Oral and Written Advocacy in Bankruptcy

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Oral and Written Advocacy in Bankruptcy Panel

The Honorable Thad J. Collins, U.S. Bankruptcy Court, Northern District of Iowa
The Honorable Dennis R. Dow, U.S. Bankruptcy Court, Western District of Missouri
The Honorable Janice M. Karlin, U.S. Bankruptcy Court, District of Kansas
The Honorable Barry S. Schermer, U.S. Bankruptcy Court, Eastern District of Missouri
Betsy Brand Six, Moderator, University of Kansas School of Law

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How to Get What You Want (With Just a little Bit of Trying) in the Central Division Bankruptcy Court

The Honorable Dennis R. Dow
U.S. Bankruptcy Court for the Western District of Missouri

How to Get What You Want (With Just a little Bit of Trying) in the Central Division Bankruptcy Court

1. **Draft Pleadings That Persuade** – A motion or response is your first opportunity to influence the judge to your client's position. Include a succinct but complete statement of your client's positions on the facts, law and why you should prevail.

2. **Be Prepared** – When appearing in Court, have all the necessary information in front of you, know the file and be prepared to answer questions from the Court on matters that touch on the issue under consideration, but may not be in the specific pleadings referenced on the docket.

3. **Give the Judge a Roadmap** – When making an oral presentation, don't simply recite the facts and dump them in the judge's lap. Assume the judge has read the pleadings, but needs to be oriented briefly to this specific matter. Give a brief presentation of the facts, identify the legal issues and the applicable law and indicate why you should prevail. In adversary proceedings, don't pass up the opportunity to give an opening statement. It gives the judge an overview of the case and establishes a framework for the receipt of your evidence.

4. **Guard Your Credibility** – Don't ask for relief that lacks a reasonable good faith factual or legal basis. Never make representations about the facts, law or your client's intentions without reason to believe they are accurate. When asking for emergency relief, make sure there is a real emergency. Asking for emergency relief when there is no emergency adversely affects your credibility. Articulate clearly the reasons for the emergency request. Failure to do so will likely result in your motion for expedited relief being denied. Don't promise in opening statement something you will not be able to prove.

5. **Lose Your Attitude** – Lawyers should exercise independent judgment and behave as professionals. Don't get personally involved in your client's positions. If you are unnecessarily caustic, sarcastic or indignant, you lose some of your persuasive power. Assailing the Court with characterizations and accusations that are not supported by the evidence may adversely affect your client's probability of success.

6. **Ask for Justice, Not Mercy** – Bankruptcy practice is based on the Code and Rules. If the Code gives the Court discretion, the Court will exercise it. When it does not, it will not. The Court has a narrow view of the appropriate use of § 105 and tends toward the textualist approach of statutory interpretation. If you ask the Court to ignore, rewrite or bend the law (too much), you are unlikely to succeed.

7. **Expect to be Held Accountable** – Deadlines in rules and orders are created for a reason. Deviations from them must be justified. While the Court has a preference for deciding things on the merits, requests to set aside default orders or grant authorization to respond out of time must be justified. Similarly, the Court expects parties, as well as lawyers, to behave as promised. Your client's failure to abide by the terms of rules or orders or to

honor the terms of a previous pledge (such as a proposal to cure defaults in response to a motion to dismiss) will likely have adverse consequences.

8. **Don't Try the Court's Patience** – The Court will grant a reasonable degree of leeway to counsel to determine the manner of presentation of a client's case, but the Court's patience is not unlimited. Stay focused and keep the presentation moving forward in a clear direction. While the Court will try to avoid doing so, it reserves the right to terminate lines of argument and inquiry, raise issues on its own and ask its own questions of witnesses.

9. **Don't Forget the Rules of Evidence** – Yes, they apply in adversary proceedings and contested matters. If prevailing requires you to show something that is not admitted, be prepared to present evidence. Remember that neither assertions in pleadings nor statements of counsel are evidence (at least not when offered in support of the party making them).

Motion Practice in the United States Bankruptcy Court for the Western District of Missouri

Honorable Dennis R. Dow

I. Generally

A. Form of Motions

1. Must be in writing unless made orally at hearing. Local Rule 9013-1.A.

2. Documents Supporting Motion

a. If relying on facts not of record, affidavit or documents must be attached.

b. May be attached unless they exceed five pages, in which case a summary of the documents must be provided.

c. Copies must be provided to opposing counsel. Local Rule 9013-1.B.

3. Proposed Orders – recent amendments to Fed. R. Bankr. Proc. 4001 notwithstanding, proposed orders need not be submitted on motions for relief from stay, for use of cash collateral or to borrow in cases under Chapter 7 or Chapter 13.

4. Responses

a. Unless another time period is specified by statute, the Federal Rules of Bankruptcy Procedure, local rules or court order, responses are due within 21 days. Local Rule 9013-1.C.

b. Responses must address the merits of the motion and, if appropriate, offer remedies. Failure to do so may result in the motion being granted with no hearing. Local Rule 9013-1.D.

c. Responses should not contain separate requests for relief. All such requests should be contained in a separate motion.

B. Service of Motions

1. By Whom – most motions must be served by the movant. Local Rule 2002-1.A., B.

Revised 8/29/14

2. On Whom Served

   a. Must be served on all parties in interest as specified on the most current version of the mailing matrix maintained for the case. Local Rule 2002-1.C.

   b. Certain specified motions must also be served upon the United States Trustee (e.g., employment and compensation of professional persons; use, sale or lease of property outside the ordinary course of business; approvals of compromises). Local Rule 2002-2.A.

3. What Must be Served – must serve request for relief; court may order the hearing notice to be served by the movant as well. Local Rule 9060-1.B.

   a. If the movant has been directed to serve the notice of hearing, failure to promptly serve the notice or to file a certificate of such service may result in denial of or delay in granting the motion.

   b. If directed to serve a notice of objection deadline, use the format suggested on the court's website.

4. Certificate of Service – each pleading must be accompanied by a certificate of service endorsed on the pleading or on a separate document and indicating the manner in which the document was served, the date of service and the persons upon whom the document was served. Local Rule 9013-3.A.

C. Processing of Motions – motions are processed in one of the following four ways.

1. Notice with Opportunity for Hearing – Local Rule 9060-1.G.

   a. These motions are scheduled for hearing only if a response is filed within the time set in a notice issued by the court (e.g., relief from automatic stay, redemption, lien avoidance).

2. Set for Hearing – Local Rule 9060-1.H.

   a. Motions described in this subparagraph of the rule are set for hearing regardless of whether a response is filed (e.g., motions to extend or impose stay, objections to confirmation.

   b. The movant is required to serve notice of the scheduled hearing.

3. Held for Response – Local Rule 9060-1.I. These motions are held for the

appropriate period of time (in most instances 21 days) to determine if a response is filed (e.g., borrowing, debtor's motion to convert or dismiss, Chapter 13 trustee's motion to dismiss).

a. If a response is filed, a hearing will be scheduled; the movant will be directed to serve notice of the hearing.

b. If no response, an order will be entered granting the motion.

4. Ruled Sua Sponte – Local Rule 9060-1.J.

a. The motions identified in this subparagraph of the rule may be ruled by the court upon the motion papers with or without awaiting a response. No hearing will be set unless the court determines that one is necessary (e.g., application to pay filing fee in installments, application to waive the filing fee, motions for extension of time, motions to reinstate dismissed cases).

D. Practical Tips on Motion Practice

1. Check the local rules for any specific requirements of form, content or procedure.

2. Make the motion as self-contained as possible, including all relevant facts. Do not make the judge search the file for information relevant to the motion.

3. Include all grounds for the relief requested. The court may find some persuasive and others not. Cite the applicable law.

4. Remember, this is your opportunity to convince the court that the relief requested is appropriate. The more detailed and persuasive the motion, the greater the chance it may be granted without the need for a hearing. Even if a response is filed and a hearing is set, a detailed and persuasive motion may incline the court to your side of the dispute as the court reviews the motion papers prior to the hearing.

II. Specific Motions

A. Procedural Motions

1. Extension of Time

a. Make certain that the deadline you seek to extend can be extended by the court and is not subject to limitations on the court's power to

extend. Fed. R. Bankr. P. 9006(b)(2), (3).

b. Extension of time requires a demonstration of cause. Do not assume that you will receive the requested extension even if it is the first one that has been requested. If you seek to extend the deadline for the second time or more, describe why the first extension was insufficient, what progress has been made and why additional time is necessary. If the motion is filed after the expiration of the relevant time period, the movant must demonstrate excusable neglect.

c. Assert all grounds for the requested extension. The court may agree with some of the reasons offered and disagree with others.

d. If possible, advise the court of the position of the opposing party with respect to the motion, particularly if the opposing party does not oppose the requested extension. Providing the court with this information will facilitate a prompter resolution of the motion and, if unopposed, virtually assure a successful one.

2. Shorten Time or Expedite

a. Some time periods may not be shortened. Make certain that the relief you request can be granted by the court. Fed. R. Bankr. P. 9006(c)(2).

b. Cause must be demonstrated in order to shorten the time otherwise provided for response. Be specific in your assertion of reasons for shortening the time or expediting the hearing. State all grounds in support of the request as some may be more persuasive than others.

c. If requesting that the court take action on the face of the motion without a hearing and without awaiting expiration of the ordinarily prescribed time for response, be clear in your request.

3. Continuances

a. Local rules require that such requests be filed within two days of the hearing, except for cause arising within that two-day period. Local Rule 9006-1.C. If you make a later request for postponement, because the reason arose within the two-day period, make sure to bring the motion to the attention of the courtroom deputy. You must appear unless you have been notified that the motion was granted.

b. Cause must be shown for the requested continuance. Be specific as to the reasons why the hearing should be postponed and indicate the period of time requested. State all available grounds for the requested postponement as the court may find some more persuasive than others. If requesting a continuance for the second time or more, state precisely why the previous postponement was not sufficient, what has taken place in the meantime and why the additional time is necessary.

c. You must provide the court with a statement of the position of the opposing side or state the efforts made to contact opposing counsel. Unopposed motions for continuance are certainly more likely to be granted.

4. Vacating Orders

a. Technically, such a motion is either a motion to alter or amend an order pursuant to Rule 9023 (which incorporates Rule 59 of the Federal Rules of Civil Procedure) or a motion for relief from a judgment or order pursuant to Rule 9024 of the Federal Rules of Bankruptcy Procedure (incorporating Rule 60 of the Federal Rules of Civil Procedure). You must state one of the grounds for relief available under one of those rules.

b. Time limits – a motion to alter or amend must be filed within 14 days of the order you seek to amend; a motion for relief from judgment or order must be filed within a reasonable period of time and, for some requests, no later than one year from the date of the order.

c. If you seek to vacate an order of dismissal, it is wise to solve the problem giving rise to the dismissal or state a definitive proposal for resolving the problem; otherwise, the court may deny the motion.

5. Reopening Cases

a. Reopening a closed case is done by motion, most often to accord certain relief to the debtor such as avoiding a lien on real property or seeking a determination of dischargeability of a student loan indebtedness. Such motions can also be filed to permit the filing of a certificate of obtaining the personal financial management course and facilitate the entry of an order of discharge in a case closed without a discharge order.

b. The motion to reopen must be accompanied by an appropriate filing

fee unless it is waived or deferred. Local Rule 1017-1.E.; Local Rule 5010-1.B. The fee is not required if relief is sought with regard to a violation of the discharge injunction, a determination of dischargeability or to correct an administrative error. Local Rule 5010-1.C.

c. A motion to reopen to add a creditor must be served upon the affected creditor along with a notice advising the creditor of the 30-day deadline for objecting to reopening or filing a complaint to determine dischargeability of the debt to be added to the schedules. Local Rule 5010-1.D., F.

B. Substantive Motions

1. Extension or Imposition of Automatic Stay

a. Contents of motion – the motion should advise the court of the number of previous cases filed by the debtor and pending within the one-year period which were dismissed, identify those cases by jurisdiction and case number, state the reason for dismissal of the prior cases and assert all facts relied upon to rebut any presumption of lack of good faith in filing. Local Rule 4001-2.B.

b. Service of motion and notice of hearing

(1) Must be served on all parties to be bound. Local Rule 4001-2.C.

(2) Case will be set for hearing on first motion docket after 14 days from the date of the filing of the motion. The movant must serve the hearing notice generated by the court. If an expedited hearing is sought, it must be requested by the movant. Local Rule 4001-2.D.

(3) Responses must be filed within 14 days of service.

c. Hearing

(1) Will be held regardless of whether an opposition to the motion is filed, unless an affidavit is filed and found to be satisfactory.

(2) Debtor or debtors should attend the hearing and be prepared to answer the court's questions or testify.

(3) Should be prepared to demonstrate that the problem causing the dismissal of the prior case has been resolved and provide any other facts indicating that the case is otherwise filed in good faith (e.g., substantial payment offered to creditors; plan payments assured by wage order).

(4) The court may grant the motion without a hearing if no opposition is timely filed, the debtor files an affidavit containing the facts upon which debtor relies to rebut any presumption for lack of good faith and the court determines the affidavit is satisfactory. If no order is entered within 48 hours of the scheduled hearing, the parties should appear as scheduled. If on a document separate from the motion, the affidavit must contain all of the facts relied upon to rebut the presumption rather than a mere incorporation by reference of the allegations contained in the motion.

2. Relief from Automatic Stay – Local Rule 4001-1.

a. Contents of motion. Local Rule 4001-1.B.

(1) Motions should indicate the balance due on the claim of the creditor as of the date of the filing of the petition.

(2) In a Chapter 7 case, if the motion is filed before the meeting of creditors, it must assert the value of the collateral securing the claim.

(3) In a Chapter 13 case, motions for relief based upon a payment default on a claim secured by real property must be accompanied by a detailed payment history on a form prescribed by the local rules.

b. Service of the motion and accompanying papers

(1) The movant must serve the notice of hearing and certify such service. Failure to do so may result in denial of the motion. Local Rule 4001-1.A.

(2) The trustee must be served with all documents supporting the motion. Local Rule 4001-1.F.

(3) Debtor's counsel and the trustee must be served with all documents evidencing perfection of the claimed security interest.

(4) With respect to deeds of trust, the movant may serve only that page or pages showing the recording information and the signature of the debtors. Full copies of the exhibits must be made available on request to interested parties.

3. Objections to Claims – Local Rule 3084-1.H., I., J.

a. It is the debtor's obligation to object to claims in Chapter 13 cases. Claims filed will be allowed unless objected to.

b. Form of objection

(1) Use of Local Form 3007-1.1 is encouraged, but not required.

(2) The objection must state some factual or legal basis for disallowance of the claim. Merely stating that appropriate documentation has not been attached or that the claimant has failed to respond to a request for itemization does not state a basis for disallowance of the claim.

(3) The objection must refer to the court's claim register number.

c. Service – the objection must be served upon the claimant, the claimant's attorney and the trustee.

d. Omnibus objections may be filed subject to the limitations of Fed. R. Bankr. Proc. 3007(d) and (e).

4. Motions for Payoff – Local Rule 3093-1.

a. Contents of motion – a motion requesting a payoff figure from the Chapter 13 trustee must be accompanied by the following information: the reason for the request for payoff; the source of funds to be used to payoff the Chapter 13 plan; the claims to be included in the payoff figure; the proposed percentage payment to unsecured claims and basis for any proposed payoff less than in full.

5. Motions to Borrow – Local Rule 3088-1.D.

a. Request to borrow must be made to the court if debtor seeks to borrow more than $2,500.00.

b. Contents of the motion – a motion to borrow must contain the

following information: the identity of the lender; the amount of the borrowing; the precise terms of the borrowing, including the periodic payment and interest rate; the purpose of the borrowing; and the impact of the repayment obligations on the debtor's ability to make payments under the Chapter 13 plan.

6. Motions to Suspend

   a. Motions to suspend should contain the following: (1) the precise number and amount of payments to be suspended; (2) the reason for the payment default; (3) a confirmation that the debtor is able to continue to make the payments going forward.

   b. The Court may be reluctant to grant a motion to suspend if it has granted numerous such suspensions in the past or if there have been multiple dismissals for failure to make plan payments and reinstatements.

   c. Anticipate the problems the motion to suspend may create. Be prepared to take necessary corrective action, such as amending the plan or increasing plan payments.

7. Motions to Retain Tax Refund

   a. If possible, the anticipated tax refund should be built in to the debtor's income as reflected on Schedule I and the Form 22C. In addition, expense amounts based on the debtor's experience in using tax refunds for deferred or extraordinary expenses should be reflected on Schedule J.

   b. A motion to retain tax refunds should include the following: (1) the source and amount of the anticipated refund; (2) a specific itemization of the proposed disposition of the funds, including the purpose and the amount of each expenditure and a detailed explanation as to why the expense is necessary and reasonable.

   c. The Court will ordinarily approve expenditures for unanticipated and out of the ordinary vehicle repairs and medical expenses and repairs to real property that affect the structural integrity of the property or the health and welfare of the occupants. Requests for other kinds of proposed expenditures should be accompanied by a brief explanation of the circumstances. Failure to do so will likely cause your motion to be set for hearing.

8. Lien Avoidance

a. Motions to avoid liens as impairing exemptions under § 522(f) should contain the following information: description of the property subject to the lien and its value; the identity of the lienholder and the amount of the claim; basis for the claim of exemption; a demonstration as to why the lien impairs an exemption claim in accordance with the formula set forth in § 522(f)(2).

b. Responses in opposition to motions to avoid liens should state specifically the reason why the lien is not subject to avoidance. If the respondent contends that the property is not exempt, the response should state why the exemption should not be allowed. If the respondent contends that the property is of a value sufficient that the lien may be retained without impairing the exemption, then the amount and basis for an alternative valuation should be stated. If the respondent contends that for some other reason the lien does not impair the exemption and is therefore not avoidable, it should be stated specifically.

9. Motions to Sell

a. Motion to sell property outside the ordinary course of business should contain the following information: (1) a description of the property to be sold; (2) the reason for the sale; (3) the identity of the purchaser and the relationship, if any, between the purchaser and the debtor; (4) sale price with some indication of the reasonableness of that price, particularly in relation to any previously scheduled value; and (5) the proposed disposition of the proceeds, including the payment of any commission, closing costs, debts and amounts to be retained by the debtor.

10. Dismissal or Conversion – Local Rule 1017-1.

a. Dismissal of cases under Chapter 7 or 11. Local Rule 1017-1.A.

(1) Must state reasons for dismissal, including the existence of any agreement between the debtor and any creditor or party in interest.

(2) Must serve notice of the motion on all creditors with 21-day objection period.

b. Conversion – Local Rule 1017-1.C.

(1) Must state reasons for conversion and state if case was

previously converted from another chapter.

(2) Notice of motion must be served by the debtor on the trustee, the United States Trustee and parties requesting notice. Creditors have 21 days to object to the motion.

(3) The above procedure is not applicable to requests to convert cases from Chapter 13 to Chapter 7. Such conversions are done by notice. The filing of the notice is the effective date of the conversion. Fed. R. Civ. P. 1017(f)(3).

11. Discharge – Local Rule 4004-4.

a. After completion of payments in a Chapter 13 case, the debtor must file a motion requesting the entry of an order of discharge, using Local Form 4004-4.1.

b. If no such request is filed, the case will, upon the filing of a final report, be closed without the entry of an order of discharge. The case must then be reopened and an appropriate reopening fee paid in order to obtain a discharge order.

C. Motions in Adversary Proceedings

1. Motions for Default Judgment

a. Contents – motions for default judgment should demonstrate the following: the plaintiff's entitlement to the relief requested; that proper service has been effectuated as required by Fed. R. Bankr. P. 7004; and that no timely response to the complaint has been filed.

b. Procedure – the motion must be filed with the court and served on the parties against whom default judgment is to be rendered. A proposed order must be submitted to the court. If damages are sought in an unliquidated amount, the court will enter an interlocutory judgment of default and set a hearing on determination of damages.

2. Motions for Summary Judgment – Local Rule 9013-1.H.

a. Contents of motion – by rule, a motion for summary judgment must contain an itemized statement of the alleged undisputed facts supporting the request for relief set forth in separately numbered paragraphs with references to the factual record supporting those assertions.

b. Contents of response – likewise, the response must identify in separately numbered paragraphs with references to the factual record, the facts allegedly in dispute. Facts in the motion will be deemed admitted unless controverted in the response.

c. Facts asserted in the motion or response must be supported by affidavits or documents or references to the record.

d. Schedule – a response to the motion for summary judgment may be filed within 21 days; 14 days thereafter a reply may be filed by the movant.

e. Timing – if possible, file the motion sufficiently in advance of the scheduled trial date to permit the briefing schedule to expire prior to trial. Otherwise, the court may decline to rule on the motion in advance of trial.

D. Replies to Motions

1. General Principles

a. Replies must respond to the substance of the allegations contained in the motion. Local Rule 9013-1.D. Failure to do so may result in the motion being granted without a hearing. This requires that factual assertions made in the motion be admitted or denied and that affirmative defenses be specifically pled.

b. Be as specific as possible about proposed solutions to problems raised in the motion. If possible, effectuate the proposed plan for resolving the issues raised by the motion prior to the hearing.

2. Motions for Relief From Automatic Stay

a. With respect to allegations of default, if the movant has complied with the rule requiring the submission of a post-petition payment history, the burden shifts to the debtor to demonstrate that payments have been made which are not reflected on the schedule. Be as specific as possible about such payments, including details such as dates and amounts.

b. If the debtor wishes to offer adequate protection, such proposal must be contained in the response to the motion. Local Rule 4001-1.E. If offering to cure defaults, be as specific as possible in the cure proposal with respect to both dates and amounts.

3. Motions to Dismiss for Default in Payment

a. A response to a motion to dismiss for default in plan payments should indicate why the payments are in default, demonstrate that the problem creating the default has been resolved and that the debtor is now in a position to continue the required plan payments, make a specific proposal for a cure of the default and demonstrate that the proposal is both reasonable and feasible.

b. If certain action is to be taken in response to the motion (such as suspension of plan payments), file the appropriate pleadings or take the appropriate action in advance of the hearing date on the motion to dismiss.

III. Small Business Chapter 11

A. Application for Retention

1. Counsel should file an application for retention immediately as the Court may not compensate counsel for time spent prior to the filing of such an application without extraordinary circumstances. The Court may not, pursuant to Rule 6003, enter an order any sooner than 21 days after the filing of the petition, but the Court will enter an order retroactive to the date of the filing of the application.

2. The Court will ordinarily authorize counsel to be paid on an ongoing monthly basis 80% of fees earned and 100% of expenses incurred, but a separate motion authorizing these monthly filings must be filed.

B. Use of Cash Collateral

1. A debtor may not use cash collateral without consent of every entity that has an interest in the collateral or an order from the Court. Unauthorized use of cash collateral may result in appointment of a trustee or a dismissal of the case.

2. Motions for authorization to use cash collateral should contain the following: (a) how much cash collateral the debtor proposes to use; (b) for what period of time the debtor proposes to use the creditor's cash collateral; (c) for what purposes the debtor proposes to use cash collateral (commonly reflected in a proposed budget attached to the motion); (d) the identity of any entities that have a claim to cash collateral; (e) any proposals for adequate protection of those entities' interest in the cash collateral. Common elements of adequate protection in cash collateral are limitations

on amount, time and purpose, as reflected above, as well as the granting of a replacement lien in cash collateral used and a requirement for monthly reporting.

3. The Court may permit the interim use of cash collateral on short notice, but may not conduct a final hearing on the use of cash collateral sooner than 15 days after the filing of the motion. Accordingly, final approval of the use of cash collateral requires two orders and possibly two hearings. Debtor's counsel must serve the persons identified in Rule 4001 and the motion must contain the information required by that rule.

4. Attached is an order approved by the Court and entered in a Chapter 11 proceeding which provides a good model for a proposed cash collateral order.

C. Bar Date

1. The Court does not ordinarily enter a bar date in a Chapter 11 proceeding unless requested to do so.

2. Requesting a bar date early in a Chapter 11 case is good practice so that the number and amount of claims can be identified. This may be essential for demonstrating feasibility if the plan proposes to pay a certain percentage of the filed and allowed amount of unsecured claims.

3. Attached is an order entered by the Court in another Chapter 11 proceeding which provides a good model of a bar date order.

D. Plan Formulation

1. Only the debtor may file a plan in the first 180 days after the filing of the case. Debtor must file a plan within 300 days of the filing of the case. Failure to do so can result in dismissal of the proceeding.

2. In a small business case, the debtor may file a combined plan and disclosure statement. A form of such combined plan and disclosure statement has been approved by the Court and is available on the Court's website. *See* Local Rule 3016-3.D. and MOW 3016-3.1.

3. The disclosure statement portion of the form should, among other things, contain historical income and expense information, a description of the financial results of the debtor while operating in Chapter 11, projections of income and expenses for the period of time over which plan payments are to be made, the amount of payments proposed to be made to classes under the plan, a balance sheet and an analysis of the value of the debtor's assets upon

liquidation and the likely distribution to creditors in the event of such a liquidation.

E. Plan Confirmation

1. The Court will ordinarily combine hearings on the disclosure statement and plan of reorganization and will issue an order upon the filing of those documents preliminarily approving the disclosure statement, setting a hearing on confirmation of the plan and establishing deadlines for the filing of ballots and objections.

2. Small business debtors are now subject to a deadline for obtaining confirmation. The Court must confirm a plan within 45 days of the date on which it was filed. Although this deadline may be extended, extensions are subject to strict limitations. *See* 11 U.S.C. § 1129(e).

3. Confirmation Hearing

a. Immediately before the confirmation hearing, debtor's counsel should file a summary of the ballots indicating the number and amount of claims accepting or rejecting in each class and identifying those classes which have accepted or rejected. Copies of the ballots should be available for inspection at the confirmation hearing.

b. Debtor's counsel should be prepared to submit evidence necessary to permit the Court to make the findings required by § 1129(a). In particular, if any individual creditor has voted against the plan, the proponent of the plan must demonstrate that that creditor would receive more under the plan than it would receive if the debtor were liquidated under Chapter 7 of the Bankruptcy Code. In addition, with respect to each class which has rejected the plan, a proponent must demonstrate the plan is fair and equitable in accordance with the requirement set forth in § 1129(b). Even in a case in which there have been no objections, the Court will require some evidence indicating that the debtor is capable of making the payments proposed under the plan and that the plan is therefore feasible and may be confirmed in accordance with § 1129(a)(11).

c. Be prepared to tender to the Court a proposed confirmation order. Any last minute agreements may be embodied in amendments to the plan made by interlineation in the confirmation order, assuming they are not material and do not require resolicitation.

Chapter One

How to Write:

A Memorandum from a Curmudgeon

To: New Associate
From: Curmudgeon

Welcome to the firm.

To work at this firm, you must know how to write. Here are the rules. Follow them.

I make three assumptions about all of your written work. First, it will contain no typographical errors. Second, it will contain no grammatical errors. Third, all citation forms will be correct. Please review your written work before you hand it to me to be sure that my assumptions hold true.

Style

Here are the rules of style. Follow them.

First, write in short sentences. If a sentence runs on for more than three and one-half typed lines, break the sentence in half. Make it two sentences.

Second, put two or three paragraphs on a typed page. If a single paragraph fills the whole page, break the paragraph in half. Make it two paragraphs.

Third, use only the active voice. At this firm, we write: "Jim threw the ball." Not: "The ball was thrown by Jim."

Fourth, when you have a choice, always use an action verb instead of the verb "to be" and an adjective. At this firm, we write: "The rule applies here." Not: "The rule is applicable here."

Fifth, start each paragraph with a topic sentence. This is important. Few people do it. You will do it. If you don't know what a topic sentence is, look it up. Now.

Sixth, use many headings and sub-headings to break up your memorandum or brief. Little pieces are easier to read.

Seventh, when you have a choice between using the word "which" and using the word "that," the word "that" is correct. (There are exceptions to this rule. Do not worry about them. If you follow my rule, you will be right 95 percent of the time. If I think that an exception applies, I will make the change.)

Eighth, do not start a sentence with the word "however." Re-write the sentence to put the word "however" in the middle of the sentence. (Again, there are exceptions to this rule. Do not worry about them. If you follow my rule, you will be right 95 percent of the time. If I think that an exception applies, I will make the change.)

Ninth, do not use the phrase "in order to." Use "to" instead.

Finally, it is *your* obligation to follow these rules. It is not my obligation to find your mistakes and fix them. You must develop the self-discipline to read your final work with an eye

toward finding and correcting each of the nine errors listed above.

I have a great deal of self-discipline. I will read your work and fix your mistakes. This, however, is not my job. It is better for your career if you fix your own mistakes; I do not enjoy fixing them for you.

Discussing a Case

When you are writing a legal memorandum for internal use, there is only one proper way to discuss a case. This is the way:

In *Smith v. Jones*,

1. Somebody sued somebody for something.
2. The trial court held something. (The trial court did not "discuss" something or "analyze" something or "believe" something; it *held* something. Ordinarily, a trial court grants or denies a motion, or enters a judgment. Use the proper verb to describe the holding.)
3. The appellate court held something. (Ordinarily, an appellate court will affirm, reverse, vacate, or remand. Use the proper verb to describe the holding.)
4. Now, you can say anything else about the case that you care to.

If you start chatting about the case before you have covered items 1, 2, and 3, I will notice your error. I will change your memorandum and make it right. I will know that you lack self-discipline.

Why do I insist on a rigid formula for discussing cases? Because my clients prefer to win.

When I discuss a case in a brief, I think carefully about the persuasive force of the precedent. I prefer to cite cases where the trial court did what my *opponent* is seeking here, and the appellate court *reversed*. By discussing the holding of that case in my brief, I tell my trial judge that he could do what the other guy wants him to do, but that the appellate court would reverse. Judges do not like to be reversed. Accordingly, if a precedent contains the implicit threat of reversal, I will use that threat (gently, of course) when I discuss the case in a brief.

The second most persuasive precedent is a case in which the trial court did what I am asking the trial court to do in my case, and the appellate court affirmed. In that situation, I am able to tell my trial judge that if he does what I am asking him to do, he will not be reversed. There is no implicit threat here, but there is at least a guarantee of affirmance.

The least helpful case is one in which a court simply discusses an issue in *dictum*. If that is the best case that you can find, I will cite that case in my brief. Beggars can't be choosers.

Your memorandum, however, *must* tell me the holding of the case first. If you do not tell me the holding in your memo, then I will not believe that you read and understood the holding. I will be forced to go to the library and read the case. I will not like this.

The Structure of a Brief

Any child can write a persuasive brief. Here's the magic formula. Follow it.

I. *Introduction*
An introduction contains one or two short paragraphs. It has no footnotes. It says something sexy about the case.

II. *Allegations of The Complaint* (in a motion to dismiss) *or*

Undisputed Facts (in a summary judgment motion) *or*

Facts (for most other briefs):
In short sentences, bring the reader up to speed. Include in your statement of facts every fact that you will later mention in your argument. Do not include facts that are unnecessary for your argument.

III. *Argument*
Our client is entitled to win for [three] reasons. First, [reason one]. Second, [reason two]. Third, [reason three].

A. *Our Client Should Win for Reason One*

The other guy falls prey to reason one. Our client therefore wins for reason one.

In this state, the rule is that litigants win for reason one. For example, in *Smith v. Jones* [discuss case, as per the formula above].

Similarly, in *Doe v. Doe*, [discuss case, as per the formula above].

[One sentence or paragraph explaining why our situation is indistinguishable.]

Therefore, our client wins for reason one.

B. *Our Client Should Win for Reason Two*

Etc.

When writing your argument, remember that we are practitioners, not academics. Your professors discussed cases because they found cases to be interesting. We prefer statutes or rules to cases. If there is a statute or rule on point, discuss it before you begin discussing the case law.

IV. *Conclusion*

For these reasons, this court should [grant our motion *or* deny the other guy's motion].

Put a date on it here. Otherwise, the certificate of service will get torn off sometime, and you (or some other person using the brief as a model in the future) will regret not knowing when the brief was written.

The Style of a Brief

There are matters of style unique to writing a brief. First, when writing a brief, avoid alphabet soup. Judges read many briefs every day. Most lawyers use alphabetical short forms for the

names of parties, statutes, and agencies. Those alphabetical short forms become meaningless after a judge has read the first twenty or thirty briefs. If ABC Co. thinks FDA regulation triggers MDA preemption in the U.S., then ABC Co. will lose. In this firm, we use words, not gibberish.

This rule applies in particular to selecting short forms for parties' names. Use words, not letters, as a short form. For example, "National Superior Fur Dressing & Dying Company" does *not* become "NSFDDC." This is gibberish.

There are exceptions to this rule. They include IBM, AT&T, GM, and VW. If I think that an exception applies, I will make the change. You use words, not letters.

When selecting the words to be used as the short form, think about the persuasive force of the words. For example, National Superior Fur Dressing & Dying Company could be shortened to "National Superior" if you would like the company to sound like a large corporation. On the other hand, the short form should be "Superior Fur" if you want the company to sound like a Ma-and-Pa outfit.

Second, unless court rules require otherwise, use the parties' names, not their status in litigation. Thus, we represent "Superior Fur;" we do not represent "the defendant." (Once again, there may be rare exceptions to this rule. We might represent "the defendant" rather than "Saddam Hussein." Again, you do not decide to use an exception. If one is appropriate, I will make the change.)

Third, use block quotations rarely, if at all. Your judge is busy. The judge's eye will naturally jump over a block quotation and go on to the next line of text. By including a block

quotation, you are inviting the judge not to read the critical quotation.

You can avoid block quotations by using quotations of fewer than fifty words. If necessary, use a quotation that is forty-nine words long. Then say: "The Court went on . . . ." Then use another forty-nine-word quotation. This will trick the judge into reading the quotation. This trick is not simply permitted; it is required at this law firm.

If you feel compelled to include a block quotation in a brief, assume that the judge will not read it. You must trick the judge into learning the content of the block quotation. You do this by summarizing the substance of the block quotation in the sentence immediately preceding it.

Thus, do not introduce a block quote: "In *Smith v. Jones*, the Court held: . . . ." Rather, introduce the quote: "In *Smith v. Jones*, the Court held that our client wins and the other guy loses: . . . ." By using this form, the judge will get your point even when he does not read the block quotation.

Fourth, use argumentative headings. "This Court Should Grant Summary Judgment Because There Is No Private Right of Action under the Federal Food, Drug and Cosmetic Act." Not: "The Relevant Provisions of the FFDCA."

Finally, keep the brief as short as humanly possible.

Those are the rules. Follow them.

We'll get along just fine.

Curmudgeon

Dicta

By Hon. Janice Miller Karlin

Yes, Goldilocks, Writing Well Really Does Still Matter

Hon. Janice Miller Karlin
U.S. Bankruptcy Court (D. Kan.); Topeka

Hon. Janice Miller Karlin is a bankruptcy judge for the District of Kansas. She is also serving her second term as a judge on the Tenth Circuit Court of Appeals BAP and is chair of the Administrative Office of the U.S. Courts Bankruptcy Judges Advisory Group.

When I first became a bankruptcy judge in 2002, there was no electronic filing in the District of Kansas. That meant that every afternoon, the clerk's staff would bring me a rolling cart full of case files, with paper orders attached that had been prepared by one of the attorneys in the case. I really believed that if I signed an order with a typographical, syntax or grammatical error, and that order was appealed, the Tenth Circuit judges who had just seen fit to appoint me to a 14-year term would think less of me when they reviewed my order.

Using my blue pen, I would thus draw a caret (an upside down "v" for those of you who did not have Mr. McKinney for ninth grade English) to include a missing character, or punctuation mark, letter or word, or put a line through a misspelled word and write in the correct spelling, or just add language to complete what I thought was an unacceptably abbreviated order. I mentioned to the bankruptcy judge that I had just replaced — Judge Julie Robinson, who had been named a district court judge — that I was bothered by this fraction of the written work product I was receiving. I lamented that it took too much time to make these corrections. She quickly told me that I needed to "get over it," explaining that everyone knew I had not drafted these orders, the appellate judges would not be confused by that, and that my edits would not make better writers or proofreaders out of those attorneys who submitted these sloppy pleadings. While it hurt to sign my name to these orders, I knew she was right. I stopped editing all but the most unacceptable orders, so long as the findings/holdings were essentially correct.

Fast forward 12 years. I now receive all orders via CM/ECF, which allows me to insert, at the top of the page, about 100 characters worth of edits. I routinely use it to set exact dates for hearings being continued, add a missing word, qualify an order or gently educate an attorney that the motion is unnecessary.[1] I have found this to be much more expedient than requiring a case administrator from the clerk's office to return the order to the submitting attorney and explain why it is being returned, receiving the replaced order, reviewing the replaced order, trying to remember why I needed to have the order replaced, etc. However, I still wonder if the ol' blue ink method wasn't more effective in putting attorneys on notice that the work product was noticeably less than acceptable. I also wonder if just signing orders that contain such errors — out of expediency because the basic holding is mostly correct — sends the message that I do not appreciate good writing and proofreading, or that somehow these skills are no longer important. These skills are still very important.

Recent Examples

Much like Goldilocks in the story of *Goldilocks and the Three Bears* — although my locks are far from golden — I like pleadings that are not too long and not too short, but just right. I don't need the formality or legalese of "being otherwise well and duly advised in the premises," or "heretofores," or "based on the stated premises following," or being told that the application for compensation is "in the official court docket of all filed pleadings" or that the debtor's attorney "appears in her own person" (who else's person would she be appearing in?).

Like all judges, I read and sign dozens of routine orders daily, and the prize goes to the attorneys who draft tight orders using plain English with a cogent "It Is So Ordered" clause so everyone knows what I'm ordering. Admittedly, a tight order can only follow when it has been preceded by a tight motion or complaint that tells me (and, more importantly, any party who might be prejudiced by entry of an order) what relief is being sought and the facts and law that support that relief.

Too Short

While I like short and well-drafted motions, I will be the first to admit that there can be "too much of a good thing." I often see motions that are simply too brief. An example is a motion to shorten a required notice period. For example, Federal Rule of Bankruptcy Procedure 2002(a)(5) provides a 21-day notice to object to a plan modification. I receive motions to reduce the objection time to 10 or 14 days with some regularity where the only basis stated for the shortening notice is that "time is of the essence." OK, I get that. I must admit that I do then expect the next sentence or phrase to tell me

1 For example, Kansas state law provides that a judicial lien does not attach to homestead real estate. For that reason, there is no reason to file motions to avoid a judicial lien against homestead real property in Kansas under 11 U.S.C. § 522(f)(1)(A). In my quest to educate the bar about this settled case law, I often add text such as "I sign this as a 'comfort' order only, because the order is unnecessary under Kansas law. *See Deutsche Bank Nat. Trust Co. v. Rooney*, 39 Kan. App. 2d 913, 917 (Kan. Ct. App. 2008) (holding judicial lien does not attach to homestead property)." My "educational efforts" on this subject have had mixed results.

why time is of the essence. Without it, I do not think that I should exercise my discretion to reduce the time limits contained in Rules that have gone through the lengthy rulemaking process and have thus been approved by everyone and their uncle, including the U.S. Supreme Court.[2]

"Dead Wrong" Is Also Too Short

Debtors' counsel responded to a rather detailed motion to dismiss a chapter 13 case with this single sentence: "COME NOW debtors and object to the motion to dismiss and show that the Trustee is dead wrong in the position [that] he has taken and debtors will soon show same." And that was it; you just read 100 percent of the response to the trustee's motion. Obviously, that response did not permit the trustee to prepare for the hearing where the motion was to be heard, nor could I research the issues to give me a head start on knowing how to next proceed. Neither of us had been given the benefit of knowing what factual or legal bases the debtors intended to assert to show that the trustee was "dead wrong." Like the too-cold porridge, this pleading did not satisfy.

Pleadings Also Need Not Be Too Long

I often receive motions to abate payments in chapter 13 cases, which is just the terminology used in this district to forgive a missed payment and tack it onto the end of the plan. The orders granting them usually consume about a page of text, and that is typically all that the trustee or I need in order to convey why the payment was missed and how the missing payment will be treated. However, some attorneys go on for three pages, repeating themselves and including redundant information. It costs them or their client money to mail these longer documents to the matrix, and it does not result in a better result for the client.

An order I signed recently provided that the court would sustain the "debtor's motion to amend plan post-confirmation [Doc. 47], and grant [the] debtor's application for compensation for services provided and expenses incurred in post-confirmation matters." So far, so good. It then added immediately thereafter that the "Debtor's motion to amend plan post-confirmation is titled: 'Debtor's Second Motion to Amend Plan Post-Confirmation in Addition to Debtor's Attorney's First Application for Compensation Filed Post-Confirmation,'" finally concluding that the "Chapter 13 plan is amended per provisions of the motion as set forth following in this Order." I do not need to know the title of the pleading if the contents of the order already provide the essence of that title, as it did here. As I write this example, my complaint seems a bit petty, but multiply that times hundreds of these a year, and the unnecessary length becomes more problematic for both the trustee who has to approve these orders and for me. The porridge here? It's too hot.

Precision Matters: Part I

An individual debtor recently asked me to deem a lease as terminated as of the date that he filed the motion to terminate the lease. He properly notified the lessor of the relief being sought, and the lessor did not object. However, when I received the default order, the debtor's language had morphed into terminating "its" lease, not "his" lease. The individual debtor was the president of a corporation that had not filed for bankruptcy, and this language change appeared to be an attempt to instead terminate the lease as to the corporate entity, even though the corporation was not the debtor. I soon learned that there was no intent to pull a fast one, only that the attorney had not done a good job of proofreading his order. Like proofreading, possessive pronouns still matter.

Precision Matters: Part II

Judges trust lawyers to include in orders granting the relief sought in an unopposed motion only the relief originally sought in that motion, unless the change is favorable to the opposing party (*e.g.*, granting more time for compliance than the motion sought). I recently received an order requiring an insurance company, which had not been notified of the motion, to pay a precise amount to a lienholder. Something about the order just did not seem right; it granted much more relief than I typically see in similar motions. I decided to read the motion more carefully.

The motion was silent about the amounts to be paid, but more importantly, it contained the name of an entirely different creditor that should receive the insurance proceeds. I returned the order, noting the inconsistencies and the lack of notice to the insurance company. The attorney had simply made an error on the creditor's name, but also had apparently realized that his original motion simply did not cover as much ground as he needed. When that happens, the attorney has two choices: (1) obtain the consent of the impacted party on the order, or (2) amend and renotice the motion. Option three — submitting an order containing relief not sought in the motion — is not a permissible choice.

Punctuation? I Still Like It!

As it turns out, apostrophes matter to me. I get orders with this kind of language almost every day: "The courts reaffirmation hearing." But there was only one court that conducted the noted reaffirmation hearing. This "courts" and not "court's" was in the body twice, and in the title of the pleading once, so this was not a typographical error. This was either a staff person who does not understand apostrophes, a lawyer who did not proofread the document before uploading it, or a lawyer who doesn't understand apostrophes. I do not like any of these three alternatives. Here are a few more:

"Debtor's had to surrender one of their two cars due to cost..."

"It's position is unsupported."

"Your late."

All of these examples show the lack of clarity that results from the simple misuse of an apostrophe.

Proofreading: I Still Like It, Too!

I get it; I know that filing routine pleadings in the court where I sit is not equivalent to filing a *cert* petition with the

continued on page 62

2 *See* U.S. Courts, "About the Rulemaking Process," *available at* www.uscourts.gov/rulesandpolicies/rules/about-rulemaking.aspx (last visited Sept. 22, 2014) (stating that "[f]rom beginning to end, it usually takes two to three years for a suggestion to be enacted as a rule," and providing links to explanations of the rulemaking process).

Dicta: Yes, Goldilocks, Writing Well Really Does Still Matter

from page 35

Supreme Court. And I promise I do not expect that perfection; you certainly don't always get perfection when you read my decisions. However, I think any pleading filed in any court deserves at least a spell-check. Now, I am admittedly reticent to suggest that lawyers (and judges) should spell-check their pleadings before signing them, lest they think spell-checking is the equivalent of proofreading. We all know that spell-check is notoriously bad at missing misspelled or incorrectly used words,[3] but I do recommend the consistent use of spell-check as a nice start. I think its use might have prevented the pleading with this sentence from being filed: "Accordingly, no mnies ahll be paid to general unsecured creditors...."

When I reviewed the order containing this language, it reminded me of those puzzles where they ask if you can read a paragraph when most of the letters are jumbled, or the vowels have been removed.[4] As it turns out, I can. But you should not ask me to! Your name is on the pleading, your client is going to see it, and judges form opinions, correctly or not, that your written work reflects your knowledge and skill level. Practicing law is not a game to see whether your judge has these cognitive skills.

Conclusion

Your written-word product conveys a message to the judge, your client and opposing counsel about you. It reveals whether you have basic English skills, but just as importantly, it reflects whether you care about your work product. So repeat after me: "Not too long, not too short." "Punctuation is still good." "Proofreading is beloved." I promise that the judges before whom you appear will appreciate it if you really believe what you have just repeated. abi

3 Here are just a few examples where spell-check will not save you: (1) homonyms ("there" instead of "their" or "they're"), (2) usage errors such as "its" and "it's" (see above) or "affect" and "effect," and (3) simply wrong words such as "untied" instead of "united" or "casual" instead of "causal."

4 Chris McCarthy, "Can You Read This?," English Language Schools, Oct. 19, 2008, *available at* www.ecenglish.com/learnenglish/lessons/can-you-read (last visited Sept. 22, 2014) (citing the following example: "I cnduo't bvleiee taht I culod aulaclty uesdtannrd waht I was rdnaieg. Unisg the icndeblire pweor of the hmuan mnid, aocdcrnig to rseecrah at Cmabrigde Uinervtisy, it dseno't mttaer in waht oderr the lterets in a wrod are, the olny irpoamtnt tihng is taht the frsit and lsat ltteer be in the rhgit pclae. The rset can be a taotl mses and you can sitll raed it whoutit a pboerlm. Tihs is bucseae the huamn mnid deos not raed ervey ltteer by istlef, but the wrod as a wlohe. Aaznmig, huh? Yaeh and I awlyas tghhuot slelinpg was ipmorantt! See if yuor fdreins can raed tihs too.").

TOP 10 GRAMMAR AND PUNCTUATION ERRORS TO AVOID IN YOUR WRITING

Betsy Brand Six – University of Kansas School of Law

Error #1: **Confusion of *it's* and *its* (**or **Proofreading problems, part I)**

While all nouns form their possessive in English with an apostrophe, English possessive pronouns do not. Thus we have *hers*, not *her's*; *his*, not *his's*; *theirs*, not *their's*; *yours*, not *your's*; and *its,* not *it's*. *It's* does exist in English, but as a contraction of *it is* or *it has*, not as the possessive form of *it*. Note that in legal writing you should not use contractions (Little Book, p. 10), so you should not use *it's* but rather *it is* or *it has*.

It's generally accepted that the court exceeded *its* authority.
It is generally accepted that the court exceeded *its* authority.

Error #2: ***Their* and *they* as singular pronouns (**or **Pronouns that disagree with their subjects, part I)**

These sentences may be politically correct, but they're grammatically problematic:

No one in their right mind would pay so much for that computer.
When a person has done wrong, they should go to jail.
Has anyone lost their ticket?

Error #3: **Confusion of *affect* and *effect***

Effect is most commonly used as a noun meaning result or the condition of being in force. Affect is most commonly used as a verb meaning to influence. When used as a noun, affect means feeling and the emphasis is on the first syllable. When used as a verb, effect means to cause to come into being or put into effect.

The termites had a startling *effect* on the piano. (noun)
The problem *affect*ed Lucia's recital. (verb)
But,
Guinea pigs display a lack of *affect*. (noun)
The duty of the legislature is to *effect* the will of the citizens. (verb)

Error #4: **Dangling/misplaced modifiers**

Note the logical dislocations in the following sentences:

Needing a heroin fix badly, the transaction was too much to resist.
(Who needed the heroin fix?)
Having served 15 years in prison, the court should release Olson.

(Who served 15 years in prison?)
Roger Clemens was questioned by lawmakers on steroids. (actual quote from CNN.com)
(The lawmakers are on steroids?)

Error #5: Confusion of *that* and *which*

That introduces a restrictive clause (i.e. one that is necessary to the meaning of a sentence). Which introduces a nonrestrictive clause (i.e. a clause that is not necessary to the meaning of the sentence and that can be omitted without changing the meaning of the sentence). Which is frequently used when that is intended.

My *car, which was brand new, was damaged in the collision.*
The car that was damaged in the collision was my car.

Error #6: Nonparallel sentences

When a sentence includes a conjunction (and, but, or, etc.), phrases joined by the conjunction must have a similar (parallel) grammatical form (nouns must be matched with other nouns, verbs must be matched with verbs of the same tense, etc.). You can often make a sentence parallel by beginning each phrase with the same word.

Compare: *I came, then I was seeing, after which I engaged in conquering.* (nonparallel)
With: *I came, I saw, I conquered.* (parallel)

Compare: *Ted loves reading, writing, and research.* (nonparallel)
With: *Ted loves to read, write, and research.* (parallel)

Compare: *The defendant is a competent lawyer with over thirty years of experience and who is respected in the local legal community.* (nonparallel)
With: *The defendant is a competent attorney who has over thirty years of experience and who is respected in the local legal community.* (parallel)

Compare: *The defendant claimed the evidence was prejudicial and that it lacked relevance.* (nonparallel)
With: *The defendant claimed the evidence was prejudicial and irrelevant.* (parallel)

Error #7: Confusion of plurals and possessives and prominent homonyms (or **Proofreading problems, part II)**

*The tree fell on the doctor's (*not *doctors) car while she was in the hospital.*

*Which of the Iowa Supreme Court Justices (*not *Justice's or Justices') lives farthest from Des Moines?*

They're planning to voice *their* opinions from that soapbox over *there*.
Who's asking us to tell them *whose* jacket that is?
You're sure this animal is *your* dog? Then the fleas are also *yours*.

Error #8: Pronouns that disagree with their subjects, part II

(Use *it* with court and company, *they* with courts and companies; with justice/justices use *he* or *she*/*they*.)

The dissenting *justices* argued for a more stringent standard. *They* wanted a three-part test.

When the *court* ruled for the plaintiff, *it* made a big mistake.

The *company* announced *it* had lost millions of dollars last year instead of enjoying a profit, and *it* is now the subject of a government probe.

Error #9: Ambiguity with definite demonstrative pronouns

Avoid using *it*, *this*, *that*, or *such* and *which* as a pronoun to refer back to a fact or concept, as the reference is not always clear: "The rule of strict liability has strong acceptance in this state, although the rule was eroded by the *Smith* decision. *This* is disturbing."

Does *This* refer to the rule or the fact that the *Smith* decision eroded the rule? Unless the reference is clear, add a noun or explanation: "*This departure from the rule* is disturbing."

Error #10: Comma, semicolon and colon usage

The following explains when a comma, semicolon or colon should be used. [1]

Use a comma in the following instances:

1. Use a comma after the salutation of an informal letter and after the closing of any letter
   a. Examples:
      i. *Dear Bill,*
      ii. *Sincerely,*
2. Use a comma between the day of the week and the date and between the date and the year (but not between a month and the year). Place a comma after a full date when it appears within a sentence.
   a. Examples:
      i. *The trial will begin on Monday, September 8, 2003, and will conclude in January 2004.*
3. Use a comma between parts of an address and after the address when the address is written in a sentence.
   a. Examples:
      i. *I live at 421 Maple Court, Lawrence, Kansas 66044, and have lived there for seven years.*

[1] Adapted from Bouchoux, Deborah E., Aspen Handbook for Legal Writers: A Practical Reference (2005).

4. Use a comma to separate digits.
    a. Example:
        i. *The transcript is 4,312 pages*
    b. Note: The Bluebook says to include the comma only if the number contains five or more digits.
5. Use a comma to separate items in a series of three or more items.
    a. Examples:
        i. *I leave all of my property to Jim, Helen, Tim, and Eva.*
6. Use commas to enclose a phrase that explains the noun it follows.
    a. Example:
        i. *John Smith, the noted attorney, argued the case.*
7. Use a comma before and after most quotations; use a comma before and after quotations beginning or ending with words such as he said, she stated, etc.
    a. Examples:
        i. *She said, "I saw the color of the light."*
        ii. *"I saw the color of the light," she said.*
        iii. *"The decision of the lower court if reversed," stated Judge Jones, "and the case is remanded."*
8. Use a comma to set off introductory material (the phrase before you get to the subject) in a sentence.
    a. Examples:
        i. *According to the Plaintiff, the accident occurred at night.*
        ii. *Unfortunately, his performance did not improve.*
    b. The comma can be omitted when the introductory clause is short.
        i. Example:
            a. In June I will begin trial preparations.
    c. Use a comma to set off an introductory dependent clause but not a dependent clause elsewhere in the sentence.
        i. Example:
            a. Because there is a material factual dispute, Defendant is not entitled to summary judgment.
            b. Defendant is not entitled to summary judgment because there is a material factual dispute.
9. Use commas to set off transitional expressions such as however, therefore, additionally, etc.
        i. Examples:
            a. The jury, however, voted to acquit the defendant.
            b. Therefore, the motion should be granted.
10. Use a comma to separate two or more adjectives that equally describe the same word (the word and could be used to join the adjectives).
    a. Example:
        1. *Allison was a fearful, anxious witness. (Allison was a fearful and anxious witness)*
11. Use commas to separate a phrase that shows contradiction.
    a. Example:
        1. *It was the Plaintiff, not the Defendant, who failed to attend the hearing.*

12. Use a comma to separate two independent clauses linked by a coordinating conjunction such as and but, for, not, or, so or yet.
    a. If each clause is a complete sentence, i.e. it has a subject and verb, then a comma is needed (unless the clause is less than five words)
        1. Examples:
            a. The plaintiff intended to amend the complaint, but the statute of limitation had expired.
            b. The door closed and we left.
    b. If the second clause is not a complete sentence (i.e. it is a dependent clause), then do not include a comma.
        1. Example:
            a. *The directors voted on the measure and refused to reconsider it.*
13. Use commas to set off nonrestrictive phrases.
    a. A nonrestrictive phrase contains information that is not essential to the meaning of the sentence. It can be removed without removing meaning.
        1. Examples:
            a. *XYZ Corp., which was bankrupt, merged with ABC Inc.*
            b. *My oldest son, Sam, has blond hair.*
    b. A restrictive phrase limits or restricts the information previously given in the sentence. The phrase cannot be removed without loosing meaning.
        1. Example:
            a. *The corporation that was bankrupt merged with ABC Inc.*
            b. *My son Sam has blond hair.*

Use semicolons as follows:

1. Use a semicolon to connect two independent but related clauses that are not joined by a coordinating conjunction, although they may be joined by a transitional word or phrase, such as however, for example, or therefore.
    a. Examples:
        i. *That was his final summation; it was strong and forceful.*
        ii. *The defendant was not credible; therefore, the jury voted to convict her.*
        iii. *The attorney argued persuasively; however, the judge overruled her.*
    b. Note that in the last example, replacing the semicolon with a comma creates a run-on sentence:
        i. *The attorney argued persuasively, however, the judge overruled her.*
        ii. However is not equivalent to a coordinating conjunction such as and or but. Either use a semicolon to signal the end of one independent clause and the beginning of a separate independent clause or separate the run-on sentence into two complete sentences.
        iii. *The attorney argued persuasively. However, the judge overruled her.*
2. Use a semicolon to separate items in a list containing commas or to separate items in a list introduced by a colon.
    a. Examples:
        i. *Standing trail for embezzlement were Connie Rivers of Portland, Oregon; Samuel Walter of Seattle, Washington; and Susan Stone of Boise, Idaho.*
        ii. *The elements to be proven in an action for breach of contract are as follows: the existence of a contract; the unjustified breach of that contract by one party; and damages caused by that breach*. (Note that these items

can also be separated by commas.)

Use colons as follows:

1. Use a colon after a salutation in a formal letter and to separate minutes from hours.
    a. Examples:
        i. *Dear Mr. Jones*:
        ii. *The hearing ended at 5:30 p.m.*
2. Use a colon to introduce a list, especially after expressions such as *the following* or *as follows*.
    a. What precedes the colon must be an independent clause (or complete sentence). This is a commonly violated rule.
    b. Example:
        i. *The defendant asserted the following three defenses: waiver, estoppel, and acquiescence.* (Note that these items can also be separated by semicolons.)
        ii. *The defendant asserted three defenses: waiver, estoppel, and acquiescence.* (Note that this version is more concise.)
3. Use a colon to signal that clarifying information will follow.
    a. Example:
        i. *We have instituted the following new policy: Goods may not be returned after ten days*.
    b. If the material following a colon is not a complete sentence, it should begin with a lowercase letter.
    c. If the material following a colon is a complete sentence, it may begin with either a capital letter or a lowercase letter. Many experts prefer to use a capital letter.
4. Use a colon to introduce a formal or long quotation.
    a. Example:
        i. *The court ruled against the defendant in unequivocal terms: "Liability is based upon this act of gross negligence."* (Note that most quotations may also be introduced by a comma.)