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## How Not to File a Complaint

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## **How Not to File a Complaint**

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# How Not to File a Complaint

By Douglas E. Abrams

A few years ago, H. Michael Stanard and his company, One Zero Charlie Productions, built an outdoor amphitheater on his property in rural Illinois and began hosting public events there. But all was not clear sailing. Stanard alleged that the county sheriff forced him to provide security at these events by hiring off-duty deputies at inflated wages, and threatened to close the road leading to the amphitheater if he refused to make these hires.<sup>1</sup>

Stanard's allegations raised the specter of serious official misconduct, but the property owner never got his day in court. After more than a year of skirmishing and false starts, the federal district judge dismissed the case with prejudice because Stanard's lawyer, Walter P. Maksym of Chicago, failed three times to draft a complaint minimally passable under the Federal Rules of Civil Procedure.

The 7th Circuit affirmed the dismissal order because the second amended complaint remained "far outside the bounds of acceptable legal writing."<sup>2</sup> "Each iteration of the complaint was generally incomprehensible and riddled with errors, making it impossible for the defendants to know what wrongs they were accused of committing."<sup>3</sup>

## Simplicity and Standards

The *Stanard* fiasco's common sense lesson is that, despite the Federal Rules' accent on notice pleading rather than the hyper-technicality that plagued earlier common law and code pleading, the Rules demand competent,

meticulous writing from counsel.<sup>4</sup> The pleadings must contain "a short and plain statement" of the claim and any defenses, as the case may be.<sup>5</sup> "Each allegation must be simple, concise, and direct."<sup>6</sup> Because the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding,"<sup>7</sup> these commands have teeth.

Under Rule 15, "[t]he court should freely give leave [to amend a pleading] when justice so requires."<sup>8</sup> The Supreme Court has held, however, that district courts retain "broad discretion to deny leave to amend where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where amendment would be futile."<sup>9</sup> In *Stanard*, the district court finally lost patience with lawyer Maksym, who ran afoul of each of these criteria by "prov[ing] unable to file an intelligible" complaint after three tries, the initial complaint and two amendments.<sup>10</sup>

Wherever possible, the Federal Rules of Civil Procedure favor judgments on the merits, and not on procedural infirmity.<sup>11</sup> The overarching contemporary vision perceives procedure as the means for securing judicial resolution under the substantive law, and not as an end in itself. Writing that is less than stellar normally does not produce dismissal with prejudice, but (as plaintiff Stanard learned the hard way) sometimes the lawyer's performance falls persistently below a minimal threshold of competence that courts are willing to accept.

## "Incomprehensible and Riddled With Errors"

Michael Stanard's original 52-page multi-count complaint contained "a number of obviously frivolous claims," and failed to specify which of more than two dozen defendants were liable under each of the other claims.<sup>12</sup> Lawyer Maksym ignored court orders to respond to defense motions, missed several deadlines, sometimes sought extensions of time, and sometimes filed responses barely minutes before the court's deadline would expire. When the lawyer finally filed the first amended complaint, his effort was "haphazard at best" and still marked by "basic incoherence."<sup>13</sup>

Lawyer Maksym reached the end of the road, however, for reasons that transcended recalcitrance and legal insufficiency. When it affirmed the district court's dismissal with prejudice of the second amended complaint, the 7th Circuit stressed that "unintelligibility is certainly a legitimate reason" for denying leave to amend a pleading.<sup>14</sup> Writing for the panel, Judge Diane Sykes catalogued five failures that marked Maksym's latest submission:

- *Lack of punctuation* ("At least 23 sentences contained 100 or more words.") Judge Sykes drew particular attention to a "staggering and incomprehensible" 345-word sentence that consumed more than 30 lines in the Federal Reporter;<sup>15</sup>
- *Near incomprehensibility* ("Much of the writing is little more than gibberish.");
- *Failure to follow basic directions* ("Given three attempts to file a

proper complaint, Maksym could not even bring himself to correct the errors catalogued by the district court following the first two rejections.”);

- *Failure to put defendants on notice* (“Despite the complaint’s length – or perhaps in part because of it – it remains unclear what constitutes the core of the claims against Nygren and the other defendants.”); and
- *Grammatical and syntactical errors* (“The district court put it best: ‘The grammatical and spelling errors’ are ‘too numerous to add “[sic]” where required.’”).<sup>16</sup>

To make matters worse for lawyer Maksym, when he sought to salvage his client’s case and his own professional reputation on appeal, the 7th Circuit found his appellate brief “woefully deficient”<sup>17</sup> and marked by “[a]ll the deficiencies that plagued the various versions of the complaint.”<sup>18</sup> By that time, the journey from law office to the clerk’s office had already left the road strewn with casualties, including the lawyer himself.

Plaintiff Stanard lost his opportunity for judicial resolution after months of procedural skirmishing that likely saddled him with hefty attorneys’ fees, but with little remaining opportunity for relief except a potential malpractice action against his lawyer. A malpractice action would start the expensive and emotionally draining litigation roller coaster anew, a prospect that clients do not anticipate when they retain counsel to secure relief in federal court.

Lawyer Maksym did not emerge unscathed, either. He told the *Chicago Tribune* that he was struggling with serious health issues while representing Mr. Stanard,<sup>19</sup> but the 7th Circuit panel concluded that the lawyer’s performance in the case raised “serious

questions about his competence to practice before” the court. The panel ordered him to show cause why he should not be suspended from the court’s bar or otherwise disciplined under Rule 46 of the Federal Rules of Appellate Procedure.<sup>20</sup> The panel also directed the clerk to send a copy of its opinion to Illinois bar authorities for possible disciplinary action.<sup>21</sup>

### Conclusion: A Lawyer’s Principal Asset

In most years when I taught civil procedure, I would incorporate a practical drafting component into doctrinal instruction, lest the students leave the course lulled into complacency that the Federal Rules’ accent on notice pleading somehow relaxes standards for competent research and writing.<sup>22</sup> The practical lesson was that although Rule 8(e) instructs courts that “[p]leadings must be construed so as to do justice,”<sup>23</sup> generous construction has its limits.

Cases such as *Stanard* remain extreme for both the magnitude of the lawyer’s failures and the force of the court’s public reaction, but extreme cases sometimes elicit valuable universal lessons. Regardless of any details that might emerge about lawyer Maksym’s health issues, the overarching lesson here transcends this particular case. Shoddy pre-trial writing can compromise a lawyer’s reputation because trial and appellate courts alike sometimes go public with their criticism.

The court may identify the offending lawyer by name in its opinion or order, as the court did 55 times in *Stanard*. In another recent decision, *Nault v. Evangelical Lutheran Good Samaritan Foundation*,<sup>24</sup> the federal district judge’s order twice identified the plaintiff’s lawyer by name for filing motion papers that were “riddled with unprofessional

grammatical and typographical errors that nearly render the entire Motion incomprehensible.”<sup>25</sup> The *Nault* judge even ordered that the lawyer personally hand deliver to his client a copy of the order and the court’s mark-up of the motion papers, showing the errors.<sup>26</sup>

Even where the lawyer goes unnamed in the court’s opinion or order, readers can easily determine his or her identity by glancing at the list of appearances that follow the case’s caption. In *Sanchez v. Carrollton-Farmers Branch Independent School District*,<sup>27</sup> for example, the opinion of the U.S. Court of Appeals for the 5th Circuit left the lawyer unnamed, but also left no doubt about the panel’s condemnation: “Usually we do not comment on technical and grammatical errors, because anyone can make such an occasional mistake, but here the miscues are so egregious and obvious that an average fourth grader would have avoided most of them.”<sup>28</sup>

Whether or not the court identifies the lawyer by name, the damage is done because word gets around. In cities, suburbs and outstate areas alike, the practicing 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.

A court’s public criticism becomes a permanent mark readily available to other lawyers who follow the advance sheets or the professional and popular media. Westlaw, Lexis and other electronic research sources transmit the mark even wider.

At stake is personal reputation, which Judge Hugh R. Jones of the New York Court of Appeals appropriately called “a lawyer’s . . . principal asset.”<sup>29</sup> A

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lawyer's reputation, wrote Chief Judge Benjamin N. Cardozo when he sat on that court decades earlier, "is a plant of tender growth, and its bloom, once lost, is not easily restored."<sup>30</sup>

## Endnotes

1 *Stanard v. Nygren*, 658 F.3d 792, 793 (7th Cir. 2011).

2 *Id.* at 798 n.7.

3 *Id.* at 793.

4 See ABA Model Rules of Prof'l Conduct, R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.")

5 Fed. R. Civ. P. 8(a), (b).

6 Fed. R. Civ. P. 8(d).

7 Fed. R. Civ. P. 1

8 Fed. R. Civ. P. 15(a)(2).

9 *Foman v. Davis*, 371 U.S. 178, 182 (1962).

10 *Stanard*, *supra* note 1, at 793.

11 See, e.g., *Foman*, *supra* note 9, at 182.

12 *Stanard*, *supra* note 1, at 794.

13 *Id.* at 794-95.

14 *Id.* at 797-98.

15 *Id.* at 798 n.7.

16 *Id.* at 798-99 (labels and quotes by the court of appeals).

17 *Id.* at 793.

18 *Id.* at 801.

19 Steve Schmadeke, *Peterson Attorney Chided for "Gibberish"; Federal Appeals Court Questions His Competence*, CHI. TRIB., Sept. 20, 2011, at 8.

20 Fed. R. App. P. 46(b)(1)B ("A member of the court's bar is subject to suspension or disbarment by the court if the member . . . is guilty of conduct unbecoming a member of the court's bar.")

21 *Stanard*, *supra* note 1, at 801-04; see also, e.g., *In re Sobolevsky*, 430 Fed. Appx. 9, at \* 9 (2d Cir. 2011) (unpublished opinion) (publicly reprimanding lawyer who, among other things, filed appellate briefs of "shockingly poor quality," and suspending him from practice before the court for two years); *Matter of Sobolevsky*, 2012 WL 1345631 (N.Y. Sup. Ct. App. Div.) (imposing reciprocal discipline on the lawyer based on the 2d Cir. order).

22 Douglas E. Abrams, *Integrating Legal Writing into Civil Procedure*, 24 CONN. L. REV. 813 (1992).

23 Fed. R. Civ. P. 8(e).

24 *Nault*, No. 609-cv-1229-Orl-321-GJK (M.D. Fla. Sept. 19, 2009), [http://www.abajournal.com/news/article/judge\\_labels\\_lawyers\\_motion\\_nearly\\_incomprehensible\\_marks\\_up\\_errors](http://www.abajournal.com/news/article/judge_labels_lawyers_motion_nearly_incomprehensible_marks_up_errors); see also, e.g., *Abner v. Scott Memorial Hosp.*, 634 F.3d 962, 964 (7th Cir. 2011) (criticizing lawyer by name for a "rambling" brief that exceeded maximum word limit).

25 *Nault*, *supra* note 24.

26 *Id.*

27 647 F.3d 156 (5th Cir. 2011).

28 *Id.* at 172 n.13; see also, e.g., *In re King*, 2006 WL 581256 (W.D. Tex. Feb. 21, 2006) ("Order Denying Motion for Incomprehensibility"; "The court cannot determine the substance, if any, of the Defendant's legal argument, nor can the court even ascertain the relief that the Defendant is requesting.")

29 Stephen P. Younger, *Reflections on the Life and Work of the Honorable Hugh R. Jones*, 65 ALB. L. REV. 13, 13 (2001); see also, e.g., *Harlyn Sales Corp. Profit Sharing Plan v. Kemper Fin. Servs.*, 9 F.3d 1263, 1269 (7th Cir. 1993) ("A lawyer's reputation for integrity, thoroughness and competence is his or her bread and butter.")

30 *People ex rel. Karlin v. Culkin*, 162 N.E. 487, 492 (N.Y. 1928).



**Douglas E. Abrams**, a law professor at the University of Missouri, has written or co-authored five books. Four U.S. Supreme Court decisions have cited his law review articles.