Kamela Bridges & Wayne Scheiss, Writing for Litigation (Wolters Kluwer 2011)

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MOTIONS

> Motions are at the core of modern litigation. Lawyers who would rather be arguing to juries are writing down their arguments instead.[1]

Before we can address the audience and purpose for a motion, we must get our terminology straight.

I. TERMINOLOGY

First, local practice for motions varies. In this book, when we refer to a *motion*, we are referring to a document that asks the court to order something. The motion includes the request and the argument. (Evidence supporting the request is attached to the motion.) That's what *we* mean by "motion," but that may not be what it means in your jurisdiction. In some jurisdictions the motion is only the request, a paragraph asking the court to order relief, but containing no argument. In those jurisdictions, the argument is contained in a brief in support of the motion or in a memorandum of points and authorities. In other jurisdictions what we would consider to be the motion appears in the form of an affidavit signed by the lawyer. So, although you'll likely need to include all the components of motions that we discuss below, those components may appear in one or more documents that may or may not bear the title "motion" in your jurisdiction.

Second, motions themselves vary. Some motions contain simple procedural requests, such as a motion for extension of time. Some motions contain more

1. Adam Liptak, *U.S. Suits Multiply, But Fewer Ever Get to Trial, Study Says*, N.Y. Times 11 (Dec. 14, 2003) (reporting study about the decrease in jury trials and increase in written decisions by judges based on papers submitted by the parties).

complex procedural requests, such as a motion to compel or a motion for a protective order. And some motions seek relief that could end (or severely damage) the other side's case, such as a motion for summary judgment or a motion to exclude an expert witness. Generally, the more complex and substantive the motion, the more likely it is to contain all of the components we'll discuss below. For ease of reference, we'll call the smaller motions that seek procedural relief *administrative motions* and the more complex motions *substantive motions.*

II. Audience

The main audience for a motion is the judge (and the judge's law clerk, perhaps). Your opposing counsel will also read the motion – or scrutinize it, really. You should write with those two audience members in mind. Your motion should give the judge all the information needed to rule in your favor, and it should persuade the judge to do so. Your motion should also anticipate likely responses from your opposing counsel. Granted, your client may read the motion, as may the opposing party, but here your primary focus is the judge.

III. Purpose

The purpose of a motion is to persuade the court to order something. That "something" can range from inconsequential to dispositive. You might be asking the court to order that you can have an extra day to serve your discovery responses. You might be asking the court to rule that your client's chief executive officer doesn't have to be deposed. You might be asking the court to exclude the other side's key expert witness from testifying. Or you might be asking the court to dismiss the plaintiff's case.

While the significance of the relief sought can vary, your purpose never should. You should file a motion only to get the relief it seeks – not for other reasons, such as putting your opponent through the cost and labor of responding. If you don't believe there is a good faith basis for granting the relief you seek, don't file the motion.

IV. Components of a Motion

As we mentioned above, local practices vary significantly regarding which components are included in which document. Local rules may also impose format requirements – particularly length limits – that will control your motion. But usually your motion and its related documents will include the following components.

A. Caption

The same caption as in all court documents prepared in the case should be at the top of the motion.

B. Title

The title should identify who is filing the motion and what relief the motion seeks. If there are only two parties to the case and the relief sought is straightforward, the title will be short. For example, the motion may be, "Defendant's Motion for Summary Judgment." But if there are multiple parties and more nuanced relief is sought, the title may need to be longer to allow the clerk to properly docket the motion. For example, your motion may be, "Defendant ABC Corporation's Motion for Partial Summary Judgment Against Plaintiff Smith's Tortious Interference Claim." Try to keep the title as short as the situation allows.

C. Opening

At the very beginning of your motion, tell the court what this motion concerns. What relief does the motion seek? One way to decide what to put in this opener is this: Often when lawyers approach counsel's table to argue a motion, the judge will ask the lawyer who filed the motion, "Counselor, what are we here on?" The opening sentence or paragraph of your motion should be the answer to that question.[2]

Writing Tip — Up-Front Summaries

Many forms or templates for trial motions contain an opening paragraph that states the parties' names and the title of the motion, like this:

Defendants' Motion for Summary Judgment

> William Adams and ABC Corporation (collectively "Defendants"), file this Defendants' Motion for Summary Judgment against all claims of Rene Selter ("Plaintiff"), in the above-referenced matter and would respectfully show unto the court as follows.

Although this traditional approach is comfortable to many lawyers, we think it is a poor way to begin a motion that is intended to persuade a judge to grant your

2. For examples of rewrites of traditional opening paragraphs, *see* Wayne Schiess, *The Bold Synopsis: A Way to Improve Your Motions*, 63 Tex. Bar. J. 1030 (2000); Beverly Ray Burlingame, *On Beginning a Court Paper*, 6 Scribes J. Leg. Writing 160 (1997).

request. Instead of restating the parties' names and the title of the motion, get right to the point and state why you are entitled to the order you seek.

Defendants' Motion for Summary Judgment

> William Adams and ABC Corporation move for summary judgment because they were never the plaintiff's employer under Texas law. In addition, the plaintiff has not exhausted her administrative remedies.

Now the judge knows, quickly and right up front, why you should get what you're asking for. You have not wasted the judge's time with needless preliminaries, and you have used the opening paragraph for persuasion instead of redundancy. *See* Kirsten K. Davis, *Persuasion Through Organization: Roadmap Paragraphs*, Ariz. Law. 26, 27 (Nov. 2004).

D. Introduction or Preliminary Statement

The opening will orient the judge to the relief this particular motion seeks, but the judge will still need some grounding in what this case concerns and how this motion fits into that bigger picture. Your next section, typically labeled "Introduction" or "Preliminary Statement," should provide that orientation. The judge may not have read any other documents in the case, so you'll need to explain (briefly) what the case is about. Then you'll need to explain how the relief sought in the motion relates to the overall case. For example, you might first explain that this is a suit for breach of a covenant not to compete. Then you might explain that the plaintiff sought discovery of customer lists used by the defendant. Then you might explain that this Motion for a Protective Order seeks to protect the defendant's customer lists from discovery.

Here's an example of an introduction for a motion seeking to prevent the defendant's president from being deposed:

Introduction

> The plaintiff, Chef Jorge Luna, should not be allowed to depose the president of Festive Foods, Inc. The requirements for taking this apex deposition have not been met. In this libel suit, Chef Luna seeks damages he claims he suffered as a result of a message sent through the Twitter account of the manager of the Madison City location of Casa Rita. Casa Rita contends that the manager, Kim Jackson, was not acting within the course and scope of her employment when she sent the message.
>
> Casa Rita is owned by Festive Foods, Inc., a Delaware corporation that owns more than 150 restaurants. Chef Luna has noticed the deposition of Eduardo Ramirez, the president of Festive Foods, Inc. Because Mr. Ramirez has no unique or superior personal knowledge of facts relevant to this suit and because the plaintiff has not sought to obtain the information through less

intrusive means, Casa Rita asks the Court to issue an order prohibiting the plaintiff from taking Mr. Ramirez's deposition.

The opening paragraph and introduction in an administrative motion may be combined with the statement of facts and argument. For example, if you seek an extension of a page limit, your opening paragraph can simply request the extension and state why it is necessary. The entire motion may be contained in that one paragraph.

But for longer motions, don't neglect the opportunity to give the judge the context necessary to understand the motion. Providing that context will allow the judge to understand the significance of the facts that follow.[3]

E. Statement of Facts

Next, in a section labeled "facts" or "statement of facts," you should explain the facts that pertain to your motion. A brief overview of the facts of the case, or a context-setting statement, may be appropriate, but keep the overview short. A sentence or two should suffice. Then focus on the facts that are relevant to your motion. Of course, if you are filing a case-dispositive motion, such as a motion for summary judgment, the facts of the case and the facts pertinent to your motion are the same. But for other motions, the judge may not need to understand much about the case to decide whether to grant the relief you are seeking.

For example, in the motion seeking to prevent the defendant's president from being deposed, the facts relating to the underlying suit will be mentioned only as they relate to the motion:

Facts

Mr. Ramirez is president of Festive Foods, the Delaware corporation that owns Casa Rita. (Aff. Eduardo Ramirez (Sept. 13, 2011), attached as Exhibit A.) In this position, Mr. Ramirez oversees the company's operations. (*Id.*) Festive Foods owns more than 150 restaurants throughout the United States. (*Id.*) Mr. Ramirez's responsibilities include supervising the company's strategic planning, new market development, and budgeting. (*Id.*) Mr. Ramirez has no day-to-day involvement with the management of individual restaurants. (*Id.*)

Mr. Ramirez has not visited the Madison City location of Casa Rita since 2003. (*Id.*) He has never met Kim Jackson, the current manager of Casa Rita's Madison City restaurant. (*Id.*)

In this suit, Chef Luna claims damages because of a message sent through Jackson's Twitter account. (Pl.'s Compl. ¶ 5–9, May 12, 2011.) On September 9,

3. Stephen V. Armstrong & Timothy P. Terrell, *Thinking Like a Writer* 15 (3d ed., Practising L. Inst. 2009) (discussing principle of "super-clarity," that "[r]eaders absorb information best if they understand its significance as soon as they see it.").

> Chef Luna noticed the deposition of Mr. Ramirez, to take place on September 26, 2011. (Ramirez Depo. Notice (Sept. 9, 2011), attached as Exhibit B.)
>
> Mr. Ramirez has no personal knowledge of any facts relating to this lawsuit. (Ex. A.) Mr. Ramirez is not familiar with Ms. Jackson's responsibilities at Casa Rita and was unaware of the Twitter message until after this suit was filed. (*Id.*)

Use appropriate writing techniques to persuasively tell the story of your motion.[4] The judge may be unfamiliar with your case before reading the motion, so this is your chance to put your client in the most favorable light possible. Avoid characterizations (using adjectives and adverbs) that attempt to force on the judge a particular conclusion. Instead, state facts that will lead the judge to the desired conclusion. As Armstrong and Terrell recommend, consider from whose point of view you tell the story, where you start and end the story, and where you add and omit detail.[5]

Every fact relied upon in the motion must be proved by evidence. A thorough statement of facts will cite that evidence after each fact. (Sometimes local rules require this.) At a minimum, state in the motion what evidence is attached to the motion. For example, your motion might state, "This motion is supported by the affidavit of Jerry Martinez, attached as Exhibit A; excerpts from the deposition of William Adams, attached as Exhibit B; and Plaintiff's Responses to ABC Corporation's Requests for Admission, attached as Exhibit C."

In an administrative motion, the statement of facts may be omitted if the few pertinent facts can be incorporated into the argument.

F. Motion Standard

Next, state the standard that the judge must apply in deciding the motion. For example, if the motion is a motion for summary judgment, your motion standard section might state that the judge should grant the motion "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."[6] Cite binding authority for the standard.

Many motions refer to this section as the "standard of review" section. But because the motion is up for initial consideration rather than review, "motion standard" more accurately labels the section.[7]

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4. For discussions of writing techniques you can use, *see* Gregory G. Colomb & Joseph M. Williams, *Shaping Stories: Managing the Appearance of Responsibility*, 6 Persps.: Teaching Leg. Research & Writing 16 (1997); Stephen V. Armstrong & Timothy P. Terrell, *Organizing Facts to Tell Stories*, 9 Persps.: Teaching Leg. Research & Writing 90 (2001).

5. Armstrong & Terrell, *supra* note 4, at 90.

6. Fed. R. Civ. P. 56(c).

7. Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* 21 (3d ed., Aspen Publishers 2006) (distinguishing between appellate standards of review and motions standards).

In administrative motions that present matters within the judge's discretion, the motion standard section is often omitted.

G. Argument and Authorities

The Argument and Authorities section is the centerpiece of the motion. In it, you should prove why your client is entitled to the relief sought.

The length and organization of the Argument and Authorities section will vary depending on complexity of the issues presented. In an administrative motion, you may cite authority showing that the court is empowered to grant the relief sought, explain authority showing that other courts have granted relief in circumstances similar to yours, and then compare that authority to your facts to show why you are entitled to the relief.

In a substantive motion, you should organize your argument around the issues the court will need to decide. First, provide the court with an overview of the law that shows what the issues are. In that overview you can dispose of any issues that are not in dispute in the motion. Then provide a roadmap for the order in which you will address the contested issues.[8]

A roadmap paragraph for a motion for summary judgment might look like this:

> Summary judgment should be granted against Katie Kelley's claim for public disclosure of embarrassing private facts. Under Texas law, the tort of public disclosure of embarrassing private facts has three elements: (1) publicity was given to matters concerning one's personal life, (2) publication would be highly offensive to a reasonable person of ordinary sensibilities, and (3) the matter publicized is not of legitimate public concern. *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473–74 (Tex. 1995). The summary judgment evidence disproves the second and third elements: Publication of the facts regarding the attack on Ms. Kelley would not be offensive to a reasonable person, and the matter was of legitimate public concern. Therefore, summary judgment is appropriate.

For each contested issue, you should usually follow the organizational structure typically used for legal analysis.[9] First, state your conclusion on the issue, phrased in terms of the case before the court. Then state and explain the governing law. After you have explained the law, apply it to your facts. Explain how the governing law applies to your case or make specific, fact-based comparisons to the precedents to demonstrate why a particular standard is or is not met. Make sure any facts on which you rely in applying the law were included in your

8. Darby Dickerson, *Motion Potion: Tips for Magical Memoranda*, 16 No. 1 Prac. Litig. 7, 8 (Jan. 2005).

9. Beazley, *supra* note 7, at 75–76 (identifying the syllogistic formulas typically taught to first-year students as a method for organizing legal analysis, variously labeled IRAC, CREAC, IREAC, and CRuPAC).

Statement of Facts and supported by the evidence attached to your motion. After your application, you may rebut your opponent's best counterarguments, and then re-state your conclusion on that issue. When you are finished addressing each contested issue, show how the conclusions on each issue add up to the overall conclusion that your client is entitled to the relief sought.

In crafting this argument, remember that trial judges are busy. Your argument needs to provide the judge with all the information needed to decide the motion, and you must prove each step necessary to the relief you seek. But don't waste the judge's time belaboring the obvious. If your motion concerns a well-settled rule of law, your conclusion, rule, and rule explanation might be contained in a sentence or two. Conversely, if the key issue in the motion is about what the rule of law is on a particular point, you may need to argue in some depth about what the rule of law is. But then your application section might be quite brief. Expand or collapse the rule, rule explanation, and application sections to provide the judge with the necessary information, but no more.

H. Prayer (Also Called "Relief Sought")

The motion should identify the specific relief sought. Rather than just asking that the motion be granted, preview the language you want to see in the court's order. For example, your prayer in a motion to compel might say:

> Defendant asks that the court grant this motion and order Plaintiff Luna to respond to Interrogatory 4 within ten days of the court's order.

I. Signature Line

This should match the signature line in your complaint or answer.

J. Certificate of Service

If you copy a certificate of service from a prior document in the case, update it to specify the motion being served, how it is being served, and upon whom it is being served.

K. Certificate of Conference

In some jurisdictions, you may be required to certify that you have attempted to resolve the issue without the need for court intervention. This requirement will probably apply only to administrative motions that could be resolved by agreement, not to substantive motions on which agreement could not reasonably be expected.

L. Evidence

Attach evidence to prove each fact upon which your motion relies. The procedural rules don't acknowledge a difference, but in practice the formality differs for administrative motions and substantive motions. For a substantive motion, comply with all the formalities. Any piece of evidence attached to the motion should be "proved up" with an affidavit proving that the document is what it purports to be and is not hearsay. For administrative motions, it is not unusual to see discovery requests or letters between counsel attached to the motion without being proved up (although there's no harm in doing so).

V. Strategic Considerations for Motions

The most important strategic decision you will make with regard to a motion is whether to file one at all. Once you have decided to file, rely only on binding authority if possible, write persuasively without appearing to persuade, and anticipate the response.

A. Decide Carefully Whether to File a Motion

Deciding whether to file a motion will be different for administrative motions and substantive motions. For administrative motions, file only if you must. Judges want lawyers to work out their own administrative matters. They hate "babysitting." Lawyers who fail to work out their administrative matters risk incurring the wrath of the judge. Some judges are quite adept at making both parties (and their lawyers) feel the pain if a judge has to be brought in to resolve administrative matters. Cooperate wherever possible. If you can agree on a matter but still need an order in place (such as an order to protect confidential materials from disclosure), simply agree upon the terms and present the judge with an agreed order. Otherwise, file an administrative motion at your own peril.

For substantive motions, you owe it to your client to assess realistically your chance of getting the motion granted. Even if you have a good faith basis for your motion (and thus won't violate ethical rules by filing it), you still might realize that your chances of getting relief are slim. Drafting a substantive motion and gathering the evidence to support it are expensive undertakings. Don't undertake them lightly.

Some cases are appropriate for substantive motions. These include:

- Cases that will be resolved on a legal issue. For example, if the parties agree on the facts but dispute whether a particular claim or defense exists as a matter of law, a motion for summary judgment is appropriate to seek resolution of the legal issue.
- Cases in which the defendant doesn't have a valid defense. For example, in some suits on a debt, the debtor doesn't have a defense but is just trying to

delay the inevitable. No trial is needed; a summary judgment motion can be used to obtain the judgment.

- Cases in which a partial summary judgment motion can be used to narrow the issues. For example, if the plaintiff has asserted multiple claims but only some present fact issues, a partial summary judgment motion can be used to knock out extraneous claims and possibly bring the parties to the bargaining table on those that remain. But be careful what you ask for. A successful motion for partial summary judgment could result in evidence favorable to your client being excluded at trial because it is no longer relevant to any live issues in the case.
- Cases in which discovery produces case-ending evidence. For example, if the plaintiff filed a fraud claim but then admitted in a deposition that there was no reliance on the allegedly fraudulent statement, you have a good candidate for a motion for summary judgment.
- Cases in which the plaintiff has failed to plead a plausible claim. As discussed in Chapter 3, the United States Supreme Court has been tightening up the requirements for pleading a viable claim. Complaints that would have withstood motions to dismiss under the old standards may now be vulnerable to a motion to dismiss.[10]
- Cases in which your opponent's expert's opinions are not reliable. Because expert testimony is necessary to prove many claims, excluding your opponent's expert from testifying can have a devastating impact on your opponent's case. If your opponent's expert's opinions don't meet the requirements set forth in *Daubert v. Merrell Dow Pharmaceuticals*, file a motion to exclude their testimony.[11]

Keep in mind the uphill battle you face to get a substantive motion granted. The judge won't grant a motion for summary judgment if a material fact issue is presented, even if your ten affidavits contradict your opponent's one. Usually judges can be reversed for granting summary judgments, but not for denying them. Likewise, if the judge denies a motion to exclude an expert, the record will contain the expert's testimony, allowing the appellate court to decide its admissibility based on a full record. If the judge grants a motion to exclude expert testimony, a remand may be necessary because the expert's testimony is not before the appellate court.

Bottom line: Take a clean shot if you have one, but otherwise save your ammunition for trial.

10. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007) (deciding that the old often-quoted pleading standard had "earned its retirement"); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (noting that *Twombly* "expounded the pleading standard for 'all civil actions' ").

11. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

B. Rely on Binding Authority if Possible

The trial court is at the bottom of the hierarchy of authority. Its decisions are likely constrained by both an intermediate appellate court and a high court. A state court deciding an issue of federal law will also have United States Supreme Court authority constraining its decision. Because the trial court is at the bottom of the pecking order, it will care most about binding authority. Arguments based on persuasive authority and policy arguments are unlikely to persuade the trial judge except on issues of first impression. If you are trying to preserve an issue for appeal, you may need to cite to persuasive authority or rely on policy arguments. Otherwise, stick to telling the trial court what its bosses have to say on the issue.

Don't make the mistake of tacking persuasive authority on to your citation under the theory that it can't hurt. It can hurt. A judge who sees a string citation to a binding case and to a persuasive one is likely to conclude that the binding case didn't quite support the motion's assertion and so you tacked on the persuasive authority to bolster the support.[12] If the binding authority supports your assertion, cite it and leave it at that.

Writing Tip — Citing Authority

In stating and explaining the governing law, you'll need to cite legal authority. Legal citations are mind-numbingly tedious yet critically important. Both the substance and the form of your legal citations affect your credibility with the judge. Some things to keep in mind:

- Lengthy string citations with no explanation will often annoy judges. Usually you need to cite only one or two cases for a key proposition -- enough to show that the proposition is still good law. If you feel you must cite several cases, explain why citation to several cases is helpful.
- Incorrect citation form can hurt your credibility. Generally, judges care mostly that the authority can be found, not that every abbreviation, space, and comma is perfect. But remember that judges have clerks who were recently staffers or editors on law reviews. Incorrect citation form may harm your credibility with these important readers.
- Just as important as correct citation form is consistent citation form. Whatever edition of the citation manual you're using, be consistent in your citation form. Don't mix italics and underlining. Always abbreviate the same words the same way. Make short citation forms consistent.

12. Steven D. Stark, *Writing to Win: The Legal Writer* 133 (Doubleday 1999).

C. Write Persuasively Without Appearing to Persuade

A persuasive motion will prove that your client is entitled to the relief sought. Using the law and the evidence, an effective motion should lead the judge to the inevitable conclusion that your relief should be granted. To help the judge decide in your favor, cite authority that creates confidence that granting your relief will not lead to reversal.

In addition to relying on the weight of legal authority, you will also want to write persuasively. Your goal is persuading without seeming to persuade; you don't want to sound strident. A judge is more likely to trust a motion that provides a reliable guide to the conclusion than a motion that pushes too hard. Think teaching, not door-to-door sales.

Entire books have been written about persuasion in legal writing, and we recommend these:

- Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* (2d ed., Aspen Publishers 2008).
- Ross Guberman, *Point Made: How to Write Like the Nation's Top Advocates* (Oxford U. Press 2011).
- Kenneth F. Oettle, *Making Your Point: A Practical Guide to Persuasive Legal Writing* (ALM 2007).

Below, we offer a few of the most important techniques for persuading in a motion.

1. Credibility

If a judge can trust you and what you've written in your motion, you've gone a long way toward persuading that judge. Thus, displaying professional credibility is an important key to persuasion. True, credibility is a trait, not a technique; it's something you show, not something you do. To show you're credible and to earn the judge's trust, remember three key concepts: care, candor, and honesty.

Care. Show the judge that you can be trusted with the small things, and you earn credibility with larger things. Read and follow the local rules, and be sure your motion — and any other court document — complies with them. Use correct citation form and always provide accurate pinpoint citations. The absence of pinpoint citations harms your credibility, and their absence is a particular pet peeve of many judges.[13] And cite the record — please cite the record. A frequent complaint of judges is the omission of record citations.[14] We're aware of multiple

13. Terri LeClercq, *Expert Legal Writing* 34 (U. Tex. Press 1995).

14. *State ex rel. Physicians Comm. for Responsible Medicine v. Bd. Trustees of Ohio S. Univ.*, 843 N.E.2d 174, 177 (Ohio 2006).

cases in which lawyers were reprimanded or sanctioned for failing to adequately cite the record.[15]

Candor. Is there a bad fact in your case? Don't hide it; address it. Explain it and put it in context. You'll earn credibility points. Did you find a case that hurts your position? Cite it. Show why it doesn't apply or how it should be distinguished. In some situations, according to Model Rules of Professional Conduct 3.3(a)(3), you may be required to cite adverse authority. But even when you're not required to do so, you should avoid the appearance that you are hiding something. Lawyers who omit unfavorable authority with this "ostrich-like tactic" have been sanctioned or rebuked.[16]

Honesty. Never lie about the facts of your case and never lie about the law. Of course, doing so could violate ethics rules, such as Model Rules of Professional Conduct 3.3(a)(1). But you also damage your credibility. The judge and court staff will likely discover your dishonesty, and even if they don't, opposing counsel is getting paid to find your mistakes. Don't risk it. "Arguably, the most important character trait for legal writers to project to their readers is *truthfulness.*"[17] Our advice goes beyond not lying: Never distort or mischaracterize. "The first time the judge thinks you have played fast and loose, your credibility – and possibly your client's case – will be lost."[18]

2. Story

A compelling story is powerful, and if you can present your client's requested relief as a narrative, you will enhance its persuasiveness. In a live presentation before a jury, trial lawyers often use the story of the case to persuade, and paying more attention to narrative can lead to a more persuasive motion as well.[19]

Naturally, you'll tell your client's story in the facts statement of a motion, but you need not stop there. Return to that story or theme in the argument as well. Even though rule-based analysis or analogies will be key tools for forming your legal arguments, "stories can enhance, rather than conflict with, analytical reasoning and are appropriate decisionmaking tools."[20]

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15. *Smith v. Emery*, 856 P.2d 1386, 1390 (Nev. 1993) (lawyer sanctioned for filing two briefs that contained no record citations); *Island Harbor Beach Club v. Dept. Nat. Resources*, 471 So. 2d 1380, 1381 (Fla. Dist. App. 1985) (thirteen page statement of facts contained only seven record citations; brief stricken).

16. Judith D. Fischer, *Pleasing the Court: Writing Ethical and Effective Briefs* 9 (Carolina Academic Press 2005) (citing examples).

17. Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 126 (2d ed., Aspen Publishers 2008) (emphasis in original).

18. Dickerson, *supra* note 8, at 9.

19. *See* Kenneth D. Chestek, *The Plot Thickens: Appellate Brief as Story*, 14 Leg. Writing: J. Leg. Writing Inst. 127, 131-32 (2008).

20. Steven J. Johansen, *This Is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 Ariz. St. L.J. 961, 962 (2006).

3. Emphasis

Generally, the beginnings and ends of sentences, paragraphs, and documents are places of emphasis.[21] They are the places where readers are paying the most attention. Use those places to your advantage. We have mentioned on several occasions in this book that letters and e-mail messages ought to begin with a summary or with a statement of the key information. The same technique can work within the parts or sections of a motion. Place important information at the beginnings and ends of sections and paragraphs. For example, to emphasize a fact, begin with it and reprise it at the end; to de-emphasize a fact, mention it once in the middle of a paragraph.[22]

You can create emphasis with detail. Using specific details tends to draw more attention than using generalities. "It was 17 degrees" is more emphatic than "it was very cold." Of course, excessive details can backfire, becoming tedious and annoying. Besides using detail, you can emphasize a person or entity by making it the subject of several sentences. The person or thing in the subject position of a sentence will appear to be responsible—after all, it is doing the action of the sentence.

Contrary to what you might think, using modifiers and intensifiers like "very," "extremely," and "highly" generally does not create emphasis or persuade a sophisticated reader like a judge. Nor does the use of "loaded" words like "clearly," "obviously," and "blatantly."[23]

D. Anticipate the Response

As the movant, you have an advantage: you get to go first. The judge will, in all likelihood, read the motion before reading the response. That means you get to present the facts and the law favorably to your side before your opponent gets the judge's attention.

Don't waste that advantage by presenting only your client's side. Instead, anticipate your opponent's response and address it in your motion as well. That way, by the time the judge reads the response, the judge will already know what you have to say about it—and, you hope, will be predisposed to your side.

This doesn't mean, though, that you need to spell out your opponent's argument in your motion. Too many motions waste precious moments of their reader's attention, arguing for the other side. In other words, don't do this:

> Chef Luna may argue that because Jackson had used her Twitter account to advertise drink specials and bands in the past, Casa Rita had implicitly authorized her actions. However . . . .

21. David Lambuth, *The Golden Book on Writing* 9, 26 (2d ed., Penguin Books, Ltd. 1983).

22. Mary Barnard Ray & Barbara J. Cox, *Beyond the Basics: A Text for Advanced Legal Writing* 184–85 (2d ed., West 2003).

23. *See* Mark Painter, *The Legal Writer* 102–04 (2d ed., Jarndyce & Jarndyce 2003).

Instead, do this:

> Jackson's occasional mention of her job, including the restaurant's drink specials and bands, to the friends and family members who subscribed to her personal Twitter account did not convert the account into one authorized by Casa Rita.

If you anticipate and respond to your opponent's arguments in your motion, your reader may be thinking, "Yes, but . . ." while reading the response. Don't squander your chance to plant those seeds of doubt in the motion.

VI. Conclusion

Audience and purpose are wrapped together for a motion: You want to persuade the judge to grant the relief you seek. To do that, meet the judge's needs. Tell the judge the necessary information, providing evidentiary and legal support. Use persuasive writing techniques to demonstrate that the relief your client seeks should be granted. For a sample administrative motion, see Appendix J. For a sample substantive motion, see Appendix K.

10

RESPONSES

Responses offer little to gain but everything to lose. You won't win your case with a dazzling response, but you might lose it with a flawed one. In *The Curmudgeon's Guide to Practicing Law*, Mark Herrmann says of defending depositions: "Nothing helpful can come from deposition defense, but you can lose your case in a heartbeat. Defending depositions can feel like lying in a foxhole as the artillery shells land around you."[1] The same can be said of responses.

I. AUDIENCE

The audience for a response is the same as the audience for a motion. You are writing to the judge (and possibly a law clerk). You should expect your opposing counsel to scrutinize your response and point out any flaws to the judge. Your client and the opposing party may read the response, but, again, your primary focus is the judge.

II. PURPOSE

The purpose of a response is to persuade the court not to order something. That "something" is whatever the motion sought. It might be minor administrative relief; it might be an order dismissing your case.

It is the "not" aspect of responses that makes them difficult. It is hard to be persuasive when you are on defense. You don't want to sound defensive, but a

1. Mark Herrmann, *The Curmudgeon's Guide to Practicing Law* 72 (ABA 2006).

response that fails to respond to the motion's best arguments might not provide the judge with the information needed to deny the relief sought. The best responses will persuade the judge of both the merits of the respondent's position and the lack of merit in the motion.

Writing Tip — Editing

With a response, as with every document you send out or file in court, your credibility is on the line. Naturally, honesty and thoroughness build credibility with the judge, as does scrupulous care in reporting the facts and the law and in citing both. But your sentence-level writing matters, too. A document with misspellings, grammatical mistakes, or even just random typographical errors can hurt your credibility. You've got to become proficient at proofreading and editing. Here are some tips:

Leave Enough Time to Edit

How much time should you spend on editing (revising and polishing)? The pros recommend that half the total writing time should be spent revising and polishing. And that doesn't include proofreading (checking for errors). Debra Hart May, *Proofreading Plain and Simple* 46 (Career Press 1997). Can you afford that? Can your clients? It's up to you. But very few lawyers can produce high-caliber work on the first draft. Every good legal writer knows that mediocre writing becomes good writing only after editing.

Assemble Reliable Sources

Don't guess about word usage, punctuation, grammar, capitalization, and other legal-writing conventions. Look it up. Get a good English dictionary and a good legal dictionary (like *Black's Law Dictionary*, 9th edition). Use a reliable style reference, such as Bryan A. Garner, *The Redbook: A Manual on Legal Style* (2d ed., Thomson West 2006), or Anne Enquist & Laurel Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* (3d ed., Aspen Publishers 2009).

Use More Than One Technique

Do you edit on the computer screen? That's fine, but it's not enough. Do some editing on a hard copy, too. You read and react differently to onscreen text and printed text. *See* Robert DuBose, *Legal Writing for the Rewired Brain: Persuading Readers in a Paperless World* (Texas Lawyer 2010).

Do you read the text out loud? That's great too. You're using your ears, not just your eyes, to help you edit. Now go further and have a trusted colleague read it and suggest some edits. Opening yourself up to critique is hard, but it's a sure path to improvement.

Do you read the document in reverse, from the last sentence to the first? Good. This technique tricks your mind so you're not familiar with the text. Familiarity leads to poor editing. But now read only the topic sentences. Then re-read the opening and closing paragraphs.

III. Components of a Response

The local rules that control a motion will also control the response. Follow them. You can expect your response and its related documents to include the following components.

A. Caption

The same caption as in all court documents prepared in the case should be at the top of the response.

B. Title

The title should identify who is filing the response and to what it responds. Long motion titles can be shortened as long as the clerk will be able to identify the match for the response.

C. Opening

Presumably the judge will read the motion before reading the response. So the response does not have the same burden the motion has to identify the subject matter. Instead, the response should immediately tell the judge why the relief the motion seeks should not be granted. Your answer to the question, "Why should this motion be denied?" should be the opening sentence or paragraph of your response.

D. Introduction or Preliminary Statement

The motion should have given the judge the context to understand how the relief the motion seeks fits into the overall case. If the motion failed to give that background, the introduction to the response should. That will allow you to set yourself up as the judge's guide through the complexity of the case.

Even if the motion did put the current issue in the larger context of the case, as the respondent's lawyer, you are unlikely to agree with movant's version. Use your introduction to frame the current issue and the case favorably for your client.

Here's how the respondent might introduce its response to the motion that was introduced in the previous chapter:

Introduction

Eduardo Ramirez's deposition is necessary to determine the scope of actual and implied authority given to managers of restaurants in the Festive Foods chain. In this libel action, Casa Rita seeks to avoid liability for a Twitter message sent by its Madison City manager about a drink special at its restaurant. Casa Rita contends that in advertising a drink special at the restaurant she manages, Kim Jackson acted outside the scope of her authority.

Casa Rita cannot simultaneously disclaim responsibility for its manager's actions and prohibit Chef Luna from deposing the manager's supervisors to determine what responsibilities she was given. Although Mr. Ramirez may not be involved with the day-to-day operations of the Madison City Casa Rita, he does oversee operations of all restaurants in the Festive Foods chain. Chef Luna should be allowed to depose Mr. Ramirez to determine what authority Casa Rita managers have.

E. Statement of Facts

In your statement of facts, explain the facts pertinent to the motion as well as any facts pertinent to additional issues you raise in the response. For example, if the plaintiff sought a summary judgment on the substance of the case and the defendant relied on a limitations defense in response, the response's statement of facts should address both the facts relevant to the plaintiff's case and the facts relevant to the defense.

Restating the facts relevant to the motion is worth the effort, both to put your spin on the facts and to keep the judge from having to refer to the motion for an explanation of the relevant facts. If the response relies on different facts (or a different version of the facts) than the motion, those facts will need to be supported by evidence, with citations to that evidence included in the statement of facts. For example, the facts section of the response to the motion seeking to prevent the taking of a company president's deposition might look like this:

Facts

Kim Jackson sent a message through Twitter stating, "Health department's taking over Chef Luna's kitchen. While he's shut down, margaritas are half price at Casa Rita." (Aff. Henry Andrews (Sept. 20, 2011), attached as Exhibit A.) Kim Jackson is the manager of the Madison City location of Casa Rita restaurant. (Transcr. Depo. Kim Jackson 3:21-4:1 (Aug. 15, 2011), attached as Exhibit B.) As such, Ms. Jackson is the highest authority at the Madison City Casa Rita. (*Id.* at 21:7-15.) Casa Rita has taken the position in this lawsuit that it is not liable because Ms. Jackson's message was outside the course and scope of her employment. (Def.'s Answer (July 19, 2011).)

Ms. Jackson's authority to operate Casa Rita is granted by the "home office" of Casa Rita's parent company. (Exhibit B at 33:14-19.) Festive Foods is the Delaware corporation that owns Casa Rita. (Aff. Eduardo Ramirez (Sept. 13, 2011), attached as Exhibit A to Defendant's Motion for Summary Judgment.) Mr. Ramirez is the president of Festive Foods. (*Id.*) While Mr. Ramirez may not know Ms. Jackson personally, he oversees all the company's operations. (*Id.*)

When asked at her deposition who her ultimate boss was, Ms. Jackson responded "Eduardo Ramirez." (Exhibit B at 71:5-8.) Ms. Jackson also stated, "I guess all my authority really comes from him [Mr. Ramirez]." (*Id.* at 72:23-24.)

The failure to cite evidence adequately can hurt your case. One Seventh Circuit case affirmed a summary judgment against a plaintiff after the plaintiff responded to the defendant's motion for summary judgment by providing a narrative statement of facts and citing only once to an entire deposition. Because the court rules required statements of fact in motions and responses to be supported by citations to the record, the trial court deemed the citation to an entire deposition insufficient and treated the defendant's statement of facts as uncontested. Faced with similar deficiencies in the appeal, the Seventh Circuit affirmed the summary judgment and tacked on a fine for the lawyer.[2] To avoid a similar fate, meet any evidentiary burden for your response with care.

F. Motion Standard

Although the motion should contain the standard that the judge must apply in deciding the motion, the response should use the motion standard section to emphasize aspects of the standard that favor the nonmovant. For example, a response to a motion for summary judgment may note that the procedure requires the court to accept evidence favorable to the nonmovant as true and make reasonable inferences in favor of the nonmovant.

G. Argument and Authorities

Use the argument and authorities section to prove why the court should deny the relief the motion seeks.

For administrative matters, a response's argument is typically fact-laden. The court probably has the discretion to grant the relief sought. (If it doesn't, of course, the response should cite legal authorities to prove that.) The court will decide whether use of that discretion would be fair and just. The response needs to show that it would not be fair and just. For example, if the motion seeks a continuance, the response may show why a delay would be unfair to the respondent. If the motion seeks to compel discovery of documents, the response may highlight the unjust burden the discovery would impose on the respondent. Because administrative matters are rarely the subject of appeals, case law addressing the matter is likely to be scarce, leaving you to argue about the facts.

The argument in a response to a substantive motion will focus on both facts and law. Typically, the response will need to show how something – often a pleading, evidence, or an expert's testimony – meets a legal standard.

If you are responding to a motion to dismiss for failure to state a claim, you will need to demonstrate the adequacy of your pleading. While the United States Supreme Court has recently tightened its interpretation of federal pleading

2. *Day v. N. Ind. Pub. Serv. Corp.*, 164 F.3d 382, 383–85 (7th Cir. 1999).

standards,[3] the rules themselves remain unchanged. Federal Rule of Civil Procedure 8 requires the complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A response to a motion to dismiss for failure to state a claim should explain this standard – preferably using cases where the dismissal of a complaint has been reversed. Then, the response should demonstrate why the complaint meets the standard.

If you are responding to a motion for summary judgment, you will need to demonstrate either (1) that your evidence creates a fact issue or (2) that the movant's evidence fails to prove that the movant is entitled to judgment as a matter of law. (Early in the case you may also ask that the motion be denied or a continuance be granted under Federal Rule of Civil Procedure 56(f) or an equivalent rule in your jurisdiction to allow time to obtain the evidence needed to oppose the motion.)

In meeting your burden in responding to a summary judgment motion, your response might try to prove facts contrary to those asserted in the motion, emphasizing the motion standard that factual disputes must be resolved in favor of the nonmovant. Indeed, responses thick with attached evidence are often submitted under the theory that "there must be a fact issue in there somewhere." The response could also attack the adequacy of the evidence attached to the motion or the credibility of the movant's evidence – and remind the court that the fact finder assesses credibility. Or the response might object to the evidence offered with the motion – because it is hearsay, for example. In that instance, determine whether you need to file a motion to strike the offending evidence, in addition to pointing out the inadequacy of the evidence in your response.

If you are responding to a motion to exclude an expert witness, your response needs to prove the admissibility of the expert's testimony. In federal court, the response should explain the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals*[4] and demonstrate how the expert's testimony satisfies those standards. The common refrain of a response promoting the admissibility of an expert's testimony is that any alleged deficiencies in the testimony go to the weight the fact finder should give the testimony, not to its admissibility.

Like a motion, a response should be organized around the issues the court will need to decide. Even if the motion has already provided the court with an overview of the law, the response should provide its own overview, stated as favorably as possible to the respondent's position. That overview should identify elements or issues not disputed in the motion, which will therefore not be discussed in the response. The response should then provide a roadmap, indicating the order in which the response will address the contested issues.

3. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007).
4. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

The previous chapter contained a roadmap for a motion; here's a sample roadmap for a response to that motion:

> Fact issues prevent a summary judgment against Katie Kelley's claim for public disclosure of embarrassing private facts. This tort has three elements: (1) publicity was given to matters concerning one's personal life, (2) publication would be highly offensive to a reasonable person of ordinary sensibilities, and (3) the matter publicized is not of legitimate public concern. *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473–74 (Tex. 1995). Rick Stafford does not deny in the motion that he gave publicity to matters concerning Ms. Kelley's personal life. The summary judgment evidence raises fact issues about whether publication of the facts regarding the attack on Ms. Kelley would be offensive to a reasonable person and whether the matter was of legitimate public concern. Because of these fact issues, the court should deny the summary judgment motion.

Also, like a motion's argument, a response's argument about each contested issue should follow the classic organizational structure for a legal analysis. After asserting your conclusion on the issue, you should state and explain the governing law. While the motion will also have explained the law, the response should highlight aspects of the law favorable to the respondent. Where possible, appellate cases reversing trial courts for granting similar motions should be used to explain the law. The subtle subtext of the response will be that the court risks reversal if it grants the motion.[5] The law should then be applied to your facts, with fact-based comparisons demonstrating why the motion should not be granted. Wrap up your discussion of each issue by restating your conclusion and tying it back to the reason the motion should be denied.

Writing Tip — Avoiding the Appearance of Sexism

Today, careful writers avoid sexism and even the appearance of sexism. Careful litigators do, too. You should never refer to a "lady lawyer" or a "woman doctor," of course. And you might prefer "chair" to "chairman," "spokesperson" to "spokesman," and "firefighter" to "fireman."

But there's another aspect to nonsexist writing: the male pronoun. Many writers prefer to avoid defaulting to the male pronouns *he*, *him*, and *his* in litigation documents. If you prefer to avoid the default male pronoun, here are some suggestions.

- Don't refer to a singular noun with a plural pronoun. This is still incorrect in professional writing: *A judge can always change their mind.*
- Use paired male-female pronouns sparingly. Using "he or she" occasionally might be fine, but repeated use is distracting. We also recommend against

5. Herrmann, *supra* note 1, at 4.

using "he/she" and "s/he." Although they might be conventional in other genres of writing, they are still less than desirable in legal writing.

- Try writing around the male pronoun when you can. Repeat the noun, make it plural, or rephrase the sentence. That way you avoid the problem without drawing attention to the fact that you're avoiding the problem. That's why we don't recommend simply switching to the default female pronoun — it draws attention to the fact that you're avoiding the male pronoun.

What's more, you might avoid the problem this way: Remember that in most litigation writing, you'll have a specific person in mind, even if you're stating a generic legal rule. For example, if you're stating a rule for testamentary capacity, you're envisioning that rule as applied to the particular testator in your case.

If the testator is a woman named Nancy Wright, you might naturally phrase the legal rule this way: "To prove that the testator had testamentary capacity, the proponents must show that she was of sound mind. [citation]." Using the female pronoun here is appropriate because the actual testator in your case is a woman. The reader already has *her* in mind.

Also, we think *testator* covers both men and women, and that *testatrix* and other *-trix* words are unnecessary.

H. Prayer (Also Called "Relief Sought")

The response should ask the court to deny the relief the motion seeks. For example, your prayer on a response might say, "Plaintiff Jackson asks the court to deny Defendant ABC Company's motion for summary judgment."

I. Signature Line

This should match the signature line in your complaint or answer.

J. Certificate of Service

If you copy a certificate of service from a prior document in the case, update it to specify the response being served, how it is being served, and upon whom it is being served.

K. Evidence

If the response challenges only whether the movant is entitled to the relief sought based on the evidence attached to the motion, the response may not need to include any evidence. In other words, if the response argues that even if all the evidence attached to the motion is assumed to be true, the motion should not be granted, then the response will not have to be supported by evidence.

Frequently, however, the response will contest the truth of evidence attached to the motion or will rely on other facts to defeat the motion. In those situations, every fact relied upon in the response must be proved by evidence.

IV. Strategic Considerations for Responses

The inherently defensive posture of responses makes them difficult to write persuasively. The movant gets to give the court its initial impression of the controversy. The respondent may seem to be hollering "not" in response. Careful consideration of the order of your arguments and emphasis on the motion standard can help counteract the movant's apparent advantage.

A. Order Your Arguments to Persuade and Respond

The best order for arguments in a response is controversial. From a judge's perspective, a response that tracks the order of arguments in the motion is the most helpful.[6] The judge can easily find the respondent's argument that corresponds to each of the movant's arguments. Since your primary audience member is the judge, ordering the arguments in the manner most helpful to that audience member may seem like the obvious choice. Why, then, is there a controversy?

The controversy arises because although the judge is your primary audience member, your purpose is not to help the judge but to persuade the judge. To persuade the judge, the conventional wisdom is that you should start with your strongest argument.[7] Presumably the movant has ordered its arguments so that its strongest argument appears first. If you respond in the same order, the movant's strongest argument – your weakest – will be first. There, in a position of prominence, where you have the reader's attention, you risk sounding defensive.

As with many other questions in the law, the answer to the question of how to resolve this controversy is "it depends." If your arguments and the movant's arguments are relatively equal in strength, tracking the movant's order of arguments may be worth the points you will score for organizing in a way that is helpful to the judge. If following the movant's order will detract from your strongest arguments, you may reorder the arguments so that your best points come first. In some instances, your opponent may have argued something that seems

6. Irwin Alterman, *Plain and Accurate Style in Court Papers* 103 (ALI-ABA 1987) (noting that judges appreciate points following the same order as the main document).

7. *See* Mary Barnard Ray & Barbara J. Cox, *Beyond the Basics: A Text for Advanced Legal Writing* 228 (2d ed., Thomson West 2003) (recommending that an argument section start "with your strongest argument unless logic requires you to modify this approach"); Laurel Currie Oates, Anne Enquist & Connie Krontz, *Just Briefs* 43 (Aspen Publishers 2008) (stating that a trial-brief writer will "almost always set out your own arguments first").

compelling, making it difficult for the judge to concentrate on your argument until that point is addressed. In such an instance, follow the recommendation of Supreme Court Justice Antonin Scalia and writing expert Bryan Garner: "[Q]uickly demolish that position to make space for your own argument."[8]

Whichever order you select, use headings, roadmaps, and thesis sentences that make it easy for the judge to locate your response to each point in the motion. That way, even if you have decided to favor persuasion by putting your strongest argument first, the judge will still turn to your response as a helpful guide because each responding point can be found easily.

Even if one of the movant's arguments seems off point, inconsequential, or unconvincing, briefly explain why. The judge needs to know how to address such points while ruling in your favor.

Writing Tip — Use of Footnotes

Generally, motions and responses should not place text in footnotes. Placing lots of text in footnotes will make the motion or response look like a law review article, a form that is not likely to impress judges. Some judges even denounce textual footnotes. See quotations collected in Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* 140–41 (2d ed., Oxford U. Press 2004).

But we believe there is at least one legitimate reason for putting text in a footnote: You want to respond to a minor point your opponent raised, but you don't want to let that point derail your current argument.

Even with this use of footnotes, though, be brief, and be sure your argument makes sense even if the reader skips the text in the footnote.

B. Emphasize the Motion Standard

While the movant has the advantage of writing first, the response to a substantive motion usually has its own advantage: the procedural posture. The author of a motion to dismiss is asking the court to toss the case based only on the pleadings; the respondent just wants a chance to prove its case. The author of a motion for summary judgment is asking the court to rule against the case as a matter of law; the respondent just wants to present evidence to the fact finder. The author of a motion to exclude expert testimony is asking the court to exclude a witness from testifying; the respondent just wants the witness to speak so that the fact finder can evaluate the testimony. And of course, the

8. Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 17 (Thomson West 2008).

author of a dispositive motion is asking the court to risk reversal; the respondent cautions against taking such a risk.

To exploit this procedural advantage, your response should emphasize the procedural posture. When responding to a motion to dismiss, don't argue the validity of your claim. Simply argue the sufficiency of your pleading.

When responding to a motion for summary judgment, don't argue that your client is right as a matter of law. Simply argue that there is a question of material fact that needs to be resolved by the fact finder. For example, in response to a motion for summary judgment asserting that there is no causation as a matter of law, you do not need to assert that there is causation. You only need to show how the evidence creates a fact issue about whether causation exists.

When responding to a motion to exclude expert testimony, don't argue that your expert is right or that the expert's testimony means your client wins. Instead, show how your expert's testimony meets the standards for admissibility, leaving for another day the argument about the credibility and weight to be given the testimony.

If you argue more than you need to in a response, the judge may find your position unpersuasive. If you modestly assert that the case needs to be allowed to proceed, while subtly reminding the judge of the risk of reversal if this is the end, the judge may see things your way.

V. Conclusion

You won't win your case with a stellar response. But if you marshal your evidence and organize your arguments to show the other side of the movant's story, you may be able to dodge the artillery shells and fight on for another day. For a sample response, see Appendix L.

790 N.Y.S.2d 714, 2005 N.Y. Slip Op. 01670

16 A.D.3d 363
Supreme Court, Appellate Division, Second Department, New York.

Clara A. CERILLI, Plaintiff-Appellant,
v.
Jeffrey S. KEZIS, Defendant-Appellee.

March 7, 2005.

Background: Patient sued physician for battery. The trial court granted physician's motion to dismiss. Patient appealed.

Holdings: The Appellate Division held that complaint stated battery claim. Reversed.

Attorneys and Law Firms

Goldstein & Metzger, LLP, Poughkeepsie, N.Y. (Paul Goldstein of counsel), for the Appellant.

Meiselman, Denlea, Packman Carton & Eberz P.C., White Plains, N.Y. (Richard J. Nealon of counsel), for the Appellee.

ANITA R. FLORIO, J.P., THOMAS A. ADAMS, SONDRA MILLER, and FRED T. SANTUCCI, JJ.

Opinion

***363** The Plaintiff, Clara Cerilli, commenced this action by filing a complaint against the Defendant, Dr. Jeffrey S. Kezis, for battery, alleging that the Defendant performed a biopsy on her over her express objection. On August 31, 2004, the trial court granted the Defendant's motion to dismiss the complaint. The court hereby reverses the lower court's decision, reinstates the complaint, and remits the case to the lower court for trial.

[1] The Plaintiff's allegation that the Defendant doctor performed a biopsy over her express objections is sufficient to state a cause of action sounding in battery.

***364** To prevail in a cause of action for battery, a plaintiff must prove that (1) the defendant made bodily contact with the plaintiff, (2) the defendant intended to make the contact, and (3) the contact was offensive in nature. *E.g.*, *Siegell v. Herricks Union Free School Dist.*, 7 A.D.3d 607, 609 (N.Y. App. Div. 2004); *Tillman v. Nordon*, 4 A.D.3d 467, 468 (N.Y. App. Div. 2004).

The Plaintiff's allegation, if true, indicates that the Defendant doctor made bodily contact with her, by way of a surgical scalpel. Body-to-body contact is sufficient, but not necessary, for battery to occur; instead, the defendant may make contact with the plaintiff's body via another instrumentality. *See* Restatement (Second) of Torts § 18 cmt. c (Am. Law. Inst. 1965), Westlaw ("In order to make an actor liable [for battery], it is not necessary that he should bring any part of his own body in contact with another person. [For example, an actor is] liable under the rule stated in this Section if he throws a substance, such as water, upon the other . . . .").

Next, the Plaintiff's allegation, if true, indicates that the Defendant doctor acted with the requisite intent for battery. The intent required for battery is "intent to cause a bodily contact." *Jeffreys v. Griffin*, 1 N.Y.3d 34, 41, n. 2 (2003); *see also Roe v. Barad*, 230 A.D.2d 839, 840 (N.Y. App. Div. 1996). However, "[t]here is no requirement that the defendant intend to cause harm." *Masters v. Becker*, 22 A.D.2d 118, 120 (N.Y. App. Div. 1964). *See also Lambertson v. United States*, 528 F.2d 441, 444 (2d Cir. 1976) ("Harper and James put it that 'it is a battery for a man . . . to play a joke upon another which involves a harmful or offensive contact.' Prosser says that a 'defendant may be liable where he has intended only a joke, as long as he intended the contact.'"). In this case, it may well be true that the Defendant doctor did not intend to harm the Plaintiff but instead thought that the biopsy would help her by detecting a disease requiring treatment. But the allegation in the Plaintiff's complaint, if true, indicates that he did intend to make the contact.

Additionally, a reasonable person in the Plaintiff's position, having expressly objected to the procedure, may well have found it offensive for the doctor to perform the biopsy, which resulted in bodily contact against her wishes. Therefore, the lower court's dismissal of the complaint was improper.

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200 A.D.2d 818
Supreme Court, Appellate Division, Third Department, New York.

Kenneth P. ZGRAGGEN, Plaintiff-Appellant,
v.
Denise WILSEY, Defendant-Appellee.

Jan. 6, 1994.

Attorneys and Law Firms

Stephen R. Spring (Michael T. McGarry, of counsel), Albany, for the Appellant.

Friedman and Manning (Stephen L. Molinsek, of counsel), Delmar, for the Appellee.

Before CARDONA, P.J., and MIKOLL, MERCURE, CREW and YESAWICH, JJ.

Opinion

***818** CARDONA, Presiding Justice.

This is appeal from an order of the Supreme Court (Travers, J.), entered October 22, 1992, in Albany County, which denied the Appellant's motion for summary judgment.

On July 30, 1989, the Appellee, Denise Wilsey, attended a pool party at the home of the Appellant, Kenneth P. Zgraggen. At some point during the day, Mr. Zgraggen and other guests sneaked up on Ms. Wilsey from behind and threw Ms. Wilsey into the pool. Later, Ms. Wilsey approached Mr. Zgraggen from behind and pushed Mr. Zgraggen into the pool. Unfortunately, as a result of Ms. Wilsey's push, Mr. Zgraggen sustained personal injuries, including a concussion and a broken wrist. Thereafter, Mr. Zgraggen sued Ms. Wilsey for battery, an intentional tort.

After discovery, Mr. Zgraggen moved for summary judgment. In his motion, he argued that there is no dispute as to any material fact in the case, and that he is entitled to judgment as a matter of law. ***819** The trial court denied Mr. Zgraggen's motion on the ground that it could not conclude as a matter of law that the contact Mr. Zgraggen sustained was offensive.

We affirm. To prevail in a cause of action for battery in New York, a plaintiff must prove that (1) the defendant made bodily contact with the plaintiff, (2) the defendant intended to make the contact, and (3) the contact was offensive in nature. *See Laurie Marie M. v. Jeffrey T.M.*, 159 A.D.2d 52, 55 (N.Y. App. Div. 1990), *aff'd,* 77 N.Y.2d 981 (1991). In this case, there is no question that Ms. Wilsey made bodily contact with Mr. Zgraggen, and that Ms. Wilsey intended to make the contact. The only issue is whether the contact was "offensive" in nature.

A plaintiff's lack of consent to the specific instance of contact that gave rise to the claim of battery is a factor to consider in determining whether the contact was offensive, but it is not conclusive. We must also consider more generally the context in which the specific instance of contact occurred. Thus, in this case, we must consider that Mr. Zgraggen never consented to the push that caused his injury. However, we must also consider the context: Earlier in the day, before Ms. Wilsey pushed Mr. Zgraggen into the swimming pool, Mr. Zgraggen had engaged in similar conduct toward Ms. Wilsey. In other words, the general context in which this contact occurred was a pool party at which the partygoers evidently were pushing each other into the pool as a friendly prank. Under these circumstances, we cannot conclude *as a matter of law* that the later contact between Ms. Wilsey and Mr. Zgraggen was offensive. Instead, the parties shall have the opportunity to argue their respective cases at trial.

ORDERED that the order is affirmed, with costs. MIKOLL, MERCURE, CREW and YESAWICH, JJ., concur.

All Citations

200 A.D.2d 818, 606 N.Y.S.2d 444

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