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# Creative Motion Practice: Who, What, Where, When, and Why

Counselor, would you like a motion schedule? This seven-word question often commences dreading, planning, writing, editing, and filing motions in criminal cases. For many criminal defense attorneys, this task is low on the list of desirable activities, perhaps just above preparing tax returns.

Many criminal defense attorneys love the battlefield inside the courtroom. For them, advocacy means standing up in court and doing what they do best: arguing, cross-examining, and objecting — anything but writing.

On the other side of the coin, many defense attorneys welcome the opportunity to advocate for a client in written form. Motion practice is not something they avoid; instead, they embrace it. For these defenders, this article will offer a view of motion practice from a new perspective — being creative.

The dictionary defines creative as relating to or involving the imagination or original ideas, especially in the production of an artistic work.[1] Prosecutors, judges, and the public will view defense counsel's clients with a narrow lens. They will see in a client what they expect to see and perhaps what they want to see. Though the Constitution grants the accused the presumption of innocence, practice in the trenches teaches that an accusation itself often creates a presumption of guilt. To overcome this narrow lens in which clients are viewed, it is essential that counsel be unique in the way counsel represents them. "Two roads diverged in a wood, and I — I took the one less traveled by, and that has made all the difference."[2] Criminal defense attorneys are presented with two roads to choose from: Be like everyone else and obtain average results, or be unique by using their strengths to arrive at better results than most lawyers. Choosing the latter makes all the difference.

Being unique and creative in the way motions are planned, written, and edited requires — prior to putting pen to paper or putting fingers on a keyboard — the consideration of who, what, where, when, and why. These considerations will guide defense counsel down the path to being creative through motion practice.

## Who?

Begin by considering who the audience is. The audience may not be the judge. Many judges delegate the reading of motions to their law clerks. It is important for lawyers to get to know their audience with the same focus they select a jury. What did the individual do before becoming a law clerk or judge? Did she write prior decisions that help or hurt defense counsel's argument? Perhaps she already has a bias that goes against the conclusion counsel wants her to reach. If so, counsel must find a way to address that bias and make his arguments unique. In making the ruling unique to the client's fact pattern, counsel alleviates the fear of creating a precedent he does not want to establish. Who does the law clerk or judge respect on the bench? Perhaps those judges have

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written decisions helpful to defense counsel's arguments.

## What?

Many types of motions can be filed in a criminal case. All have one thing in common: They all ask the court to take some action. By its nature, a motion is a formal way for a party to persuade the court to take some action.

A trilogy fundamental to all persuasion, especially in motion practice, is the *law*, the *facts*, and the *emotions* that drive decisions. Many attorneys excel at researching the law. They can synthesize the discovery to present facts helpful to their arguments. However, few attorneys appreciate the importance of emotions or how to integrate emotions when persuading others to act. Since the goal of a motion is to persuade the court to act in some manner, harnessing the power of emotions is the most important part of the trilogy.

Harnessing emotions when persuading is natural. Research on the use of emotion in persuasion demonstrates that people possess a learned association between emotion and persuasion. An attempt to persuade another will create a spontaneous shift in the language used toward more emotional appeals.[3] When people speak, they naturally use words that are likely to generate an emotional response in the audience. Lawyers must avoid taking the emotion out of an argument they already are inclined to use.

The writer can use emotion to influence the reader by carefully choosing words. This technique is subtle but effective. The Reverend Dr. Martin Luther King Jr. did not declare that he had an idea. Instead, he had a "dream." That dream sparked the civil rights movement. In written advocacy, defense counsel should spend considerable time choosing important language. Is the client a defendant? Rarely will such a label be helpful, if at all. Why are lawyers so careful not to use such labels in oral advocacy in front of a jury, yet they label their client "the defendant" in motion practice? Consider what label to use: Mr. Jones, Patrick Jones, or simply Patrick.

Emotion flows free in oral advocacy. The presenter uses voice characteristics, such as tone, pace, rhythm, and volume to project the intended emotion. Writing is far more complex. It includes outlining, drafting, and editing by others who do not share the emotion of the writer. After these steps, the writer starts redrafting. These methods of preparing a written document offer many opportunities to remove emotion from the argument. When writers are going through this process, they are more focused on style, grammar, punctuation, and organization than on the power of the emotions in the argument. This process risks the filtration of emotion from the argument. To avoid this, counsel should start by dictating what she wants to say into a recorder. After drafting the motion, counsel should go back to the voice recording to determine if she has unnecessarily filtered the emotional language from the argument. This will occur every time counsel writes with legalese instead of using a plain language approach to writing. Terry McCarthy, one of the pioneers of cross-examination, always teaches lawyers to talk to jurors as if they are in a bar. Lawyers should write no differently.

| Emotional Words | Filtered Language |
|---|---|
| You ***alone*** can right this wrong. | We ask **Your Honor to find** this action violated our client's constitutional rights. |
| This conduct created a ***danger*** to the rights all of us share with Mr. Jones. | Allowing such conduct creates ***a slippery slope*** which allows police and the government to secure evidence illegally in other cases. |
| The People ***failed*** to meet this burden. | The ***People did not establish proof by a preponderance of evidence*** to establish the legality of the conduct. |

Be especially cognizant of the removal of any words that may trigger a healthy level of fear because fear can be a powerful motivator for acting. See the examples of "Emotional Words" and "Filtered Language" in the chart in this article.

When tapping into the power of emotion in persuasive writing, defense lawyers must consider the audience. The audience will be more likely persuaded when what counsel asks them to do is something they wanted to do in the first place. Most of the power to persuade takes place in the receiver of the message; persuaders typically account for less than 10% of the effect.[4] Research shows that the listener's desire to be consistent will impact the success or failure of an argument. Everyone possesses a desire to maintain consistency in their beliefs. This is the reason managers are less likely to see faults in employees they themselves hired. Judges will strive to be consistent in their decisions. If the judge in the client's case wrote on the issue before or on a related topic, be sure to place particular emphasis on that fact. Judges will also seek to be consistent with courts of superior jurisdiction or fear the likelihood of a reversal on appeal. The strongest emotion in influencing action is fear. People are more motivated by the possibility they may lose something of value, such as health or money, than they are of gaining something they want.[5]

The use of a syllogism in counsel's argument will enhance the likelihood that the audience will be persuaded because it uses logic to let the listener reach conclusions without being told how to think. People are better persuaded by the reasons they have themselves discovered than by those that have been forced upon them. This synthesizes the power of logical reasoning using the syllogism.

A syllogism is an argument that consists of a major premise, a minor premise, and a conclusion. After the major and minor premises are proven, the audience is led to the conclusion themselves.

> *Major premise:* All members of NACDL are lawyers.
>
> *Minor premise:* John is a member of NACDL.
>
> *Conclusion:* Therefore, John is …

By using this technique, the audience will not have the conclusion forced upon them. Instead, once convinced that the major and minor premises are true, they will arrive at the conclusion that John is a lawyer themselves. This will greatly enhance the power of arguments made in a motion.

*Major premise:* If consent is not voluntary, a search based on it is unlawful.

*Minor premise:* John Smith's consent was not voluntary.

*Conclusion:* Therefore, the search of John Smith was …

In this example, the writer still must establish both the major premise (law) and minor premise (facts), but once accomplished, the emotional desire in the listeners to reach their own conclusions will lead them to the conclusion that the search of John was unlawful.

Lawyers should always consider how many arguments they want to advance and whether the arguments will help to persuade the court. One theory is to throw everything against the wall and see what sticks. This idiom itself implies the advancement of an illogical argument unlikely to persuade others. In motion practice, attorneys will often have alternative theories to advance, each with the capability of becoming a winning argument. One such example is arguing a Fourth Amendment violation that results in an illegal seizure and the suppression of evidence. In advancing this argument, counsel may want to argue that the car stop itself was unlawful. But the continued detention of an individual after the stop of the car or the arrest itself may also be argued to be unlawful. Each argument, if successful, will result in the suppression of evidence. Each argument requires the consideration of different facts and different legal precedents. Consideration should be given to all that is gained or lost in advancing these alternative arguments.

When deciding what to include in a motion, it is important to consider the dilution effect. The dilution effect is a judgment bias. When a judge is presented with information that is helpful to a particular issue (e.g., the law concerning probable cause to arrest), a risk exists that the court will underutilize such information when information not important to such an analysis is also presented (e.g., the law concerning car stops).[6] The brain does not distinguish the relevant from the nonrelevant information when considering each independent argument. Instead, having irrelevant information dilutes the power of persuasion. People's minds do not add 75 (the value of argument A) to 25 (the value of argument B) to reach a total of 100. People average these out, resulting in a value of 50. Thus, the weaker argument may dilute the stronger argument.[7] Less can indeed be more. Advocates should be careful in advancing multiple arguments to persuade the court or risk their better argument being diluted by the weaker one.

## Where?

An author may deliberately seek to confuse the reader when writing for certain audiences. This technique may be helpful when the writer wants to make the reader feel uncomfortable, lost, or confused. When writing murder mysteries this can be highly effective, but this technique will not work well when writing to persuade the reader.

**A trilogy fundamental to motion practice: the *law*, the *facts*, and the *emotions* that drive decisions. Harnessing the power of emotions is the most important part.**

Planning where various components are placed in the motion aids persuasive writing. A well-planned piece of writing will take a clear path that the reader can follow. Where counsel places the various components of an argument will help focus the reader on the pathway counsel wants the reader to follow.

The pathway counsel wants readers to take will only be clear to them if counsel imposes structure on the story (such as who, what, where, when, and why). To understand the value of structure, consider the barriers to communication that result from the lack of structure. Most people know someone who communicates without structure. That person's story goes something like this:

> Did I tell you about the great restaurant I went to last night? It was great. Oh, you will never guess who I ran into at the restaurant. Joe! It has been so many years since I saw Joe last. I forgot all about him. For good reason too. Do you remember the time Joe stole that money from Susan? I felt bad for Susan. She is vulnerable. I think Sue is that way because of the way she was raised — no siblings, an only child …

The story above leads people to believe that they will find out about a great restaurant. Not only do they never learn the reason the writer enjoyed the restaurant, but also they do not learn the restaurant's name, the type of food it serves, or where it is located. If the writer wanted people to visit the restaurant, that effort failed. When listening to a story without a structure the audience loses focus and is unsure of what will follow or what pathway the story will take. The listener will give up and often not pay attention to or follow the story, which prevents the story from being persuasive.

In persuasive writing, the goal is to keep the listener engaged and comfortable. Writers want the listener to follow their arguments so that they can persuade him. When writing motions, the listener can more easily follow the arguments if the structure is clear to the reader. Writers can use many tools to connect with the audience and create structure.

Each segment should have a clear title with labels that make sense to the reader. When writing an Omnibus Motion, for example, the writer may be asking the court for various forms of relief. The title of each segment should clearly identify the facts, law, and emotion succinctly with a label.

> **"The officer's stop of the car Mr. Jones was driving was illegal, and the evidence gathered after this illegal act must be suppressed."**

Using such a title will cue the reader into the structure of the argument. This will allow the reader to determine what each segment seeks to argue and sets the reader up to follow and possibly be persuaded by the argument.

Topic sentences are another important tool in creating structure. The topic sentence appears as the first sentence of the paragraph, helps communicate the structure to the reader, and summarizes the information in each paragraph. Since the reader will be cued into the purpose of the paragraph by reading the topic sentence, he or she is more likely to follow the arguments made by the writer. The writer should start by writing the topic sentence before the other content within the

paragraph. The topic sentence also helps the writer know what information to exclude from a paragraph. If the content of a paragraph does not pertain to the argument advanced in the topic sentence, it will only confuse the reader and should be removed. As an example, here is this paragraph's topic sentence: "Topic sentences are another important tool in creating structure." Another sentence does not help or advance the topic sentence: "The writer should start by writing the topic sentence before the other content within the paragraph." That sentence may be relevant to the larger story, but its inclusion in this paragraph may confuse the reader and make it more difficult to follow. It should be omitted.

The order of counsel's argument will impact its effectiveness. If lawyers view written motions as a learning episode for the reader, the primacy-recency effect will have an impact on the effectiveness of arguments. The primacy-recency effect teaches that an audience will tend to remember best that which comes first and remember second best that which comes last. People tend to remember least that which comes just past the middle of the material. This phenomenon has been studied since the 19th century.[8]

## When?

The power of a well-written reply should not be ignored. In life, people always want to get in the last word in an argument. No trial attorney would dare wave a summation. Yet lawyers often do not request an opportunity to reply; even worse, when they have the opportunity, they do not know how to use it. In determining whether and how to file a reply, consideration should be given to what arguments the opponent made in its opposition papers that can be refuted. Of particular importance is an argument that impacts the opponent's reasoning. If done effectively, this can negatively impact the overall persuasiveness of the opponent's arguments because counsel has effectively used primacy and recency.

Also, an advocate should consider whether oral argument may be advantageous. Determine if the judge will permit oral argument. Perhaps counsel's strengths lie in her ability to orally persuade, or counsel's adversary may have a weakness in making oral arguments. If either is true, do not pass on the opportunity to deliver arguments both in writing and through oral argument.

The timing of motion filing may help counsel negotiate a better plea. Some motions do not have to be filed by a certain deadline. This is often true with dispositive motions, discovery motions, motions to dismiss in the interest of justice, requests to modify the jury charge, and pretrial motions to preclude evidence. If counsel is looking to give the prosecutor a motive to offer the client a better plea offer, proper timing of the motion can create that opportunity.

## Why?

The question regarding why lawyers file omnibus (or suppression) motions can be answered directly with the reply that lawyers seek some order from the court. But the more creative answer lies in the benefits of the motion practice itself.

A defense attorney's role is not to make the prosecutor's job easier. Some defense attorneys rarely will accept an offer from the prosecution to agree to stipulations in lieu of motions. The prosecutor and the court seek the alternative of stipulations because they do not want to do the work of responding to or deciding the motion. Defense attorneys must give thought to the role of the court in this regard and whether they will risk being denied a hearing on a motion if they choose to write. However, consider that in making motions defense attorneys do more than seek to obtain a hearing. They seek the suppression of the evidence itself, not simply a hearing. A hearing should only be held to determine disputed facts. Thus, a prosecutor must respond to the motion with factual assertions. This may disclose facts previously not known. The People's response will also cue counsel in regarding the theory of the prosecution's case from the way the prosecutor argues the relationship between the law and the facts. The process of preparing the motion will also aid the defense attorney in understanding the strengths and weaknesses of the defense. Both sides engaging in this process may help lead to a resolution of the case prior to trial.

Many motions can be used creatively that do not simply address the suppression of evidence. These motions include modification of bail, change of venue, to compel a bill of particulars, to compel discovery, a modified jury charge, dismissal for facial insufficiency, dismissal for destruction of evidence, severance, speedy trial, *motions in limine,* and dismissal in the interests of justice. Each can be used creatively depending on the facts of the client's case.

## Conclusion

Motion practice is not something to avoid; instead, lawyers should welcome motion practice as an opportunity to be more creative in the way they practice criminal defense. Advocates should challenge themselves to be original. If defense lawyers allow themselves to think outside the box and consider who, what, where, when, and why — prior to putting pen to paper — it will lead down the road less traveled and to a road that allows more originality and greater creativity in motion practice.



## Notes

1. *Creative,* Oxford Languages Dictionary (Dec. 23,2022), https://languages.oup.com/google-dictionary-en/.

2. Robert Frost, The Road Not Taken: A Selection of Robert Frost's Poems (1991).

3. M.D. Rocklage, D.D. Rucker & L.F. Nordgren, *Persuasion, Emotion, and Language: The Intent to Persuade Transforms Language via Emotionality*, 29(5) Psychol. Sci. 749-760 (May 2018), https://doi: 10.1177/0956797617744797.

4. *Id.*

5. *Id.*

6. Encyclopedia of Social Psychology (Roy F. Baumeister & Kathleen D. Vohs eds., 2007), https://dx.doi.org/10.4135/9781412956253.

7. Niro Sivanathan, https://www.ted.com/talks/niro_sivanathan_the_counterintuitive_way_to_be_more_persuasive.

8. David A. Sousa, How the Brain Learns (6th ed. 2022).

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