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"(MY FORMER) PET PEEVES REGARDING PROPOSED FAMILY COURT ORDERS – MISGUIDED, MISUNDERSTOOD AND MISCONDUCT"

""Twas brilling, and the slithy toves
Did gyre and gimble in the wabe;
All mimsy were the borogroves,
And the mome raths outgrabe.

Beware the Jabberwock, my son!
The jaws that bite, the claws that catch!
Beware the Jubjub bird, and shun
*The frumious Bandersnatch!"**

**"Jabberwocky" (in part) f*rom *Through the Looking-Glass and What Alice Found There"* (1872 by Lewis Carroll): "When Alice has finished reading the poem she gives her impressions: *„It seems very pretty", she said when she had finished it, „but it"s rather hard to understand! (You see she didn"t like to confess, even to herself, that she couldn"t make it out at all.) „Somehow it seems to fill my head with ideas – only I don"t exactly know what they are!"*

Did you read this, and did you understand what it *says*…and what it *means?* And are you certain the opposing attorney and his or her client understood it? Perfect. You"ve just sent your family court judge your proposed order for the judge to sign.

When you sent the "proposed order" to the judge, what exactly did you want the order to accomplish, and what result did you seek? Did you want to sound smart? Did you want the order to sound or be purposely vague? Were you guessing at what the judge had ordered and instructed? Did you try to cleverly add several "findings" or "conclusions" or (please say no) slip in some additional relief for your client that the judge never ordered?

Answer this question for me: in order of priorities from the list below, what do *you* believe is most important to your family court judge after the conclusion of your case?

Making certain the proposed order accurately states the judge"s ruling?
Making certain the proposed order is grammatically correct, with the judge"s name spelled correctly?
Making certain the proposed order is sent to the judge as soon after the hearing or trial as possible?
Making certain that if you cited statutes or appellate court opinions in the proposed order, they were a correct statement of the law applicable to the judge"s ruling.

Making certain the proposed order, as to form, complied with the *South Carolina Rules of Family Court* or the *South Carolina Rules of Civil Procedure*?
All of the above?
Any of the above?

Finally, forget what might be important to the judge. What do *you* consider to be most important regarding the proposed order, and in the same "priorities" stated above? Time‟s up.

If you said *"making certain the proposed order is sent to the judge as soon after the hearing or trial as possible"*, give yourself a prize because you‟re probably the greatest family law attorney in South Carolina, and your hourly rate is probably too low. Don‟t waste your valuable time reading another word in this article, and have a great life.

For all others, please take just a moment to read on. I‟m going to give you my own top five "pet peeves" affecting those "proposed orders" which you were requested to draft and send to your family court judge. Trust me, there are more than five.

Pet Peeve No. 1: An attorney taking too long to send a proposed order to the judge.

First of all, there is one universal maxim in the practice of family law: ***The judges' orders are the beating heart of every case…no other documents in the case file are more important.*** You can have a "banker‟s box" full of pre-trial motions, discovery, and work product, and you can try a case for days on end, but at the conclusion of that case (and every hearing involved in that case) *nothing happens* until your family court judge both signs and enters his or her order in the clerk‟s office.

It truly doesn‟t matter to a judge how brilliantly you performed inside the courtroom, because it is all talk until that order is signed. The parties‟ conduct, not your eloquence, is governed by the court‟s order.

You also realize, of course, that at the conclusion of your case, your judge could have given you his or her ruling from the bench, but that an "oral" order means absolutely nothing until it is reduced to writing and entered of record. *Serowski v. Serowski,* 381 S.C. 306, 672 S.E.2d 589 (Ct.App.2009) ("…until written and entered, a court has discretion to modify or amend a ruling. A judge is not bound by a prior oral ruling and may issue a written order which is in conflict with the oral ruling."); *Doe v. Doe,* 324 S.C. 492, 478 S.E.2d 854 (Ct.App.1996) ("Judgments in general, and divorce decrees in particular, are not final until written and entered. Until written and entered, the judge retains discretion to change his mind and amend his oral ruling accordingly.").

Also, your failure to get your proposed order to the judge quickly could very easily result in your having committed an act of professional malpractice. As just one example (and there are many others), what if your judge ordered the other party to pay your client a fixed amount of child support with the "first payment due on the first Friday immediately subsequent to the entry of the court‟s order". You then wait six weeks to get the judge the proposed order and the judge happens to be on vacation or holding court in some other circuit by the time the order gets to the judge‟s desk. The order is eventually signed eight weeks after the ruling, and the first child support payment is to begin on the ninth week. Your delay cost your client, in tax-free child

support payments, whatever amount the judge had ordered times eight.

Let me also give you this "tip": if your client was the one to receive the child support or any other significant judicial relief, and the opposing attorney jumps up and shouts "Judge, I‟ll prepare the order", then if I were you, I‟d start worrying; and if you have to ask "why?", you‟ve got a even bigger dilemma over which to ponder.

Also, take the time to read the South Carolina Supreme Court‟s opinion in the case of *In re Rast*, 360 S.C. 96, 600 S.E.2d 534 (2004), in which an attorney was publicly reprimanded for his failure to timely submit a proposed order to the family court judge.

Pet Peeve No. 2: "In the law, the power of clear statement is everything." – United States Supreme Court Associate Justice Joseph Story.

These words were written almost two hundred years ago by one of the first Associate Justices of the United States Supreme Court. They mattered then…they matter now.

All court orders have two essential functions: first, they govern the conduct of the case and/or the parties, and, second, they are intended to punish a party-litigant for that party‟s willful failure to comply with the order. Although there is often extraneous language in court orders, after you scroll down to "NOW THEREFORE, it is ORDERED, ADJUDGED and DECREED", everything following is mandatory. Consequently, if a substantial part of your proposed order is closely akin to *"Jabberwocky"*, but the "ordered" terms, provisions and conditions are otherwise accurate, clearly defined, and clearly understood, the order may still be flawed using the following analogy: picture a court order as a funnel, beginning at the top with a recitation of the "findings of fact", followed by any "conclusions of law" made by the judge, and ending at the "tip" with the various provisions of the judge‟s ultimate decision in the case.

If the findings within the body of the order are vague, confusing or ambiguous, the judge‟s decision may be unsupportable or problematic in the event future action is necessary to interpret the order or to enforce it.

As to this issue of clarity, for those attorneys reading this article who were practicing law in the „60s and‟70s, you‟ll remember this tortured language: *"The party of the first part does hereby deliver to and instruct the party of the second part to deliver and sell the articles and goods described in greater detail by the instrument created and offered by both the first and second parties to the party of the third part"*. I think this means the following: "Mr. Doe and Mr. Jones have mutually agreed to sell and deliver the following identified property to Mr. Smith."

The basic legal writing skills of family law attorneys should have evolved over the years at least to the rudimentary extent that in the body of the order we should be using the words "wife" and "husband" when referring to, well, the wife or husband. You can use "plaintiff" and "defendant" in the caption, and then you should *never* use either term again in your proposed order.

I might suggest, as one example, that in your proposed order immediately under the case caption you begin with the following subheading:

> *Identification of parties:*
>
> *For the purposes of this order only, the parties shall be identified as follows: Plaintiff – "wife", "former wife" or "mother", and Defendant – "husband", "former husband" or "father". The parties may together be referred to as "spouses", "former spouses", or "parents".*

Always craft the language of the proposed order to be consistently clear throughout and to the point, and with the ultimate intent that the family court judge‟s decision is clearly understood.

Pet Peeve No. 3: An attorney submitting a proposed order which includes "findings" not mentioned by the judge either in the judge's bench order or in the "instructions for preparation of the order".

You would think that, at least to the family court judge, Rule 58(a)(2), *South Carolina Rules of Civil Procedure*, would be the "judicial gift that keeps on giving".

Rule 58(a)(2) states: "…upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly prepare the form of the judgment, ***or direct counsel to promptly prepare the form of judgment, to which may be attached the decision, order or opinion of the court***, and after review and approval by the court, the clerk shall promptly enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record. Entry of the judgment should not be delayed for the taxing of costs."

While serving as a family court judge I made it a practice to draft my orders on those cases I had taken under advisement, preferring not to send out "instructions" to the attorneys involved in the case. I had no interest in being a martyr, although this practice was admittedly time-consuming. Rather, I did this for three basic reasons: one, it was *my order* and I knew what I wanted it to say and accomplish; two, it ultimately saved me time in completing my work on this case (to a judge, "completion" means signing and entering your order); and three, in the event of a subsequent action for contempt of court, I wanted to make certain that the judge who tried that contempt action had a clear understanding of the parties‟ conduct which my order was intended to govern. [I might also quickly add, hypocritically, that if my final orders were to be appealed, I wanted to go down in flames on the work I had created, and not an order which I had requested and relied upon someone else to create.]

Although in reading an attorney‟s proposed order I might have winced at the phrasing or technical form, simply because I might have crafted the order differently, I could get over that bit of anal retentiveness if the order clearly and correctly included both my salient findings and what I had ultimately ordered in the case. Nonetheless, in the final analysis that order belonged to me, and when I signed it and entered it, I owned it.

Also, you must appreciate that by the sheer number of orders which every family court judge is called upon to sign, it is entirely reasonable to assume that a judge will not have the time to compare his or her written "notes" against the language of every proposed order submitted.

Consequently, I always found it troubling when, as a family court judge, I encountered an attorney whose every submitted order required "extra scrutiny". Beware and be warned…if you're caught by your family court judge with a knowing attempt to include relief not ordered by the judge, I would suggest you might want to bend over and kiss your family law practice goodbye.

I would also suggest you read the case of *In the Matter of Jennings,* 321 S.C. 440, 468 S.E.2d 869 (1996), an attorney who was disbarred for, among other things, submitting such a proposed order ("A temporary hearing was held before Judge Spruill. Judge Spruill requested that respondent prepare an order reflecting what he had decided at the hearing. A proposed order was sent to Judge Spruill for his signature. The order was signed and afterwards opposing counsel moved for reconsideration on the ground the order contradicted what was decided at the hearing. … (R)espondent was guilty of misconduct for preparing an order which misrepresented the judge's decision.").

Pet Peeve No. 4: An attorney copying his or her client with the proposed order being transmitted to the judge; or, the attorney's failing to copy the opposing attorney with the proposed order.

If we have a clear understanding that it is the order which is both signed and entered of record that matters, and that the judge *always* retains the discretion to change a "bench order" or "oral order", what can a family law attorney possibly gain by sending a copy of a "proposed order" to his or her client? If you ultimately receive an entered order which differs, perhaps entirely, from the one you initially sent your judge, and which is less favorable to your client, how do you explain the variations to your client? Your client will immediately perceive that (a) the other side has "bought off" the judge, (b) you misled your client, (c) the family court system is inequitable or corrupt…and on and on. If you've been doing this, quit.

Effective July 1, 1994, compliance with Rule 5(b)(3), *South Carolina Rules of Civil Procedure*, became mandatory ("Any party providing a proposed order, proposed findings of fact or conclusions of law, or proposed judgment or other paper to the court for its consideration in any pending manner shall serve the same on all counsel of record at the same time and by the same means."). Considering that this Rule has been in effect for over 16 years, if you are willfully failing to comply with it, you should most probably be sanctioned by the court.

Pet Peeve No. 5: An attorney sending an unsolicited *ex parte* letter to the judge requesting that the judge "consider" including additional relief in the proposed order being prepared by that attorney.

Historically and annually, every South Carolina family court judge hears approximately 3,000 cases and signs approximately 5,000 various orders. If you're seriously interested in pushing a family court judge's buttons, go ahead and send one of these *ex parte* "requests", and be sure and copy the opposing counsel (and to show your client how much you really care, also

copy your client with the letter). Now sit back and watch the dominoes fall. You‟re now almost challenging the judge to take the time to respond to your letter; and you‟re certainly requiring the opposing attorney to reply and "cc" his or her own client. If your judge immediately fails to stop this tactic, then it‟s the judge‟s fault. Family court judges don‟t have the luxury of time to engage in this nonsense, and family law attorneys know it.

Conclusion:

Maybe this "cautionary tale" will help you, and maybe it won‟t. After all, it‟s fairly basic stuff, isn‟t it? In any event, humor me and let me leave you with this final thought: always remember there truly is nothing sadder than a haggard, old, retired family court judge trying to sound relevant.

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