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# The Adoption of Proposed Orders Verbatim: Avoiding Reversible Error

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In nearly all areas of the law, the parties' submission of proposed orders to the trial court is a ubiquitous and long-standing practice. And for nearly just as long, the judiciary has recognized the significant due process problems that can arise if a trial court adopts a party's proposed order verbatim. Indeed, more than 60 years ago, the First Circuit Court of Appeals cited a decision from 1910 as support for the proposition that "[t]he independence of the court's thought process may be cast in doubt when the findings proposed by one of the parties winds up as the court's opinion."[1] While in most cases the verbatim adoption of a proposed order is not per se reversible, the order can be challenged on the basis that the process was fundamentally unfair.[2] In making that determination, courts consider factors such as: (1) Whether the losing party had ample opportunity to present its arguments. (2) Whether the court independently reached a firm decision before requesting a proposed order. (3) Whether the court, in directing a party to draft the proposed order, instructed that the order reach a particular result and discuss specific points. (4) Whether the court directed a party to draft the proposed order in open court or otherwise publicly. (5) Whether other parties requested the opportunity to review the proposed order to make objections to it. (6) Whether the court had command of the issues and proceedings and was an active arbiter throughout the litigation.[3] Similar to the "fundamentally unfair" analysis, some courts focus on whether the judge engaged in independent decision-making, and consider factors such as: (1) Whether the order is consistent with or divergent from the verbal rulings of the court. (2) The amount of time that has passed since the hearing, and whether the judge remembers the case. (3) Whether there are there irregularities or conflicts in the terms of the order. (4) Whether the judge participated in the trial or hearing. (5) Whether the judge edited or altered the proposed judgment to conform it to his or her conclusions about the case, or whether he or she signed it verbatim.[4] The question for litigators is how to avoid an appellate challenge to a favorable order simply because the trial court saw the wisdom of your proposed order and adopted it verbatim.

While no formula is bulletproof, consider the following:

- Start with the fundamentals. Make sure your proposed order applies the correct legal framework and accurately reflects the testimony and evidence (if any), as well as any factual findings and legal conclusions announced by the trial court.
- Avoid using the proposed order as an advocacy piece. Keep the language as neutral and objective as possible and avoid using hyperbole.
- To the extent possible, submit the proposed order to opposing counsel before sending the order to the judge. That will provide opposing counsel with the opportunity to object before the order is entered.

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[1] *In re Las Colinas, Inc.*, 426 F.2d 1005, 1009 & n.4 (1st Cir. 1970) (citing *Brenger v. Brenger*, 125 N.W. 109 (Wis. 1910)). [2] *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572–73 (1985). [3] *See In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1269 (11th Cir. 2021). [4] *See King v. King*, 363 So. 3d 1099 (Fla. 4th DCA 2023).

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