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Some Best Practices for Motions, Briefs, and Hearings

Motion and Brief Best Practices

"*I didn't have time to write a short letter, so I wrote a long one instead.*"
– Blaise Pascal

Background of Michigan Business Courts

Michigan established business courts effective January 1, 2013.[1] Since then, business courts have become part of the fabric of Michigan's jurisprudence. Indeed, attorneys licensed within the past 13 years have not known a time when Michigan did not have business courts. As business court practice has matured, business court judges have developed views on what effective advocacy looks like in their courts. Over the years, *Touring the Business Court* columns[2] have gathered insights directly from business court judges through interviews with those judges. This article distills that advice as well as other recommendations from the business court judges to highlight some of the best practices for motions, briefs, and hearings.

The Top Six Briefing Tips: Make Briefs Clear, Concise, Direct, Relevant, Respectful, and Well-Supported

Business court judges (like other judges) prefer briefs that are: clear, concise, direct, relevant to the issues, respectful, and well-supported. In that regard, it is helpful to keep in mind the purpose of the business court:

> (3) The purpose of a business court is to do all of the following:
>
> > (a) Establish judicial structures that will help all court users by improving the efficiency of the courts.
> >
> > (b) Allow business or commercial disputes to be resolved with the expertise, technology, and efficiency required by the information age economy.
> >
> > (c) Enhance the accuracy, consistency, and predictability of decisions in business and commercial cases.[3]

Below are some specifics.

Purpose of the Motion and Brief

The motion and brief are an attorney's direct line of communication to the business court judge. They present a unique opportunity to carefully choose your words, sentences, paragraphs, and ideas and present them in a succinct and compelling manner. The goal is to make the case and issues clear to the judge by focusing on the specific issues at hand. Effective briefs tailor their approach to their audience—the judge. In doing so, however, the briefs also speak to the opposing counsel, the opposing party, and any insurance company that might be involved.

Clarity, Conciseness (and Precision), Directness, Relevance

Judges prefer clarity and conciseness because it allows the judge to clearly and quickly grasp the core issues of the case. Judges value briefs that provide relevant background information—but only relevant information. (For example, a motion to compel does not need to recite all the procedural and substantive facts of the case.) Moreover, persuasive briefs effectively tie the facts and law together. To do so, judges praise brevity. As one business court judge puts it, "Be simple and clear with the facts—leave out the nonsense." Or, another judge observed, the 20-page cap "is not a goal"; it's a maximum that should generally not be reached. A well-edited brief signals disciplined thinking and respect for the court's time. Briefs should effectively weave the issues, applicable law, and analysis together by going to the heart of the issue. A concise introduction along with clear headings and subheadings helps to provide judges with a clear direction of where the brief is heading.

Effective briefs do not require the judge to do the work for you. Judges do not want to dig through cluttered arguments; they want to know the precise issue and relief requested. As one judge recommended, "Provide more than superficial analysis. Do not presume the court will do your work for you." Another judge suggested that you spell out the basis for the motion in the motion itself: "Don't just say 'see attached brief.'"

When defending against an argument (or an anticipated argument) from the opposing counsel, address the issues (including the "bad facts") directly. Avoid hyperbole and be candid with the court. "Evading questions by the judge" is counterproductive, as one judge noted. Additionally, focus on the law that is relevant to the specific issue before the court. As one judge observed, be "clear and concise. If you are defending an argument, hit the issues head-on."

Respectful

Judges caution against unnecessary rhetoric. As one judge noted, "belligerence typically masks lack of merit." Do not attack opposing counsel. This advice was repeated time and again in our interviews with business court judges.

In a related vein, judges want lawyers to make a genuine attempt to resolve issues before filing a motion. For a discovery motion, for example, this may take the form of a detailed letter or email to opposing counsel explaining the issues. Sometimes, a phone call or a Zoom meeting can resolve an issue or narrow the issues. "Pick up the phone" is advice many judges have given. As one judge mentioned, do everything you can to narrow the issues; bring me "only what you can't agree on."

Well-Supported Briefs

Court rules, Michigan Supreme Court cases, and published Michigan Court of Appeals decisions, of course, provide the most compelling support for a brief. Avoid irrelevant citations and unpublished authority that do not bear directly on the issue at hand. As

one business court judge put it, "Give me one good case on point that actually says what you say it says, and I'll be forever grateful." Judges also find that citing too many cases that are relevant to the subject matter generally but that do not apply to the specific legal issue may obscure your main point. As one judge suggested, "Ask yourself: 'Can someone who does not know the case understand the motion?''

Further, a brief may be more persuasive when it acknowledges that there are no published cases directly on point. If there is nothing on point, just say so. (In that event, unpublished opinions or cases from another jurisdiction may be helpful.) That being said, decisions by other Michigan business court judges can be persuasive. Also, know when to provide a judge's copy of the motion and brief.

TROs and Preliminary Injunctions

Regarding motions seeking equitable relief, especially temporary restraining orders, it is important to recognize that there is an asymmetry of information. Attorneys may spend days or sometimes weeks with a client's matter before filing the motion, while the judge is encountering it for the first time. Business court judges are cautious about granting this extraordinary relief, especially ex parte. Judges advise attorneys to strictly adhere to the specific court rules and to state specific facts supporting each element for a TRO and a preliminary injunction. But as one judge said, TROs should be "used sparingly."

Further, temporary restraining orders must provide the reason why notice cannot be given and why notice would create a risk of harm.[4] It is not enough to explain the irreparable harm that will occur. Judges recognize the urgency of such requests and often act quickly.

Still, judges also wonder why a party is seeking an ex parte order when that party or its attorney has had communications with the other side before filing the motion. That would suggest that some kind of notice of the motion (maybe even in a telephone call or an email) could probably have been given.

Hearings and Oral Argument

"[*Oral argument is*] *an opportunity to face the decision-makers; to try to answer the questions that trouble judges*."
— Justice Ruth Bader Ginsburg

The Top Six Traits of Persuasive Attorneys: Prepared, Punctual, Professional, Respectful, Candid and Direct, and Know What the Judge Wants

Business court judges agree: Persuasive attorneys are prepared; punctual; professional and respectful in the way they address the court and opposing counsel; and candid and direct in response to questions from the court or points from the opposing side. And they know how the judge will likely handle the hearing.

Preparing for the Hearing

The hearing is the judge's opportunity to ask questions, clarify issues, and obtain more information. This allows the attorney to address the judge's concerns and questions directly. Attorneys, of course, should be familiar with the facts and the key legal authorities.

In addition, counsel should anticipate questions from the court and arguments from opposing counsel and be prepared to respond. One judge recommended that counsel be prepared for "intensive questions." Another judge summed it up: "be prepared, and know your case."

Conduct During Hearing: Be Candid and Direct in Response to Questions or Arguments, Professional, and Respectful

During oral argument, attorneys should listen carefully and be prepared to adapt in response to the court's questions and concerns. While delivering an argument, judges prefer that attorneys focus on critical issues rather than addressing tangential ones. Further, judges caution against summarizing the written brief in oral argument. Make your "point succinctly and without unnecessary repetition," recommended one judge. On the other hand, you should be prepared to make a record if needed.

Moreover, respond fully to the questions from the court and the points from opposing counsel. During this process, judges recommend talking *to* the court, not *at* the court. When questioned, judges prefer a direct answer; evasion or delay may undermine credibility. In other words, deal directly with the weakness of your case, just as you have done in your brief.

Be prepared to explain how you have attempted to resolve the dispute with opposing counsel. Asked about what is counterproductive at oral argument, one judge said this: being notified at the hearing that "attorneys had not met and conferred and that they could have narrowed the issues."

Of course, professionalism and candor are a given. Thus, oral argument should not descend into personal attacks and sarcasm—it is inappropriate and it distracts from the merits.[5] As one judge observed, personal attacks "get in the way of your actual mission, which is to further your client's interests."

Practical Considerations

Judges have raised concerns about the growing reliance on substitute attorneys at motion calls. While delegation may be unavoidable at times, sending a lawyer unfamiliar with the record defeats the purpose of oral argument. To judges, this is frustrating and unhelpful, especially when the judge comes prepared to deal with a particular issue.

And, as always, know your judge and his or her specific protocols.[6] More on that below.

Judge-Centered Approach

Hearing Dates

Part of knowing your judge involves scheduling motions consistent with the judge's protocol and calendar. For many judges, this usually isn't an issue, except when it comes to TRO

motions and dispositive motions. As to the former, some judges recommend contacting the judge's clerk to notify the court that a TRO motion has been filed. Regarding dispositive motions, check the court's protocol on hearing dates. Many judges set separate hearing dates for dispositive motions. If a hearing is likely to be particularly long or involved, one judge recommends notifying the court several days in advance. Or when uncertain, email the clerk (copying opposing counsel) about whether the judge would like to set a special hearing date. If you are uncertain whether your motion is up for hearing at the scheduled time, check the court's online docket.

Review Prior Decisions

Michigan business court opinions are posted online. This State Court Administrative Office database is keyword searchable and provides the date of the order and the full opinion. The search function returns all opinions that use the words it contains. For instance, a search for *shareholder oppression* returns all opinions that use the word *shareholder* and/or the word *oppression* in the same opinion. The search can be further narrowed to only cases that contain the phrase *shareholder oppression* through quotation marks—"shareholder oppression." The opinions found in the database can provide insight into how a particular judge has ruled on an issue in the past and provide guidance as to future rulings on a similar issue. As a result, attorneys can emphasize certain aspects of a claim or defense in front of a particular judge, or perhaps not file a particular motion or agree to the relief requested by the opposing party.

The Michigan business court opinion database can be accessed at: https://www.courts.michigan.gov/administration/trial-court/trial-court-operations/business-court/.

Local Administrative Orders; More on Judge's Protocols

Each business court has a local administrative order ("LAO") for operation of its respective business court docket. The LAO is approved by the State Court Administrative Office. LAOs contain useful information regarding internal policies and procedures for local court management. As mentioned, judges also advise attorneys to review their protocols. A judge's protocol typically may contain information regarding Zoom hearings, summary disposition motions, motions for reconsideration, adjournments, emergency motions, and physical copy requirements. In addition, these protocols may address page limits, scheduling orders, case management, exhibit labeling, proposed orders, protective orders, and expectations regarding meet-and-confer obligations.

Below are links to business court protocols for the various business courts:

Allegan County Business Court Judge Protocol

Judge Mathew W. Antkoviak: https://www.allegancounty.org/courts-law-enforcement/48th-circuit-court/judges

Berrien County Business Court Judge Protocol

Judge Donna B. Howard: https://www.berriencounty.org/695/Hon-Donna-B-Howard-Presiding-Judge

Calhoun County Business Court Judge Protocol

Judge Brian K. Kirkham: https://www.calhouncountymi.gov/departments/courts/circuit_court/business_court.php

Genesee County Business Court Judges' Protocols

Judge B. Chris Christenson: https://cms2.revize.com/revize/geneseecountyjudicialcourt/Documents/General%20Information/Judges/Policy-procedures-Civil-Criminal-christenson.pdf

Judge Brian S. Pickell: https://cms2.revize.com/revize/geneseecountyjudicialcourt/Documents/General%20Information/Judges/Policy-and-Procedures-Pickell.pdf

Ingham County Business Court Judge Protocol

Judge James S. Jamo: https://cc.ingham.org/courts_and_sheriff/circuit_court/jamo.php

Jackson County Business Court Judge Protocol

Judge Richard N. LaFlamme: https://www.co.jackson.mi.us/382/Honorable-Richard-LaFlamme

Kalamazoo County Business Court Judge Protocol

Judge Curtis J. Bell: https://www.kalcounty.gov/directory.aspx?EID=95

Kent County Business Court Judge Protocol

Judge Curt A. Benson: https://www.kentcountymi.gov/DocumentCenter/View/5525/Bensons-Procedures-PDF?bidId=

Livingston County Business Court Judge Protocol

Judge Matthew J. McGivney: https://milivcounty.gov/courts/judges/mcgivney/

Macomb County Business Court Judges' Protocols

Judge Richard L. Caretti: https://www.macombgov.org/departments/16th-judicial-circuit-court/honorable-richard-l-caretti

Judge Kathryn A. Viviano: https://www.macombgov.org/departments/16th-judicial-circuit-court/honorable-kathryn-viviano

Monroe County Business Court Judge Protocol

Judge Daniel S. White: https://www.co.monroe.mi.us/485/38th-Circuit-Court

Muskegon County Business Court Judge Protocol

Judge Kenneth S. Hoopes: https://co.muskegon.mi.us/365/Chief-Judge-Kenneth-S-Hoopes

Oakland County Business Court Judges' Protocols

Judge Victoria A. Valentine: https://www.oakgov.com/home/showpublisheddocument/16631/639003748206800000
Judge Michael David Warren, Jr.: https://www.oakgov.com/government/courts/circuit-court/judges/civil-criminal/hon-michael-warren

Ottawa County Business Court Judge Protocol

Judge Jon A. Van Allsburg: https://miottawa.org/courts/20th-circuit/

Saginaw County Business Court Judge Protocol

Judge M. Randall Jurrens: https://www.saginawcountymi.gov/courts-public-safety/courts/business-court/

St. Clair County Business Court Judge Protocol

Judge Michael L. West: https://www.stclaircounty.org/Offices/63

Washtenaw County Business Court Judge Protocol

Judge Carol A. Kuhnke: https://www.washtenaw.org/1443/Honorable-Carol-Kuhnke

Wayne County Business Court Judges' Protocols

Judge David J. Allen: https://www.3rdcc.org/departments---divisions/divisions/civil
Judge Annette J. Berry: https://www.3rdcc.org/departments---divisions/divisions/civil
Judge Edward Ewell, Jr.: https://www.3rdcc.org/departments---divisions/divisions/civil
Judge Muriel D. Hughes: https://www.3rdcc.org/departments---divisions/divisions/civil
Judge Brian R. Sullivan: https://www.3rdcc.org/departments---divisions/divisions/civil

NOTES

1. MCL 600.8031 et seq.

2. The columns have regularly appeared in the Michigan Business Law Journal since the Spring 2018 issue. They are word-searchable. Most current (and many former) business court judges have been interviewed. https://connect.michbar.org/businesslaw/newsletter.

3. MCL 600.8033.

4. MCR 3.310(B)(1).

5. One judge reminded attorneys to remember the oath they took when they were admitted into practice. https://www.michbar.org/generalinfo/lawyersoath.

It is also important to be familiar with the 12 Principles of Professionalism. https://www.michbar.org/generalinfo/professionalism_principles.

6. To the degree that anything here is contrary to the practice or protocol of a particular judge, the judge's practice and protocol obviously prevail.

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