is based solely on the underlying facts of the case, they are set forth under the heading "Statement of Facts."

### *a. Purpose and Goals of the Statement of Facts*

Think of drafting the statement of facts as accurate storytelling. Your purpose and goals are to tell a compelling, concise, and accurate story that will make the court want to rule your way, and give it enough information to do so. Many, if not most, of the legal rules you will be seeking to invoke in the discussion or argument section involve flexible standards that will be applied to the facts to reach a desired outcome. The statement of facts develops and reinforces your message and sets up your analysis in the discussion section. The statement should provide enough information and context for an unfamiliar or vaguely familiar reader—a judge, law clerk, or court attorney—to easily see what the case is about and what happened. You want the reader to be interested and ideally, sympathetic—or at least understanding.

We use the term "compelling" in context. Your underlying facts may not be riveting; they may be technical, tedious, or, even, in the abstract, dull. Or your client may not be seen as sympathetic, for example, if you represent BigCo. in a serious personal injury case in which you are moving for summary judgment based on the expiration of the statute of limitations. Your goal still is to tell the story so that the facts (1) are as easy to follow and as accessible as possible and (2) promote your message.

The scope of the statement of facts will depend on the issues addressed in the motion. For example, in a motion to dismiss based on lack of personal jurisdiction over your client, the statement of facts

would focus on your client's contacts with the forum state, while briefly describing what the underlying case is about.

Some drafters prefer to write the statement of facts first—to tell the story and prepare for the analysis in the discussion of argument section. Others prefer to write the discussion section first and then the statement of facts after they are clear on what facts are relevant. Preferences also vary from case to case. Our recommendation is to begin with the section that seems easiest to you.

### *b. Dealing with Favorable and Unfavorable Facts*

The statement of facts must include all legally material facts, both favorable and unfavorable. In determining whether a fact is legally material, consider the research you have done, your knowledge and understanding of the applicable law both for and against your position, and your message or theory of the case. Any fact you refer to in the discussion or argument section must be included in your statement of facts. Similarly, any facts you know your opponent will use should be included. You may include or omit any subjective (not legally material) facts—favorable and unfavorable. Your decision whether to include subjective facts, either good or bad, will often depend on your message—how you are packaging the case. Finally, as a guide, remember that your statement of facts cannot be misleading through omission, inaccurate description, or otherwise.

In general, favorable facts support your client's legal claim or defense (legally material facts), or provide shading or background that you think will make a court or jury favorably view your client or its position (subjective facts). Unfavorable facts are those that undermine your client's legal claim or defense (legally material facts), or provide shading or background you think might make a court or jury unfavorably view your client or its position (subjective facts).

Although the statement of facts must include all legally material facts, favorable and unfavorable, you do not have to handle them equally. Rather, you will emphasize favorable facts and de-emphasize unfavorable ones. This is done through placement, tone, and treatment.

### *i. Placement*

The first step in deciding placement of facts is to assess your case and decide which facts are favorable and which are not, and why. Keep a list either in your mind, on screen, or on paper of (1) facts that support your legal positions or provide shading or background you think will make the court want to rule in your favor, and (2) facts that undermine your legal position and/or support the other side's, or provide shading or background you think might make the court want to rule against you. Knowing the strengths and weaknesses in the facts is essential to good legal story telling.

Once you have assessed which facts are favorable and which are unfavorable, you are ready to start drafting. Place favorable facts in positions of emphasis, *e.g.*, at the beginning of a section, paragraph, or sentence, or at the end of these with a solid build up. Conversely, bury damaging facts in the middle of the narrative or the middle of paragraphs or sentences. Sometimes, unfavorable facts can be de-emphasized by being joined or juxtaposed with favorable facts. However, make sure you do not taint your favorable facts in doing so.

Always, at a minimum, set forth all the facts the court will need to rule in your favor. This requires a thorough understanding of your theory of the case and the applicable law, including any tests, elements, requirements, or factors. Make sure you have corresponding facts for each.

### *ii. Tone and Treatment*

Emphasizing favorable facts and minimizing unfavorable facts is not just a matter of where you place them, but of what you say about them and how you say it. For favorable facts, use the active voice, concrete subjects, and active predicates, *i.e.*, employ all the sentence writing techniques described in Chapter 2 regarding clarity and getting and keeping the reader's attention. On the other hand, distance and minimize unfavorable facts with the passive voice, *e.g.*,

“An accident occurred.” Sentences containing unfavorable facts can and should be dull—accurate but not commanding attention. Avoid, however, couching unfavorable facts in confusing sentences that a reader may have to read more than once to understand. This will unbury those facts.

Word choice is critical. Favorable facts should be set forth in vivid, specific terms that convey as much meaning as possible, without going overboard, e.g. “attack” versus “incident.” Specific concrete words are more effective than adjectives and adverbs. They also take up less space. You may use your own words to characterize facts as long as those words are accurate. Your goal is to tell a compelling story without going too far and appearing overwrought or overly dramatic. We suggest using a “might readers roll their eyes?” test for assessing this.

In treating unfavorable facts, use words that are bland and general, without being inaccurate. This is the time to use terms like “incident,” “event,” “occurrence,” “matter,” and the like. Be sure though, not to be so general as to be absurd. For example if a person demanded money in an armed robbery, do not describe the event as a “conversation.”

In treating favorable or unfavorable facts maintain a professional tone. You do not want to appear to be belittling or arguing with the other side. This undermines your position and signals to the court that it needs to solve your problem rather than your solving a problem for the court.

### ***c. Organization***

Although favorable and unfavorable facts are treated differently in terms of placement, the overall organization of the statement of facts in a memorandum to the court is similar to that in an office memorandum. The first paragraph should provide the background and context so the judge, law clerk, or court attorney can better understand the subsequent details; why they’re important, where they fit, and the like. It should include the parties and any other significant players and the general situation giving rise to the motion or opposition. Then, mindful of placement of favorable and unfavorable

facts, tell the story in a sequence that will (1) make it easy for an unfamiliar or vaguely familiar reader to understand what the case is about and (2) best deliver your message. A common sequence is chronological order. Other logical arrangements are by issue or subject, by witness, or from the general to the specific. As always, be sure not to jump back and forth between issue to issue or subject to subject. Include all facts that pertain to an issue or subject before moving on. If the statement of facts is long or complex, break it up with short descriptive headings that identify the topic, issue, or subject of the facts discussed.

### *d. Citing to the Record and Providing Support for the Statement of Facts*

In an office memorandum it is enough to simply note the sources on which the facts are based. In a memorandum to the trial court, however, any fact you describe should be accompanied by a cite to the court file that indicates where the document can be located, usually a docket number, *e.g.*, "Complaint, Docket No. 3." For facts that are based on documents that are not in the trial court file, you will need to provide them as an exhibit to the memorandum or an authenticating declaration and cite to them, *e.g.,* "(Exhibit 4, 10/20/2010 Letter from Donna Looper to Nancy Rapoport.)" Also, if not voluminous, consider attaching supporting documents as exhibits even if they are in the court file. This will make it easier for the judge, law clerk, or court attorney to locate and review them.

The documents you use and cite to will be made part of the record and, absent a sealing order, open to the public. Thus, the sources for the facts in the statement of facts should not be private or privileged, *e.g.*, client interviews, inter-office memos, letters between other attorneys in the firm and the client, and the like. Public documents and sources include pleadings in the file, sworn declarations, deposition transcripts, and letters to or from the opposing party or counsel.

### *e. Show vs. Tell*

In telling a compelling story in your statement of facts, avoid conclusions and argument. Rather, set out the specific facts that would *lead* readers to a conclusion, ideally so that they think they came to the conclusion on their own. This is much more compelling than your telling them what to conclude, which often triggers resistance. So rather than writing, “The defendant committed a heinous crime,” state specifically what the defendant did. Use adjectives and adverbs sparingly. Instead use concrete, precise terms that do not require further description to lead the readers to the conclusion you want them to reach.

Also be sure not to describe facts such that they become legal conclusions, *e.g.*, “When the plaintiff put on her skis, she assumed the risk that she might be injured by fellow skiers,” or “The defendant voluntarily waived his right to silence, and then spoke to the police.” Save these types of statements for the discussion or argument section. Concentrate on telling an accurate, compelling story or painting a picture for the court.

***f. Conclusion***

In the statement of facts you are telling a story, a true one. It must be accurate and contain all legally material facts, but how you tell the story depends on whose it is and the message you want to send the court. Your statement of facts should both set up your analysis and make the court want to rule your way. We discussed the “roll the eyes test” for going overboard and appearing too dramatic. On the flip side is the “eyes glazed over test.” Passing this test means doing all that you can to simplify technical or complicated facts so they become accessible and easy to grasp. Also, do not pack your statement of facts with quotations, especially block quotations, as readers tend to skip over them. Use just your best quotes for special emphasis and/or to support a compelling statement or characterization you have made.

Always remember that you are telling a story to and painting a picture for *the court* versus arguing with the other side. Keep your tone professional, never smug or snotty.

# D. Discussion or Argument

## 1. Purpose and Goals of the Discussion or Argument Section

In the statement of facts you have set forth the facts the court will need to rule in your favor in such a way that it will want, or at least be inclined, to do so. The purpose and goals of the discussion or argument section are to show the court *how* to rule in your favor and *why* it should. Here is where you explain the law and apply it to your facts to compel a favorable result. We recommend titling this section "Discussion" because that term implies that you are explaining the state of law as it actually is, versus arguing your version of it. Also, "Discussion" is often the term courts use for their explanation and application of the law, and it is wise to align yourself with the court.

Showing the court how to rule in your favor involves making your points as clearly and concisely as possible. This often means organizing complex information so that the busy reader can quickly and easily understand it. Chapters 1 and 2 discuss tools to help you accomplish this as a drafter. These include (1) putting context before details, (2) going from broad to narrow and general to specific, (3) linking new information with familiar information, and (4) having an explicit structure. The structure of the discussion section of a trial court brief is based on the CRAC format (Conclusion, Rule/Law, Application/Analysis, and Conclusion). Similar to the IRAC format used in office memoranda, the CRAC format is designed to deliver information in the most straightforward manner and is the format most readers expect. Also important in organizing complex information is deciding on a message—the theory, theme, or pitch for the case—which will enable you to package the details and focus your drafting. You are selling the court a solution you want it to implement. Before a court will implement your solution, it needs to understand how it works; thus you must lead the court from point A to point B in a straightforward manner, not take it through a maze.

Clear simple solutions (particularly to complex issues) tend to be persuasive in their own right, which is a good start. You add to this in

the discussion section by telling and showing the court *why* it should implement your solution and rule in your favor. This requires thorough and sophisticated knowledge of the law and authorities and how they affect your facts. There is no substitute for sound research, analysis, and preparation. With that foundation you will be able to:

(1) Recognize strong points and arguments and make the most of them;
(2) Understand and overcome or minimize weaknesses in your positions;
(3) Understand the hierarchy of your authorities and use them to your best advantage, and
(4) Organize your arguments persuasively and coherently.

All these accomplishments combine to further persuade a court to rule your way.

## 2. Organizing Your Discussion or Argument Section

### *a. Main Sections*

In a memorandum in support of a motion, every independent ground on which you base your request becomes a main section in the discussion. If, for example, a motion to dismiss is based on lack of personal jurisdiction, lack of subject matter jurisdiction, and improper venue, each of these grounds would get its own section. In a memorandum in opposition to a motion, each independent reason the court should deny the request should get its own section. The main sections of supporting and opposing memoranda will usually be similar in subject matter. However, the drafter of the opposing memorandum is not obligated to follow the supporting memorandum's organization. In both supporting and opposing memoranda, each main section is preceded by a heading that identifies the issue addressed in the section.

*Ordering your main arguments (sections):* If you have more than one independent reason why the court should rule in your favor, you should almost always put your strongest argument first, the next strongest second, etc. The judge, law clerk, or court attorney will read your memorandum quickly, and first impressions are important and will influence the decision-maker's remaining impressions. Your strongest argument is the one that delivers your message most effectively. It contains the highest ranking and most on-point cases and makes the most of your facts.

Which argument is strongest and which arguments are stronger than others may become obvious to you in the research and analysis stage, or the hierarchy may not be clear until you have tested your argument in the drafting and revision stages.

Sometimes, however, drafters must lead with arguments other than their strongest, for example, when the strongest argument is dependent on first establishing another element or requirement. Or a court may not be able to understand the stronger argument unless it is preceded by a simpler argument that helps set the context for the stronger, but more detailed and complicated argument.

Finally, if you have two arguments that you think are of equal strength, lead with the one that is most consequential—that would give you the most relief. For example, in a motion to dismiss based on lack of personal jurisdiction and improper venue, the argument that the court does not have personal jurisdiction over your client would go first.

### ***b. Subsections***

An independent ground or reason the court should rule your way may have sub-issues that each merit discussion. For example, a ground for your motion or opposition might contain several elements or requirements that must be established; each element would get its own CRAC and subheading. Or for clarity's sake you may need to divide a complex argument with several types of legal support into subsections, each with its own CRAC and subheading. Division of an argument into subsections may become obvious during the research

and analysis stages. Or, during the drafting stage you may find that you need to break up a long argument into subsections.

In general, if a matter merits a paragraph or more discussion of the law, and then a paragraph or more of application of the law to your facts, it should become a subsection and get its own heading and a separate CRAC. On the other hand, be careful not to subdivide your argument unnecessarily or excessively. Too many subsections and headings can break up the flow of an argument. Finally, if you use subsections, do not have a main argument with just one subsection under it. A single, stand-alone subsection is not a subsection at all.

Ordering your subsections requires balancing clarity with strength. Ideally, the subsection with the strongest arguments goes first. If this interrupts the flow or logic of the main argument, or if your strongest argument is dependent on one in another subsection, the strongest material may have to come later in the discussion. A discussion section that is quickly and easily understood is most important. In order to be persuaded by an argument, a court must first understand it.

If a main section/argument contains subsections, it is common to put a “mini summary argument” after the main section heading and before the first subheading that sets forth your overall conclusion on the main argument, supported by your conclusion for each of the subsections, in the order you discuss them, with citations to authority for each.

### 3. Make the Structure Explicit

Before you start to draft a trial memorandum, decide what your main arguments are and have a plan regarding what order to put them in. Also have an idea of which argument should be divided into subsections and in what order those subsections should go. This may change as you draft and revise, but it is important to start with a structure in mind. Then make that structure explicit with headings, subheadings, CRAC, well-organized paragraphs, sentences, and appropriate transitions.

## 4. Reviewing and Ranking Cases and Other Authorities

By the time you are ready to start drafting the discussion section, you will have an idea of which cases and authorities you will use in your sections and subsections. Review them carefully so that you have thorough and comfortable knowledge of their holdings and important facts, as well as any laws, tests, factors, and the like, they contain. Complete and sophisticated knowledge of how the cases and other authorities help or hurt your cause is essential in drafting good arguments.

Once you have reviewed the cases you are considering using, rank them with your message in mind. Whether you prefer to think of it as your theory of the case, theme, or pitch, the message determines how you package and sell your points and arguments to justify your position and motivate the court to rule your way.

For each section and subsection you plan to draft, determine which:

- Cases you will use to set out your basic laws or tests;
- Cases have compelling language that you will want to quote or paraphrase;
- Cases have facts that you want to use to analogize or distinguish the facts in your case;
- Cases are useful simply because the court ruled the same way you want the trial court to rule.

It is likely that the same case or cases will be useful in more than one category. These cases go to the top of the heap and will be featured in your argument. If there are cases you thought you might use that did not make any of these categories, put them aside. It is

likely you will not use them in your discussion. Do not throw them away yet, because a use for them may be triggered as you draft your arguments. What is important is that you start with a plan regarding which cases you are going to use and why. This will focus your writing and prevent you from cluttering up your memorandum with extraneous discussion and case citation.

Also examine and rank the cases you think are harmful because:

- they set forth rules that are detrimental to your cause;
- they have damaging language that you can imagine the other side quoting; or
- their facts and holding could undermine your theory of the case.

Here, too, the same case or cases might satisfy more than one category. These go to the top of the "must legally assail and/or factually distinguish" heap. Resist the urge to ignore or dismiss cases that might be damaging, because the opposing side certainly will not.

Also, be sure that the authority you intend to use is still good law. This means Shepardizing™ or Keyciting™ your authorities, and having enough knowledge of the law and subject matter to recognize if, for example, a case was decided before a change or shift in the law.

Finally, all cases and authorities are not created equally. Be clear on where in the hierarchy of authority they fall. First note whether the case or other authority is controlling—does it come from an appellate court or a court of last resort in the trial court's jurisdiction? Is a statute or ordinance from the state or county in which the trial court is situated? Authority that is not controlling, *e.g.,* cases and statutes from other jurisdictions and secondary sources such as treatises, is merely optional. Optional authority is sometimes referred to as "persuasive authority"—which is a misnomer, because optional authority is only persuasive if the court decides it is. For further

discussion regarding the hierarchy of authority see Chapter 3, section (A)(1).

Then for each section and subsection, rank the controlling authorities among themselves, *e.g.*, cases from courts of last resort in the jurisdiction are ranked higher than appellate court cases.

As drafters become more experienced this all will become second nature and happen automatically.

## 5. Drafting Your Argument

There are two cardinal rules to live by in drafting the discussion or argument section of your trial court memorandum:

1. *Keep it simple*—In general your reader, be it the trial judge, law clerk, or court attorney, is extremely busy and pressed for time. They may be reviewing and working up as many as 20 motions at a given time. You want to grab their attention and make it easy for them to rule or recommend ruling your way.

2. *Stick to your theory of the case, theme, or pitch*—This is the essence of your memorandum, your message. It should guide how you organize your arguments, what cases you use, how you use them, and how you use your facts.

The discussion or argument section is comprised of CRACs (Conclusion, Rule/Law, Application/Analysis, Conclusion), each of which help deliver your message to the court and persuade it to rule in your favor. Each main argument without subsections is addressed using a CRAC, and each subsection within a main argument gets its own CRAC.

### *C: Conclusion—The Heading*

Each section and sub-section is preceded by a heading that concisely sets forth the conclusion you want the court to reach on the issue or sub-issue. The main function of a heading in a trial memorandum is to act as a sign post that identifies the main point of the section or subsection for the reader. Phrasing the heading in the form of a conclusion makes it persuasive. Drafters should resist the urge to cram their arguments and supporting reasons in headings because this usually makes the headings long and unwieldy. Also, readers tend to skip over lengthy headings—those more than 3 lines. If you can set forth your conclusion and fundamental reason in support in less than 3 lines, do so. Otherwise you are better off saving the fundamental reason for the topic sentence that immediately follows the heading.

If you are having difficulty drafting a heading, skip it and move on to explaining and applying of the law on the issue or sub-issue. After you have finished, the exact conclusion you want the court to reach will become much clearer.

### *R: Rule/Law—Identifying, Explaining, and Illustrating the Law*

Begin every rule/law section with a topic sentence that sets forth the conclusion you want the court to reach and the fundamental reason why, accompanied by a cite to the strongest supporting authority. This may feel repetitive to the heading, but probably will not be if your heading is of manageable length. By including a citation to authority, you are backing up the conclusion with law.

The topic sentence elaborates on the heading, without becoming bogged down in details. The goal is to be simple and compelling. Use concrete, descriptive words, and the active voice.

Next set forth and explain the law, standards, tests and/or factors in a way that supports your argument. For every law, include a pin cite to the authority from which it came. Similarly, every explanation of the law should be followed by a pin citation to the authority from which it came or on which it is based. This shows readers you are not making it up and enables them to look up the case or other authority for themselves. Quote where you think the language is particularly

compelling, but limit block quoting as readers often skip over block quotes. If you do block quote, it may be useful to include a summary of the quote either immediately before or after it to ensure that its content is communicated effectively.

Be sure to illustrate the law and explanations with examples from the cases. Illustrating the law means including specific factual examples from cases that show how a particular requirement was met or not met or to show when a factor or series of factors was or were present, or not. Specific facts and holdings are necessary to show how a law works in practice. Without them, the rule/law section will be merely abstract. Placement of illustrations depends on the laws being explained. Sometimes they will relate so easily that you can explain them together in one paragraph and follow that paragraph with a paragraph of case examples. Other times you will need to illustrate as you go, meaning certain laws will need to be illustrated before moving to explaining others.

Identifying, explaining, and illustrating the law in a way that best delivers your message requires thorough and sophisticated knowledge of the authorities and how they affect your facts. First you need to draft in a logical order that is easy to understand. This usually means going from broad to narrow and general to specific, as in an office memorandum. At the same time you want to focus on the most favorable aspects of the law (be it rules, standards, tests, factors, etc.) and highlight your strongest cases. Knowing what all these are, how they relate, and how they affect your case is critical. There is no substitution for thorough research, analysis, and preparation.

As you explain and illustrate the rules to advance your side, it is important not to ignore law, explanations, or cases on which the other side will rely. Your goal is to diminish their impact. This means distinguishing them on their facts or assailing them legally. (See below regarding dealing with adverse authority).

Every law, explanation, or case that you refer to in the application section of your CRAC must first be set forth in the rule/law section. Also, do not discuss the facts until the application section. Readers have a hard time following a piecemeal analysis in which the drafter states a law and applies it; states another law and applies it, etc.

Instead, set out, explain, and illustrate all the laws applicable to an issue or sub-issue, then apply them.

### ***A: Application/Analysis***

Begin each application section with an overall assertion of whether facts in your case meet or fail to meet the basic law you have set forth in the rule/law section, with a pin cite to your strongest authority. Here, you are telling the court specifically the result you would like it to reach based on the law and facts. Thus, make your overall conclusion specific: “The court has personal jurisdiction over the defendant” rather than general: “The defendant meets the above tests and factors.”

Then, in order of broad to narrow, strongest to weakest:

A. *Tell* the court why the facts in your case meet or fail to meet the laws you have set out and explained, with pin cites to supporting authorities (these are your “assertions”), *e.g.*, The defendant had numerous and systematic contacts with Texas, including monthly business trips, leasing a summer home, and renting a post office box. *See McDermott v. Cronin*, 31 S.W. 2d 617, 619 (Tx. Ct. App. 2000) (defendant established minimum contacts with the forum by using a Texas mailing address on both correspondence and contracts).

B. *Show* the court how the facts in your case meet or fail to meet the laws you have set out and explained by comparing and contrasting them to facts of the cases cited in the rule/law section of your CRAC. Here you will show the court how your facts are (1) the same or similar to cases that held in your favor, and (2) unlike the facts of cases that did not. Remember, a good contrast can be just as persuasive as a comparison. Be sure to pin cite to these cases as you discuss them and the facts of your case. This shows that the client specific facts you are highlighting are legally significant, and enables the reader to go to the exact page and find the facts of the case you are comparing or contrasting. The goal in the application section is to show the court that your

conclusions and assertions are sound and well supported by the law and the facts.

Avoid a mechanical application of the various laws, tests, factors, etc. in the order they are set out in the cases. Look at your facts and decide which are the most compelling. Perhaps several combine into a central theme. Highlight these facts or theme and show they meet or violate a rule or requirement as explained in the cases. This is the time when you can use some of the descriptive words you concluded were too over the top for your statement of facts. You still want a professional tone, however—you do not want to appear overwrought. Ask yourself: "Would my reader roll her eyes at this?"

***Dealing with Adverse Authority***

You will need to address adverse cases in the controlling jurisdiction. This is different than addressing counter arguments in an office memo. Deal with adverse authority by distinguishing it on its facts, and/or assailing it legally, which may involve showing its reasoning was flawed, that the court misinterpreted prior caselaw, that it was decided before a change in the law, or that the case is an outlier—that few other courts have cited it or ruled the same, etc. There are many reasons a case may be "wrong." A good lawyer and drafter is able to identify these reasons and explain them coherently.

In general, first try to distinguish a case on its facts, because trial courts are more apt to distinguish a case than say it is wrong if they can do so. This means showing how its facts are different than those in your client's case and why that is significant. But do not be afraid, if you have grounds, to show how and why a case is legally incorrect.

Try to minimize the impact of an adverse case by putting it in the middle of your argument rather than at the beginning or the end. Avoid ending your argument on a low note. Finally, try to deal with an adverse case as swiftly as possible.

*Note*: In memoranda to the court, avoid *articulating* a possible argument on the other side. Thus, eliminate sentence structures like: "The (defense/prosecution) might argue, relying on ________, that ________", or sentences that begin with: "An argument could be

made" or "It could be said," etc. It is the other side's responsibility to make its own arguments, and you do not want to articulate or highlight opposing arguments (indeed, you may state the argument better than they do).

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**Final Words on Discussion/Argument**

1. State What You Want;
2. Tell Why;
3. Show How.

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## E. Conclusion

In the conclusion section of an MPA or trial brief, remind the court in simple, compelling terms what you want it to do, and why it should. Some jurisdictions limit what can be contained in a conclusion. If so, follow this guidance strictly. In any event, the conclusion should seldom, if ever, exceed a single three to five sentence paragraph.

## F. Create a Heading and Topic Sentence Outline

A good way to test memoranda to the trial court for overall substance and organization is to create a heading and topic sentence outline. After you have completed a draft of the MPA or trial brief, highlight the document's headings and subheading along with the topic sentences of every paragraph, then copy them in order into a separate document and print it out.

First check if the headings and topic sentences identify all the subjects, issues and points necessary to analyze the problem or matter and persuade the court to rule in your favor. Thus, in the statement of facts are all the significant categories of facts clearly identified? In the discussion section, are all issues that needed to be addressed, and all points and arguments that needed to be made, identified? Are the major or overarching applicable laws identified in the topic sentences of the rule/law paragraphs? Are your overall

conclusions for each issue and sub issue set forth in the topic sentences of your application paragraphs?

If the outline reveals any ambiguities or omissions in facts or analysis, review your draft. It may be that you have left out subjects, issues, points, or arguments that you intended to address or that you realize need to be addressed, or steps in an analysis or argument may have been omitted—which mean more substantive drafting is needed. Or, you may have fully addressed the necessary subjects and issues, but the headings and topic sentences do not adequately identify them—which means revising or adding headings or topic sentences.

Second, check if the headings and topic sentences are arranged in a logical order that is easy to follow. Pared down to headings and topic sentences you should be able to tell if the MPA provides context before details, puts familiar information before new information, and has an explicit structure. A heading and topic sentence outline also reveals whether the issues and sub issues are logically and persuasively arranged, *e.g.*, threshold issues are addressed first, and issues and sub issues that relate to each other or that follow each other are put one after another, and that, where possible, the strongest arguments are placed first, followed by the next strongest, etc. Also, the subjects and issues may be arranged logically in persuasive order, but some topic sentences may need transition words to make their relationship explicit.

Third, check if the headings clearly and concisely identify the subject of the section or subsection in the form of a conclusion, and that the topic sentences clearly and concisely identify the subject or point of the paragraph. In other words, check your headings and topic sentences first in isolation to ensure they are clear and strong, and then make sure they are accurate.

## G. Trial Court Memorandum Statement of Facts Drafting and Reviewing Guidelines

Examine your statement of facts for the following:

1. Substance/Analysis

2. Organization

3. Sentence Structure, Word Choice, Tone

4. Paragraph Structure

5. Technical Aspects: Proofing, Grammar, *Bluebook*, etc.

Each of these is discussed separately below.

## 1. Substance/Analysis

Does the statement of facts include all legally material facts? Does it include helpful or compelling background and emotional (subjective) facts? Based on your research and knowledge of the law, does the statement contain all facts necessary to rule in your favor? Have any facts pertaining to any relevant legal issue, element, or factor been omitted?

Does the statement of facts provide enough information and context for an unfamiliar or vaguely familiar reader to understand what the case is about and what happened?

Does the statement of facts promote your theory, theme, or pitch and deliver the message you want to send to the court?

Does the statement of facts set up your analysis in the discussion or argument section? Is every fact you refer to in the discussion or argument section set forth in the statement of facts?

## 2. Organization

Organization is particularly important in the statement of facts. First make sure you have set forth the facts, including background facts so that the reader will understand what the case is about and what happened. Then check to see if the favorable facts are put in positions of emphasis—at the beginning of the section, paragraph, or sentence, or at the end with a solid build up. Check to see if unfavorable facts are de-emphasized—buried in the middle of the section, paragraphs, or sentences, or effectively joined or juxtaposed with favorable facts.

Overall, is the story you have told easy to follow and as compelling as the underlying facts allow?

If complex, have you broken up the statement of facts with short, descriptive subheadings to aid the reader in finding topics and to provide some relief for the eyes?

### 3. Sentence/Word Choice, Tone

Sentence structure and word choice are also critical in drafting the statement of facts. First, check for sentences that are confusing or hard to read and understand. This is a detraction for both favorable and unfavorable facts. (Indeed, when dealing with an unfavorable fact, you do not want the reader to have to read your sentence more than once.) Then check to see if favorable facts are described using compelling, specific, and descriptive words, in active sentences with concrete subjects and active predicates. Also see if unfavorable facts are effectively de-emphasized by use of the passive voice and flat general terms.

Is the tone compelling, yet professional? Is it subtle in its partisanship? Detractions would be an overly emotional, angry, combative, or smug tone; or, conversely, a tone that is too flat or seemingly uninvolved. Any tone that suggests the drafter is putting himself in the place of the court, or commanding the court, is detraction as well.

## 4. Paragraph Structure

The guidelines for critiquing paragraphs in the statement of facts are the same as with all legal writing only with an eye toward emphasizing favorable facts and de-emphasizing unfavorable facts. Paragraphs should begin with a topic or transitional sentence. Every sentence in the paragraph should (1) relate to the topic/transitional sentence, and (2) relate to the sentences around it. The second requirement is accomplished by arranging the sentences in a logical progression, and, often, by using good transition words that signal where you are going with the sentence, *e.g.*, thus, accordingly, moreover, conversely, nevertheless.

Also check for effective placement and emphasis of favorable facts, and effective burying of unfavorable facts within the paragraphs.

Detractions include paragraphs without clear topic or transition sentences; sentences that do not relate to the topic identified; paragraphs that are choppy or disconnected because the sentences are not arranged smoothly or because transition words are needed; and, of course, paragraphs that fail to effectively emphasize favorable facts or that emphasize or fail to minimize unfavorable facts.

## 5. Technical Aspects: Proofing, Grammar, *Bluebook*, etc.

This category involves attention to detail. Student drafters should avoid leaving points on the table because they have not had time to proofread thoroughly or ensure their cites are in perfect *Bluebook* form. The rule applies with the same force in the real world. A document that has distracting proofing and *Bluebook* errors and that suffers from inconsistent formatting will undermine the document's persuasiveness and the drafter's credibility.

Some points on the technical editing checklist:

- Check for widows and orphans—opening and ending lines of paragraphs that are stranded alone on their own page. There should always be at least two lines of a paragraph on a page. If not, change the page break.

- Keep headings with the text to which they relate. Two lines of text together with the heading is the minimum preferred.

- Check that pages are numbered consecutively.

- Examine the font size used. 12 point is standard, although 14 point is becoming increasingly the norm for federal appellate courts for ease of reading.

- Check margins (at least one-inch around); use of defined terms where appropriate.

Finally, check that you have strictly complied with all requirements of the local rules of the court. Some may surprise you. For example, a court may require that all documents filed with it begin on the second line of a 28-line double spaced page, on every page. Why? Because the documents are bundled in two-hole punched file folders and, when the folder gets thick, one cannot turn back enough of the pages above to see the first line on the page. Know the local rules and follow them to a fault. There will be hyper-technical members of the clerk's office staff that will refuse to file your documents if they are out of compliance.

## H. Trial Court Memorandum Discussion/Argument Drafting and Reviewing Guidelines

Examine your Discussion or Argument section for:

(1) Substance/Analysis,
(2) Organization,
(3) Sentence Structure, Word Choice, Tone,
(4) Paragraph Structure, and
(5) Technical—Proofing, Grammar, *Bluebook*, etc.

## 1. Substance/Analysis

*In this category, look at content and persuasiveness*. Do you demonstrate a thorough and sophisticated knowledge and understanding of the subject matter and applicable laws, rules, standards, tests, factors, and cases? Are the laws, rules, standards, tests, factors, and cases necessary to enable a court to rule in your favor all present? Are the cases used effectively to highlight and focus the reader's attention on favorable facts? Are the client specific facts used effectively to persuade court? Are adverse cases effectively distinguished or legally assailed? Are the headings informative, compelling and easy to read? Does the discussion promote the theory of the case, theme, or pitch?

The ultimate question is: "Does the court have enough legal and factual information to rule in my favor and would it be persuaded to do so?"

Also assess your citation to the cases. Every law, rule, standard, test, factor, and fact you describe must be accompanied by a pin citation to the case from which it came, so readers can go to the exact page of that case or exact subsection of the statute and see for themselves. In addition, when comparing or contrasting the client specific facts with those of a particular case, you must cite to the exact pages of that case where those facts are set out or discussed.

Detractions include:

(A) Omission of important laws, rules, standards, tests, factors, or cases;
(B) Not recognizing or highlighting useful cases, laws, rules, standards, tests, factors, facts from the cases, or client facts;

(C) Not distinguishing or critically analyzing flaws in adverse cases;
(D) Spending too much time on weaker points;
(E) Dull, lengthy recitation of the facts in the cases, or dull, lengthy, mechanical application of the laws; or
(F) Sequential analysis and application of the cases—the writer should synthesize the cases and highlight significant favorable factors and facts.

## 2. Organization

First check if you have organized the discussion or argument in a logical manner that is easy to follow. Do the sections/arguments follow the theory of the case? If there is more than one main argument, are the arguments set forth in a compelling and logical order? If the arguments are divided into subsections, does this help your understanding, or is the flow interrupted? Do general, overarching rules come first, followed by discussion of factors and facts from the cases? Do the paragraphs logically follow each other, with informative topic or transitional sentences?

Next assess whether the arguments are arranged persuasively. Are the most helpful cases in positions of emphasis? Are the client specific facts placed or woven in strategically, so that the reader can easily see how they meet or fail to meet any applicable test or rule? Are unfavorable facts and cases put in positions of de-emphasis, *e.g.*, in the middle of the argument or paragraph?

The ultimate questions: Would unfamiliar or vaguely familiar readers understand the discussion or argument? Would they be persuaded by it?

## 3. Sentence/Word Choice/Tone

First, check for sentences that are confusing or hard to read and understand. Then check that favorable laws, rules, standards, tests,

factors, and cases are set forth using compelling, specific, and descriptive words, in active sentences with concrete subjects and active predicates. Also see if unfavorable facts, tests, factors, or cases are effectively de-emphasized by use of the passive voice, and flat general terms.

Assess the tone: is it compelling, persuasive, yet professional? This is argument, and thus the drafter can use works that were too overboard for the statement of facts. Still, the drafter must ask "is the reader likely to roll her eyes?" Detractions include an overly emotional, angry, combative, smug, or partisan tone; or conversely a tone that is too flat, seemingly uninvolved. Any tone that suggests the lawyer is putting herself in the place of the court or commanding the court is detraction as well.

### 4. Paragraph Structure

The well-written, persuasive paragraph is the key component of the discussion or argument. Make sure the paragraphs begin with an informative and compelling topic or transition sentence that clearly identifies the point the writer is advancing. Then every sentence in the paragraph should (1) relate and support the topic/transitional sentence, and (2) relate to the sentences around it. The second element is accomplished by arranging the sentences in a logical progression and, often, by using good transition words that signal where you are going with the sentence, *e.g.,* Thus, Accordingly, Moreover, Conversely, Nevertheless.

Check for emphasis of favorable facts and law and de-emphasis of unfavorable facts and law.

Detractions include paragraphs without clear, compelling topic or transition sentences, sentences that do not relate to the topic identified; paragraphs that are choppy or disconnected because the sentences are not arranged smoothly or because transition words are needed, paragraphs that fail to effectively emphasize favorable facts or law, or that emphasize or fail to minimize unfavorable facts or law.

### 5. Technical: Proofing/Grammar/*Bluebook*, etc.

This category assesses attention to detail. Drafters should proofread thoroughly to ensure their cites are in perfect *Bluebook* form and there are no grammatical, punctuating, or other proofing errors. Also double check to make sure that all local rules regarding form and formatting have been complied with. See section (G)(5) of this chapter for a proofreading checklist.

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## The Basic Structure: CRAC

Under this format, for each issue and sub-issue:

**C—Conclusion:** Identify the issue by setting forth the conclusion you want the court to make. Do this in your headings and the topic sentences that come immediately after your headings.
**R—Rules/Laws:** Set forth and explain the applicable rules or law in order of broad to specific/general to narrow (describing factors is part of explaining). Illustrate the law and your explanations with factual examples from the cases. Set forth, explain and illustrate the law so as to advance your position. Do not ignore—but rather diminish—the importance or impact of rules, factors or cases that you know the other side will rely on. Remember, often detailed or narrow laws are used to explain broader ones.
Think of the Rule/Law section as Law/Law-Explanation/Law-Illustration section.
**A—Application/Analysis:** Begin with your conclusion—that the facts of your case meet or fail to meet the basic law you have set forth in the rule/law section, with a cite to your strongest supporting authority. Then in order of broad to narrow, strongest to weakest:
1. *Tell* the court why the facts meet or fail to meet the laws you have set out and explained and illustrated, with citations to supporting authorities (these are your "assertions"), and

2. *Show* the court how the facts meet or fail to meet the laws you have set out and explained and illustrated by comparing and contrasting them to the facts of the cases cited in the rule/law section—be sure to pin cite to these authorities as you discuss them and the facts of your case.

Also distinguish and diminish any factors or cases you know the other side will rely on. The goal is to show the court that your conclusions and assertions are sound and well supported. Think of the application as the “tell and show” section.

Remember: Do not introduce or refer to any new rules, explanations, factors, cases, or facts in the Application/Analysis section. They must first be introduced in the Rule/Law section or the Statement of Facts.

**C—Conclusion:** If necessary because the analysis is lengthy and/or complex, tell the court again the conclusion you want it to make and why, with a cite to your essential authorities.

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## Checkpoints

- The purpose of a MPA or brief in support of or opposition to a motion in the trial court is to persuade the court to take or not take the action requested in the motion.

- The audience for an MPA or trial brief is a judge, law clerk, or court attorney. Their experience and expertise will vary. One thing they all have in common: a heavy work load—a large number of cases, only one of which is yours.

- The goals in drafting MPAs or briefs in support of or opposition to a motion are to make the court want to rule in your favor and make it easy for the court to do so.

- To draft an effective MPA or brief in support of a motion, you must first know exactly what relief you are seeking or opposing; drafting a proposed order is one way to accomplish this end.

- Effective MPAs or briefs feature a message that is delivered well and a simple solution for the trial court to implement.

- Developing a Message: to effectively package and market your points and arguments, you need to develop a theory, theme, or a pitch for your case.

- MPAs and briefs are comprised of a caption, a preliminary statement, a statement of facts, a discussion or argument section, and a conclusion. Each portion has its distinct purpose.

- The preliminary statement sets the context and provides a road map for the MPA or brief. It is similar to an executive summary in an office memo, except that it advocates a position rather predicts a result.

- Drafting the statement of facts is a matter of accurate storytelling. Your goal is to tell a compelling, concise, and accurate story that will make the court want to rule your way and give it enough information to do so.

- The statement of facts develops and reinforces you message and sets up the analysis in the discussion section.

- The statement of facts must include all legally material facts, both favorable and unfavorable.

- Emphasize favorable facts by:
  - placing them at the beginning of a section, paragraph or sentence, or at the end of these with a solid build up, and
  - describing them using the active voice, concrete subjects, and active predicates.
  - Minimize unfavorable facts by
  - placing them at the in the middle of the narrative or the middle of paragraphs and sentences, and
  - describing them in words that are bland and general—as long as they are accurate.

- Maintain a professional tone in describing the facts, favorable and unfavorable.

- Although favorable and unfavorable facts are treated differently in terms of placement, the overall organization of the statement of facts in MPAs and trial briefs is similar to that of an office memo. The first paragraph should provide the background and context so that the reader con better understand the details. The statement of facts should be arranged logically so that the readers can easily understand what the case is about and the message you are delivering.

- The statement of facts should be free of conclusions and argument, and must contain any fact referred to in the discussion section.

- Any fact set out in the statement of facts must be accompanied by a citation to the trial court record or to an attached exhibit.

- The purpose of the discussion or argument section in a MPA or trial brief is to *persuade* the court to rule your way. This is different than trying to win an argument or show that you are right.

- We recommend using the term “discussion” rather than “argument” in your heading. Discussion implies that you are explaining the state of the law as it is, versus arguing your version of it.

- Persuading the trial court involves showing it how to rule in your favor and why it should so.

- Where possible, provide the court with simple solutions that are easy to understand and implement.

- Showing the court why it should rule your way requires thorough and sophisticated knowledge of the law and authorities and how they affect your facts.

- In an MPA or brief in support of a motion, every independent ground on which you base your request becomes a main section in the discussion.

- In an MPA or brief in opposition to a motion, every independent reason the court should deny the request becomes a main section in the discussion.

- Ideally the section with the strongest most persuasive points and arguments goes first, the next strongest second, and so on.

- Sometimes you may need to lead with arguments other than your strongest, *e.g.*, when the strongest argument is dependent on first establishing another requirement, or where a court might not be able to understand the stronger argument unless it is preceded by a simpler argument.

- Before you begin drafting review and rank your authorities, and make sure they are still good law.

- In drafting the discussion section of an MPA or trial brief, remember to:

    - Keep it simple, and

    - Stick to your theory, theme or pitch—the essential message you want to deliver.

- The discussion section is composed of CRACs (Conclusion, Rule/Law, Application/Analysis, Conclusion). Each main argument without subsections is addressed using a CRAC, and each subsection within a main argument gets its own CRAC.

- The conclusion section of an MPA or brief in the trial court is a simple, short restatement of what you are asking the court to do. Typically one does not restate the reasons for doing so in any degree of detail.

- Test your MPA or trial brief for overall substance and organization by creating and reviewing a heading and topic sentence outline.

- Once you have a complete quality draft, thoroughly assess the MPA or trial brief using the statement of facts and discussion/argument guidelines set out in this chapter.

- Make time to print and proofread the MPA or trial brief separately before filing it or turning it in.

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