



AMERICAN  
BANKRUPTCY  
INSTITUTE

## 2017 Delaware Views from the Bench

*Young Lawyers Track*

### **Best Practices for Motion and Brief Drafting**

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**YOUNG LAWYERS TRACK:  
BEST PRACTICES FOR MOTION AND BRIEF DRAFTING**

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**A. BEST PRACTICES FOR DRAFTING MOTIONS AND BRIEFS**

1. Identify the Purpose of the Pleading
  - Honestly analyze the case
  - Carefully identify the issue(s)
  - Clearly characterize the relief sought
2. Identify the Audience and Tailor Your Approach Accordingly
  - Bankruptcy Court
  - Appellate Court
3. Adopt a Proper Structure
  - Use a structure that most advances your position
  - Have a strong introduction/preliminary statement and a strong conclusion
  - Have a coherent theme or strong central idea to convey
  - Set the stage and tell a persuasive story
  - Present in a logical manner
4. Use the Correct Format
  - Comply with applicable Federal and Local Rules and Chambers Procedures
  - Make the pleading visually easy to read - white space, visual alignment and headings are appealing to a reader
  - Use descriptive headings and subheadings
  - Avoid long sentences
  - Use shorter paragraphs
  - Avoid large block quotes
  - If applicable, use short lists and bullet points
  - If applicable, use visual aids (tables, charts, timelines) - show; not tell
  - Use footnotes moderately
  - Do not use footnotes to present substantive legal argument or relevant facts
  - Employ the proper case citation form for the jurisdiction

5. Principles of Good Writing
  - Write in the active voice, not the passive voice
  - Write grammatically
  - Write focused and logically
  - Be clear, succinct, and direct - use concrete, not abstract language
  - Use plain English
  - Avoid nominalizations (using a verb as a noun)
  - Use correct homophones (insure/ensure, forbear/forebear, therefor/therefore)
  - Avoid legalese, convoluted phrases, jargon and unnecessary words
  - Start each paragraph with a strong lead sentence
6. Employ a Respectful Tone
  - Maintain a temperate, objective, reasonable and respectful tone
  - Exercise appropriate professional behavior and refrain from making *ad hominem* attacks on opposing counsel or parties
  - Avoid emotional arguments, as opposed to persuasive arguments
  - Maintain your credibility
  - Avoid self-expression
7. The Statement of Issues Presented
  - Carefully and clearly define the issue(s)
  - Be issue selective – limit issues to those that are strong and persuasive
8. The Statement of the Case, Introduction or Opening
  - Concisely identify the issue(s) presented, summarize your position (relief sought) and highlight why the Court should reach that conclusion
  - Lead with the conclusion
  - Provide a roadmap for the Court

9. The Statement of the Facts
  - Know the facts
  - Consider the best structure for telling the facts – chronological, story
  - Include all relevant facts for a decision
  - Accurately describe the facts
  - Write succinctly; state the facts as tightly and thoroughly as possible
  - Use facts, not conclusions or arguments
  - Use specifics, not generalities
  - Engage the reader
10. Summary of the Argument
  - Lead with a compelling opening paragraph
  - Concisely summarize the argument and state why you should win
11. The Argument
  - Use argumentative headings to focus the Court
  - Lead with the strongest, most compelling argument
  - Weak arguments dilute the strength of stronger arguments
  - Present coherent argument before responding to opponent's argument or anticipated argument
12. Effective Use of Case Law to Support the Argument
  - Know the relevant case law, statutes and rules
  - Rely most on those cases that support the outcome you advocate, especially if the cases are binding in the jurisdiction
  - Weave in binding case law and explain how it applies to the facts
  - Avoid discussing each case precedent in detail with respect to both facts and reasoning; cite cases for the holdings
  - Explain how the holdings of the cases guide the decision-making process for the Judge

- Address controlling contrary authority
    - Argue why prior case wrongly decided
    - Distinguish the prior case
  - Bolster your cases (dispositive cases and cases on point) and challenge the opposition's cases that are distinguishable or not binding
  - Use proper case citation
  - Avoid lengthy string cites
13. Conclusion
- Be brief
  - Be meaningful
  - Summarize your position and the relief sought
14. Be Persuasive
- When possible, use other side's facts to support your argument
  - Give the Court the reasons and legal grounds to rule in your favor
  - Provide the legal analysis to serve as the bases for the Court's opinion
15. Be Credible
- Present a clear and convincing legal argument
  - Do not misrepresent the legal authority
  - Do not make a dishonest argument
  - Do not misstate or exaggerate facts
  - Concede bad facts - put them in context
  - Do not make an unfair comparison or irrelevant analogy
  - Do not incorrectly cite authority
  - Do not make weak or unpersuasive arguments

16. Replies/Reply Briefs

- Only respond to significant arguments raised or correct material misstatements of fact or mischaracterizations of the record
- Do not address every point raised in the answering brief or responsive pleading
- Avoid being overly defensive

17. Proofread Carefully and Edit

- Confirm proper case caption, title, signature block
- Check for spelling, typographical and grammatical errors - do not rely on a word processing program
- Confirm defined terms, references to other sections, exhibits and documents
- Clarify ambiguities
- Eliminate redundancy and excess
- Smooth transitions - avoid choppy and repetitive transitions
- Tighten the structure
- “Shepardize” or “Keycite” the cited cases and use proper case citations
- Allow sufficient time to digest, proofread and self-edit so as to provide a fresh perspective
- Have someone else review and edit the document

**TOP PITFALLS FOR DRAFTING MOTIONS AND BRIEFS**

1. Using legalese and jargon
2. Poor organization
3. Ignoring bad facts or misstating facts
4. Misrepresenting legal authority
5. Citing dicta which is not germane
6. Making alternate legal arguments that are inconsistent
7. Failure to comply with Rules, General Chambers Procedures and/or Judge's Procedures
8. Incorrect, misleading and/or overuse of case citations and string cites without explanation
9. Spelling, typographical and grammatical errors
10. Neglecting to proof read and edit the final product



**B. BEST PRACTICES FOR ORAL ARGUMENT ON MOTIONS AND BRIEFS**

1. Know the Rules and Procedures
  - Federal Rules
  - Local Rules
  - Court's Standing Orders
  - Court's Internal Operating Procedures
  - Chambers Procedures
  - Bring a copy of the Bankruptcy Code, Bankruptcy Rules, Local Rules and relevant procedures to the hearing
2. Know Your Audience - the Judge and Law Clerk(s)
  - Know the Judge's preferences and the Court's customs and protocol
  - Know the Judge's customary level of pre-hearing preparation
  - Know how the Judge handles arguments (*i.e.*, summarizes pleading and objections)
3. Know Your Opposition
  - Do not interrupt opposing counsel
  - Do not engage in argument with opposing counsel
4. Know the Case
  - Know the record - factually and procedurally
  - Know the facts - know what is and is not in the record
  - Know the burden - understand who has the burden of proof and convey why such burden was met/not met
  - Know the law - the key cases, statutes and rules
  - Know the argument - explain why your client should win and the legally permissible route to obtain that result
  - Know the relief sought - what is it that you want the Court to do

5. The Argument

- Be prepared to commence argument, including having your materials organized, when the Judge takes the bench
- Introduce yourself and identify the party you represent
- If it is a timed argument, reserve rebuttal time (if applicable) and beware of the clock

6. Primacy and Recency

- Take advantage of your first and last minute of argument (do not waste it on procedural history or minor points)
- Convey an easy roadmap for the Judge - explain why your client should prevail and the legal path to that result
- Go to the heart of the matter quickly
- Convey your points succinctly and directly; use plain language
- Use a conversational tone
- Address issues candidly
- Never end by responding to other side; circle back to your theme and your strongest argument
- Think big picture
- Incorporate a persuasive theme that is short, easy to understand, catchy and tells a story and then organize around your theme
- Use facts, not conclusions; use specifics, not generalities
- Tailor your argument to the Judge's questions and embrace questioning
- Anticipate questions and answer the Judge directly
- Prioritize the Judge's questions over the pre-planned argument
- Concede what must be conceded; confront weaknesses in your argument
- If the Judge rephrases your position do not agree unless you are certain; if in doubt, restate your position

7. Maintain a professional demeanor with the Judge (be deferential) and with your adversary
  - Do not interrupt or speak over the Judge
  - Listen carefully to the Judge and opposing counsel
  - Wait for the Judge to complete a question before answering
  - Do not ask the Judge questions - if clarification is required, indicate your understanding of the question and respond accordingly
  - Do not ignore or dodge questions
  - Always show respect for the Judge
  - Adopt an appropriate tone
    - Do not whine
    - Do not display frustration
    - Do not use sarcasm
  - Be aware of your posture and body language
    - Do not point fingers at opposing counsel
    - Do not roll your eyes, sigh or fake surprise or indignation in response to opposing counsel's statements
  - Refer to opposing counsel respectfully
8. Exhibits and Evidence
  - Know the Court's procedures for presenting evidence (For example, in Delaware have pre-marked exhibit binders for the Judge, Witness, Law Clerk and opposing counsel)
  - Have extra pre-marked exhibits available in the event additional copies are required
  - Do not approach the bench or the witness with Exhibits without requesting Court approval
  - Understand how to formally introduce exhibits and request exhibits be admitted into evidence (keep track of exhibits admitted into evidence)

9. Demonstrative and Visual Aids
  - Consider use of visual aids or demonstrative exhibits, such as graphs, diagrams, charts, sound bites, or video testimony
  - Use visual aids or demonstrative exhibits sparingly and with meticulous planning - avoid overuse or misuse
  - Comply with the Court's requirements for use of courtroom technology
  - Test all equipment prior to the hearing
10. Proffers, Declarations and Witness Presentation
  - When presenting argument on a motion, proper evidence may be required to support the relief sought in the motion
  - In lieu of direct examination of a live witness counsel may, with Court approval, use a proffer
    - A proffer is the direct testimony of a witness that is stated in open Court on the record by counsel in lieu of the direct examination of the witness
    - The witness must be available for cross-examination
  - Some Courts allow testimony in writing in the form of a declaration, which is typically prepared and submitted in advance of hearing
    - Declarations must comply with all applicable rules of evidence (*e.g.*, declaration must be based on personal knowledge, state admissible facts, and demonstrate declarant's competence to testify regarding the facts set forth in the declaration)
  - Testimonial evidence by a witness under oath may be presented orally in Court
  - Carefully consider the impact of presenting a proffer or declaration as opposed to a live witness
11. Remember Judges are people too
  - The Judge is not an adversary
  - Maintain credibility
  - Make eye contact
  - Use your voice to create emphasis
  - Use the power of pause and repetition

12. Prepare, Prepare, Prepare!

- Re-read the pleadings
- Prepare an outline, not a script, of the argument
  - Memorize the opening and closing statement
  - Outline the argument and prepare bullet points
  - Highlight the best facts and law in support of position
- Prepare a question and answer
  - Anticipate the Judge's questions
  - Prepare "sound" or "thought" bite answers
- Know the strengths and weaknesses of your argument
- Know the record and be able to locate cited facts, legal theories, and case citations
- Practice the argument - practice builds confidence
- Avoid reading a script
- Take a step back from the case you know so well and preview the argument with people who are not familiar with the facts
- Moot the argument with a diverse audience

**TOP PITFALLS FOR ORAL ARGUMENT ON MOTIONS AND BRIEFS**

1. Not being prepared - not knowing the case, the law, the rules, the Judge or the opponent
2. Failure to anticipate the Judge's questions
3. Failure to answer the Judge's questions
4. Interrupting or arguing with the Judge
5. Overstating the law or the facts
6. Failure to bring a witness to a hearing (whether the matter is contested or uncontested) and/or failure to prepare a proffer for presentation or present direct testimony through a live witness
7. Making personal attacks on opposing counsel or the adversary
8. Reading a prepared speech
9. Making unnecessary evidentiary objections
10. Making inadvertent admissions or stipulations
11. Editorializing opposing counsel's argument
12. Assuming the Court will entertain telephonic oral argument

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