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Sanctions for Evading Maximum Page Limits on Court Filings

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SANCTIONS FOR EVADING MAXIMUM PAGE LIMITS ON COURT FILINGS

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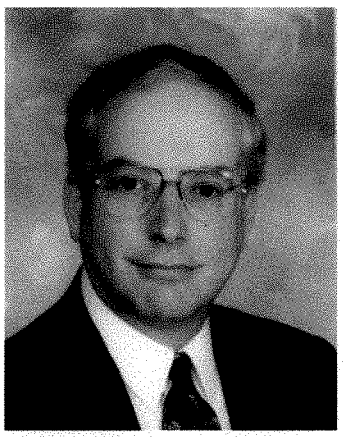
ON MARCH 30, IN *CAFEX COMMUNICATIONS INC. V. AMAZON WEB SERVICES, INC.*, FEDERAL DISTRICT JUDGE VICTOR MARRERO (S.D.N.Y) IMPOSED A MONETARY SANCTION ON DEFENDANT AMAZON'S COUNSEL FOR FILING A MEMORANDUM THAT VIOLATED THE COURT'S INDIVIDUAL RULE ABOUT MAXIMUM PAGE LENGTH.[2] THE COURT FOUND THAT COUNSEL'S "FLOUTING" AND "SUBVERTING" OF THE RULE WAS "A DELIBERATE CHOICE . . . TO GAIN SOME SLIGHT ADVANTAGE."[3]



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The Individual Rule requires that memoranda "be double spaced and in 12-point font with 1-inch margins."[4] Judge Marrero found that the offending memorandum (which opposed CafeX's motion for a preliminary injunction) was "24-point spaced, not double spaced, and allowed Amazon to submit a substantially longer memorandum than the 25 pages" permitted.[5]

A Growing Lineup

Judge Marrero joins a growing lineup of judges who have imposed or threatened sanctions on counsel for attempting to evade court rules that set maximum page limits on briefs, memoranda, and other filings. Orders and reported opinions catalogue various strategies, including these: presenting the main text in a font smaller than the court's required font;[6] presenting the main text with spacing less than required double spacing;[7] using excessive footnotes, often single-spaced or in small fonts;[8] or narrowing required margins on the sides, the top, or the bottom of pages.[9]

Evasive efforts are unlikely to fool trial or appellate judges, who read briefs and other filings week in and week out. Courts have denounced these efforts as "circumvention,"[10] chicanery,"[11] "manipulation,"[12] "embarrassing,"[13] "tactics,"[14] "facades,"[15] "sleights of hand,"[16] and "a favorite undergraduate gambit."[17] And, as attempts to "skirt" page limits,[18] demonstrations of "blatant scorn" for court rules,[19] and conduct "disrespectful to [the] court and to opposing counsel."[20]

Disciplined Editing

In a particular case, counsel may genuinely feel unable to make effective factual or legal argument within the court's maximum page limits. Counsel perceiving unusual complexity has candid recourses that do not descend to "playing with the font, line spacing, or margins."[21] As a threshold matter, one Illinois federal district court advises that lawyers (like other writers)[22] often can trim their drafts with disciplined editing.[23]

The Illinois federal district court continued: "If after rigorously editing one's work (*i.e.*, deleting repetitious matter, useless verbiage, and material that presents nothing more than counsel's indignance), a memorandum still exceeds the page limit, the proper course is to request leave to file an over-sized brief."[24] The court may grant or deny leave based on its perceptions of whether the law or facts are as unusually complex as counsel urges.[25]

Sanctions For Abuse

Courts may impose any of a range of sanctions against lawyers or firms who spurn editing or requests for leave, and try instead (as one court put it) to "disguise the excess [of briefs] by . . . typographical techniques."[26] As in *CafeX Communications*, the court may impose a monetary sanction on counsel. The court may also reject or strike the offending document.[27] The court may refuse to consider argument that appears after the final page prescribed by the rules.[28] The court's written opinion may merely warn counsel against future violations without imposing an immediate sanction,[29] but such relative leniency cannot be predicted.

Damage From Court Admonition

For a lawyer or firm, potential sanction or warning for attempted evasion may be merely the tip of the iceberg. In *CafeX Communications*, Judge Marrero's sanction amounted to only

$1,048.09, the cost of preparing a compliant memorandum. Such an amount would hardly impoverish the typical counsel.

The bulk of the iceberg, the potentially permanent damage lurking below the surface, is the embarrassment that can accompany judicial admonition for sharp practice. The court may identify the offending lawyer or firm by name in its opinion or order. Even where (as in *CafeX Communications*) the lawyer or firm goes unnamed, readers can usually determine identity from the list of appearances that typically follow the case's caption, from the court's docket entries, or sometimes from coverage in the legal media. One way or another, counsel risks besmirching a professional reputation for integrity.

Admonition and sanction early in the proceeding may lead the court and adversary to question whether counsel who would cut corners with court rules would also cut corners with factual or legal argument. The court's early admonition may also tarnish the client's impressions of counsel, and may even lead a disgruntled client to consider afterwards whether arousing perceived judicial animosity might have contributed to an adverse outcome.

After final judgment, word about sharp practice may get around the bar. In cities, suburbs, and outstate areas alike, the bar usually reduces itself to a relatively discrete group bound by bar association memberships, other mutual relationships, word of mouth, recollections, and past experiences. The specialization that characterizes much of contemporary law practice may constrict the circle still further.[30]

In many private-law matters, scrutiny of a lawyer's candor may not extend beyond parties and counsel. With public exposure in a court opinion, however, lack of candor becomes a record permanently available to other lawyers who follow the advance sheets or the legal media. Westlaw, Lexis, and similar electronic sources open the record even wider to research that exposes prior transgressions.

A Lawyer's "Bread and Butter"

The Model Rules of Professional Conduct specify that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."[31] The specification leaves no latitude for seeking to tilt the playing field in a client's favor by evading court rules about page length and format.

Succumbing to temptation can exact a price because the U.S. Court of Appeals for the 7th Circuit is right that a reputation for integrity is a lawyer's "bread and butter."[32] The risk of forfeiting this nourishment is not worth a few extra errant passages in a brief, memorandum, or other court filing.

Endnotes

1 Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books. Four U.S. Supreme Court decisions have cited his law review articles. His latest book is EFFECTIVE LEGAL WRITING: A GUIDE FOR STUDENTS AND PRACTITIONERS (West Academic Publishing 2016).

2 *CafeX Communications Inc. v. Amazon Web Servs., Inc.*, 1:17-cv-01349-VM (Order of Mar. 30, 2017).

3 *Id.*

4 *Id.*

5 *Id.*

6 *Kelly v. Provident Life & Acc. Ins. Co.*, 2010 WL 5300807 *3 (D. Vt. Dec. 20, 2010). *See also, e.g., Madrigel v. Astrue*, 2012 WL 4060976 *5 n.1 (N.D. Ohio Aug. 20, 2012); *Forsythe v. Bd. of Educ.*, 956 F. Supp. 927, 928 (D. Kan. 1997) ("shrinking the font size to near microscopic proportions"); *Kanter v. Epstein*, 866 A.2d 394, 403 (Pa. Super. Ct. 2004); *Kent v. Charlie Chicken, II, Inc.*, 972 S.W.2d 513, 517 (Mo. Ct. App. E.D. 1998).

7 *E.g., Equal Employment Opportunity Comm'n v. Darden Restaurants, Inc.*, No. 1:15-cv-20561 (U.S.D.C. S.D. Fla.) (Order of July 25, 2017) ("The Court will not tolerate a deliberate disregard of Court Orders."), discussed in Debra Cassens Weiss, *Big Law Firm Scolded By Federal Judge for Disregarding Line-Spacing Orders*, A.B.A. J. (posted Aug. 1, 2017), and Paul Brinkmann, *Judge Scolds Darden's Seasons 52 Over Line-Spacing*, ORLANDO (FLA.) SENTINEL (July 31, 2017); *Smith v. Colvin*, 2016 WL 880037 *9 n.2 (E.D. Mo. Mar. 7, 2016); *Panarello v. City of Vineland*, 2016 WL 3638108 *6 (D.N.J. July 7, 2016); *Kanter, supra* note 6, 866 A.2d at 403.

8 *E.g., Conference of State Bank Supervisors v. Office of the Comptroller of the Currency*, No. 1:17-cv-00763-JEB (U.S.D.C. D.D.C.) (Order of July 28, 2017) (party's "excessive footnoting both violates [the applicable court rule] and appears to be an effort to circumvent page limitations"), discussed in Debra Cassens Weiss, *Federal Judge Cites 'Excessive Footnoting' and Imposes Page Limit For Revised Government Brief*, A.B.A. J. (posted July 31, 2017); *EEOC v. Darden Restaurants, Inc.*, *supra* note 7; *Coyle v. Aquila, Inc.*, 2009 WL 10672014 *1 n.1 (W.D. Mo. Mar. 9, 2009); *Kent, supra* note 6, 972 S.W.2d at 517.

9 *E.g., Kanter, supra* note 6, 866 A.2d at 403.

10 *E.g., Griswold v. Comm'rs of S.S.*, 2014 WL 4639509 *1 n.1 (E.D. Mich. Sept. 16, 2014); *Condon v. City of Chicago*, 2011 WL 5546009 *1 n.1 (N.D. Ill. Nov. 9, 2011); *Coyle, supra* note 8, 2009 WL 10672014 at *1 n.1; *Kent, supra* note 6, 972 S.W.2d at 517.

11 *E.g., Kanter, supra* note 6, 866 A.2d at 403.

12 *E.g., IMI Norgren Inc. v. D & D Tooling & Mfg., Inc.*, 2003 WL 40499 *1 (N.D. Ill. Jan. 6, 2003).

13 *Id.* (citation omitted).

14 *English v. CSA Equip. Co.*, 2006 WL 2456030 *10 n.41 (S.D. Ala. Aug. 22, 2016); IMI *Norgren Inc., supra* note 12, 2003 WL 40499 at *1.

15 *Johnson v. Roehl Properties*, 2012 WL 1144027 *4 (N.D. Ind. Apr. 4, 2012).

16 *Condon, supra* note 9, 2011 WL 5546099 at *1 n.1.

17 *Forsythe, supra* note 5, 956 F. Supp. at 928 (citation omitted).

18 *Numatics, Inc. v. Balluff, Inc.*, 2014 WL 6750589 *2 (E.D. Mich. Dec. 1, 2014); *Attachmate Corp. v. Health Net Inc.*, 2010 WL 4365833 *7 (W.D. Wash. Oct. 26, 2010).

19 *La Reunion Francaise, S.A. v. Halbart*, 1998 WL 1750128 *1 n.1 (E.D.N.Y. Sept. 28, 1998).

20 *Reyes v. City of Chicago*, 199 WL 608768 *2 n.1 (N.D. Ill. Aug 6, 1999).

21 *IMI Norgren Inc., supra* note 12, 2003 WL 40499 at *1 (citation omitted).

22 DOUGLAS E. ABRAMS, EFFECTIVE LEGAL WRITING: A GUIDE FOR STUDENTS AND PRACTITIONERS, ch. 8 (West Academic Publishing 2016) ("Perfect First Drafts Don't Exist").

23 *IMI Norgren Inc., supra* note 11, 2003 WL 40499 at *1 (citation omitted). *See also, e.g., Smith, supra* note 7, 2016 WL 880037 at *9 n.2; HERBERT MONTE LEVY, HOW TO HANDLE AN APPEAL 176 (2d ed. 1982) (except perhaps in exceptional cases, "skillful writing and editing can prune the brief to manageable size").

24 *IMI Norgren Inc., supra* note 12, 2003 WL 40499 at *1 (citation omitted).

25 *E.g., Murray v. City of Bonners Ferry*, 2016 WL 3198232 (D. Idaho June 8, 2016) (denied); *Gibbs v. Ga.-Pac. Wood Prods., LLC*, 2009 WL 3211013 *4 (S.D. Ala. Sept. 30, 2009) (granted); *R & G Invs. & Holdings, LLC v. Am. Family Ins. Co.*, 787 S.E.2d 765, 769 (Ga. Ct. App. 2016) (denied).

26 *Johnson, supra* note 15, 2012 WL 1144027 at *4 (quoting *Westinghouse Elec. Corp. v. NLRB*, 809 F.2d 419, 424-25 (7th Cir. 1987)).

27 *E.g., EEOC v. Darden Restaurants, Inc., supra* note 7; *Brantley v. Ferrell Elec., Inc.*, 112 F. Supp.3d 1348, 1380 n.17 (S.D. Ga. 2015).

28 *E.g., Stanfield v. Dart*, 2014 WL 996482 *8 (N.D. Ill. Mar. 13, 2014).

29 *E.g., Brantley v. Ferrell Elec., Inc., supra* note 27, 112 F. Supp.3d at 1380 n.17; *Wilson v. HSBC Bank USA*, 2013 WL 12114443 *1 n.1 (C.D. Cal. May 31, 2013); *Griswold, supra* note 9, 2014 WL 4639509 at *1 n.1; *Erie Painting & Maintenance, Inc. v. Illinois Union Ins. Co.*, 876 F. Supp.2d 222, 224 (W.D.N.Y. 2012); *IMI Norgren Inc., supra* note 12, 2003 WL 40499 at *2; *Velasco v. State*, 2014 WL 605843 *1 n.1 (Nev. Feb. 13, 2014).

30 Douglas E. Abrams, *supra* note 22, at 21.

31 ABA MODEL RULES OF PROFESSIONAL CONDUCT, *Preamble* [2] (2016).

32 *Harlyn Sales Corp. Profit Sharing Plan v. Kemper Fin. Servs.*, 9 F.3d 1263, 1269 (7th Cir. 1993). *See also, e.g.*, Stephen P. Younger, *Reflections on the Life and Work of the Honorable Hugh R. Jones*, 65 ALB. L. REV. 13, 13 (2001) (quoting New York Court of Appeals Judge Hugh R. Jones: "A lawyer's reputation is his principal asset.").

SUPREME COURT RULE CHANGES

The Supreme Court of Missouri, in an order dated September 26, 2017, the Supreme Court of Missouri repealed subdivision (n) of subdivision 4-1.0 (Terminology); paragraph [10] of the Comment to subdivision 4-1.0; paragraph [6] of the Comment to subdivision 4-1.1 (Competence); paragraph [4] of the Comment to subdivision 4-1.4 (Communication); subdivision (b) of subdivision 4-1.6 (Confidentiality of Information); paragraphs [15] and [16] of the Comment to subdivision 4-1.6; paragraph [6] of the Comment to subdivision 4-1.17 (Sale of Law Practice); subdivision (a) of subdivision 4-1.18 (Duties to Prospective Client); paragraphs [1], [2], [4], and [5] of the Comment to subdivision 4-1.18; subdivision (b) of subdivision 4-4.4 (Respect for Rights of Third Persons); paragraphs [2] and [3] of the Comment to subdivision 4-4.4; paragraphs [1] and [2] of the Comment to subdivision 4-5.3 (Responsibilities Regarding Nonlawyer Assistants); subdivision (d) of subdivision 4-5.5 (Unauthorized Practice of Law); Multijurisdictional Practice of Law); and paragraphs [1] and [16] of the Comment to subdivision 4-5.5; all of the foregoing as a part of Rule 4, entitled "Rules of Professional Conduct."

In lieu thereof, the Court adopted a new subdivision (n) of subdivision 4-1.0 (Terminology); a new paragraph [10] of the Comment to subdivision 4-1.0; new paragraphs [6], [7], and [8] of the Comment to subdivision 4-1.1 (Competence); a new paragraph [4] of the Comment to subdivision 4-1.4 (Communication); new subdivisions (b) and (c) of subdivision 4-1.6 (Confidentiality of Information); new paragraphs [15], [16], [18] and [19] of the Comment to subdivision 4-1.6; a new paragraph [6] of the Comment to subdivision 4-1.17 (Sale of Law Practice); a new subdivision (a) of subdivision 4-1.18 (Duties to Prospective Client); new paragraphs [1], [2], [4], [5], and a new last paragraph following paragraph [8] of the Comment to subdivision 4-1.18; a new subdivision (b) of subdivision 4-4.4 (Respect for Rights of Third Persons); paragraphs [2] and [3] of the Comment to subdivision 4-4.4; paragraphs [1], [2], [3], and [4] of the Comment to subdivision 4-5.3 (Responsibilities Regarding Nonlawyer Assistants); new subdivisions (d) and (f) of subdivision 4-5.5 (Unauthorized Practice of Law); Multijurisdictional Practice of Law); and new paragraphs [1] and [16] of the Comment to subdivision 4-5.5.

In the same order, the Court repealed subdivision 8.105 (Limited Admission for In-House Counsel" of Rule 8, entitled "Admission to the Bar," and in lieu thereof adopted a new subdivision 8.105 (Limited Admission for In-House Counsel).

This order became effective September 26, 2017.

The complete text of the order may be read in its entirety at www.courts.mo.gov.

In an order dated October, 2017, the Supreme Court of Missouri repealed subdivision 5.26(b), entitled "Designation of Trustee," of Rule 5 (Complaints and Proceedings Thereon), and in lieu thereof adopted a new subdivision 5.26(b), entitled "Designation of Trustee."

This order became effective October 5, 2017.

The complete text of the order may be read in its entirety at www.courts.mo.gov.