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Good writing is rewriting.
Annotated original and revised versions of a successful brief

Below is the original version of a brief I wrote when I was practicing at Morrison & Foerster, followed by my recent revisions to it. I've annotated the original and revised briefs to discuss their strengths and weaknesses—and to provide teaching points that illustrate effective writing and advocacy techniques. While the original brief is a matter of public record, I've changed all the parties' names. I've also changed the briefs' font and spacing to make them more readable in this format.

I put the same constraints on my revised brief that I faced when I wrote the original brief. I want the original and revised briefs to parallel each other so you can meaningfully compare their writing and organization. For example, our original brief was only a few lines under the page limit. While I've significantly revised our original brief, my revised brief is the same length. Similarly, I didn't do any additional research for my revised brief to maintain consistency with our original brief.

Our brief opposed a plaintiff's motion to amend his complaint to add claims for fraud, emotional distress, and punitive damages against our client, a bank. The plaintiff's original complaint alleged three causes of action that claimed the bank failed to identify documentary discrepancies relating to a letter of credit that the bank had issued to facilitate an international sales transaction between the plaintiff and third parties. The plaintiff filed his motion five weeks before trial—after discovery had closed. The Plaintiff knew all the facts he alleged in his proposed amended complaint when he filed his original complaint.

You don't need to understand letters of credit to analyze the briefs. But for context, banks issue letters of credit to buyers who want to purchase goods in international sales transactions. A bank's letter of credit commits the bank to pay the beneficiary—the seller in the sales transaction—if the beneficiary meets the letter of credit's conditions. A letter of credit typically requires the beneficiary to present certain documents to the bank, like a bill of lading and invoice. These documents must be written in the same terms as those required by the letter of

credit. If even minor discrepancies exist between those documents and the terms of the letter of credit—even a missed period or typo—the bank is not obligated to pay on the letter of credit unless the seller corrects, or the buyer waives, the discrepancies. So the bank that issued the letter of credit focuses only on the documents that evidence the sales transaction. The bank does not consider the actual quality of the goods or whether the parties complied with their underlying sales contract.

I respectfully disagreed with my partner regarding the order of our arguments. My partner wanted to first argue that the plaintiff's amended complaint was subject to a general demurrer because he wanted to emphasize how drawn out this case would become if the plaintiff's motion were granted. He also wanted to emphasize that the plaintiff had previously sued other parties for this same transaction. I suggested that we should first argue the motion was untimely and then argue that granting the motion would prejudice our client because these were the typical grounds for denying motions to amend.

The original brief reflects my partner's preferred organization; the revised brief reflects my preferred organization. While I worked with a partner, I was primarily responsible for the original brief. Most, if not all, of the mistakes in the original are mine.

Our opposition was successful. The court denied the plaintiff's motion to amend because the motion was untimely and would prejudice our client if the motion were granted.

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Original Brief

Original Brief	Annotations
I. INTRODUCTION AND SUMMARY OF ARGUMENT After the close of discovery and a mere five weeks before trial is set to begin, plaintiff Leo Julian ("Julian") now seeks leave to amend his complaint to try to transform a negligent misrepresentation action in a Letter of Credit case into an action based on intentional fraud and claims for punitive damages and emotional distress.[1] As detailed below, Julian's motion should be denied, and the trial should go forward on February 6, 1995 for the following reasons. First, Julian's motion for leave to amend should be denied because Julian's proposed amended complaint is subject to general demurrer for failure to state a cause of action. California law is clear that a motion for leave to amend should be denied when the proposed amended complaint is subject to demurrer. 5 Witkin, California Procedure § 1125 (3d ed. 1985). Julian's new claims for intentional misrepresentation and fraudulent concealment are subject to general demurrer because Julian has made judicial admissions in prior federal court actions, involving the very same Letter of Credit transaction, that he relied on the alleged misrepresentations of persons and entities other than VGNB, and that these misrepresentations induced him to authorize the release of the Letter of Credit funds.[2] (See	• This heading screams at the court because it underlines text that uses all caps. The revised brief uses better formatting for its headings. • I love our theme. We capture in one sentence that Julian's motion is untimely and prejudicial. • Avoid over-defining terms. "Julian" is the plaintiff's last name. No confusion will result from using "Julian" without defining it first. • Legal analysis is hard, so make the court's job as easy as possible. Use the same terms to refer to the same thing. We fail to do that here. For example, in this paragraph we refer to Julian's "proposed amended complaint" using lowercase text. Yet in the next paragraph, we refer to the same document with initial caps: "Proposed Amended Complaint." • The sentence beginning with "Julian's new claims" contains 63 words. The content is good, but the content gets lost because the sentence contains too many words. Judges are like everyone else. They need resting places where they can absorb the information you offer. Periods and paragraphs give those resting places. Limit most sentences to about 20-25 words. Write even shorter sentences when possible.

[1] On December 20, 1994, this Court granted VGNB's motion for summary adjudication of issues and dismissed Julian's causes of action for Breach of Contract and Negligent Disbursement.
[2] It is well settled that admissions in prior pleadings are admissible in subsequent judicial proceedings. Dolinar v. Pedone, 63 Cal. App. 2d 169, 176 (l944).

Julian's federal complaints attached as Exhibits A and B to VGNB's Request for Judicial Notice.) Notably, Julian's second federal complaint containing these admissions was filed on May 4, 1994, only a day after Julian filed his complaint in this action. Thus, Julian's motion should be denied because he cannot state a claim against VGNB for fraud in that he cannot now plead, in direct contradiction to his federal complaints, that he relied on any alleged misrepresentation by VGNB when he authorized the release of the Letter of Credit funds.	• The last sentence in this paragraph is also too long because it contains 49 words. Long sentences challenge your readers' memory and comprehension, so these sentences obscure their main points. Also, this paragraph was 22 lines long in the original format—almost a full page. It only has five sentences. Five sentences are reasonable for a paragraph if those sentences are relatively short. But because two of the sentences are exceedingly long, the result is a very long paragraph. The court needs more opportunities to rest and absorb your analysis.
Second, Julian's motion for leave to amend should be denied as untimely. Julian's own memorandum of points and authorities ("MPA") admits that Julian himself was aware of all of the facts alleged in his Proposed Amended Complaint prior to the filing of his original complaint in May, l994. Julian states: "[A]ll of the facts alleged in the proposed First Amended Complaint are found in a combination of the original complaint, the deposition testimony of Dr. Julian in this matter, and the responses to interrogatories posed by Bank to Dr. Julian. (MPA, p. 5, ln. 5-9.) Despite having full knowledge of all of the facts alleged in the First Amended Complaint, Julian failed to seek leave to amend until seven months after filing his original complaint, after the close of discovery and on the eve of trial. California law is clear that "[a] long unexcused delay may be the basis for denying permission to amend pleadings, especially where the proposed amendment interjects a new issue, which may require further investigation or discovery procedures." Rainer v. Community Memorial Hospital, l8 Cal. App. 3d 240, 258 (1971). Julian has offered no excuse for this delay. Thus, Julian's motion is untimely and should be denied.	• We used good thesis sentences throughout our introduction. Judges like clear signposts that identify where your argument is headed. • "First Amended Complaint" is our third way of referring to the same document. One way to avoid this mistake is to immediately define key terms in your pre-draft outline and use those terms in your initial draft, rather than seeking to edit problems like this later. • This paragraph has 13 lines and six sentences. In general, limit paragraphs to four or five sentences each. Six sentences should generally be your upper limit. In the revised brief I break this argument down into two shorter paragraphs. • Rules frame issues. If you state a rule for an issue in your introduction, state it immediately after your thesis. A rule gives the court the foundation to understand why the facts you're addressing are relevant. In general, don't save your rule until the end of your argument. Instead, end your argument with a parenthetical that demonstrates how your argument parallels the logic of your mandatory authority. See the revised brief for examples.
Third, the declaration of Astrid Rollo in support of	

Julian's motion is woefully insufficient. Local Rule 9. 19 (e) of this Court requires that "if a motion for leave to amend is filed after the trial date is set, the supporting declaration must set forth in specific detail the reasons why the amendment is necessary and an explanation as to why the motion was not filed sooner. Pertinent dates regarding acquisition of the information must be stated." Ms. Rollo's declaration conspicuously omits stating when any new information supporting the amendment was acquired. The declaration also fails to state what new information was acquired. Specifically, the declaration fails to set forth even one fact that Julian learned during discovery that was unknown to him when he filed his original complaint. Because Ms. Rollo's declaration fails to explain why the amendment was not made earlier, Julian's motion must fail. Fourth, Julian's own cited authority does not support his motion for leave to amend. Julian relies on Honig v. Financial Corp. of Am., 6 Cal. App. 4th 960 (l992), to support his claim that even in "fast-track" cases, motions to amend should be liberally granted. However, the Honig court overturned the trial court's denial of plaintiff's motion to amend because the plaintiff in that matter alleged facts which occurred after plaintiff filed his original complaint. Id. at 966. To the contrary, Julian now seeks leave to amend his complaint to allege facts that were known to Julian in May of 1992. Honig in no way contradicts the principle that a trial court may properly deny a motion for leave to amend made on the eve of trial when no explanation has been offered for the party's failure to amend earlier in the case. Fifth, contrary to Julian's assertions, his new fraud claims are drastically different from his negligent misrepresentation claim. To permit Julian to completely change the nature of his case at this late date would severely prejudice VGNB and	• We underlined far too much in this paragraph and in general. Don't use underlines for emphasis. If you must use typographical means of emphasis, use bold or italics. But avoid these too. Prefer non-typographical means of emphasis. For example, write short sentences using active voice or place important information at the sentence's or paragraph's end. • The highlighted sentence restates the argument in the previous sentence. While lawyers may think restated points add emphasis, restated points sap readers' energy. So readers will have less interest and ability to retain later arguments. If page or word limits are tight—they often are—restated points also waste space that could be used to develop authority or arguments. • This paragraph is also six sentences, but five of the six sentences are short. Despite my general advice to limit most paragraphs to four or five sentences, this paragraph is fine at six sentences. • This paragraph is good. We developed our argument in just five sentences.

seriously undermine the judicial process in this case. Julian's new claims of fraud and emotional distress require discovery that VGNB previously had no notice was necessary. Additionally, as discussed above, VGNB will need to challenge Julian's amended complaint on the pleadings. Because Julian was dilatory in making his motion, VGNB should not and cannot be foreclosed from challenging Julian's amended complaint and pursuing any discovery regarding Julian's claims. VGNB would thus be severely prejudiced if Julian's motion were granted. However, should this Court decide to grant Julian's motion, the trial date should be vacated or continued to allow VGNB to challenge Julian's amended complaint and pursue additional required discovery.

- I love words. I love the word "dilatory." But we could have found a simpler word. Help the court by using simple terms wherever possible. When I reworked this sentence in the revised brief, I avoided this word by revising the sentence's construction. Had I not changed the sentence's structure, I could have used a word like "late," "slow," or "lax."
- This introduction was 3 ½ pages in its original format. I generally favor detailed introductions. Judges are busy. They also have short attention spans. So develop concise versions of your arguments to grab judges' attention when they have the most energy and focus.

II. JULIAN'S MOTION SHOULD BE DENIED BECAUSE JULIAN'S PROPOSED AMENDED COMPLAINT IS SUBJECT TO GENERAL DEMURRER

"It is of course proper to deny leave when the proposed amendment or amended pleading is insufficient to state a cause of action or defense." 5 Witkin, California Procedure § 1125 (3d ed. 1985). For example, in Hayutin v. Weintraub, 207 Cal. App. 2d 497 (1962), the court upheld the trial court's denial of plaintiff's motion for leave to amend to add a cause of action for fraud holding that the trial court properly considered whether the proposed cause of action was properly pleaded. Id. at 506-07. Julian has admitted in prior federal pleadings (the first of which was originally filed almost two years before Julian filed his present action, and the second of which was filed on May 4, 1994 after dismissal of the original complaint for failure to prosecute) that he relied on the misrepresentations of persons and entities other than VGNB, and that these misrepresentations induced him to authorize the release of the funds pursuant to the Letter of

- I aggressively researched all the issues in this brief. I didn't find much authority on the demurrer issue. Witkin had a rule statement on this issue so we used it. But we supported the rule with mandatory authority so we weren't just relying on a secondary source, even a source as authoritative as Witkin.

  We had a second case, *Congleton*, that we cited at the end of our argument. In my revised brief, I moved *Congleton* to support the rule statement so I could reinforce my rule with more mandatory authority.
- The third sentence contains 76 words, not counting the citation parenthetical. That's far too long. Judges understand arguments better when they are presented in smaller, bite-sized chunks. Let the court rest between each step of your argument.

  And avoid putting information in parentheses in your analysis. Parentheses suggest you're giving tangential information. Legal memoranda provide *essential* information. If what you put in your parentheses is tangential, take it out. If it's essential, don't place it in parentheses.

Credit (See Julian's federal complaints, attached as Exhibits A and B to VGNB's Request for Judicial Notice). For example, in paragraph 86 of the original federal complaint attached as Exhibit A, Julian alleged: "In reliance on these representations by [the defendants in the original federal complaint], Plaintiff [Julian] was induced to, and in fact did, authorize the release of $1,579, 200 to Defendants Trimac International and BTB International." Julian repeated these very same admissions in his second federal complaint, filed on May 4, 1994, only one day after the filing of Julian's complaint in this action. (See ¶ 81 of second federal complaint, attached to VGNB's Request for Judicial Notice as Exhibit B.) Because Julian has admitted that he relied on the misrepresentations of others not including VGNB, Julian cannot state a cause of action for fraud. Thus, this Court may properly deny leave to amend on this ground alone. Significantly, this Court may properly deny leave to amend when, as in this case, the parties proposed amendment contradicts an admission made in prior pleadings. Congleton v. Nat'l Union Fire Ins. Co.,189 Cal. App. 3d 51, 62 (1987).

III. JULIAN'S MOTION TO AMEND IS UNTIMELY

California courts have consistently held that a long, unexcused delay in seeking to amend pleadings warrants the denial of a motion to amend. In Lloyd v. Williams, 227 Cal. App. 2d 646 (1964), plaintiff brought an action to recover money she had paid pursuant to a contract alleging two causes of action for money had and received and an accounting. Id. at 647-48. Four months after the court had issued its pretrial conference order and five weeks before trial, plaintiff moved to amend her complaint to add three new causes of action, including an allegation of fraud. Plaintiff filed a similar motion a week before trial. Both motions were denied. Id. at 648. On appeal, the court

- Note the two highlighted portions of this argument. They say the same thing. The second time the fact does meaningful work. It asserts that Julian was complaining about other parties' intentional misrepresentations while at that same time he was only suing VGNB for failure to identify documentary discrepancies.

  That's a great juxtaposition for VGNB. We could have solved two problems if we had eliminated the earlier reference: 1) we would have made the earlier sentence at least somewhat shorter; and 2) we would have eliminated redundant information.

- The rule that ends this paragraph works reasonably well here because it connects the law to the conclusion in this case. But this rule would be better placed in the opening paragraph. Rules frame issues. Rules also demonstrate why the facts you're addressing are relevant. So in general, state rules early in your analysis, not late.

- This paragraph is horribly, horribly long. Judges need resting spaces. This paragraph was over a page long in its original format. We could have at least broken this argument down into two paragraphs. One paragraph could have stated our rules and authority; the second could have stated our argument.

  In my revised brief, I used three paragraphs for this argument.

- Good headings should do the following: 1) identify the conclusion you want the court to reach; and 2) state a reason that supports your conclusion. These reasons are usually determinative facts. Headings serve as thesis sentences for arguments. If done well, they provide a bullet-point outline of your analysis in your table of contents.

- Our opening sentence is good. We state a rule that frames the issue immediately.

- Many attorneys prefer to use parentheticals instead of full discussions of authority. Parentheticals are great, but full case discussions often highlight parallels between authority and your client's facts more effectively. So consider using full case discussions more often.

  First, appellate courts offer full descriptions of precedent in their opinions. Trial courts rely on those opinions. So

affirmed the Superior Court's denial of plaintiff's motion to amend, reasoning "no explanation was offered for plaintiff's delay. It was not offered to cure a technical defect, but instead added facts and substantially changed the theory of plaintiff's case." Id.

Similarly, in Moss Estate. Co. v. Adler, 41 Cal. 2d 581 (1953), the court held that defendant was properly denied leave to amend her answer to include fraud as a defense to plaintiff's quiet title action twelve days before the date set for trial. The court reasoned that:

> The trial court was thus presented with a situation wherein defendant sought to file an amended answer alleging a new defense based on different facts on the eve of the trial more than a year after the original answer was filed, and more than two months after she had notice of the date set for trial. Defendant was aware of the facts at the time the original answer was filed, but she gave no excuse for her delay. The original answer gave no inkling of the facts alleged in the proposed amended answer, and a continuance would have been required had leave to file had been granted.

Id. at 586 (emphasis added).

your arguments will parallel the arguments courts often see in the precedent cases.

Second, lawyers reason by analogy. Analogies can identify factual parallels and demonstrate parallel logic. By emphasizing the court's reasoning in a full case discussion, you can support your argument better than even a well-crafted parenthetical can.

For example, note the detailed facts we relied on in *Lloyd* that directly parallel Julian's facts. Both cases involved the following: 1) a motion to amend made five weeks before trial; 2) the motion to amend changed what was basically a breach of contract action into a fraud action; 3) the motion alleged new facts; and 4) the plaintiff offered no explanation for the delay.

By discussing this case fully, we were able to rely on the parallel logic of the case in our argument.

- *Moss Estate* is another case where we could rely on parallel logic even though the facts seem facially different. We have the following facts in common: 1) the trial date was set; 2) both motions were made to add fraud; 3) both parties were aware of the facts before they filed their original pleading; and 4) no explanation was provided for the delay.
- Banish block quotations from cases. Some judges state they don't read block quotes. And block quotes undermine advocacy because they impose more work on readers. Your job is to crystallize and clarify. Block quotes do not crystallize and clarify. They instead transfer the analytical work that you should be doing to your readers. So rewrite block quotes in your own words.
- When a court says something in a particularly effective and pithy way, excise that short quote if that quote relates directly to your client's facts.

  Here, for example, this block quote suffers from several problems:

  - The quote contains 107 words.
  - The first sentence contains 56 words.
  - This first sentence also identifies two distinguishable facts: 1) the longer time between the original complaint and the motion to amend, and 2) the shorter time before trial.

	▪ This sentence also uses an antiquated Middle English word—"wherein"—and two unnecessary "to be" verbs. The revised brief eliminates this block quote and states the court's reasoning more favorably and concisely.
By his own admission, Julian knew of the facts underlying his proposed First Amended Complaint prior to filing his complaint on May 3, 1994. Julian has offered no excuse for his delay in alleging these new facts. Thus, Julian's motion to amend is untimely and should be denied. Julian's new fraud claims are based entirely on representations allegedly made by VGNB to Julian in 1992. Thus, Julian knew the facts underlying his proposed fraud claims in 1992, <u>two years before</u> he filed his original complaint on May 3, 1994. Importantly, Julian admits in his MPA that "all of the facts alleged in the proposed First Amended Complaint are found in a combination of the original complaint, the deposition testimony of Dr. Julian in this matter, and the responses to interrogatories posed by Bank to Dr. Julian." (MPA, p. 5, ln 5-9.) Thus, Julian knew all of the facts on which he bases his proposed new fraud claims before he filed his original complaint.	• I researched and read all the cases in California involving motions to amend to find authority that was directly on point. We developed this great authority, but we failed to use it in our argument because we never linked our authority to our argument. At minimum, we needed what I call a "thesis analogy" that identifies the parallel logic between our authority and our own situation. See the example in the revised brief. • Use party admissions wherever possible. Similarly, avoid making admissions that damage your position. Here, opposing counsel attempted to argue that VGNB wasn't prejudiced by the amended complaint, but its argument for this issue gave us a great admission that Julian's motion was untimely.
Furthermore, Julian also claims for the first time that he has suffered "emotional distress" as a result of the Bank's actions. Again, VGNB's actions which allegedly caused his emotional distress occurred in May of 1992. Moreover, Julian's "distress" was particularly within Julian's own knowledge. Julian is a medical doctor. Julian certainly did not become aware of his "distress" through discovery directed at VGNB. Thus, Julian could have and should have alleged this claim in his original complaint.	• We placed quotations around "distress" throughout this paragraph. This technique has the subtle, or not-so-subtle, effect of undermining the credibility of Julian's claim. We slightly mock the claim while using concrete facts to establish that Julian didn't learn about his emotional distress during discovery.

IV. THE DECLARATION OF ASTRID ROLLO IN SUPPORT OF JULIAN'S MOTION FAILS TO EXPLAIN WHY JULIAN COULD NOT HAVE AMENDED HIS COMPLAINT EARLIER.

Julian offers only one declaration in support of his motion, the inadequate declaration of Astrid Rollo. The declaration of Ms. Rollo utterly fails to explain the reasons for Julian's untimely motion. Local Rule 9.19(e) of the Los Angeles County Superior Court provides: "Motions to amend must be made promptly upon discovery of the need therefor. Usually a stronger showing is necessary when such motions are filed near the trial date. If a motion for leave to amend is filed after the trial date is set, the supporting declaration must set forth in specific detail the reasons why the amendment is necessary and an explanation as to why the motion was not filed sooner. Pertinent dates regarding acquisition of the information must be stated." (emphasis added.)

Because Ms. Rollo's declaration does not set forth any of the pertinent dates, it is wholly insufficient under all aspects of the Local Rules. Conspicuously absent from Ms. Rollo's declaration are the dates that Julian learned information that was supposedly unavailable to him, and the content of this "newly acquired" information. Nowhere does Ms. Rollo state that Julian obtained any information regarding VGNB's allegedly fraudulent behavior of which Julian was supposedly unaware when he initiated this action. Ms. Rollo states only that "the most recent information concerning Defendant VGN Bank's fraudulent behavior was made known in the deposition of Michael Bringa, an individual who was deposed this week, on November 14 and 15, 1994. Mr. Bringa's testimony and the testimony of Mr. Malcolm Franks (deposed on November 9, 1994) gives insight into the behavior of Defendant VGN Bank." (Declaration, 5, p. 2-3.) This statement completely fails to articulate what information

- Beware of burdening your analysis with excessive "glue" words. "Working" words add meaning to your sentences. "Glue" words hold sentences together. These words are necessary, but they should be used judiciously.

  Glue words are words like the following: prepositions, compound prepositional phrases, articles, and connectives.

  In Section IV, the heading and the first two sentences have unnecessary glue words. For example, using the possessive "Rollo's declaration" would have eliminated all the "of's" in the heading and first two sentences. See my revised brief for alternative constructions of the heading and these sentences.

- This is another exceedingly long paragraph. It contains eight sentences and took up 26 lines in the original format, almost a full page.

  Your reader needs resting places to stop and absorb your argument. Paragraphs provide those resting points.

- I would start a new paragraph at "Ms. Rollo states only." This break would allow the court to linger a bit longer and absorb the previous sentences, which demonstrate that Ms. Rollo's declaration didn't identify any new facts that Julian learned after he filed his original complaint.

Julian supposedly learned from Mr. Bringa and Mr. Franks that Julian did not already independently possess. Ms. Rollo's statement that the deposition of Mr. Bringa provided the "most recent information" is telling. At best, Ms. Rollo's statement merely asserts that Mr. Bringa's deposition testimony may have partially supported Julian's own memory of the facts at issue in this matter.

The reasons why plaintiff did not include dates are clear: if plaintiff detailed his knowledge with dates, that detail would dramatically illustrate the basis for denial of the motion:

1. Plaintiff knew all facts alleged in the Amended Complaint when he filed his complaint in May, 1994, when he answered interrogatories in August, 1994 and when he was deposed in October, 1994;

2. Plaintiff knew all of the facts when the case was set for trial on October 3, 1994; and

3. There are no dates plaintiff can offer that warrant granting of this motion.

- We used two colons in the same sentence. While that may be technically OK, it looks odd and may cause the reader to ask whether one can properly use two colons in a sentence. We don't want the court focusing on that issue. Instead, we want the court focusing on our argument. I would add a period after "clear." This period would give me two short, direct sentences that lead into a great factual summary.
- Bullet points are a great way to convey information. They give the court a break from reading textual paragraphs. And they also offer more "white space" in your document than standard paragraphs. They also make the organization of your points transparent.

  I like the content of our bullet points, but we formatted them poorly. All text should be indented to the right of the bullet; the text in bullets should not wrap back to the left margin. The automated bullet point lists on your computer will do this for you. Don't manually create bulleted lists.

V. JULIAN'S CITED AUTHORITY DOES NOT SUPPORT HIS MOTION

Julian relies on two cases to support his motion, yet neither case supports Julian's argument. In California Casualty Gen. Ins. Co. v. Superior Court, 173 Cal. App. 3d 274 (1985), the court stated that "if the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend." Id. at 278. (Emphasis added.) The assumption underlying the rule in California Casualty does not exist in this matter. For

the reasons discussed herein, Julian's motion is both untimely and prejudicial to VGNB.

Julian also relies on Honig v. Financial Corp. of Am., 6 Cal. App. 4th 960 (l992). The situation in Honig is much different than the present matter. In Honig, plaintiff filed a complaint alleging, inter alia, fraud, breach of contract, and intentional infliction of emotional distress. Plaintiff was fired after he had filed his complaint. Plaintiff then moved to amend his complaint to include causes of action for wrongful termination and defamation. Id. at 963. The court held that the trial court abused its discretion by denying plaintiff's motion to amend reasoning "[plaintiff's] proposed amendments finished telling the story begun in the original complaint. The added assertions described the continuation of the events asserted in the initial pleading." Id. at 966. The facts alleged by Julian occurred in l992, two years before the initial complaint was filed. Unlike the plaintiff in Honig, there is no reason why Julian could not have alleged his fraud claims in his original complaint.

- Another stuffy, wretched, and antiquated Middle English word: "herein." The revision removes this stuffy word.
- When researching, seek cases that give you the rules and arguments you want, but only *use* cases that don't hurt you in other respects. Julian's counsel was using this case for a very general proposition: motions to amend should be liberally granted even in "fast track" cases. I imagine there were other cases that stated this same rule.

  By using a case that was distinguishable on its facts, Julian's counsel gave me an opportunity to further emphasize that Julian's motion was untimely and that the court should not apply the general rule that supports liberally granting motions to amend.

VI. JULIAN'S NEW CLAIMS AND PRAYER FOR RELIEF COMPLETELY CHANGE THE NATURE OF THE COMPLAINT AND PREJUDICE VGNB

A. Contrary to Julian's Assertions, Julian's New Claims and Prayer for Relief Completely Change the Nature of the Complaint

Julian's surviving claim for Negligent Misrepresentation is based solely on the allegation that VGNB funded the Letter of Credit after allegedly negligently misrepresenting to Julian the nature and extent of documentary discrepancies. (See Julian's original Complaint, ¶¶ 12, 13, 14, 15 and 25.) For example, in paragraph 15 of Julian's Complaint, Julian alleges that: "Had Dr. Julian been informed by Bank about the non-conforming documentation, he would not have waived the discrepancies and would have insisted that no

- I like our detailed factual arguments in this section. But we wasted opportunities to frame the issues with our rules. We were fighting an uphill battle in our opposition because motions for leave to amend are liberally granted. While we ultimately won, we should have framed a narrow rule that emphasized that leaves for motions to amend *in situations like VGNB's* should not be granted.

payment was due from Bank based on said documents." That Julian based his Negligent Misrepresentation claim on documentary discrepancies is further made clear by his allegations in paragraph 25 of his Complaint. "On or about May 5, 1992, Bank represented to Dr. Julian that Bank had: (1) received documents in conjunction with a request for payment on Letter of Credit No. 30478; (2) examined said documents; and (3) found them to be in conformity with Letter of Credit No. 30478 but for three specified exceptions. None of these specified exceptions mentioned any other patent and non-conforming discrepancies in the documentation. . . ."

Contrary to Julian's assertions, Julian's new fraud claims are completely different from his Negligent Misrepresentation claim because Julian's new claims are not based on alleged documentary discrepancies. Instead, Julian's new claims are based on allegations that VGNB fraudulently coerced Julian to continue with the underlying transaction and fraudulently concealed its liability under the Letter of Credit to Julian. For example, in his Proposed Amended Complaint, Julian alleges in paragraph 43 that:

> On several occasions between approximately April 30 and May 5, l992 in response to Dr. Julian's voiced concerns as to whether the cigarettes were actually shipped on board the "Export Freedom", as indicated in a bill of lading Bank showed Dr. Julian, Bank represented to Dr. Julian that Dr. Julian's cigarettes were actually being shipped "under the table" and that Dr. Julian should continue with the transaction because Bank would pay on the letter of credit no matter what. Bank represented to Dr. Julian that it is nearly impossible for a person to forge a bill of lading . . .

Thus, given the drastically changed nature of Julian's allegations, this Court should reject Julian's baseless contention that Julian's new fraud claims are mere extensions

- The first two sentences establish a lengthy thesis. But the argument that comes after the quote from the amended complaint is conclusory. This structure should be reversed. Keep your thesis statements concise. Develop your argument after you've provided the factual foundation for it.

of his existing Negligent Misrepresentation claim.

B. Julian's Proposed Amended Complaint Would Prejudice VGNB's Defense

Julian now asserts, without a single citation to the record, that his two new causes of action for fraud, his new claim for emotional distress, and his new prayer for punitive damages do not prejudice VGNB's defense even though discovery is now foreclosed. Julian's claim defies all reason. Can plaintiff argue with a straight face that adding claims for intentional fraud, emotional distress and punitive damages - - where no such claims existed before - - does not change the nature of the case?

If Julian were allowed to allege fraud and emotional distress at this late date, VGNB would be required to mount a defense to those claims which differs markedly from its planned defense to Julian's original claims. Based on Julian's original complaint allegations, VGNB has focused its discovery on whether discrepancies existed in the documents, whether Julian had knowledge of those discrepancies, and whether any such alleged discrepancies caused Julian any damage. To defend against Julian's new claims, it would be necessary for VGNB to conduct further discovery, which at a minimum, would include reopening Julian's deposition to determine the facts upon which Julian bases these new claims. VGNB may also seek to depose other witnesses, some of whom are located abroad. Additionally, Julian's emotional distress claim would necessitate a medical evaluation of Julian and the retention of an additional expert to opine on his claims. To be forced to reopen discovery on such a large scale would clearly prejudice VGNB.

Moreover, Julian's late addition of a punitive damages claim severely prejudices VGNB's prior discovery plan.

- We again failed to frame our argument with a rule. If we first state a principle that defines prejudice, our arguments will be even more compelling because we can tie our facts back to the rule.

- Some experienced practitioners and legal writing experts like rhetorical questions. But briefs should generally answer questions—not ask them. Our next paragraphs answer this rhetorical question. And by spending a paragraph on this question, we lost opportunities for advocacy elsewhere. I would rather have a rule and some case authority here instead of a question.

  Rhetorical questions should make the argument on their own. Our question doesn't, so we should just make the argument.

- Note the highlights in these final three paragraphs. Our emotional distress argument is separated in two different locations. First, it's at the tail end of this argument. Second, we make a full-paragraph argument that ends this sub-section. The court shouldn't have to find the same conceptual argument in two separate places.

  Whenever I discuss argument structure, I always make two points:

  - "Give your reader one analytical task at a time."
  - "Say it once. Say it well. And never say it again."

VGNB is presently exposed to $1.5 million principal damage claim. If Julian were permitted to at amend his complaint, VGNB would face a $1.5 million compensatory damage claim plus the potential of an expansive, discretionary punitive damage award. If VGNB had been aware of Julian's claims earlier, VGNB's expanded potential liability may have merited more expansive discovery. For example, two witnesses with knowledge of Julian's participation in the Letter of Credit transaction live overseas: Justin Marcian (Julian's father-in-law) and Brun von Sutter (the agent who purportedly shipped the goods). Due to the untimely nature of Julian's motion, VGNB is now foreclosed from deposing these individuals, even though VGNB's increased potential liability may merit discovery regarding these individuals.

Finally, Julian has raised a claim for emotional distress. VGNB had no reason to, and did not, question Julian regarding his mental state and any resulting physical manifestations of his alleged "emotional distress." Further, VGNB has not had an opportunity to subject Julian to a medical exam to verify his supposed distress. Without an opportunity to mount a defense to Julian's emotional distress claim, VGNB would be severely prejudiced.

C. If this Court Does Grant Julian's Motion, The Trial Date Should Be Vacated Or Continued to Enable VGNB To Challenge The Pleadings And Conduct Discovery on Julian's New Claims

VGNB believes that Julian's belated motion for leave to amend should be denied. However, out of an abundance of caution, if this Court should grant Julian's motion, VGNB respectfully urges that this Court vacate or continue the trial date. Without citation to the record or any reasoning, Julian states in his brief and Ms. Rollo states in her declaration that a continuance is unnecessary. Such assertions, coming after Julian's two new claims of fraud, Julian's new claim for

Here, we're forcing the court to consider the same analytical argument in two different places.

In my revised brief, I state the emotional distress argument after the fraud argument and before the punitive damages argument. This structure keeps my argument focused and coherent because the court only has one analytical task at a time. First, the court only has to understand my argument about the new claims and why they would prejudice VGNB. Second, the court only has to understand why our new damages exposure would prejudice our prior discovery plan.

- Organizational choices can impact the ease in which you make your fallback arguments. We argued for fourteen pages that the court should deny Julian's motion. We had a variety of obvious and confidential reasons why we really didn't want to face the fraud claims. So we didn't want to give the court a way to split the baby and give each party something, which courts are often inclined to do.

  But on our last page we explicitly gave the court an out and identified a way to split the baby: reopen discovery and vacate or continue the trial date.

  Our organization helped us here. Our fallback position came in the third sub-subsection. This arguably lessened the impact of our concession. The fallback position flowed naturally in our "prejudice" section.

emotional distress, and Julian's new claim for punitive damages, strain credulity. VGNB needs, and deserves, the time and opportunity to challenge Julian's amended complaint on the pleadings and to explore Julian's new allegations. As discussed above, Julian's proposed amended complaint is subject to general demurrer. By delaying his motion, Julian should not be permitted to strip VGNB of its right to challenge the amended pleading. With regard to discovery, VGNB would need, at minimum, to retake Julian's deposition to determine Julian's reliance on the alleged intentional misrepresentations by VGNB, whether Julian's damages were caused by Julian's alleged reliance, and explore Julian's claim of emotional distress. Additionally, VGNB would need discovery regarding Julian's physical condition. Further, VGNB would need the opportunity to depose witnesses with knowledge of Julian's state of mind prior to May 5, 1992: Justin Marcian and Brun von Sutter. Even if discovery were not already foreclosed, this discovery could not take place in time to allow VGNB to prepare for the February 6, 1995 trial date.

As a practical matter, given the February 6, 1995 trial date, VGNB would not have time to challenge Julian's amended complaint before trial. Accordingly, the trial date should be vacated or continued if the Court grants the motion to amend.

VII. CONCLUSION

For the foregoing reasons, VGNB respectfully urges that this Court deny Julian's motion for leave to amend.

I reorganized the sections in my revised brief. One drawback to my revised organization is that my fallback position sticks out a bit more than it does in here.

- Note the highlighted portions of this sub-section. Here again we are giving the court two analytical tasks at a time. We reference the potential for a demurrer in this first paragraph and in our next paragraph. In between we discuss how VGNB would be prejudiced. Instead, we should have articulated the demurrer argument in its entirety once so the court could absorb our argument in full without being distracted by other issues.

  Also, this paragraph is another long paragraph. One way to make this paragraph shorter is to focus each paragraph on a distinct argument: 1) VGNB needs more time for discovery; and 2) VGNB needs more time to challenge Julian's amended complaint on demurrer.

  Another way to break up this long paragraph is to start a new paragraph at the sentence beginning with, "As discussed above." The first paragraph would be a general thesis paragraph, although one can reasonably question whether we should devote so much time to restating Julian's argument. The second paragraph could discuss the need for additional discovery, while the third paragraph could discuss the need for time to challenge Julian's amended complaint on the pleadings.

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Revised Brief

Revised Brief	Annotations
I. Introduction and summary of argument. Discovery is closed. Trial begins in five weeks. Yet plaintiff Leo Julian now seeks leave to amend his complaint to try to transform a negligent misrepresentation action in a letter of credit case into an intentional fraud action—including new claims for punitive damages and emotional distress.[1] Julian's motion should be denied for the following reasons. First, Julian's motion for leave to amend should be denied as untimely. Julian's memorandum of points and authorities ("MPA") admits that *Julian knew all the facts alleged in his proposed amended complaint (the "Amended Complaint") before he filed his original complaint in May 1994*: "all of the facts alleged in the proposed First Amended Complaint are found in a combination of the original complaint, the deposition testimony of Dr. Julian in this matter, and the responses to interrogatories posed by Bank to Dr. Julian." (MPA, p. 5, ln. 5-9.) *Even though Julian already knew the facts alleged in the Amended Complaint*, he failed to raise them in his original complaint. And Julian failed to seek leave to amend until seven months later—after discovery is closed and only five weeks before trial. Because Julian has offered no excuse for his delay, his untimely motion should be denied. *See Lloyd*	• Typography experts recommend avoiding all-caps text for headings. Because headings should typically be full sentences, headings are too long for all-caps. Similarly, avoid initial caps. Initial caps are for titles; headings aren't titles. Use bold rather than underlines to highlight your headings. Underlined text is harder to read because it takes up more white space in the document. It also makes certain letters that go below the baseline of the line harder to read, like g, j, and y. • Unlike in the original brief, I have defined the term "Amended Complaint" immediately so I can refer to it consistently and clearly throughout the analysis. • Use substantive transitions to demonstrate relationships between sentences or paragraphs. A substantive transition is a transition where the writer restates a portion of the previous sentence in the current sentence. See the italicized portions of these two paragraphs for an illustration. This technique also allows you to restate favorable facts elegantly. Here, for example, I get to restate that Julian knew these facts when he filed his original complaint seven months earlier. • Prefer shorter connectives to longer ones. For example, "and" or "also" transition to the next point more effectively than "moreover" or "in addition." Similarly, prefer "but" or "yet" to show contrast instead of connectives like "however" or "nevertheless." • Tether arguments to authority, even in introductions. I typically use parentheticals

[1] On December 20, 1994, this Court granted VGNB's motion for summary adjudication of issues and dismissed Julian's causes of action for Breach of Contract and Negligent Disbursement.

v. Williams, 227 Cal. App. 2d 646, 648 (1964) (affirming trial court's denial of plaintiff's motion to amend her complaint for fraud because the plaintiff filed her motion after the trial court's pretrial conference order and the plaintiff failed to explain her delay). Second, Astrid Rollo's declaration that supports Julian's motion further shows that Julian's motion is untimely. Local Rule 9.19(e) of this Court requires that if party moves for leave to amend after the trial date is set, counsel's supporting declaration must specifically identify the following: 1) when the party acquired new information, including the specific dates when the party acquired this information; and 2) why the motion could not have been filed sooner. Ms. Rollo's declaration fails to state *when* Julian learned new facts and *what* new facts Julian learned. Because Ms. Rollo's declaration fails to explain why Julian's motion to amend was not made earlier, Julian's motion must be denied as untimely. Third, granting Julian's untimely motion would severely prejudice VGNB's defense. Julian's new fraud claims differ significantly from his negligent misrepresentation claim. He bases his negligent misrepresentation claim solely on VGNB's alleged failure to identify documentary discrepancies relating to its letter of credit (the "Letter of Credit"); Julian bases his new proposed fraud claims on alleged intentional misrepresentations by VGNB about the underlying sales transaction between Julian and third parties. Discovery is closed, yet Julian's new claims of fraud and emotional distress require crucial discovery that VGNB previously had no notice was necessary. VGNB limited its discovery because it was only potentially liable for Julian's original $1.5 million damage claim. It now faces potentially greater damages claims that would justify more intensive	to do this. If I've researched well and write effective parentheticals, the parentheticals will demonstrate the parallel logic between my arguments and my authority. • I reframed the argument about Ms. Rollo's declaration. The original brief focused solely on her declaration failing to comply with the local rules, making it more likely that the court might think this argument relates to a technicality. I instead use this argument to augment my previous argument that the motion was untimely. My thesis and conclusion sentences both incorporate the contention that the motion isn't timely. • The original brief used three sentences to state what I said in one sentence here. This sentence is highlighted in blue. I made this edit for two reasons. First, I didn't need three sentences to make the argument. With careful editing, I condensed the argument into a short, 17-word sentence. When editing, seek to turn sentences into clauses or phrases. You'll make more pointed arguments that your readers will more likely retain. Second, in this revision I wanted to add more authority in the introduction and more rules in my discussion. I couldn't just add these things because I would go over the page limit. So I had to shorten some arguments to free up space. • In our original brief, we merely asserted that Julian's new claims were different. Avoid arguments by assertion, even in (relatively) short introductions. Here, I used a paragraph to concisely argue why Julian's Amended Complaint stated claims distinct from his original complaint. This used some space, but because prejudice is a compelling argument on its own and reinforces the timeliness argument, I wanted to give the argument its due. This factual foundation also makes it easier to establish my prejudice argument in the following paragraph. • I use a semi-colon in the last sentence of the previous paragraph to demonstrate how Julian's new claims differ from his original claims. Semi-colons can be used to compare facts and ideas. This technique helps avoid long dependent clauses and varies the length and structure of your sentences. So you keep your readers' interest.

discovery. Even if discovery were not foreclosed, VGNB could not complete its discovery in the five weeks before trial begins. Thus, VGNB would be severely prejudiced if Julian's motion were granted. *See Moss Estate Co. v. Adler*, 41 Cal. 2d 581, 586 (1953) (affirming the trial court's denial of the defendant's motion to amend her answer for fraud because her "original answer gave no inkling of the facts alleged in the proposed amended answer" and granting her motion would have required a continuance).	• Each of our arguments in our original brief were stated in a single paragraph. Our paragraphs were long and sapped our reader's attention. In this revised introduction, I broke several of the arguments into two paragraphs. This structure helps make the organization of the argument more transparent and gives the court more resting places.
Fourth, Julian's motion for leave to amend should be denied because his motion is futile. A trial court may deny a motion for leave to amend when the proposed amended complaint is subject to demurrer. *Hayutin v. Weintraub*, 207 Cal. App. 2d 497, 506-07 (1962) (affirming trial court's denial of the plaintiff's motion for leave to amend because the plaintiff's new fraud allegations were potentially unable to survive a motion for demurrer).	• I again support my argument with a parenthetical of mandatory authority that demonstrates the parallel between my argument and precedent. • In the original brief, this demurrer argument was one paragraph and contained 23 lines in this format. In this revision, this argument contains 24 lines but is broken into two paragraphs. The paragraph break lets the court take a quick mental rest during the argument. Note the natural break between the paragraphs. The first paragraph contains the thesis, rule, and supporting parenthetical. The second paragraph contains the argument.
VGNB can demur to Julian's Amended Complaint because it fails to state a cause of action. Julian's Amended Complaint alleges that he relied on intentional misrepresentations by VGNB when he authorized the release of the Letter of Credit funds. But Julian admitted in two prior federal court actions regarding this same transaction that he relied on the alleged intentional misrepresentations of parties other than VGNB when he authorized the release of the Letter of Credit funds.[2] (*See* Julian's federal complaints attached as Exhibits A and B to VGNB's Request for Judicial Notice.) Because Julian has admitted that he relied on other parties' intentional misrepresentations, he cannot successfully plead that he relied on alleged intentional misrepresentations by VGNB. Thus, Julian's futile motion	• Note the sentence structure in this argument. I have one lengthy 37-word sentence, but all other sentences contain approximately 20 words or fewer. In contrast, the original brief had one sentence that contained 62 words. Another sentence contained 48 words. The revised argument is clearer, in part because concepts are broken down into more digestible chunks. Note also that the more direct sentence structure helps me make my argument in 15 lines instead of 17. This reduction gives me some room to add a parenthetical that identifies the parallel between my authority and my argument. • While I've rearranged the organization of my arguments and framed those arguments somewhat differently, the length of the introduction hasn't significantly changed. In general, I favor introductions that highlight all the major arguments in my

[2] Admissions in prior pleadings are admissible in subsequent judicial proceedings. *Dolinar v. Pedone*, 63 Cal. App. 2d 169, 176 (l944).

for leave to amend should be denied.

Finally, Julian's own authority does not support his motion. Julian relies on *Honig v. Financial Corp. of Am.*, 6 Cal. App. 4th 960 (l992), to support his claim that motions to amend should be liberally granted even in "fast-track" cases. But the court in *Honig* overturned the trial court's denial of the plaintiff's motion to amend because the plaintiff had alleged facts that occurred *after* the plaintiff filed his original complaint. *Id.* at 966. In contrast, Julian seeks leave to amend his complaint to allege facts that Julian knew in May 1992—two years *before* he filed his original complaint. Julian's ability to find a favorable quote in a distinguishable case does not change this fundamental principle: a trial court may deny a motion for leave to amend made just before trial when the plaintiff knew all the facts when he filed his original complaint, and his amended complaint changes his theory of the case.

Thus, VGNB respectfully requests that this Court deny Julian's motion for leave to amend. But if this Court grants Julian's motion, the trial date should be vacated or continued to allow VGNB to challenge Julian's Amended Complaint and pursue necessary discovery.

II. Julian's motion to amend should be denied because Julian's motion to amend is untimely.

Courts may deny parties' motions for leave to amend their pleadings when they are made after a long and unexcused delay, especially when the parties knew the facts underlying their proposed amendments when they filed their original pleadings. *Lloyd v. Williams*, 227 Cal. App. 2d 646, 648 (1964) (affirming the trial court's denial of the plaintiff's motion to amend her complaint for fraud because she filed her motion five weeks before trial and failed to explain her delay in filing the motion); *Moss Estate Co. v. Adler*, 41 Cal.

discussion section. Judges are busy. They get tired and lose focus just like the rest of us. I want to establish the basis for my arguments immediately when the judge's attention and energy are at their best.

- Use dashes to highlight important facts or ideas. Dashes can be used to highlight interruptive information in the middle of sentences or at the end of sentences.
- Use colons to highlight explanations and give readers resting places in longer sentences. The last sentence in this sentence would contain 55 words without the colon. Instead, the first independent clause contains just 17 words. The next clause is still long, but the reader has a break before she absorbs it.
- Our original brief had a little bit of snark. I add some snark at the end of this paragraph. While I generally try to avoid snark, it arguably works here. The final sentence advances my theme that Julian is grasping at straws. I previously contended that Julian has no excuse for his extensive delay. I amplify this here by noting that he not only can't identify supporting facts, but he also can't identify supporting law.

- Note the heading structure. It provides a conclusion and a reason for the conclusion. This structure provides a nice bullet-point outline of your analysis in your brief's table of contents. They also let you begin your first paragraph with favorable rules because your heading contains your thesis.
- Use rules to frame your issues. Frame the issue broadly or narrowly depending on your position. Here, I'm trying to frame the rule narrowly. Courts grant most motions for leave to amend, and most jurisdictions have rules stating that motions to amend should be granted liberally. So I must narrow the issue to improve my chances of winning.

2d 581, 586 (1953) (affirming the trial court's denial of the defendant's motion to amend her answer for fraud because she knew the facts underlying her proposed amended answer when she filed her original answer and did not explain her delay). Julian's motion is untimely because he knew all the facts underlying his Amended Complaint before he filed his original complaint in May 1994. Julian admits his prior knowledge in his brief: "all of the facts alleged in the proposed First Amended Complaint are found in a combination of the original complaint, the deposition testimony of Dr. Julian in this matter, and the responses to interrogatories posed by Bank to Dr. Julian." (MPA, p. 5, ln 5-9.) Yet he delayed amending his complaint for seven months. He's offered no excuse for this prolonged delay. Similarly, Julian now alleges that he suffered "emotional distress" because of VGNB's actions. VGNB's alleged actions that caused his emotional distress occurred in May 1992. And Julian's "distress" was particularly within Julian's knowledge because Julian is a medical doctor. He certainly did not become aware of his "distress" through discovery directed at VGNB. Thus, Julian could have alleged this claim in his original complaint. Discovery is closed. This case is set for trial five weeks from now. Julian has no excuse for his seven-month delay. So Julian's untimely motion should be denied.	Here, I assert that that motions to amend should not be granted when the plaintiff knew the facts before filing her original motion failed to explain her lengthy delay. These facts parallel my argument and suggest that leave shouldn't be granted. • I used full case discussions in our original brief for this argument. But I used parentheticals here so I could use full case discussions in my prejudice section. I felt the prejudice section needed more help from case authority than this section because this argument is easier to establish. Ideally, I would use cases other than *Lloyd* and *Moss Estate* for this section so I could bring more authority to bear in this brief and have holdings that were more explicitly limited to the untimeliness issue. But I didn't find any other good cases with parallel facts that had holdings limited to untimeliness. I tried to massage this issue by just limiting the parentheticals to the untimeliness issue. • As I stated in my annotations for the original brief, avoid admissions in your papers. Plaintiff's counsel was trying to establish an argument that our client wasn't prejudiced by Julian's new claims. This contention certainly helped that argument, but it arguably cost too much because it gave us a great admission for our untimeliness argument. • My argument in this section is much shorter than in our original brief. I did this in the following ways. First, I wrote a single thesis sentence for my argument instead of a paragraph. Second, while I liked the original brief's emphasis that Julian knew the facts two years before filing his original complaint, I had to shorten my arguments in places to provide space for other additions. So I eliminated that emphasis to focus on my core argument: Julian knew all the facts underlying his amended complaint at the time he filed his original complaint. Third, I wrote a short paragraph that summarizes the basis for our contention. Two sentences are under ten words; the other two sentences are exactly ten words. These short, clear sentences draw attention to the obvious problems with Julian's delay.

III. Astrid Rollo's declaration supporting Julian's motion fails to identify any new facts that Julian learned since filing his original complaint.

Astrid Rollo's declaration to support Julian's motion further shows that Julian's motion is untimely. If a party moves for leave to amend after the trial date is set, counsel's supporting declaration must specifically identify the following: 1) when the party acquired new information, including the specific dates when the party acquired this information; and 2) why the motion could not have been filed sooner. Local Rule 9.19(e), the Los Angeles County Superior Court.

Yet Ms. Rollo's declaration fails to state the simple facts this rule requires:

- What new facts Julian learned;
- When he learned them; and
- Why he failed to make his motion sooner.

Local Rule 9.19(e) requires a stronger showing for the need to amend when a party requests leave after the trial date is set. Julian has made no showing. So Julian's untimely motion to amend should be denied.

IV. Julian's untimely motion for leave to amend should be denied because permitting Julian's new claims and damages requests after discovery is closed and just before trial would prejudice VGNB.

A. Julian's new claims and prayer for relief change the nature of his complaint.

Julian's surviving claim for Negligent Misrepresentation is based solely on his allegation that VGNB funded the Letter of Credit after negligently misrepresenting to Julian the nature and extent of documentary discrepancies. (*See* Julian's

- Prefer active voice in headings. Your headings will typically become shorter. Seek short, punchy verbs to drive your contention.
- Also, compare this heading to the original heading for this argument. By avoiding all-caps, I use three lines for my heading, not four. And the heading is much more readable than the underlined, all-capped text in the original. I've got a good argument: I don't need to yell at my readers.
- The original brief stated the rule in a lengthy block quote. Avoid block quotes. Judges gloss over them. Instead, provide rules in short sentences. Here, I reduced the lengthy quote in the original into a single tabulated sentence. With tabulation, you can give your readers information in short, understandable chunks. This sentence has a 22-word introductory clause. The two tabulated points contain 16 and nine words, respectively. This sentence is so much shorter than an 81-word block quote! Plus, the judge will now read the rule!
- Use bullet points to give your reader something different to look at and highlight key points. Bullets provide more white space, so readers can process them easily.
- Note the explicit contrast I have highlighted in yellow. By using parallel construction and short sentences, I highlight Julian's failure to meet the standard.
- This argument is now much shorter than the argument in the original brief. So the judge has more energy to comprehend later arguments, and the judge will more easily retain this argument.
- I removed the initial caps from my sub-headings, using normal sentence capitalization instead. The bold text highlights the heading.
- I had an organizational choice here. I like framing issues with rules. I considered placing the rule I have in section IV.B. at the beginning of section IV.

  But I decided against that because I then would have needed to combine sections IV.A. and IV.B. into a single section. That would have led to a very lengthy sub-section. It also would have led to having

original Complaint, ¶¶ 12, 13, 14, 15, and 25.) For example, in paragraph 15, Julian highlighted that he relied on VGNB's failure to identify the alleged discrepancies: "Had Dr. Julian been informed by Bank about the non-conforming documentation, he would not have waived the discrepancies and would have insisted that no payment was due from Bank based on said documents." Julian's narrow focus on documentary discrepancies to support his negligent misrepresentation claim is amplified by his allegations in paragraph 25 of his original complaint:

> On or about May 5, 1992, Bank represented to Dr. Julian that Bank had: (1) received documents in conjunction with a request for payment on Letter of Credit No. 30478; (2) examined said documents; and (3) found them to be in conformity with Letter of Credit No. 30478 but for three specified exceptions. None of these specified exceptions mentioned any other patent and non-conforming discrepancies in the documentation. . . .

In contrast, Julian's new claims allege that VGNB fraudulently coerced Julian to continue with the underlying transaction and concealed its liability under the Letter of Credit to Julian. For example, in paragraph 43, Julian's Amended Complaint alleges fraud regarding the underlying transaction:

> On several occasions between approximately April 30 and May 5, l992 in response to Dr. Julian's voiced concerns as to whether the cigarettes were actually shipped on board the "Export Freedom", as indicated in a bill of lading Bank showed Dr. Julian, Bank represented to Dr. Julian that Dr. Julian's cigarettes were actually being shipped "under the table" and that Dr. Julian should continue with the transaction because Bank would pay on the letter of credit no matter what. Bank represented to Dr. Julian that it is nearly impossible for a person to forge a bill of lading . . .

Julian's new fraud claims plainly differ from his negligent misrepresentation claim because Julian's new

two case discussions and the argument that is currently in section IV.A. come before my prejudice argument.

My prejudice argument is the key argument in this section. I didn't want it trailing so much other information before I made it.

Instead, I let my argument speak for itself in section IV.A. and concretely framed my prejudice argument with a rule in Section IV.B.

- I discourage block quotes from cases, but I encourage quotes from the record—even block quotes.
- When offering a longer quote, use an independent clause that summarizes what the quotation provides or how it supports your argument.

  For example, the introduction to this block quote emphasizes that Julian's original complaint focused on documentary discrepancies to establish his negligent misrepresentation claim.

  Similarly, the introduction to the block quote below highlights Julian's fraud allegations.

  This technique helps ensure that a longer quotation gets read. It also helps ensure that your quotation's meaning is understood because you've provided a thesis for the quotation.

  Don't force your readers to try to understand the importance of the quote on their own. Instead, tell your readers explicitly how the quote relates to your argument.

claims are not based on alleged documentary discrepancies. Julian's original complaint focused on VGNB's duties to *him* under the Letter of Credit. In contrast, Julian's new fraud claims focus on VGNB's alleged intentional misrepresentations regarding the underlying sales transaction between Julian and *third parties*. As an issuer of the Letter of Credit, VGNB had no duty to examine the facts regarding the underlying sales transaction. Thus, Julian's new claims dramatically change the nature of his original complaint.

B. Julian's untimely Amended Complaint would prejudice VGNB's defense because it was filed after the close of discovery and on the eve of trial.

A motion to amend pleadings prejudices the opposing party when the motion is untimely and contains a new allegation of fraud, especially when the motion is made shortly before trial. *Lloyd*, 227 Cal. App. 2d at 648.

For example, in *Lloyd*, the plaintiff sued to recover money she had paid under a contract, alleging two causes of action for money had and received and an accounting. *Id.* at 647-48. Four months after the court had issued its pretrial conference order—and five weeks before trial—the plaintiff moved to amend her complaint to add three new causes of action, including an allegation of fraud. The plaintiff filed a similar motion a week before trial. Both motions were denied. *Id.* at 648. On appeal, the court affirmed the trial court's denial of the plaintiff's motion to amend because it was untimely and prejudiced the defendant: "[n]o explanation was offered for plaintiff's delay. It was not offered to cure a technical defect, but instead added facts and substantially changed the theory of plaintiff's case." Id.

- As I noted above, motions to amend are liberally granted, so I again need to frame a narrow rule to help support my contention that prejudice would result from granting the motion in this situation.

  Structure your rule to parallel the best facts in your argument. This technique helps support your argument before you even make it. Note that my rule relies on three great facts that support my argument.

  - The motion is untimely: a conclusion established in Section II;
  - The amendment contained an allegation of fraud where one didn't previously exist; and
  - The motion occurred shortly before trial.

  I would have loved to have written a rule relating to the trial date being set, but *Lloyd* doesn't explicitly support that rule.
- Use dashes to highlight key facts. Here, I use dashes to highlight that the motion in *Lloyd* was made five weeks before trial—just like Julian's motion.
- Note the parallel facts between *Lloyd* and Julian's situation.
  - The original complaint was essentially for breach of contract, while the amendment was for fraud.
  - The motion for leave to amend was made five weeks before trial.

  Note the parallel logic between this case and Julian's situation.

Similarly, in *Moss Estate Co.*, the court held that the defendant was properly denied leave to amend her answer because her motion to amend was untimely and included new assertions of fraud. 41 Cal. 2d at 586. In *Moss Estate*, the defendant's original answer in a quiet title action did not allege fraud. But twelve days before the date set for trial, the defendant sought leave to amend her answer to include fraud as a defense.

The court affirmed the trial court's denial of her motion because her untimely motion blindsided the plaintiff. The court reasoned that the defendant alleged a new defense after the trial date was set. While she knew the facts when she filed her original answer, she did not justify her delay. Because her "original answer gave no inkling of the facts" she alleged in her proposed amended answer, the trial court "would have been required" to grant a continuance if it had allowed the motion. *Id.*

Similarly, Julian's untimely motion was made shortly before trial, alleging new fraud claims where none previously existed. Julian's untimely motion prejudices VGNB's defense because VGNB is foreclosed from conducting further discovery. If Julian were allowed to allege fraud at this late date, VGNB would have to mount a strikingly distinct defense to these new claims, a defense that VGNB had no notice was necessary. Relying on the allegations in Julian's original complaint, VGNB focused its discovery on narrow issues like the following: 1) whether discrepancies existed in the documents; 2) whether Julian knew about those discrepancies, and 3) whether Julian suffered any damage

- No explanation was offered for the delay.
- The amendment not offered to cure a technical defect.
- The amendment alleged new facts and changed the theory of the case.

- One way to transition between cases is to use what I call a "transition holding." It's a particular example of the substantive transition technique I previously discussed.

  A transition holding works by stating the holding broadly and incorporating parallel language from your rule into the holding. Besides helping you write an effective transition, you further reinforce your rule. I highlighted the transition holding in blue.
- Prefer short, punchy verbs to bland verbs. Here, "blindside" is an evocative two-syllable word. It frames the court's reasoning effectively.
- I eliminated the block quote of the case, but I excised two short quotes that relate directly and favorably to my facts. The court's reasoning is now offered in 67 words—not 107 words.
- Note again the parallel facts and logic.
  - The moving parties knew all the facts alleged in their amended pleadings when they filed their original pleadings.
  - The amended pleadings alleged fraud.
  - The amended pleadings contained new facts that the opposing party previously did not know.
  - The trial date was set.
- I link my argument to authority in a simple thesis that tethers my argument to the logic of the cases.

- Note the paragraphing in this argument. Besides giving your readers resting places, paragraphs also make the organization of your argument transparent.
  - Paragraphs 1 & 2 relate to prejudice from Julian's new fraud claims.
  - Paragraph 3 relates to prejudice from Julian's emotional distress claim.
  - Paragraphs 4 & 5 relate to prejudice from VGNB's increased damages exposure.

from these alleged discrepancies. To defend against Julian's new claims, VGNB would at minimum need to reopen Julian's deposition to determine the facts upon which Julian bases his new fraud claims. But VGNB would also need to depose other witnesses who allegedly perceived the new facts Julian alleges to do the following: 1) learn facts that might undermine Julian's credibility; and 2) learn facts that may support its defense. Noticing and conducting these depositions would cost VGNB time and money. Two of these potential witnesses live abroad, so VGNB would suffer even more expense and delays. Julian has also raised a claim for emotional distress. VGNB had no reason to, and did not, question Julian about his mental state and any resulting physical manifestations of his alleged "emotional distress." Besides forcing VGNB to reopen Julian's deposition, Julian's new emotional distress claim would require VGNB to do the following: 1) seek a medical evaluation of Julian to verify the delayed onset of his newly discovered distress, and 2) retain an additional expert to assess Julian's mental state. Forcing VGNB to invest more time and money in such large-scale discovery—much of which could have been done earlier and more efficiently had VGNB been aware of the allegations—would severely prejudice VGNB. Julian's late addition of a punitive damages claim further prejudices VGNB's prior discovery plan. If VGNB had been aware of Julian's extensive damages claims earlier, it would have invested more resources in discovery. VGNB is presently exposed to a $1.5 million principal damage claim. If Julian were permitted to amend his complaint, VGNB would suddenly confront a potential expansive and discretionary punitive damage award.	A bonus to paragraphing is that—assuming you respect your thesis sentences—your arguments will focus on one analytical issue at a time. This technique adds clarity to multi-issue arguments. • A short dependent clause in the second sentence reminds the court that granting Julian's motion requires us to reopen Julian's deposition. This reference back to the previous paragraph reminds the court of all the new discovery VGNB would be forced to conduct. • A colon introduces a list. Both tabulated points begin with an active verb. • Use dashes to emphasize favorable facts and arguments.

VGNB's expanded potential liability would have merited more expansive discovery. For example, two witnesses with knowledge of Julian's participation in the sales transaction live overseas: Justin Marcian, Julian's father-in-law; and Brun von Sutter, the agent who purportedly shipped the goods. Because of Julian's untimely motion, VGNB cannot depose these individuals even though VGNB's increased potential liability would very likely require VGNB to seek documents and testimony from these individuals.

While Julian has asked to amend his complaint, he has not asked this Court to reopen discovery or extend the trial date. Julian's untimely motion prejudices VGNB even if discovery were reopened, especially because this Court, like the court in *Moss Estate Co.*, would have to continue the trial date. But Julian's proposal is even more prejudicial because VGNB would have no opportunity to prepare a new defense against Julian's new claims.

- This sentence uses a substantive transition with a bit of parallel construction: expansive damage claims require expansive discovery.

V. Julian's motion should be denied because Julian's Amended Complaint is subject to general demurrer.

A court may deny a motion to amend a pleading if the amended pleading cannot state a cause of action or a defense. *Hayutin v. Weintraub*, 207 Cal. App. 2d 497, 506-07 (1962). Thus, a court may properly deny leave to amend when the plaintiff's proposed amendment contradicts an admission made in his prior pleadings. *See Congleton v. Nat'l Union Fire Ins. Co.*, 189 Cal. App. 3d 51, 62 (1987) (affirming the trial court's denial of the plaintiffs' motion to amend their complaint to allege they relied on the defendant insurer's grant of an insurance policy because their proposed allegations conflicted with admissions they made in an earlier brief that stated they had not relied on this grant).

Julian has admitted in two prior federal pleadings that he

- As I stated in my comments on the original brief, avoid relying on secondary authority in your rules. Here, I eliminated the cite to Witkin and relied on mandatory authority instead.

  But if a dearth of authority forces you to rely on secondary authority for your rule, support that rule as much as possible with citations to mandatory, primary authority.
- I use a parenthetical to support my rule. The facts and reasoning of *Congleton* didn't obviously parallel my facts. So I framed a parenthetical to massage those issues and state the court's holding favorably.
- The parenthetical contains 48 words, which is long, but I needed to describe the relevant facts. This problem is ameliorated by three things; 1) The first two sentences in this paragraph contain fewer than 25 words; 2) the paragraph contains only three sentences; and 3) the parenthetical ends the short paragraph, so the reader gets a break to rest after absorbing the long sentence.

relied on the intentional misrepresentations of parties other than VGNB when he authorized the release of the funds under the Letter of Credit. (*See* Julian's federal complaints, attached as Exhibits A and B to VGNB's Request for Judicial Notice). For example, in paragraph 86 of his first federal complaint—filed almost two years before Julian's original complaint against VGNB—Julian alleged: "*In reliance on these representations* by [the defendants in the first federal complaint], Plaintiff [Julian] was induced to, and in fact did, authorize the release of $1,579,200 to Defendants Trimac International and BTB International." (*See* Exhibit A.) Julian repeated these admissions in his second federal complaint, filed on May 4, 1994—just one day after Julian filed his original complaint against VGNB. (*See* ¶ 81 of Julian's second federal complaint as Exhibit B.)

Because Julian has admitted that he relied on the intentional misrepresentations of parties other than VGNB, Julian cannot state a cause of action for fraud against VGNB. Thus, this Court may properly deny Julian's leave to amend on this ground alone. *See Hayutin v. Weintraub*, 207 Cal. App. 2d 497, 506-07 (1962) (affirming the trial court's denial of the plaintiff's motion for leave to amend because the plaintiff's new allegations of fraud were potentially unable to survive a motion for demurrer).

- Parentheticals generally work best in two places: 1) to support a rule statement; and 2) within an argument. If you use a parenthetical to end your argument, frame the parenthetical to parallel the facts and reasoning in your argument.

VI. Julian's cited authority does not support his motion.

Neither of the two cases Julian cites in his opening brief support his request for relief. Julian cites *California Casualty Gen. Ins. Co. v. Superior Court*, 173 Cal. App. 3d 274, 278 (1985), for the unremarkable proposition that "if the motion to amend is *timely made* and the granting of the motion will not *prejudice the opposing party*, it is error to refuse permission to amend." (Emphasis added.) Julian fails to establish this rule applies because Julian's motion is

- I added just a small amount of literary flair to emphasize that the general rule regarding motions for leave to amend does not apply. The phrase "unremarkable proposition" conveys that opposing counsel can't find concrete authority to support their argument.

untimely and granting his motion would prejudice VGNB. Julian also relies on *Honig v. Financial Corp. of Am.,* 6 Cal. App. 4th 960 (l992), but the facts in *Honig* differ strikingly from the facts here. In *Honig*, the plaintiff filed a complaint against his employer alleging, among other things, fraud and breach of contract. *Id.* at 963. The plaintiff was fired after he had filed his complaint; he then moved to amend his complaint to include causes of action for wrongful termination and defamation. *Id.* at 964. The court held that the trial court erred by denying plaintiff's motion, reasoning that: "[the plaintiff's] proposed amendments finished telling the story begun in the original complaint. The added assertions described the continuation of the events asserted in the initial pleading." *Id.* at 966.	
Unlike the plaintiff in *Honig*, Julian has no new story to tell. Julian knew the facts he alleges in his Amended Complaint two years before he filed his original complaint. So unlike the plaintiff in *Honig*, Julian has no excuse for not alleging his new claims in his original complaint.	• The revision makes a stronger distinction. First, I begin a new paragraph that highlights the transition to my argument. Second, the distinction comes immediately, rather than in the second sentence of the argument. So the distinction serves as the thesis for the argument. Third, by using the phrase "new story," I directly tie into the basis for the court's holding in *Honig*.
VII. If this court does grant Julian's motion, the trial date should be vacated or continued to enable VGNB to challenge Julian's complaint and conduct discovery on Julian's new claims. Julian's belated motion for leave to amend should be denied. However, if this Court should grant Julian's motion, VGNB respectfully urges this Court to reopen discovery and vacate or continue the trial date. Without citation to the record or authority, Julian's brief and Ms. Rollo's declaration assert that a continuance is unnecessary. These assertions, coming after Julian's two new claims of fraud, Julian's new claim for emotional distress, and Julian's new claim for punitive damages, strain credulity. VGNB needs and deserves the opportunity to explore the factual basis for	• This is one weakness in my new organizational scheme. Our fallback position in the original brief was in Section VI.C., so it was a bit more hidden as the third subsection. Here, my organizational scheme forced me to add this as its own major section. I had principled reasons for my decision, and I think the benefits outweigh the costs, but this is a cost. The important thing is that I considered the costs and the benefits of my strategic choices. Reasonable lawyers may differ on how they balance the costs and benefits of their decisions. The key is to meaningfully identify and resolve these issues. • Note the short arguments. I already made my points. I don't need to belabor them. I merely need to refer to them to establish my contention that if the court granted the

Julian's new allegations. But discovery is closed. Even if discovery were not already foreclosed, this discovery could not take place in time to allow VGNB to prepare for the February 6, 1995, trial date. And Julian's proposed amended complaint is subject to general demurrer. Julian should not be permitted to strip VGNB of its right to challenge his amended pleading by delaying his motion. VGNB would not have time to challenge Julian's amended complaint before the trial date. **VIII. Conclusion** Julian knew all the facts alleged in his Amended Complaint two years before he filed his original complaint. Discovery is closed. Trial is near. Julian is out of time. Julian's motion to amend is untimely, would prejudice VGNB if granted, and is futile. So Julian's belated motion should be quickly denied.	motion, providing the time and opportunity to conduct additional discovery was appropriate. • Also note the organization. My first paragraph has a thesis and my argument that we need more time to conduct discovery. My second paragraph focuses solely on needing time to challenge Julian's amended complaint. • Take advantage of every opportunity for advocacy. While many attorneys just throw in a boilerplate sentence in the conclusion, make your conclusion work for you. Here I use two short paragraphs to carry my opening theme through the entire brief. That's especially helpful here because I just gave the court an opportunity to split the baby in the previous section. I explicitly contrast Julian's dilatory actions to the immediate action I'm asking the court to take.