



GRAMMAR GURUS

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GRAMMATICAL PET PEEVES

It is a daunting task to present oneself as a "grammar guru." Carol Anne and I know that we are undoubtedly destined to insert some error into our copy that the watchful eye will detect. But, you know, that's really okay. [I know what you are thinking—started a sentence with a conjunction and used both a colloquialism and a contraction . . . but what if I did those things purposefully in order to create a more casual voice? Are those errors or simply stylistic choices?] In this column, Carol Anne and I will ponder such questions as those presented in the preceding brackets, but what we would like to ponder most are the grammatical questions you may present: the niggling little items you see more than one way in printed copy, or argue over when you edit a colleague's copy, or worst of all, avoid using for fear of embarrassment.

First, our qualifications:

Both Carol Anne and I are law clerks to Tennessee appellate judges. Those of you who may have benefited from having the Honorable James Curwood Witt, Jr. of the Court of Criminal Appeals as a professor will immediately acknowledge Carol Anne's authority upon learning that she is one of Judge Witt's career clerks and that she previously spent several years as the senior clerk for the Honorable Charles D. Susano, Jr. of the Court of Appeals. I was an English professor in an earlier life and actually taught a college course entitled "Perfect Grammar" for several years (as if that were not asking for trouble!). My skills were specially honed during my first clerkship under the demanding editing pen of the Honorable Joseph M. Tipton, Presiding Judge on the Court of Criminal Appeals, and continue to be tested in my current work for the Honorable Thomas R. Frierson, Judge on the Court of Appeals.

Second, we would like to begin this column by clearing up one pet peeve each: Carol Anne will address the Oxford comma, and I will discuss confusion over use of the words "which" and "that."

Finally, an invitation. Carol Anne and I will be alternating authorship of this monthly column in DICTA. Please contact us with grammatical or stylistic issues of your own, whether you are posing a question, venting a pet peeve, or (heaven forbid) detecting an error. We can be reached at Carol-Anne.Long@tncourts.gov and Sally.Goade@tncourts.gov.

The Oxford Comma

When confronted with the question of what grammatical issue I wanted to address in this initial column, I immediately decided upon the Oxford comma, or, as it is more commonly known, the serial comma.¹ This comma immediately precedes the coordinating conjunction (usually "and," though occasionally "or" or "nor") in a list of three or more things. In the sentence, "My daughter wants a doll, a teddy bear, and a bicycle for her birthday," the serial comma falls between "bear" and "and." Although this comma is not required across the board (journalists rarely use it), it is required by, among others, the *Hodges Harbrace Handbook*, the *MLA Style Manual*, the *Chicago Manual of Style*, and Strunk and White's *Elements of Style*, and, as such, it should be employed in legal writing.

The primary function of the serial comma is to resolve ambiguity. A classic example of the ambiguity created by the omission of this comma can be seen in the sentence, "I'd like to thank my parents, Ayn Rand and God." Without the serial comma, it appears as if the writer's parents are Ayn Rand and God when, in fact, the writer intends to thank his or her parents in addition to Ayn Rand and God. Although clarity in writing is always important, it is of the utmost importance in legal writing. In essence, you want to avoid giving the reader pause while reviewing your written work, and the inclusion of the Oxford comma is one way to accomplish that goal.

As a side note, the Oxford comma is so popular (among grammar nerds, I imagine, but still . . .) that it has its own Facebook page with over 32,000 "likes," and, in 2008, the indie rock band, *Vampire Weekend*, released a slightly profane but catchy tune entitled "Oxford Comma," which peaked at #38 in the United Kingdom. Although the song lyrics make it abundantly clear that the band is, at best, ambivalent about the Oxford Comma, I hope that this brief article has served to convince you, my fellow members of the bar, to use the serial comma. Grammar nerds everywhere will thank you.

Which or That?

When I was in graduate school for English, a friend who was in nursing school once emailed me as she was rushing to meet a paper deadline with the following request: "Sally, quick—what is the difference between 'which' and 'that'?" I laughed and tried to explain as succinctly as I could, but if the writing in legal documents all around us is any indication, the difference is not always easy to grasp. Part of the confusion, I believe, stems from a false impression that "which" is somehow more formal than "that" and thus should be used whenever possible in legal writing. In truth, both are relative pronouns with more than one function, but when you are deciding between the two, it is invariably because you are including either a restrictive or non-restrictive clause in your sentence.

THE RULE: "that" is used for a restrictive relative clause, and "which," with a comma preceding it, is used for a non-restrictive relative clause. See, e.g., BRIAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* 156-57 (2d ed., West 2006).

The problem with the rule as I have stated it, like so many grammatical rules you might research, is that you have to understand grammatical terms within the rule for the rule to make any sense. What is a restrictive relative clause? First, a clause is a group of words that contains its own subject and verb but does not necessarily make up the entire sentence. Second, a relative clause is one in which the subject is a relative pronoun, most commonly: that, which, who, or whom. Finally, the tricky part is that the clause is restrictive if only the items to which the relative pronoun refers are included in the description or definition of the clause. For example:

1. The two permanency plans that the trial court ratified required the father to pay child support.
2. The two permanency plans, which the trial court ratified, required the father to pay child support.

You will notice right away that these two sentences appear exactly the same except for the choice of "that" in the first and "which" (with its accompanying paired commas) in the second. This choice has affected the meaning, however. The relative clause in the first sentence ("that the trial court ratified") is restrictive, meaning that only those two permanency plans were ratified and identifying only the ratified plans as the subject of the sentence. The relative clause in the second sentence is non-restrictive, meaning that it is added information about the plans and does not help to identify them as the subject of the sentence. Note: The first choice implies the existence of at least one other plan that the trial court did not ratify. Quick quiz: Can you explain why I used "that" in the preceding sentence?

¹ I chose this topic because I am a big fan of commas. It naturally follows that I am a big grammar nerd.



By: Sally A. Goade

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WHO IS READING THIS ANYWAY?

Don Paine, who I will always think of as “Professor Paine,” made me take a spelling test long after I thought I would never take one again. The test was required for my Civil Procedure II section at UT Law, and preparing for this article, it was easy to find because the course notebook still holds a place of honor on my office shelf. Professor Paine’s list places a special emphasis on “supersede,” which I can still spell without checking because I remember his hint that “there is no ‘c’ in supersede.” Once in a while I encounter a brief in my work now with the spelling of “judgement” with an “e,” which I sometimes employed years ago when I was not writing in legal circles and read a great deal of old British literature. Professor Paine included the proper (for all American and all British legal usage) spelling of “judgment” in our drill, along with, among other gems, “admissible” (“only one ‘a!’”), “certiorari,” (so often abbreviated we often forget the full spelling), and “subpoena” (tell me you never inverted the “b” and “p”).

Professor Paine’s spelling list taught us something more, of course. He let us know that the correct spelling mattered to our target audience outside law school, experienced legal readers like him, whether they be firm shareholders, bar association leaders, or judges. Often, an error is an error. Sometimes, however, the questions that arise about usage, whether variants in spelling, punctuation, or context, boil down to one question: Who is the intended audience? Notice, for instance, how that question affects an issue posed by a KBA member this month:

Question: How is the possessive form of a proper noun ending in “s” formed?

Generally, the possessive form of a proper noun (name) ending in “s” is the full name plus an apostrophe and another “s.” Example:

Mr. Harris’s complaint included a request for attorney’s fees.
Chris’s deposition and trial testimony did not agree.

Why have we become accustomed to seeing only an apostrophe used to form such a possessive in our local *Knoxville News Sentinel* and in many other publications? Journalism has all but abandoned the second “s,” but not in all cases. The *Associated Press Stylebook* (“AP”) calls for only an “s” after a name ending in “s.” The *New York Times Manual of Style and Usage*, however, still demands the second “s” after the apostrophe, unless the name ends in two sibilant sounds (Kansas’s weather), except that the “s” should be kept after all if the second sibilant sound is silent (“Arkansas’s parks”).¹ Considering our audience for legal writing, the AP’s negation of the second “s” is probably not for us unless we are writing for a journalistic legal publication that has adopted AP style.

As for non-journalistic trusted authorities, the *Modern Language Association Handbook* (“MLA”) follows the traditional rule with the second “s,” as does Brian Garner’s *The Oxford Dictionary of American Usage and Style* (“Oxford”), and the *Chicago Manual of Style* (“Chicago”) (to which Garner contributes). There are exceptions to the rule, but what those exceptions are varies with the style book you are using. The Hodges’ *Harbrace Handbook* (“Harbrace”) wisely instructs us to consult the publication guide for the discipline in which we are writing. You can at least defend the following exceptions with an authority lending

support:

- (1) The name is Biblical or Classical (“Jesus’ name” or “Oedipus’ crown”) (Oxford)
- (2) The name was formed from a plural noun (“General Motors’ reputation” or “United States’ foreign aid”) (Oxford)
- (3) The name is a place or organization but refers to a single entity (“United States’ foreign aid”) (Chicago).
- (4) The name ends in a syllable pronounced “eez” (“Sophocles’ poetry”) (Chicago)

On closer scrutiny, numbers two and three amount to essentially the same exception. As for the fourth exception, I found a few variations, all dependent upon the pronunciation of the final syllable (note the exception offered by *The New York Times* above), and many with examples given that would fall under number one above, the Biblical or classical names.

Personally, I prefer to keep the second “s” unless the word is a clear exception, but then I was originally schooled in a discipline governed heavily by the MLA, which offers no exception to the rule. In many instances, to keep continuity in the office, a discussion and consensus on which exceptions to adopt may be necessary (you may laugh, but I have been involved in three such consensus-making discussions on this issue in three separate offices since entering the legal world). The key, again, is your audience, and that brings me back to Professor Paine. Suzanne Craig Robertson, in the January 2014 *Tennessee Bar Journal*, wrote a stirring tribute to Don Paine in which she described his editing style during his twenty-five years of leadership and contribution. She noted:

He viewed the Associated Press Style, which the *Journal* uses, with disdain. But if I could cite to a reference as to why I did something like I did, and if we were consistent, he would give in.

With his stylish exclamation points that looked like alarmed triangles, he would fax the proof back to correct my mistakes or omissions with short handwritten instructions: “Quotation marks needed!” If he had left off the quotation marks himself, he was quick to admit that.

Anyone who has worked for an appellate judge in Tennessee who received a corrective fax from Don Paine knows the awful feeling of realizing exactly who might be reading an error that inadvertently slipped into final copy.

In the end, the best advice for forming a possessive of a proper noun ending in “s,” or any other variable construction, is to be aware of the style your organization has adopted, choose exceptions consistently and sparingly, and imagine Professor Paine’s students (colleagues, mentees) as your readers.

¹ See also Merrill Perlman. “Multiples Choice: Some Singular Help with Plural Possessives,” *Columbia Journalism Review*, August 27, 2012, available at http://www.cjr.org/language_corner/multiples_choice.php.



By: Sally A. Goade
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COMMAS AND HYPHENS ARE NOT SALT AND PEPPER

One of my responsibilities in my pre-law life was to supervise student teachers in English. I remember cringing once when I heard one of my charges (a graduate student) telling her eighth grade students that it usually worked to place the commas "where you would breathe if you were talking." More recently, a legal writer, recognizing that her method might not be best, confessed to me that she tends to "sprinkle" commas liberally. Perhaps comma overuse always has run rampant, but lately I also have been noticing another form of punctuation abuse: hyphen madness.

This month's column will focus both on "hyphen madness" and on one type of comma overuse: the comma placed between two verb phrases sharing the same subject. Both actually may be products of a laudable effort to streamline writing. One of George Orwell's "rules" in his influential essay, "Politics and the English Language," is that if "it is possible to cut a word out, always cut it out." One of my frequent laments after meeting a deadline is that "I didn't have enough time to write fewer words."

Punctuation errors can be one of the unintended consequences of an effort to streamline. You can avoid tacking on a clunky prepositional or explanatory phrase by joining two words to serve the function of an adjective, adding a hyphen, and placing your new construction before the word it is modifying. If you place your modifier after the word being described, do you still need a hyphen? No, you do not, and it is an error to use one. As for our comma usage example, you can avoid repetition of a subject by joining two verb phrases to describe your subject's action, but do you still need a comma between the phrases? No, you do not.

HYPHEN MADNESS

The General Rule: Use a hyphen to join two or more words that describe a noun they are preceding.
Examples:

- 1. The grantor conveyed his interest in the disputed property to his then-living children.
Explanation: "then" and "living" have been combined to describe "children," enabling the writer to avoid adding, "who were then living."
2. During the four-month determinative period, the father failed to pay any child support.
Explanation: "four" and "month" have been combined to describe "determinative period," enabling the writer to avoid adding, "which lasted four months."
3. The pet-centered, in-love-with-horses-since-junior-high me was also drawn to the listing within "Peoples with Disabilities" for the Therapeutic Riding Academy of Knoxville.
Explanation: I have to own this creation from my September 2012 DICTA article introducing KBA's Volunteer Handbook. "[P]et" and "centered" are joined as one adjective, and those other seven words with hyphens are joined to form a second adjective, all describing "me." The comma between the two hyphenated constructions is placed as you would any two adjectives preceding a noun. Proceed with caution, though; the effect of joining several words with hyphens to form one adjective can be a little cutesy, not to mention hard on the eyes.

Madness: A hyphen should NOT be used to join words in the following constructions:

- 1. An accepted compound noun (one noun formed by two or more words)
Examples:
• child support order ("child support" is describing "order," but "child support" is an accepted compound noun, so no hyphen)
• high school student ("high school" is describing "student" but is an accepted compound noun)
Explanation: Compound nouns are sometimes formed

with a hyphen until they become accepted, giving us an evolution such as "electronic-mail message" to "e-mail message" to "email message," and depending on your audience, "email" as a stand-alone noun (or even verb). There are also a few words commonly used in compounds that always take a hyphen (e.g., "self" in "self-confident").

- 2. Noun followed by its description
Examples:
• The responsive brief is well written.
BUT: The well-written responsive brief was persuasive.
• The defense attorney is strong willed.
BUT: The strong-willed defense attorney battled the odds.
Explanation: You may notice that in each example with the description following the noun, an intransitive (inactive) verb connects the subject to the description, leaving no need for another connector, such as a hyphen.
3. Adverb ending in "ly" and verb combined to describe a noun
Examples:
• newly acquired property ("newly" is an adverb modifying the verb "acquired," and the two together are modifying "property")
• timely filed appeal ("timely" is an adverb modifying the verb "filed," and the two together are modifying "appeal")
Explanation: Because the adverb's function is to modify the verb, a hyphen repeats the signal of connection already given by the "ly" ending.

SHARED SUBJECT

The General Rule: Do not place a comma between two elements of a compound predicate (usually two verb or adjectival phrases sharing one subject).

- Example:
1. Harold sprinted to the courthouse and filed the complaint two minutes before closing.
NOT: Harold sprinted to the courthouse, and filed the complaint two minutes before closing.
BUT WHAT IF: Harold sprinted to the courthouse, and he filed the complaint two minutes before closing.
[Yes, now we need a comma because the subject ("Harold") has been restated.]
AND WHAT ABOUT: Harold sprinted to the courthouse, filed the complaint two minutes before closing, and immediately called his client.
[Now we have a list of three verb phrases, and the commas are needed to divide the items in the list. The last comma is the somewhat controversial Oxford comma (see February 2014 "Grammar Guru" column).]
Explanation: One subject performing multiple actions will still present a simple sentence (subject-verb structure). Even though a restated subject may still represent the same actor ("Harold" and "he" above), the structure of the sentence is now compound (subject-verb, conjunction ("and"), subject-verb).

We may address more complicated compound predicates in a future column, but the basic equation is:

One Subject + Two Things = no comma between the two things
Finally, excellent readers, which lawyers really have to be, can often squeak by in their writing without analyzing the relationship between sentence structure and punctuation because they have developed a sense of what "looks right." The sense will fool us, though, as will the pauses taken when reading aloud and the spots sprinkled with commas and hyphens like salt and pepper.

1 Douglas E. Abrams, "George Orwell's Classic Essay on Writing: The Best Style 'Handbook' for Lawyers and Judges." Reprinted in the May 2014 issue of Tennessee Bar Journal, Vol. 50: No. 5, and originally appearing in Precedent, The Missouri Bar's quarterly magazine.



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ATTORNEY'S FEES OR ATTORNEYS' FEES?

This month's question was sent by regular DICTA columnist, Melissa B. Carrasco of Egerton, McAfee, Armistead & Davis, P.C. Melissa notes that on all but one occasion when requesting fees in pleadings, she has been referring to more than one attorney's work. She has used the plural possessive, "attorneys' fees," but she asks whether her choice is correct because she so often sees the singular, "attorney's fees," used instead. My co-clerk and I, having encountered this dilemma in our own work on appellate opinion drafts, recently reached a consensus that the singular, "attorney's fees," is a term of art and that we should use it even when referring to fees earned by more than one attorney. How did we reach such a consensus, and were we right?

The fact that Melissa asks this question reveals an attention to detail in her drafting that is often sorely missing. Another KBA member, frustrated with the many apostrophe errors she has seen in legal writing, has asked if in this column we might simply review the rules for forming possessives with apostrophes. Sure, we can, but I suspect the problem is that lawyers know the basic rules but are failing to proofread carefully to ensure consistent application of those rules. Let's look first at how to counter the more basic errors.

Proofreading for Apostrophe Errors

One version of the phrase at issue that we may see occasionally is unequivocally an error: "attorneys fees." It is becoming more common, however, to use "attorney" as an adjective, creating the phrase, "attorney fees." This is actually the version used in Tennessee's alimony statute. See Tenn. Code Ann. § 36-5-121(d)(5) (providing that alimony in solido may be awarded "in order to provide support, including *attorney fees*") (emphasis added). Once the "s" has been added, though, "attorney" can no longer function as an adjective. If an "s" has been added to indicate more than one attorney, the relationship between the noun and "fees" must be indicated with a possessive apostrophe following the "s."

As a writing teacher, I found that when a writer placed an apostrophe inconsistently or not at all, it was often due to a failure to recognize the two-step process involved in creating a plural possessive noun. If you are working with someone who seems to be careless with possessive apostrophes, try reminding the writer that the first decision is whether the word is singular or plural (one "attorney" or adding an "s" for more than one), and that the apostrophe is then only added to form a possessive. If the word is singular, an "s" must be added with the apostrophe ("attorney's fees"), but if the word is already plural, the apostrophe is added by itself ("attorneys' fees").

If apostrophe errors are slipping by in your proofreading process, try training your eye to hover for a nanosecond each time a word ends in "s." Check the word to see if it is part of a possessive construction and if so, whether an apostrophe has been placed properly. Remember that the possessive form of a pronoun does not include an apostrophe, for instance, "hers" and "its" (but "it's" for the contraction, "it is"). The first reaction to this suggestion may be that there is no time for "hovering" when facing a deadline, but a competent editor will develop the ability to catch apostrophe foibles almost subconsciously, reading for substance even while noting cues, such as "s" endings, for possible errors.

Choosing a Form

As for our central question, in his *The Redbook: A Manual on Legal Style* (2d ed. 2006), Brian Garner seems to give unequivocal support to Melissa's practice of using the plural possessive form if the legal fees are for more than one attorney's work. Garner expressly states:

attorney's fees. Use the singular by default, the plural (attorneys' fees) only if more than one lawyer will in fact receive fees.

In a recent online blog, however, Garner has tempered this advice:

The prevalent form appears to be *attorney's fees* (whether there is one attorney, two attorneys, or an entire firm involved). But *attorneys' fees* is also acceptable – and preferred by some – if it's clear that more than one attorney is charging for services. Although inelegant, *attorney fees* is becoming more common – presumably to avoid making a decision on the apostrophe altogether.

Bryan A. Garner, *LawProse Lesson #115: Is it attorney's fees or attorneys' fees?* LawProse, Apr. 23, 2013, available at <http://www.lawprose.org/blog/?p=1402>.

In the recent past, Tennessee appellate courts have used all three of the choices Garner cites to indicate the fees due for legal services:

1. attorney fees
2. attorney's fees
3. attorneys' fees

My co-clerk and I based our decision to use the singular "attorney's fees" as a term of art on two factors: First, because we need to cite established case law that refers to attorney's fees in general and not to specific instances of plural attorneys receiving fees, we run the risk of appearing inconsistent if we switch between singular and plural in the same document. Second, in a recent and often-cited decision involving domestic law, the Tennessee Supreme Court used "attorney's fees" even though the specific facts in the case involved work performed by plural attorneys. See *Lovelace v. Copley*, 418 S.W.3d 1 (Tenn. 2013); but see *Johnson v. Hopkins*, 432 S.W.3d 840 (Tenn. 2013) (employing "attorneys' fees" to indicate fees awarded for the services of more than one attorney in a landlord-tenant action that did not require citation to precedent regarding attorney's fees).

As with this column's examination of the formation of possessive singular proper nouns ending in "s" (see the April 2014 issue of DICTA), consistency within a document and knowing why your office is choosing one form over another are paramount. To my mind, Melissa's choice of the plural possessive makes sense in a pleading accompanying an affidavit showing multiple attorneys' work. On the other hand, if you are citing case law using the singular possessive and would like to keep all references to attorney's fees singular, the need for consistency and use of "attorney's fees" as a term of art will support your decision. If you are consistent, you can even choose to join the "inelegant" trend of using attorney as an adjective (with no "s"), but be forewarned that a few of us old apostrophe watchers may wince at the omission.

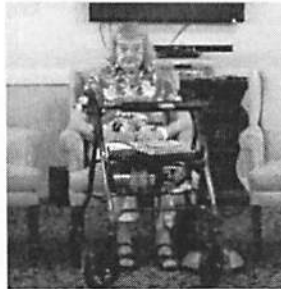


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SEIZING MY FAVORITE EDITOR'S SUGGESTION

I have a favorite editor I imagine over my shoulder every time I finish a draft: my mom. My mother, an avid reader of DICTA, has suggested a subject for this month's column: distinguishing gerunds from participles.

First, a word about my favorite editor: Dr. Barbara Aileen Wells Gunn is eighty-eight now, and she is still catching my mistakes. Twice during the past year I have sheepishly suggested that our office file a corrected opinion because after the opinion had become public, my mother read the final version and found a small proofreading error that began with my work. As a result, whenever our office is about to file an opinion on which I have worked, I ask that the presses be held for a few minutes while I pretend to be my mother as I read it one more time.



Dr. Barbara Gunn, preparing to give a presentation at Emeritus at Oak Ridge about her life in publication, April 2014

When people express surprise that my mother can still proofread so well at her age, I am tempted to roll my eyes. They have no idea. The title of "Dr." denotes her Ph.D. in sociology from Stanford University, completed while she was pregnant with me, her third and youngest child. Having earned her bachelor's degree from the University of Oregon while pregnant with my brother and her master's degree from the University of California at Los Angeles while expecting my sister, my mother has always said that pregnancy is a wonderful time to finish a degree.

In May 1948, *The Saturday Evening Post* published an article my mother wrote about the experience of completing college while married to a World War II veteran husband also attending university, discovering she was pregnant at the beginning of her sophomore year, and raising my brother while she and my dad juggled classes and work. In those days, nearly all of the advice my mom received, professional and otherwise, was to quit school as soon as she learned she was expecting. Instead, she completed her journalism degree with honors, sold an article and movie rights, and began a lifelong habit of submitting her writing for publication, not only her professional research as a University of California, Davis and University of Nevada, Reno professor, but her personal musings as well. She was most recently a frequent guest columnist for *The Oak Ridger*.

While participating in a local writing group, my mother was dismayed to hear the group leader respond to a question about participles by stating that all words taking an "-ing" ending are participles. The leader's explanation omitted an important class of words: gerunds. Many writers use participles and gerunds effectively without necessarily understanding their definitions or distinguishing between them. I confess to sometimes using the vague term, "-ing word," when teaching writing courses. My mother, as usual, is right though. Failing to distinguish between participles and gerunds can be

the source of some common yet easily preventable errors.

A **participle** is a verb form that may function as part of a verb phrase ("was arguing") or as a modifier ("Arguing passionately, counsel barely consulted his notes."). A **present participle** is formed by adding the "ing" ending to a verb ("arguing"), and a past participle is most often formed by adding "-ed" ("argued"), although several irregular verbs take a different form ("written").

A **gerund**, like most present participles, is formed by adding the "ing" ending to a verb, but in contrast, a gerund actually functions as a noun.

Example: "*Arguing* may be a favorite sport for many attorneys."

To create a gerund phrase, other words are added to the "-ing" verb form to function together as one noun phrase:

Example: "*Arguing a civil case before a jury* may become a lost art if some predictions are realized."

Note that in the preceding example, "Arguing a civil case before a jury" functions as the subject of the sentence's main clause.

Here is the tricky part: if a gerund is preceded by a noun, the noun needs to be formed as a possessive. Think of the action as belonging to the preceding noun.

Example: *The attorney's filing the complaint* commenced the action.

In this example, "The attorney" is the subject of the gerund phrase (in italics). The entire gerund phrase is the subject of the sentence.

Here is a subtle shift in our example:

The attorney, *filing the complaint*, commenced the action.

Why no possessive? The subject of the sentence has shifted—it is the attorney who commenced the action rather than the filing of the complaint that did so (note the shift in emphasis). In this case, "filing" is a participle, and the entire participial phrase, "filing the complaint," is modifying the verb of the sentence, "commenced." Note that the participial phrase now requires paired commas because it is interrupting the main sentence structure.

And one more:

The attorney commenced the action by *filing the complaint*.

The participial phrase has now become part of a prepositional phrase (with the preposition, "by") and is still modifying the verb, "commenced." It could be argued that "filing the complaint" is actually a gerund within the prepositional phrase, especially because a prepositional phrase extends from a preposition through to a noun, but the meaning of "by" as how something is done tells us that "filing a complaint" is functioning as an adverb. No comma is used because one is not necessary before a closing prepositional phrase. The choice to use a preposition has eliminated the interruption in sentence structure, but sometimes an interruption is desirable, perhaps in this example to spotlight the act of filing.

Quick quiz: Did I dangle a participle at the end of the preceding sentence?

My plan is to surprise my mother with this article, meaning that she has yet to read it and that I may well be sheepishly explaining some needed correction in next month's column. May all of our over-the-shoulder editors be so demanding.

When people express surprise that my mother can still proofread so well at her age, I am tempted to roll my eyes.