EIGHT COMMON WRITING MISTAKES IN MOTION PRACTICE

BY ROBERT DUBOSE

LIKE ANY GOOD CLICK-BAIT, THE TITLE PROMISES A LIST. But the goal is more than to list common writing mistakes — such a list easily could exceed 100 mistakes. The goal is to identify the common mistakes in motion practice that most interfere with persuasion.

A strategy for persuading judges

My choice of the mistakes in this list reflects a writing strategy to persuade judges through motion practice. That strategy is: (1) to help the judge understand the heart of the argument quickly, and (2) to convey the heart of the argument by highlighting a few key facts regarding the requested relief. Once the motion or response accomplishes those tasks, it then should include as many details as necessary to prove and support the argument.

This strategy grows out of two observations:

First, judges need to understand the main argument quickly. Most trial judges have limited time. With a docket often exceeding 20 motions per day, few judges have time to read every page of every motion and response. They need only the information necessary to make a ruling. And they need that information quickly.

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Second, judges are most likely to be persuaded by a few key facts. Most rulings on motions turn on a single fact or set of facts that are pivotal to the relief requested. Even when the parties disagree about the law, their dispute usually turns on the facts. To illustrate, consider the most common types of disputes in motion practice:

- *How the legal rule applies to the facts.* For many motions, the parties agree on the governing legal rule; the dispute in applying the rule turns on the facts.

- *Which legal rule applies.* Often each side will point to a competing legal rule, each of which dictates a different result. Although the dispute concerns which rule applies, the judge's decision between rules typically turns on facts. For instance, the judge must decide whether the facts of the case at hand more closely resemble the line of cases that apply one rule or whether they are distinguishable.

- *How the judge should exercise discretion.* The law often gives the judge discretion about how to rule on disputed issues, such as trial continuances and many discovery disputes. In those instances, judges typically decide the dispute based on which result is more just or fair — a decision that rests on facts.

The common mistakes frustrate the judge's needs. They either prevent the judge from understanding the heart of the argument quickly or distract the judge from deciding the issue.

The strategy is not to limit motions to a few facts or legal citations. An effective motion may need extensive support. The strategy is to enable a busy judge to focus on the highlights of the argument, even if the motion includes much more than the highlights.

Mistake 1 — Failing to start with an impactful summary

Too many motions and responses begin with something other than a summary. Some of the worst sections to place at the start of a motion are:

- a detailed procedural history of the case, untethered to the issue in dispute;
- a long introduction of the facts of the case that do not bear on the relief requested in the motion; or
- a long discussion of general legal standards or principles that neglects to apply that law to the argument.

This information wastes time. It delays the judge from understanding the heart of the argument. Although procedural history, facts, or law may be relevant, those details should be incorporated within the framework the argument to help the judge understand how those details support the argument.

After the title of the document, a motion should summarize the argument. When the summary appears first, it orients the judge to everything else that follows. And if the judge has only a few minutes to review the document before the hearing, an impactful summary will give the judge the core of the argument.

The key to an impactful summary is to present the primary argument and the strongest supporting points — usually the few facts most important to the requested relief. Too often, summaries offer only general conclusions. A conclusory summary rarely persuades the judge who lacks the time to read the entire document.

Most good summaries include:

- **The relief requested**. The judge will evaluate the rest of the argument in light of that relief.

- **The most persuasive legal details.** Identify the governing legal rule or rules that support the argument. The most persuasive law is the rule or principle that specifically addresses the point of dispute between the parties, rather than some neutral, general principle.

- **The most persuasive factual details.** Identify one or two pivotal facts most likely to persuade the judge. These should be the facts that persuade the judge to apply the law in your client's favor.

If the judge has time to read only the summary that contains this information, the judge will at least understand the heart of the argument.

A summary should be short, usually half a page. A summary that extends beyond the second page defeats the purpose — to conveying the highlights quickly.

Mistake 2 — Failing to use persuasive argument headings
Unless a motion is very short or makes only one argument, it should include argument headings. Headings serve important purposes:

a—Headings should summarize an argument. They help a judge by summarizing the section of argument that follows in one persuasive sentence. A judge should be able to read just the headings of a motion and understand all of the main points.

b—Headings help judges locate an argument. Frequent, concise headings help the judge find a particular argument.

c—Headings help judges structure their processing of details. By focusing the judge on the outline of the main steps in the argument, headings help a judge process how the details support those main steps.

d—Headings signal a new argument. Headings help a judge's brain switch gears because they signal a new argument. They prevent the judge from missing it.

Argument headings should be persuasive. Neutral headings do not persuade (e.g., "Summary judgment standard"). Each heading should be a complete sentence that summarizes the argument of the section (e.g., "ShopCo has not met its summary-judgment burden because it has failed to prove each element of its waiver defense").

Mistake 3 — Failing to connect the dots of the argument
Too often, advocates skip steps in the logic of the argument. The advocate may assume a step in the logic and expect the judge will make the same assumption. But judges do not necessarily make the same assumption — even if the assumption is logical.

For instance, summary judgment motions and responses frequently recite the standard for summary judgment: "The party moving for traditional summary judgment has the burden to submit sufficient evidence that establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law." Standing alone, that standard does little to persuade or help the judge. The best way to persuade the judge is to explain how the evidence meets or fails to meet that standard.

A persuasive motion or response should connect the dots. It should lay out all steps in the reasoning of the argument.

Mistake 4 — Misusing passive voice and nominalization
This mistake is not *using* passive voice, but *misusing* it. Too often, advocates misuse passive voice in a way that obscures and weakens the argument.

A grammar refresher: there are two ways to help identify passive voice. First, the subject of the sentence always receives the action (e.g., "Mary was fired."). Second, the verb in the passive voice contains at least two words (e.g., "was fired"). Passive voice is the opposite of the active voice, where the subject of the sentence performs the action (e.g., "ShopCo fired Mary").

Passive voice can obscure or weaken an argument in several ways:

- It can obscure the actor's identity when the reader needs to know who the actor is. The sentence "Mary was fired" does not identify who did the firing.

- It fails to assign responsibility. The sentence "Mistakes were made" does not assign any responsibility to the person who made them. Yet legal writing is often about assigning responsibility (e.g., who caused the accident, who has the burden of proof, who must satisfy the conditions).

- It weakens the action. It adds a word to the verb. And because it separates the actor from the action, it lessens the action.

Passive voice can be a useful tool when used properly, such as when:

- The actor is unknown (e.g., "First Savings was robbed").

- The actor is unimportant (e.g., "The original hearing date was cancelled").

- The focus of the sentence is something other than the actor (e.g., in an argument about the requirements to prove reckless driving, "Reckless driving cannot be proved by a ticket for failure to carry insurance").

- The sentence contains multiple subjects, which make the subject confusing without passive voice (e.g., "Expert testimony cannot be supported by unproven assumptions, untested theories, or a failure to exclude other causes").

Be aware of passive voice. Avoid it unless it serves a useful purpose.

Mistake 5 — Using intensifiers

Intensifiers are adverbs or adverbial phrases that emphasize other words, usually ending in -ly and almost always ending in -y. Examples include absolutely, clearly, certainly, highly, extremely, obviously, and very.

Paradoxically, intensifiers do not make an argument stronger or more emphatic. They sound like shouting. Worse, they often suggest the advocate is attempting to overcome a step in the argument that the advocate cannot prove (e.g., "ShopCo's conduct clearly reflects fraudulent intent").

Avoid intensifiers. When you have the urge to use one, ask whether the reason is to compensate for a weakness or assumption in the argument. That question can help you identify and fix the problem.

Mistake 6 — Disparaging opposing counsel

Judges are distracted and often offended by language that disparages opposing counsel. Advocates most commonly disparage, not by explicit name-calling, but by describing opposing counsel's intent.

One common disparagement uses an adjective to characterize the opposition's argument. Words like "disingenuous" and "blatant" essentially accuse opposing counsel of deceiving the court (e.g., "ShopCo's blatant misinterpretation of the contract is disingenuous"). These adjectives go beyond describing the argument and impliedly accuse the opponent of ill intent. A more persuasive argument focuses not on the opponent's intent but with the problems with its argument (e.g., "The words the parties used in their contract contradict ShopCo's interpretation").

Another common disparagement makes assertions about opposing counsel's motive or strategy (e.g., "Seeking to distract from its egregious conduct, ShopCo attempts to deflect the blame on its independent contractor"). Focus on the argument itself, not the opponent's motives or strategy.

Disparagement often backfires, causing the disparager to lose more credibility than the opposing counsel being disparaged. This is because most judges see disparagements as unprofessional. *See* The Texas Lawyer's Creed—A Mandate for Professionalism, reprinted in TEXAS RULES OF COURT 865, 865 (West 2012) (instructing lawyers to not make 'disparaging personal remarks' about opposing counsel").

Disparagement also distracts from real persuasion. The best

argument highlights the pivotal facts on which the legal rule turns — not opposing counsel's intent or strategy.

Mistake 7 — Misusing block quotations
Quotations of evidence or authority are one of the most important tools of motion practice. By showing the exact words that a court, witness, or document used, a quotation helps verify that the law or evidence supports an argument. When a motion fails to quote the controlling statute or rule, for instance, the judge may become suspicious that the authority does not stand for the stated argument.

But beware of lengthy quotations. Block quotations — especially when longer than four or five lines — often cause the judge to skim or skip over the quote entirely. Thus, when an advocate uses a long block quotation to make a point, it can cause the judge to overlook the point altogether.

Block quotations often are a symptom of lazy legal writing. Rather, than connecting the dots of the argument, many advocates simply cut and paste a block quotations to make their point. The block quotation should never be a substitute for reasoned argument. The most important points of a motion or response should appear in the main body of the argument and never only in the block quote.

Although overused, block quotations may be helpful, even necessary in some situations — such as in a dispute about a lengthy provision in a statute or a contract. Most judges want to see all relevant parts of the disputed provision, rather than just reading an advocate's paraphrase of the provision.

When long quotations are necessary, it helps to introduce them by first giving the judge context — especially by explaining the main point of the quotation and how it supports the argument. Consider a block quote as backup support that some judges may want to read, but that other judges may skip.

Mistake 8 — Misusing typographical emphasis
In oral hearings, the judge is rarely persuaded by an advocate who yells. Effective oral advocacy requires modulation of volume, remaining always within a respectful range.

The same is true of written advocacy. The typographical equivalents of yelling are the misuse of ALL CAPS, First-Word Capitalization, underlining, *italics*, and **bold** — ***OR WORSE SOME COMBINATION OF THESE***, especially when used for emphasis. Aggressive typography is not persuasive argument. Persuasive argument concisely points to the factual, legal, or logical problems with the other side's analysis. Aggressive typography distracts from that analysis.

Not all typographical emphasis amounts to yelling. In a few situations these tools can enhance, rather than distract from, an argument.

- **Capitalization** is the standard tool for concise section titles, such as "FACTS," or "ARGUMENT." But avoid using capitalization in argument text or even sentence-length headings. Both all caps and first-word capitalization make a sentence more difficult to read. Thus, their effect is often the opposite of what the advocate intended.

- **Bold text** is useful for headings. It sets headings apart from the rest of the text, which allows the judge to find them more quickly.

- **Italicized or bold text** also can be useful for occasional, brief emphasis. For instance, readers are more likely to place emphasis on words or phrases at the end of a sentence. It rarely helps to italicize or bold words at the end of the sentence because the reader naturally places emphasis there. In contrast, readers place *the least emphasis* on words in the middle of a sentence. If it is impossible to move words to the end of the sentence for emphasis, bold or italics can help direct attention to words in the middle. But because overuse of typographical emphasis is distracting, use it sparingly.

Avoid these mistakes. More importantly, keep in mind the persuasive strategy they reflect. A motion or response should persuade a busy judge by conveying the heart of the argument clearly, without distraction, as quickly as possible.

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