

NOTE: This material is dated and is provided as general guidance for best practices. Please check for updated statutes, rules, and online procedures, including new proposed order formatting requirements effective May 2015.

PRACTICE GUIDELINES MEMORANDUM

TO: Attorneys Practicing Before Me and
Other Interested Persons

FROM: C. Timothy Corcoran, III
United States Bankruptcy Judge

DATE: January 5, 1994 (Revised July 1, 1998)

RE: Guidelines for Preparing and Submitting
Proposed Forms of Orders

The following are some general guidelines as to the preparation and submission of proposed forms of order for cases and proceedings pending before me that you may find helpful.

I. In general.

Orders should follow the following general outline:

A. Title. Include in the title a description of the order and the relief accorded by the order.

E.g. --

1. "Order Modifying Automatic Stay in Favor of Creditor, Rock Solid Bank"

2. "Order Allowing Claim No. 9"

Note especially --

The title "Order" is insufficient. It provides no help when one is searching through the docket or the file for a particular order. See L.B.R. 9072-1(a).

B. Introduction. Always begin with how the matter comes before me. "Consideration" means considered in chambers without a hearing. I do not use the expression "ex parte." "For hearing" means a hearing was held and I determined the matter at the hearing. If a hearing was held, always include the date of the hearing.

E.g. --

1. "This case came on for consideration of the debtor's application to approve the employment of counsel."

2. "This case came on for hearing on July 19, 199X, of the trustee's objections to Claim No. 9 filed by Rock Solid Bank."

C. The decision or determination. Next recite what happened and the reasons why I am entering the order. It is imperative that the reasons that the order is being entered are stated accurately.

1. If my oral ruling at the hearing is to constitute the basis for my decision, simply recite that. You do not need to summarize or restate the basis or reasons for my oral decision in the proposed form of order unless I specifically ask you to do so. (Please note that F.R.Civ.P. 52(a) sets forth when findings and conclusions are required.)

E.g. --

a. If Rule 52 findings and conclusions are not required: "For the reasons stated orally and recorded in open court that shall constitute the decision of the court,"

b. If Rule 52 findings and conclusions are required: "At the conclusion of the hearing, the court made findings of fact and conclusions of law stated orally and recorded in open court. Based upon that decision,"

2. If the parties have agreed to the entry of the order in the form proposed, recite that.

E.g. --

a. "The parties have filed a written stipulation agreeing to the entry of an order containing these terms."

b. "At the hearing, counsel announced on the record the parties' agreement to the entry of an order containing these terms."

c. "Counsel for the movant represented to the court at the hearing that the respondent, who did not attend the hearing, consents to the entry of an order containing these terms."

3. If the court has directed a response to a motion and the respondent has failed to respond, or if the respondent failed to appear at the hearing, then the court will grant the motion because the respondent has not opposed the motion despite the opportunity to do so. Simply recite all of this as the reason for the order. Specifically note the failure to respond or the nonappearance of the respondent when either occurs. Avoid the use of the word "default." That is a F.R.Civ.P. 55 term of art not applicable in this situation.

E.g. --

a. "Although the court directed a response to the motion, the respondents failed to file a response. The court therefore deems the motion to be unopposed."

b. "The respondent failed to appear at the hearing. The court therefore deems the motion to be unopposed."

Note especially:

Generic reasons for the entry of the order, such as "Being fully advised . . . ," are insufficient. Similarly, alternative reasons are not to be used, such as "because of the debtor's written or oral consent or otherwise"

D. The disposition. Next state what I ruled.

E.g. --

1. "The motion is therefore granted."
2. "The objection is therefore sustained."

Note especially:

Motions and applications are "granted" or "denied;" objections are "sustained" or "overruled." Please use these terms of art correctly.

E. The relief. Next state the relief that flows from the disposition.

E.g. --

1. "Accordingly, the complaint is dismissed without prejudice to the right of the plaintiff to file an amended complaint within ten days from the date of notice of the entry of this order, failing which the complaint shall stand and be taken as dismissed with prejudice without further order."

2. "Accordingly, Claim No. 9 filed by Rock Solid Bank is hereby disallowed in its entirety."

Note especially:

Proofs of claim and claims of exemption are either "allowed," "disallowed," or some combination of both. The point is that these are words of art that should be used.

F. Widow lines. A widow line is a single line of text at the top of a page that carries over the sentence or paragraph from the previous page. I will not sign an order that has a widow line or nothing but the "Done and Ordered" block and signature line at the top of the signature page. See L.B.R. 9072-1(b).

G. Service information. The names and complete mailing addresses of all parties who are to receive copies of the order when entered must be typed at the end of the order. A mere listing of the names of the parties is insufficient. Addresses are required because the clerk certifies service to those listed at the addresses stated in the service list by use of a rubber stamp.

H. Copies and envelopes. Service copies of the order and stamped addressed envelopes for service must also be submitted. See L.B.R. 9072-1(c).

II. Special problems -- orders granting relief from stay.

Stay relief orders require the following components:

A. Introduction. Determined upon hearing (and date) or upon consideration in chambers. See Section I.B. above.

E.g. --

1. "This case came on for preliminary hearing on August 15, 199X, of the motion of the creditor, Rock Solid Bank, for relief from the automatic stay."

2. "This case came on for consideration of the motion of the creditor, Rock Solid Bank, for relief from the automatic stay."

B. Basis of the court's determination. State why the order is being entered. State the precise reasons, not some generic, "one size fits all," boilerplate reason.

E.g. --

1. "Neither the debtor nor the trustee appeared in opposition to the motion."

2. "The creditor has filed the written consents of the debtor and the trustee."

3. "The parties announced at the hearing agreement to the entry of an order containing these terms."

4. "The court directed the debtor and the trustee to respond to the motion, but neither has done so."

5. "Although the debtor filed a response to the motion as directed by the court, the response is insufficient as a matter of law and fact to sustain the debtor's burden to demonstrate why the automatic stay should remain in effect as to the property in issue."

denied? C. The disposition. Is the motion granted or

E.g. -- "It is, therefore, ordered that the motion is granted."

D. The relief. State precisely what relief is provided; state what it is that the creditor can do.

E.g. --

1. "Accordingly, the automatic stay is hereby modified to permit the creditor movant to commence and prosecute a mortgage foreclosure action in state court against real property, the legal description of which is"

2. "Accordingly, the automatic stay is hereby modified to permit the movant to take possession of and to sell its collateral more particularly described as"

3. Accordingly, the automatic stay is hereby modified to permit the movant to prosecute through judgment his personal injury claim against the debtor presently pending in Case No. 98-1234 in the Circuit Court for Gator County, Florida

Note especially:

1. What the creditor can do must be specifically stated. Generalities, such as "to enforce its rights," are not sufficient.

2. The property must be described specifically.

E. The in rem limitation. Limit the relief to in rem only and not in personam against the debtor.

E.g. --

1. "The relief granted here permits the creditor to [seek and obtain an in rem judgment] [take action] against the property only and does not permit the creditor to seek or obtain in personam relief against the debtor."

2. In the event the movant obtains judgment against the debtor in the state court action, the movant may enforce the judgment solely against insurance proceeds. The movant may not enforce the judgment against the debtor, property of the debtor, or property of the estate absent prior order of this court.

III. Special problems -- orders granting extensions of time.

Motions for orders granting extensions of time are usually considered in the first instance in chambers. I will set down for hearing such motions only if I believe it necessary. The preparation of a motion for extension of time, therefore, is an integral part of your preparation of a proposed form of order granting the motion.

A. Motions for extension of time should include the following information:

1. The original due date.
2. The new date you want fixed as the due date. Please do not just request a set number of days and expect me to do the computations.
3. The reasons the extension is required.
4. Facts showing that the extension is not the result of the movant's or counsel's procrastination or lack of attention.
5. The other party's position with regard to the requested extension.

B. File the motion in plenty of time so that, if a hearing is required, the hearing can be noticed and held before the expiration of the original due date.

C. If the motion is filed after the original due date, it must include facts showing excusable neglect. F.R.B.P. 9006(b)(1). Unless excusable neglect is shown, expect such a motion to be denied.

D. Always submit a proposed form of order with your motion. Do not suffer delay in the submission of the motion to me for consideration while the clerk calls you for the proposed order.

E. Include in your proposed form of order the specific new due date you are seeking. Do not draft the order with a blank line for me to write in that date or for me to write in a number of days as the extension. If I do not like your proposed date, I will interlineate a different one.

IV. Special problems -- orders granting continuances of hearings.

The comments in Section III above as to extensions of time are equally applicable to orders granting continuances of hearings. In addition:

A. Tell me in your motion:

1. The earliest date the matter can be rescheduled and why.

2. Whether your problem can be solved by advancing the hearing date, and, if so, the earliest it can be advanced, and

3. Most importantly, the other party's position. See L.B.R. 5071-1(b). I need to know the other party's position when I am considering the merits of the motion in chambers and without a hearing. If I am told the other party consents or has no opposition to the motion, I can more readily grant the motion without a hearing than I can if the party opposes the motion or if I do not know the other party's position. Even if the other party consents, I may still be required to deny the motion based upon calendar or case management considerations. Nevertheless, I am much more likely to grant the motion if I am told that the other party consents.

B. Remember that all creditors noticed hearings present special problems. See L.B.R. 5071-1(f). If the order reschedules an all creditors noticed hearing, be sure to include the following as the last paragraph of the proposed order: "Counsel for the movant shall immediately serve a copy of this order on all creditors and parties in interest using a current mailing matrix obtained from the clerk. Counsel shall promptly thereafter file proof of such service."

C. Always submit a proposed form of order with your motion. See L.B.R. 5071-1(c). Include blank spaces in the proposed order for the clerk to enter the new dates. Id. Include copies and addressed, stamped envelopes. Id.

V. Special problems -- orders approving the employment of professionals.

Although seeking and obtaining orders approving the employment of professionals is a subject outside the scope of this memorandum, all proposed forms of order granting such relief must include the following language. "No payment whatsoever shall be made to, or accepted by, the professional absent application and order of the court."

I have also prepared a separate Practice Guidelines Memorandum discussing affidavits filed in support of applications to employ professionals in Chapter 11 cases. Included in that memorandum is a proposed form of order granting such an application. A copy can be obtained from the clerk.

VI. Special problems -- orders avoiding liens.

A. Orders avoiding liens pursuant to Section 522(f) of the Bankruptcy Code must specifically describe:

1. The lien being avoided.

E.g. --

a. "The judgment lien created by the recording of a certified copy of the final judgment rendered on January 5, 199X, by the Circuit Court for Hillsborough County, Florida, in Case No. 93-1234, styled "Super Corporation v. John J. Jones," in Official Record Book 1234, at page 123, of the Public Records of Hillsborough County, Florida."

b. "A non-purchase money, non-possessory security interest created by the debtor's execution of a loan and security agreement in favor of Friendly Finance Corporation dated January 5, 199X."

2. The property on which the lien being avoided was fixed.

E.g. --

a. "The debtor's exempt homestead real estate, the legal description of which is . . . , Hillsborough County, Florida."

b. "A 27-inch Sony television model KV-1234." Use the same description as that contained in the instrument creating the lien whenever possible. General descriptions, such as "household goods," are not acceptable.

B. An order should also include a recitation that the property was claimed and allowed as exempt. We check the motion and proposed order against the debtor's Schedule C to make sure the property has been claimed as exempt and that the description of the property in the schedule is the same as the description in the motion and the proposed order. Be sure, therefore, that the descriptions in the motion and the schedules are the same or that the property can otherwise be matched. A motion that contains only the legal description of real property and schedules that contain only a street address do not allow us to be sure the property is the same. If your motion, contains both the legal description and the street address, however, then we can see that the property is the same.

VII. Special problems -- orders determining secured status of claims and redeeming collateral.

I have prepared a separate Practice Guidelines Memorandum discussing in detail motions and proposed orders determining secured status of claims and redeeming collateral. A copy may be obtained from the clerk.

VIII. Special problems -- agreed or stipulated orders.

By definition, a request for an order, except when an application is authorized by the rules, is made by motion. F.R.B.P. 9013. To obtain an order, therefore, a motion must be filed. This means:

A. Do not file stipulations and expect an order to be entered. Either support your motion with the stipulation, file a joint or agreed motion, or recite in your motion that you are authorized to represent that opposing counsel consents to the entry of an order granting the motion without further notice or hearing. A bare stipulation will simply languish in the file; I will take no action with respect to it until a motion is filed. This is also true of notices.

B. Do not submit an "agreed order" containing counsel's signature at the end that authorizes the court to enter "the foregoing order." Not only does this violate the motion mandate of F.R.B.P. 9013, but it also offends another principle, that is, orders are instruments of the court and should not contain counsel's signature.

C. In preparing a proposed form of order you submit in these situations, simply follow the general guidelines set forth elsewhere in this memorandum. Be sure to recite in the proposed order that it is being entered upon the stipulation or agreement of the parties in the manner described in Section I.C. above.

IX. Default or "drop dead" procedures.

I will approve the following default procedures -- read that to mean I will not approve some other procedures.

A. State the default, such as non-payment or the like. Negotiate and include grace periods, as you desire.

B. Upon default, the creditor may file and serve a motion for final order granting relief from the stay. (Call it that so no additional filing fee will be required.)

1. The motion shall be sworn to or otherwise supported by affidavit.

2. The motion shall recite the facts of the entry of the original order establishing the payment or other requirement and the facts of default.

C. The responding party shall have a stated amount of time (as the parties may agree) to file and serve a contravening affidavit or sworn response contesting only the fact of default. Other "defenses" will not be entertained.

D. If such a contravening affidavit or sworn response is filed, the court will set down for hearing the motion for final order on an expedited basis at the next available time on 24 or 48 hours notice, if possible. At that hearing, the court will determine if a default has occurred and dispose of the motion accordingly.

E. If no such contravening affidavit or sworn response is filed, the movant may then submit a proposed form of order granting the motion for final order, and the court will consider the motion in chambers and without a hearing. The proposed form of order shall recite specifically what has happened and why the order is being entered.

F. Please note --

1. A motion for final order is required. Merely filing an affidavit of default will not result in the entry of an order.

2. Although F.R.B.P. 9017 and F.R.Civ.P. 43(e) permit the court to hear motions of this kind on affidavits, an affidavit submitted in support of the motion must set forth facts as would otherwise be admissible in evidence under the Federal Rules of Evidence through the witness making the affidavit. Accordingly, the affidavit must affirmatively show, on its face, that:

(a) The witness is competent to testify. F.R.Evid. 601; §§ 90.601 - 90.603, Fla. Stat.

(b) The witness has personal knowledge of the facts stated. F.R.Evid. 602. If the witness offers hearsay testimony, the affidavit must show that the testimony is within a hearsay exception. See, e.g., F.R.Evid. 803(6) (when the witness relies on business records). Absent extraordinary circumstances that are set forth in the affidavit, a client representative with knowledge must make the affidavit; counsel may not do so. First, counsel usually has no personal knowledge and is instead relying on inadmissible hearsay. Second, counsel is not usually permitted to offer testimony. Cf. Rule 4-3.7, Florida Rules of Professional Conduct.

(c) The witness has taken an oath or affirmation as to the truth of the facts stated in the affidavit. F.R.Evid. 603. If a notary public administers the oath, the notary's jurat or certificate of administration of the oath must be in correct form. § 117.05(16)(a), Fla. Stat. A notary public's certificate of acknowledgment of execution in lieu of an oath is insufficient. § 117.03, Fla. Stat. See, also, §§ 117.05(16)(b)-(c), 695.03, and 695.25. As an alternative to the use of a notary public, the witness may make an unsworn declaration under penalty of perjury in appropriate form. 28 U.S.C. § 1746; § 92.525, Fla. Stat.

(d) An event of default has occurred. The affidavit must therefore contain an affirmative statement of the specific facts demonstrating that the debtors are in default of their contractual obligations by the failure to make particular payments or to otherwise perform under the contract or adequate protection order.

3. The responding party will have the opportunity to contest the claim of default.

4. The stay is not automatically modified in the future upon the happening or non-occurrence of a specified event. An order is required to modify the stay should the specified event happen or not occur.

G. I have prepared a separate Practice Guidelines Memorandum including sample forms of adequate protection orders, "drop dead" or default motions and affidavits, and final orders granting relief from stay. A copy can be obtained from the clerk.

X. Judgments and orders, especially (but not limited to) those in adversary proceedings.

A. The federal rules make a significant distinction between a decision and a judgment. The rules further provide that the judgment be set forth in a separate document, not added to the end of a decision. F.R.B.P. 9021; F.R.Civ.P. 58. This is called the "separate judgment rule." Thus, the rules require both a decision and a judgment; two distinct documents should be entered by the court.

1. Examples of decisions include:

a. Findings of fact and conclusions of law entered under F.R.Civ.P. 52. Findings and conclusions can be written or oral. I frequently dictate oral findings and conclusions on the record in open court.

b. An order granting a motion for summary judgment under F.R.Civ.P. 56.

c. An order granting a motion for judgment by default under F.R.Civ.P. 55.

2. A decision must include the reasons of fact and law that cause the court to grant the relief requested. In a money judgment situation, the decision should contain the amount to which the plaintiff is entitled and how it is calculated. An appeal is taken from the judgment, but on appeal the reviewing authority will look to the decision to see why the trial court entered the judgment on appeal. If oral findings and conclusions were made, the reviewing authority looks to the transcript. If there are no reasons or if the reasons are insufficiently stated in the decision, the judgment will surely be reversed summarily.

3. Remember especially that attorneys fees must be specifically alleged, F.R.B.P. 7008(b); and that the relief contained in the judgment cannot exceed that pled in the complaint, F.R.Civ.P. 54(c). If you are seeking attorney's fees as part of your damage claim, include an affidavit of your time, rates, and the like. I will then determine the amount of your fees and include that in the decision document. If you are submitting a proposed form of decision document, prepare it with the necessary blanks so I can fill in the amounts I determine.

4. The decision should conclude with words like:

a. "In accordance with F.R.B.P. 9021, the court is contemporaneously entering a separate judgment."

b. "Counsel for the plaintiff is directed to submit a proposed form of separate judgment for consideration and entry by the court."

B. The judgment should then generally be in the form contained in F.R.Civ.P. Form 32 as appropriately modified. In this court, however, it should be prepared for entry by the judge and not for entry by the clerk. Note that the title is "judgment" and not "final judgment" as is the case under the Florida Rules of Civil Procedure. F.R.Civ.P. Form 32 may be found in the Appendix of Forms following the Federal Rules of Civil Procedure. See F.R.Civ.P. 84.

1. F.R.Civ.P. Form 32 is especially easy to follow in a money judgment situation.

2. Consider the following examples of additional decreedal language for discharge and dischargeability judgments:

a. "The debtor is denied a discharge."

b. "The debt owed by the debtor defendant, A.B., to the creditor plaintiff, C.D., on account number 123-456-789, is excepted from the discharge granted the debtor on June 1, 199X, in this bankruptcy case."

c. "The debt reduced to judgment in this money judgment is excepted from the discharge to be granted the debtor in this bankruptcy case."

3. The federal rules also include a "single judgment rule." If the complaint seeks relief against multiple parties or involves multiple claims, one judgment only is entered after all of the claims against all of the parties have been determined. F.R.B.P. 7054(a); F.R.Civ.P. 54(b). In this event, there may be several decisions entered by the court throughout the course of the proceeding upon which the single judgment, entered at the end, is based. In extraordinary circumstances, but only with express determinations and directions, the court may direct the entry of judgment when fewer than all claims are determined. Id.

4. Post-judgment interest is controlled by 28 U.S.C. § 1961, not the Florida statutes. If you are entitled to post-judgment interest, leave a blank line in the judgment for me to fill in the applicable rate on the day I enter the judgment, just as is shown in F.R.Civ.P. Form 32. The Administrative Office of the U. S. Courts informs me periodically of the applicable statutory rate.

5. I routinely grant costs to the prevailing party pursuant to F.R.B.P. 7054(b). The amount of costs is not included in the text of the judgment as it is in Florida state practice. Rather, as shown in F.R.Civ.P. Form 32, the judgment simply contains a provision that the prevailing party shall recover its costs of action. After the entry of judgment, the party

entitled to costs files a "Bill of Costs" on a printed form that is available from the clerk. 28 U.S.C. § 1920; F.R.B.P. 7054(b); F.R.B.P. 9021; F.R.Civ.P. 58. If you are aggrieved by the clerk's action in taxing costs, file a motion to review the clerk's taxation of costs. F.R.B.P. 7054(b).

6. Be especially mindful of L.B.R. 7054-1 when seeking costs and attorneys fees. It establishes a short deadline after the entry of judgment by which you must file your bill of costs or motion to determine the amount of fees.

C. As to motions for judgment by default after a default has been entered pursuant to F.R.Civ.P. 55, refer to L.B.R. 7055-2. I also require that the motion be accompanied by an affidavit or affidavits establishing all the material elements of the claim, including its validity and amount, if applicable. F.R.Civ.P. 55(b)(2). An affidavit of non-military service must also be filed. The order granting motion for judgment by default must recite the facts established in the record supporting the judgment, including its amount. Remember: this is a decision document. A separate form of judgment is also required.

XI. Submission of proposed forms of orders.

A. Your attention is invited to the provisions of L.B.R. 9072-1(d) requiring that proposed orders submitted as a result of the court's ruling at a hearing shall be submitted within three days from the date of the hearing.

B. As a matter of courtesy to the court, I request that all proposed orders submitted for my consideration be submitted with cover letters addressed to me and signed by counsel rather than signed by non-lawyer personnel. Counsel's signature is a statement that counsel has reviewed the proposed form of order and that it is correct and in appropriate form. Cover letters submitted with respect to proposed orders should not be addressed to the clerk. Proofread before you submit the proposed order.

C. I also require that, in all contested matters and adversary proceedings other than for appropriate ex parte matters, counsel provide copies of the proposed forms of order to opposing counsel and all other appropriate parties, as the circumstances dictate, at the same time they submit the proposed forms of order to me. See Florida Rule of Professional Conduct 4-3.5(b).

1. In all matters other than the most simple ones as to which there can be no reasonable objection to the proposed form of order submitted by counsel, my strong preference is that submitting counsel first obtain the approval of the forms of proposed order from opposing counsel before submitting them to me and that submitting counsel affirmatively represent that approval in their cover letters.

2. In all cases, cover letters should affirmatively reflect that copies are provided to opposing counsel and the other necessary parties. For this purpose, the copy notation "cc" and "with enclosure" with the names of the recipients typed at the end of the cover letter is sufficient.

D. Also, please remember to include service copies and envelopes. See L.B.R. 9072-1(c).

XII. If you have questions or need more help?

Counsel should feel free to contact my law clerk, Cheryl Thompson, at (813) 301-5200 if counsel has questions about preparing and submitting proposed forms of order in particular or about practice and procedure issues generally. Although Ms. Thompson cannot provide legal advice, she will be more than happy to assist you with practice and procedure questions.