Presented:
30th Annual School Law Conference

February 19-20, 2015
Austin, TX

Ethics in Court Papers

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Wayne Schiess | UTCLE School Law Conference | February 20, 2015

"[Most legal-writing] tasks are for masters of English, but too few are found in law offices or on the bench." Robert Gunning, *The Technique of Clear Writing* 242 (1968).

Summary

Is it possible to write unethically?

It sure is, and listed here are citations to 25 of the most embarrassing, humorous, and perhaps instructive cases that deal with poor legal writing. The lawyers in these cases faced bar discipline, court sanctions, and civil liability. Let's hope you never do. For further reading, see Wayne Schiess, *Ethical Legal Writing*, 21 Rev. Litig. 527 (2002). (Note: Rather than clutter up the text here with lots of citations, I've cited the relevant case just once at the end of the discussion of that case.)

1. Breaking rules

In trials and appeals, courts place limits on the documents lawyers file; some lawyers try to get around the limits. Generally, courts dislike that.

In one case, the United States sought leave to file a petition for rehearing and rehearing en banc that was19 pages and 5500 words long. The limit for those petitions was 15 pages or 4200 words. In support of the request to file a longer brief, counsel told the court that his original draft was 30 pages long, and that he asked members of his department to review the brief "with the intent to reduce the length." The court replied, "We gather these efforts were not entirely successful."

Referring to the longer brief in disparaging terms, the court held that leave to file a "fat brief" would be granted only upon a showing of diligence and substantial need. Counsel's belief that he had exhausted his ability to edit the brief was not a showing of diligence and substantial need. The court admonished the lawyer:

> We have every confidence that when the United States Department of Justice applies its formidable resources to the problem, it will come up with a petition for rehearing that complies with our rules, yet presents the government's position elegantly and forcefully. . . . The clerk is ordered to return the non-conforming petition. If the United States chooses to file a conforming petition, it may do so no later than one week from the date of this order.

United States v. Molina-Tarazon, 285 F.3d 807, 807 (9th Cir. 2002). This understated tone with a hint of sarcasm is common when judges chastise lawyers.

Another lawyer who requested permission to file a "fat brief" teaches us all something about trying to get around the rules. If your request to file a longer brief is denied, the court will probably scrutinize your actual submission closely.

In this case, the petitioner requested permission to submit a brief in excess of the court's limits. Denied. The petitioner then submitted a brief in excess of the 50-page limit. Rejected. The petitioner then submitted a brief that "technically" conformed to the page limit; but the petitioner had accomplished it by shrinking the typeface and squeezing the margins. Appeal dismissed. *White Budd Van Ness Partn. v. Major-Gladys Dr. Jt. Venture*, 811 S.W.2d 541, 541 (Tex. 1991).

Some lawyers do more than exceed the word limit. In one case, the attorney broke several rules:

- omitted citations to the record
- omitted the appellate standard of review
- exceeded the word limit
- omitted required table of contents and authorities

And, worst of all, the lawyer submitted "creative renditions of what actually occurred at the district court." The court declared, "We must insist that parties not clog the system by presenting us with a slubby mass of words rather than a true brief." (A "slub" is a twisted piece of wool or a lump in a piece of wool.) The court also said that the appellant has "approached our rules with such insouciance that we cannot overlook its heedlessness." Brief struck; appeal dismissed. *N/S Corp. v. Liberty Mut. Ins. Co*., 127 F.3d 1145, 1146 (9th Cir. 1997).

Finally, in the most clever effort I have ever seen to get around court rules, a lawyer tried to keep a brief within the limits by omitting one of the arguments. In its place, the brief referred the court to arguments made on that issue in a motion for summary judgment at trial.

The court correctly pointed out that "[w]ere we to approve this tactic, appellate briefs would be reduced to a simple appellate record reference to a party's trial court arguments." And the tactic "would be an open door for parties to circumvent the appellate brief page limitations." Thus, the court held that it would consider only the arguments that were actually in the appellants' brief. *Guerrero v. Tarrant Cty. Mortician Servs. Co*., 977 S.W.2d 829, 832–33 (Tex. 1998).

2. Writing poorly

Sadly, some lawyers write badly—very badly. Sometimes they get into trouble for it. If these cases weren't so sad, they'd be more humorous.

For example, in a federal district court, a lawyer filed a wordy, repetitive complaint containing multiple allegations per paragraph, improperly pleaded evidence, and argumentative language. The court ordered the lawyer to re-plead the complaint, and offered this help:

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First appeared as part of the conference materials for the
30th Annual School Law Conference session
"Ethics in Court Papers"