

Concurrent Session

That's Good Advice:
Legal Writing
and Oral Argument

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Grand Rapids

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Detroit

**Educational
Materials**

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That's Good Advice: Legal Writing and Oral Argument

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and

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**ORAL ARGUMENT: THE ONE TIME YOU
HAVE THE JUDGE'S UNDIVIDED ATTENTION**

1. Organizing your thoughts.
 - a. Advance preparation is mandatory.
 - b. Using written outlines.
 - c. Highlighting controlling law.
 - d. Clearly stating the relief you are requesting.
2. Understanding your objective at oral argument: what are you trying to accomplish?
 - a. Persuading the Judge to grant or deny the relief in question.
 - b. Emphasizing the key points in your brief.
 - c. Responding to arguments in opponent's brief.
 - d. Shoring up vulnerable areas in your position.
 - e. Be an advocate.
3. Keeping it simple
 - a. Be brief.
 - b. Avoid reading or repeating your entire brief.
 - c. Avoid long discussions of case law that are best covered in your written brief.
 - d. On rebuttal, avoid repeating your entire arguments that you've already made.
4. Hitting curveballs.
 - a. Handling questions from the Court that may disrupt your flow, and getting back in your argument.

- b. How to respond to questions that seem irrelevant.
 - c. Thinking on your feet: sensing what is important to the Judge by listening and then adjusting your arguments accordingly.
5. Professionalism and civility.
- a. Avoid interrupting opposing counsel and Judge.
 - b. Avoid personal attacks on opposing parties and counsel.
 - c. Body language and facial expressions.

**LEGAL WRITING:
CASUAL OBSERVATIONS FROM A READER**

1. General Principles

a. Identify the Speaker

Lawyers and the public may think of a lawyer as little more than a client's "mouthpiece," implying that the client is always the speaker. This is not, however, invariably true.

In briefs, for example, a lawyer is to some extent expressing the client's point of view, but to some extent the brief is one part of a conversation between the lawyer and the court. Lawyers, however, sometimes draft affidavits for witnesses, and in that instance the speaker is the witness. And, from time to time, lawyers draft proposed orders or findings of fact, and of course the speaker is the court.

Each of these speakers has a separate purpose in communicating, so the lawyer as drafter must be mindful of these goals.

b. Identify the Audience

It is always useful to keep in mind the intended audience, and not to assume that the audience is obvious. For example, in a motion or brief before the bankruptcy court, the bankruptcy judge is obviously a member of the audience, but by no means the only member. The judge has a law clerk who, depending on the individuals, may be more or less involved in the decision process.

In addition, although lawyers necessarily focus their attention on the trial court, they must also keep in mind that an appellate court may at some point join the audience. This is important for purposes of preserving arguments and issues on appeal, and more generally persuading this possible, ultimate decision maker who may be called upon to review the record.

Legal briefs also present an opportunity to send a message to your adversary, pointing out the fallacies in opposing arguments, weaknesses in expected proofs, or other shortcomings.

The lawyer should, of course, count the client among likely audience members. It is natural to expect that the client will read the lawyer's work product, and form

opinions about the lawyer's skills as attorney and counselor, based on her skills as drafter or author.

A final point, dictated more by technology than anything else: sometimes it is impossible to know or predict who will be in the audience. For example, an email to opposing counsel or a client or witness may find its way into a brief or become an attachment to a motion. Civility should be the order of the day in all writings if for no reason other than the fact that disclosure to third-parties may be possible in the age of instant communication.

c. Writing Forces Organization

Some courts require written pretrial statements, trial briefs, and similar writings not as a matter of custom or habit, but because putting pen to paper forces lawyers to think about their cases and their arguments. The exercise of writing is a crucial step in forming one's litigation strategy. It might make sense not to wait for court-ordered writings such as briefs, pretrial statements, trial memoranda or other court filings, and instead take the initiative by crafting a file memo or memo to the client outlining the issues and arguments.

d. Typography

Be sensitive to the appearance of your page. A big, dull block of uninterrupted text may land at the bottom of the pile on the desk of a busy jurist. Use paragraphs wisely, add headings, bullets, block quotes, and other devices easily inserted with modern word processing to give your page an inviting affectation. No one wants to stare at a tombstone.

2. Affidavits & Declarations Under Penalty of Perjury

a. Fed. R. Bankr. P. 9017 and Fed. R. Civ. P. 43(c)

Every request for an order takes the form of a motion, and every motion should have an evidentiary foundation. Too often, lawyers file motions consisting of nothing more than the lawyer's statements about what should occur, and why, without offering any support in the record.

Bankruptcy Rule 9017 incorporates Civil Rule 43(c), which provides that "when a motion relies on facts outside the record, the court may hear the matter on affidavits . . ." Most motions rely on facts outside the record. Consider, for example, motions for relief from stay or to avoid liens, where issues of property

value and loan balances come into play. Motions require evidentiary support, and a well-drafted affidavit can do the trick.

It is easy to put words in a witness's mouth by drafting the affidavit (or affirmation described below). Take care, however, to pick the affiant wisely because he or she must still have personal knowledge, and must be willing to suffer the penalties of perjury of the statements the lawyer drafts.

b. Solemn Affirmation

Federal law authorizes a convenient alternative to the affidavit -- a solemn affirmation under penalty of perjury -- without the hassle of running to the bank to button-hole a notary public. *See* 28 U.S.C. § 1746; *see also* Fed. R. Bankr. P. 9017 (incorporating Fed. R. Civ. P. 43(b)).

Counsel should consider drafting declarations for their clients or witnesses, when evidentiary support is necessary in connection with a motion or other contested matter. Section 1746 can transform mere *ipse dixit* writings into evidentiary support for relief simply by framing the writing as a declaration from someone with personal knowledge, and punctuating it with the following magic words or words to similar effect:

I declare under penalty of perjury that the foregoing is true and correct. Dated October 8, 2010 at Kalamazoo, Michigan

28 U.S.C. § 1746. The statute prescribes a slightly different form of “jurat” for declarations made outside the United States.

3. Writing Briefs and Motions

a. Role of Each Document

i. The Motion

A request for an order is called a “motion,” and motions are usually in writing. *See* Fed. R. Bankr. 9013. The role of the document we call a “motion” is to advise the court about the nature of the controversy, the relief requested, the factual basis for the relief, and perhaps a summary statement of the applicable statutes or other authorities.

It is usually helpful to separate the “motion” from the brief in support of the motion, so the court can quickly locate pertinent information and types of information. Rather than including elaborate legal arguments, the motion should be a concise summary of the request for relief, and should function as the means for getting the factual support before the court, by way of affidavit, deposition excerpts, documentary attachments, and so on. Generally, the motion should be in paragraph form, with each paragraph separately numbered, in much the same way as a complaint.

Though a motion is similar to a complaint, a response to a motion ought not take the form of an answer, with the cursory “admitted,” “denied,” *etc.* Such terse responses are helpful in the pleading context, but are not especially helpful in motion practice, where the court is considering a more limited request for an order in a much more compressed timeframe. The response to a motion, like the motion itself, should give the procedural and factual setting, but of course from the non-movant’s viewpoint. Like a motion, a response may attach affidavits, declarations, exhibits or other materials germane to the relief requested.

In short, legal argument belongs not in the motion or response itself, but in a supporting or opposing brief. This way, the court will know where to turn for different types of information about the controversy.

ii. Brief in Support

Having scrubbed the motion of most legal argument, the moving party is ready to write the supporting brief. Unlike the motion, which usually should take the form of numbered paragraphs akin to a complaint, the brief should be more narrative, and should of course supply the statutes, rules, cases, learned commentary, and other authorities in support of the relief requested. Think of the brief as one of the few permissible opportunities to engage in an *ex parte* communication with the decision-maker, free of the distractions and interruptions that your opponent will likely offer if you get to oral argument. Remember, too, that in some jurisdictions or on some occasions, the court may not permit oral argument. Your brief is the only sure-fire instrument to get your authorities -- and your story -- before the court.

- Tell Your Client’s Story
- Teach, Don’t Preach

- Consider how you label the actors (“Plaintiff” versus “National City” versus “Creditor”)
- Know your decision-maker – Does she prefer the forest or the trees?
- Know your jurisdiction and controlling authority
- Summarize and explain cited authority
- Pick the winning arguments, and discard the losers – don’t gum up your brief with every conceivable argument, as this undermines your credibility
- Present arguments from strongest to weakest
- Acknowledge weakness – this is a sign of strength
- Avoid mindless string-citing
- Keep in mind any limits on jurisdiction and authority
- Make less accessible authorities (*e.g.*, commentary or perhaps unpublished slip opinions) more accessible by including them in an appendix
- Avoid *ad hominem* arguments

4. Proposed Findings of Fact and Conclusions of Law

Some courts require counsel to submit proposed findings of fact and conclusions of law. Although you cannot reasonably expect the court to adopt your submission word for word, proposed findings serve important purposes for the court and counsel, both. For the court, the document can provide direction; for counsel, discipline.

Identify the elements that you need to prove, and list them. With word processing software, revision is easy, so make a list and fill in the gaps with references to testimony and exhibits that you expect to introduce. This exercise will help you better understand your case, and identify gaps to fill before trial.

It makes sense not to leave this task to the last minute. Perhaps you can develop the findings of fact and conclusions of law as the case progresses, revising it along the way. It might be a useful tool even if you never get to trial.

Make sure your conclusions of law correspond to your findings of fact, perhaps by cross-referencing exhibits or anticipated witness testimony. Even if the court does not adopt your findings of fact wholesale, you have drawn a roadmap to recovery that you can use at trial, and perhaps the court can use after trial to rule in your favor.

5. Plan-related Drafting

a. Plans & Amendments

Most consumer practitioners confronting plan-drafting issues do so in the context of Chapter 13, wage-earner reorganizations. In such cases, the Chapter 13 Trustee is, initially at least, the principle member of your audience.

Know your trustee, and use his or her preferred plan. There is usually no need to re-invent the wheel, and the plan is no place for pride of authorship or displays of legal insight. If you have something special to add, tack it on to the end of the trustee's preferred plan in a special, easily-identified section.

If you insist on drafting your own, the plan should read like a piece of private legislation, with provisions directly authorizing or prohibiting specific actions. Anticipate routine objections from the usual suspects. The plan is not the place to pull a fast one by inserting a controversial provision and hoping your audience (the court, creditors) is asleep in their seats. It is better to flush out controversies on the front end, especially regarding liens and title issues, rather than have to fight on the back end. To mix metaphors, it is better to flush out the fox in the field than be bitten by the snake in the grass.

Amendments should dovetail with the plan. For example, use the language of legislation: "notwithstanding paragraph 2(c), the debtor may . . ." or "Paragraph 2(c) in the Plan filed with the court on August 30, 2010 is stricken in its entirety and restated as follows: . . ."

When drafting multiple amendments, take care not to create future problems of interpretation. For example, if the *second* plan amendment includes a boilerplate integration clause such as "except as provided in this amendment, the plan as originally filed shall control," this may erase important provisions in the first amendment, perhaps inadvertently. This is a classic problem of using piecemeal amendments, and may counsel in favor of amending the plan simply by restating it, in full, with all necessary changes. The restatement approach has the additional advantage of permitting parties to consult a single document to determine their rights and obligations, rather than several perhaps inconsistent documents.

Avoid creating a new problem while endeavoring to fix an old one. So, for example, if the secured creditor is correct that the mortgage payment is actually

\$300 higher than your plan proposes, and if plan proposes to pay the creditor through the trustee, make sure you don't omit amendatory language adjusting the plan payment as well as the mortgage payment. Similarly, if the amendment proposes to surrender collateral, expect that the trustee, the court, or a creditor may ask you to account for the liberated payment.

Multiple amendments are a recipe for mistake, confusion, and litigation. Piecing together multiple documents to form a coherent whole is frequently difficult. At the very least, if you use serial amendments to put out pre-confirmation fires, at least number them, using terms such as "First Pre-Confirmation Amendment" and so on.

Although serial, piecemeal amendments are permissible, it makes more sense to restate the plan, and provide a redline version tracking the changes.

6. Drafting Orders

a. Pre-Hearing Orders

Make sure the order language comports with the motion. In other words, if your motion or application asks for \$2,000 in fees, make sure this same amount is in the order.

If you are doing an order on Notice and Opportunity, inconsistencies between the proposed order and the motion can delay relief. A stitch in time saves nine.

b. Post-Hearing Orders

In most cases, there is nothing wrong with drafting an order that simply says, "for the reasons stated on the record on October 8, 2010 in Kalamazoo, Michigan, IT IS HEREBY ORDERED . . ."

If the relief granted is more complicated, or you want your order to specify the grounds for relief in more detail, pay close attention and submit an order that conforms to the court's oral ruling exactly. This is not the time to overreach, lest you invite suspicion that you tried to pull a fast one.

7. Drafting Stipulations and Agreements

a. Out-of-Court Agreements

Remember that an out of court settlement stipulation is a contract, so you should draft it with contract principles in mind. The following provisions may be useful:

- Express the factual premises. Avoid the “whereas, whereas, whereas” verbiage of yore, but give context to support “meeting of the minds” and aid in interpretation;
- Consider adding clauses that adopt rules of construction;
- Authorize execution in counterparts, filing of duplicates, for convenience;
- Adopt Bankruptcy Code definitions where appropriate;
- Clearly specify events of default and enforcement.

Keep in mind that, especially in the bankruptcy setting, your agreements may affect third parties (such as a trustee). Take care not to overreach. An agreement that purports to affect third party rights creates unreasonable expectations in the subscribing parties, invites United States Trustee objections, jeopardizes enforcement, and may, if the court is asked to approve the agreement, delay the process.

b. Defined Terms

Use a defined term (e.g., “The term “Collateral” means . . .”) whenever you intend to refer to the term throughout the document. Although using defined terms tends to make the document seem more technical, and to some extent interrupts the flow, on balance the practice brings more precision and discipline.

c. Ambiguity

i. Inadvertent ambiguity

Remember -- the more ambiguity there is, the less control you may ultimately have over the stipulation and its terms. If your agreement is not clear and it invites litigation, at the end of the day, the court will have the last word -- not you or your client.

ii. Deliberate ambiguity

Sometimes common courtesy or strategic objectives require a legal writer to obfuscate by using deliberately ambiguous terms, or perhaps by using the passive voice as discussed below.

There may be a role for ambiguous expression, but ambiguity should result from conscious choice, rather than inattention or sloth.

d. Passive and Active Voice

Generally, using the “active voice” makes writing more precise, more lively, more effective. The active voice also assigns responsibility; the passive voice does not.

For example, the following sentence lets the reader know that something went wrong, but does little else:

“Mistakes were made.”

It fails to give the full picture such as who made the mistake. In contrast, consider the phrase, “The court erred” or “Counsel missed the deadline prescribed in the applicable statute.” Both assign responsibility.

Consider another example:

“The lawnmower was defective.”

The following alternative places the blame, and does so more precisely:

“John Beere designed and manufactured a defective lawnmower.”

Although the passive voice might eventually allow the author to get the message across, it almost certainly will require additional words or sentences in order to assign responsibility.

Even where passive sentences assign responsibility, they do so in a clumsier way: “Mr. Smith was insulted by Mrs. Smith.” The more sleek and effective alternative: “Mrs. Smith insulted her husband.” The latter delivers the message with more force.

Train your eyes and ears to look for forms of the verb “to be” -- this is the primary culprit in passive voice problems. So, “were,” “was,” “will be,” “have been” all signal that the passive voice is at work and the writer is at rest. Often, it pays to rephrase.

There are times, however, when a passive voice may suit your purpose, especially when there is animosity between the parties and little hope or point in assigning blame (for example, in a settlement agreement). If you do not wish to point fingers, the passive voice may help. Remember, if you have to be honest, at least have the courtesy to be vague!

The passive voice may also suffice where the subject matter under consideration, or who caused the outcome under review, is not especially material, and the additional detail might detract from more important points.

In short, if using the passive voice would advance some purpose, by all means use it, but do so deliberately.

e. Economy & Clarity

Longer is not stronger. Busy readers appreciate economy in written materials, and writers who can make their point in fewer words score more points. Drafting shorter documents, however, takes time and effort. A few witty quotes make the point:

“I have only made this letter longer because I have not had the time to make it shorter.”

Blaise Pascal

“Not that the story need be long, but it will take a long while to make it short.”

Henry David Thoreau

“If I had more time, I would have written a shorter letter.”

Marcus T. Cicero

“If you want me to give you a two-hour presentation, I am ready today. If you want only a five-minute speech, it will take me two weeks to prepare.”

Mark Twain

Good advice for stipulations and most other forms of legal writing. Generally speaking, the shorter the document, the better.

These quotes also make the point, however, that concise writing takes time and effort. Do not leave important writing tasks to the last minute.

8. Correspondence & Office Writing

a. Client Letters & Questionnaires

Carefully review and revise your client questionnaires to ensure they use precise but plain language. Keep in mind that the audience is probably not as sophisticated as the author.

Imprecise questions may invite imprecise answers. So, for example, the question “List all your assets” may solicit only puzzled looks from some clients, enumeration of investment accounts from others, or a listing of irrelevant reports from others (“Tall, dark, handsome”).

A questionnaire that asks a client to list specific types of assets (e.g., “Please list all automobiles, motor cycles, ATVs and similar items”) may produce more useful responses. Remember, too, a term of art may have a precise meaning for a lawyer but not for a layperson. If a questionnaire asks for a listing of “personal property,” don’t be surprised if the response lists only lingerie and a few toiletries. Most of our clients would not regard causes of action or tax refunds as “personal property” though technically they are. Be precise and you will harvest more and better information.

Client letters should use simple terms and not look like a brief or a law review article. If you draft your letters in everyday language and skip the legalese, you will elicit and convey more useful information, and save time by not having to answer follow-up phone calls from your clients wondering what your letter means in “real life.”

b. Demand Letters

Be clear. Be concise. Be specific. If you intend to accelerate the entire balance, or demand the return of specific property, then say so. Avoid threats or emotion, and provide enough information to permit the recipient to comply or seek more information. As with other correspondence, avoid legalese.

c. Settlement Proposals

Be clear. Be concise. Be specific.

Consider adding a legend indicating your intent to claim the protection of Fed. R. Evid. 408 or similar rules.

d. Emails

Beware. An email is not as formal as a written letter, and the conversational nature of emails may lull the writer into making grammar and spelling mistakes, and perhaps more important, mistakes in judgment.

E-mails may seem as ephemeral as conversation, but they have form and permanence that the spoken word lacks.

Grammar and spelling errors in messages to your more discerning clients may give them the impression that you are sloppy, unprofessional, or not sufficiently committed to their case.

Email is also not secure, and has a habit of showing up as attachments to motions in embarrassing ways. On the receiving end, it is much easier for your audience to hit “forward” and broadcast your email widely and perhaps inadvertently, than to copy an old-fashioned letter or scan it for electronic distribution. It is of course possible for a client to leave a letter on a desk for wandering eyes to see, but somehow letters foster privacy and discretion -- hallmarks of the attorney/client relationship -- in a way that email does not.

With the proliferation of email traffic, getting a letter these days creates the distinct impression that the author took more time in preparing the message. In fact, the process of writing (and revising) a formal letter lends itself to more reflection and deliberation than hitting “reply” (or worse, “reply all”) and dashing off a glib response.

9. Role of Forms

Form may be national, such as those available from the Administrative Office of the U.S. Courts, local (such as those found an appendix to local rules), or private (such as those found in your partner’s files).

Frequently they provide a useful starting point for a particular procedural task, and sometimes the form is all you need. Sometimes, however, forms may take on a life of

their own -- especially private forms developed over a period of years in which the Bankruptcy Code has changed. Lawyers may be loathe to discard old provisions that have outlived their utility, resulting in forms that include more than their fair share of surplus language. So, while forms may be useful guides, practitioners must be careful to actually read their forms before deploying them. Ask critical questions and don't treat the form as immutable simply because others have not dared to change it, or because it happened to work the last time someone used it.

a. Official Forms (many available on U.S. Court Website)

The Administrative Office of the United States Courts maintains many official forms that will save time and aggravation if you use them. They are available at <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx>. There is a surprising variety of forms, many useful, many obscure, but using an official form brings the mantle of officialdom and a measure of comfort.

b. Local Court Forms

Many courts have developed forms for ordinary matters, such as abandonments, motions to delay the discharge, "notice and opportunity," and similar routine procedures. Consult your local rules appendix and use the forms your court and colleagues have developed for run-of-the-mine events.

c. Law Office Forms

One benefit of practicing in a firm is that another lawyer has likely confronted in the past the same or similar situation that you are confronting today. He or she may have a form that has developed or evolved over the years to address particular situations. These forms may be a great **starting point** for your current work product, but do not be shy about revision. Chances are that the form has accumulated idiosyncratic baggage designed to address the issues of a long-gone client that might not be germane today. Even worse, yesterday's provisions might adversely affect today's client, either by creating ambiguity, inconsistency, or simply by revealing the drafter's ignorance or laziness.

Office forms may express collective wisdom or simply accumulated drivel. Read your forms carefully before signing and filing them.