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Summer 2009

## How Not to Seek an Award of Attorney's Fees

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### Recommended Citation

Douglas E. Abrams, How Not to Seek an Award of Attorney's Fees, 3 *Precedent* 36 (2009).  
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# School of Law

University of Missouri



**Legal Studies Research Paper Series  
Research Paper No. 2009-25**

## **How Not to Seek an Award of Attorney's Fees**

**Douglas E. Abrams**

Published in the Summer 2009 issue of *Precedent*, the quarterly magazine of the Missouri Bar: <http://members.mobar.org/pdfs/precedent/aug09/abrams.pdf>

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# How Not to Seek an Award of Attorney's Fees

By Douglas E. Abrams

In 2007, lawyer Brian M. Puricelli won his client a \$150,000 jury verdict against a Philadelphia police officer for false arrest during a street celebration following the division championship victory that put the Philadelphia Eagles in the Super Bowl two years earlier.<sup>1</sup> Shortly after entry of judgment in *McKenna v. City of Philadelphia*, Puricelli filed a petition seeking more than \$180,000 in attorney's fees for his work in the federal civil rights action. In a published decision reported nationally, internationally and locally, U.S. District Judge J. William Ditter, Jr. awarded fees of only \$26,000 because, among other reasons for reduction, the lawyer's request came in written submissions that the court found "slip-shod."<sup>2</sup>

## "SLIP-SHOD SUBMISSIONS"

Judge Ditter lambasted the Puricelli fees petition for its caption, which omitted one word and misspelled another ("interets"), but that was only the beginning.<sup>3</sup>

The court also quoted verbatim the petition's opening sentence, complete with its nine misspelled words and two citation errors, quite an array before the judge's eyes even reached the argument's first period:

"Plaintf [sic] for the facts and argument [sic] of law made in the mocong [sic] papers and supporting memorandum of law for an award of counsel fees, award of litigation [sic] costs,

delay damages and post judgemnt [sic] interest under Fed. Rule of Civil Pro. 59(e), 42 USC [sic] 988 and 28 USC [sic] 1920, submits the proposed order shouold [sic] be entered as the Court's order; and in support of same, plainitff [sic] im [sic] McKenna though [sic] counsel says: . . ."<sup>4</sup>

The fee petition's remaining 20 paragraphs, and its Wherefore clause, were laden with more misspellings, including these: "withint," "Philadehia," "attoreys," "Ubited States," "Pensylvania," "reasonbale," "achived," and "Bargining Agreeemnt."<sup>5</sup> Judge Ditter also referenced the petition's "punctuation miscues"<sup>6</sup> and its "misquotations as well as errors of omission, commission, and abbreviation."<sup>7</sup>

Thanks to careless cutting-and-pasting from a proposed order Puricelli had filed in an unrelated case, the *McKenna* petition's proposed order (with still-uncorrected misspellings) recited "the wrong amount of [the plaintiff 's] judgment and orders three strangers to this action to pay attorneys' fees and costs."<sup>8</sup> In another cut-and paste job gone awry, the memorandum of law supporting the *McKenna* fees petition repeated the same typographical errors, "the same bungled case citations," and the "same case-name errors" found in a memorandum that Puricelli had submitted to the court in yet another unrelated action.<sup>9</sup>

Judge Ditter did acknowledge that three days after filing the first *McKenna* fees petition, lawyer Puricelli filed an amended petition which "corrected most of the original's misspellings,"

and thus was "better but not good."<sup>10</sup> By that time, Puricelli was likely on a short judicial leash for having overlooked the adage that a person gets only one chance to make a good first impression. According to the court, he had commenced the *McKenna* lawsuit with a "verbose . . . repetitive" complaint that contained 56 misnumbered paragraphs "replete with misspellings, errors of grammar, and punctuation lapses."<sup>11</sup> Near the end of the trial, the plaintiff's proposed jury instructions provided an apt denouement, described by Judge Ditter as a "mish-mash of misdirections, misnomers, and mistakes."<sup>12</sup>

## MISSING THE LESSON

Evidently lawyer Puricelli had not learned his lesson, because the same court had publicly rebuked him for similarly deficient written submissions in a civil rights action four years earlier. In *Devore v. City of Philadelphia* in 2004, he won a \$430,000 jury verdict for a police officer who had been harassed and later terminated in retaliation for reporting that his partner had stolen a cell phone from a neighborhood juvenile.<sup>13</sup>

When the *Devore* defendants cited deficient writing in the complaint and later filings as a ground for reducing the award of attorney's fees, Puricelli's written response dug the hole deeper: "As for there being typos, yes there have been typos, but these errors have not detracted from the arguments or results, and the rule in this case was a victory for Mr. Devore. Further, had the Defendants not tired [sic] to paper

Plaintiff's counsel to death, some type [sic] would not have occurred. Furthermore, there have been omissions by the Defendants, thus they should not case [sic] stones."<sup>14</sup> "If these mistakes were purposeful," the magistrate judge concluded in *Devore*, "they would be brilliant."<sup>15</sup>

Puricelli's courtroom performance in *Devore* impressed the court, which found that the lawyer was "well prepared, his witnesses were prepped, and his case proceeded quite artfully and smoothly."<sup>16</sup> The magistrate judge concluded, however, that Puricelli's "complete lack of care in his written product shows disrespect for the court."<sup>17</sup> Finding that the plaintiff's filings were marked by an "epidemic" of misspellings interspersed in "vague, ambiguous, unintelligible, verbose and repetitive" passages, the court approved fees at a dual rate, \$300 an hour for courtroom work, but only \$150 an hour (a rate the court found "generous" under the circumstances) for written work.<sup>18</sup>

## MAKING SENSE OF THIS SAGA

This unfortunate tale yields six lessons useful even to lawyers whose writing would not descend to lawyer Puricelli's levels.

1. *Law is indeed a literary profession.* If the *Devore* opinion is any indication, Brian Puricelli could argue effectively in the courtroom, though his written submissions did neither him nor his client any good.

Lawyering depends on spoken and written expression, and lawyers act at their peril when they give short shrift to either. When I was in law school, Professor Louis Lusky would tell his classes that "a lawyer who can stand up and speak effectively before a tri-

bunal will never go hungry." He did not mean to limit his advice to future litigators because, he told us, effective client representation demands

versatility. Indeed, we law professors sometimes justify our classroom use of the potentially intimidating Socratic Method as a way

to help train our students to communicate in public about legal issues, whether as advocates or counselors.

Writing is also central to the lawyer's professional repertoire. In my first "Writing It Right" article, I surveyed the vast universe of writing regularly done by lawyers: "Briefs, motion papers and transactional documents dominate client representation; judges speak through written opinions; and lawyers draft legislation, administrative regulations and other government documents. Lawyers and judges write treatises, law journal articles, and continuing legal education materials. Lawyers also discuss important policy questions in magazine articles, newspaper columns and Internet postings. . . ."<sup>19</sup>

Lawyers frequently write under time pressure imposed by tight, inflexible deadlines. An occasional typo in written submissions is understandable because lawyers, like other people, may strive for perfection but rarely achieve it.<sup>20</sup> Despite their busy schedules, however, lawyers need to guard against overtly deficient writing, even when the deficiency would

likely not arouse the public attention drawn by *McKenna* and *Devore*.

2. *Careless writing can unreasonably burden the court and adver-*

*saries.* In *Devore*, the magistrate judge reduced Puricelli's fees award partly because the lawyer's "lack of care caused the court, and . . . defense coun-

"[W]ritten communication marked by proper grammar, syntax and spelling is a bare minimum expected from the men and women who practice our literary profession."

sel, to expend an inordinate amount of time deciphering the arguments and responding, accordingly."<sup>21</sup> Time remains a precious commodity for courts and counsel, who cannot afford the luxury of confidently skimming over inarticulate papers strewn with rhetorical roadblocks.

In trial and appellate courts alike, advocates need to consider the professional "responsibility (and, indeed, the opportunity) to assist the court . . . by making the reading easier and more manageable."<sup>22</sup> Even outside the courtroom, however, written communication marked by proper grammar, syntax and spelling is a bare minimum expected from the men and women who practice our literary profession.

3. *There is no substitute for careful editing.* Judge Ditter found that any pre-submission editing of the *McKenna* complaint by Brian Puricelli's co-counsel was "shamefully inadequate."<sup>23</sup> The same could have been said about any editing that might have been done on the lawyer's other written submissions in that case and *Devore*.

Editing begins with the writer, whose own proofreading is essential to any document destined to reach an audience large or small. Lawyers remain ultimately responsible for their own written work, so (to quote President Harry S Truman) the buck stops with them. Because lawyer Puricelli knew that he would sign his filings and advance them as his own, he had no basis for the understatement, shortly after the *McKenna* court slashed his fees request, that “sometimes I don’t proofread enough.”<sup>24</sup>

At some point, however, even talented writers lose capacity to improve the draft by themselves. A strong finish depends on enlisting input from others who review and critique the draft for substance and style. In the Spring 2008 issue of *Precedent*, I advanced six basic guidelines to direct a writer’s quest for productive editing by others.<sup>25</sup> “[N]o one,” I wrote, “has ever edited my work and made it worse.”<sup>26</sup> With the slightest reflection, any lawyer could say the same thing.

Editing by others remains doubly important to lawyers who hold misgivings about the quality of their written expression, as Puricelli certainly should have held before he filed the *McKenna* complaint. In a law firm of any size, lawyers seeking editorial assistance may consider enlisting partners, associates, administrative assistants, or even student law clerks or interns. Each of these people has different capacities to provide substantive or stylistic support, but any could easily have improved Puricelli’s documents before he filed them.

4. *Beware of “spell-check.”* In an interview with *The Legal Intellicer* shortly after Judge Ditter slashed his fees request, lawyer Puricelli acknowledged that he relies too

heavily on spell-checking software.<sup>27</sup> Dependence on spell-check actually does not appear to be the root of his problems in *McKenna* and *Devore*, however, because even relatively quick use would have caught many of the misspellings. Because other misspellings would have escaped detection, however, Puricelli’s predicament provides opportunity for cautionary words about this software, whose limitations should come as no surprise to any careful writer familiar with it.

Like so many other “labor saving” devices that affect our daily lives, spell-checking software can exact a heavy price. The software (and grammar-checking software in programs that have it) is actually quite porous. Spell-check does not detect a misspelled word when the writer inadvertently spells another word correctly (in *Devore*, for example, “tried” and “tired,” or “cast” and “case”).

Spell-check alerts me to problems as I type. Near the end of a project, I sometimes pay closer attention to spell-check before I do my own proofreading, sometimes after. Whatever the preference, spell-check is a tool and not a crutch, useful indeed but not a short-cut or substitute for good old-fashioned proofreading. Close proofreading is hard work, but writing is itself hard work, whether an impending deadline looms, or whether the writer has greater time for reflection.

As Benjamin Franklin wrote and as sports coaches still regularly repeat to instill a work ethic in their athletes, “[t]here are no gains, without pains.”<sup>28</sup> The federal judges’ acid reactions to lawyer Puricelli’s submissions also summon the admonition of eighteenth-century British author and lexicographer Samuel Johnson that

“[w]hat is written without effort is in general read without pleasure.”<sup>29</sup>

5. *Cutting-and-pasting can be dangerous.* Judge Ditter cited careless cutting-and-pasting as grounds for reducing the *McKenna* fees request.

Form books can be found in most law libraries, and internal form files have long been staples in private law firms and public agencies. Like spell-checking and grammar-checking software, however, forms can be tantalizing invitations to laziness and corner-cutting. Forms that appear grammatically correct and structurally sound might win high grades in a law school drafting seminar, but in actual law practice they may carry unintended pitfalls for failing to reflect the unique circumstances the lawyer and client now confront.

On the one hand, a lawyer carefully using all or part of a form can avoid wasteful efforts to “reinvent the wheel.” The lawyer can profit from prior wisdom while saving valuable professional time, and thus presumably also unnecessary cost to clients.

Forms remain useful, however, only when the lawyer adapts them to suit the present matter. Lawyer Puricelli learned the hard way, for example, that passages quickly lifted or marked-up can inadvertently preserve former names, dates and circumstances. Opponents snicker, and the billed client feels slighted by the lawyer’s failure to recite its name or cause properly.

In hard nosed-negotiations, inadvertence can also weaken the lawyer’s hand, and thus the client’s position, by evincing a lack of thoroughness that might lead opposing lawyers to “smell blood” and seek to take advantage. As Judge Ditter demonstrated in *McKenna*, carelessness

can diminish the court's confidence in the lawyer's advocacy.

The form may also have emerged from a context quite different from today's context, though the difference is unlikely to appear on the face of the form months or years after its deposit in the form book or internal form file. The form, for example, may have been finalized under the law of a jurisdiction other than the one that would govern today's proceeding, particularly where the form appears in a national form book. Even within a particular jurisdiction, the operative law may have changed in the interim. Today's parties may also have backgrounds, needs, desires and anticipated future courses of dealings different from those that motivated the parties responsible for the form.

Forms frequently contain language and passages that emerged after negotiations, and perhaps tedious give-and-take and ultimate compromise, that reflected the relative bargaining power of the prior parties. Parroting weaker form language, for example, disserves a client that is now in the stronger position. The buyer's counsel may have written the first draft of the form, but

"Lawyers rightly tagged with a reputation for work that falls below accepted levels of competence have no one to blame but themselves. Word gets around."

today's first draft might be the seller's responsibility.

Like spell-check, a good form is a tool and not a crutch. Forms are useful indeed, but are not short-cuts or substi-

tutes for good old-fashioned analysis, interpretation, reasoning and negotiation based on counsel's informed understanding of the client's needs and circumstances today.

6. *Electronic submissions require special care.* Lawyer Puricelli told *The Legal Intelligencer* that, using the *McKenna* court's electronic filing system, he had accidentally first filed a draft that had not been proofread.<sup>30</sup> The lawyer's dismal track record makes this explanation hard to swallow, but the explanation nonetheless presents another opportunity for cautionary words: Technology provides no excuse for abandoning the good, old-fashioned care required when lawyers mail or hand-deliver their papers to the courthouse and the other parties. It is too easy sometimes to press a key on the computer and then have "sender's regret" once it is too late.

## CONCLUSION: THE LAWYER'S MOST VALUABLE ASSET

Shortly after Judge Ditter's decision on his fees request, lawyer Puricelli charged that he is now "singled out" by judges and opponents because

his public chastisement in *Devore* had attracted such attention four years earlier.<sup>31</sup> "I think," Puricelli complained to *The Legal Intelligencer*, that

"they say: 'We're going to scrutinize this guy because he's been told about this before.'"<sup>32</sup>

Lawyers rightly tagged with a reputation for work that falls below acceptable levels of competence have

no one to blame but themselves. 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. For good or bad, lawyers size up their peers and should expect to be sized up by them.

Lawyers can size up a peer's writing any time they face, or collaborate with, the peer in a private or public matter. In many private-law matters, scrutiny of a lawyer's writing may not extend beyond parties and counsel. Even where written submissions do become public records technically available to all, deficient writing usually does not lead to rebuke in the published reports, or in national and local newspapers and journals. When the sort of public exposure experienced by lawyer Puricelli does occur, however, the deficiencies become a permanent open book readily available to any other lawyer who follows the advance sheets or the professional and popular media. Westlaw, Lexis and other electronic research sources have opened the book even wider in recent years.

Private scrutiny or public exposure can affect not only the lawyer's self-esteem, but also the lawyer's livelihood. Brian's Puricelli's stumbles in *McKenna* and *Devore*, for example, likely cast doubt in the minds of other bar members and past clients who might contemplate new relationships with him, including whether to send referrals his way.<sup>33</sup>

Lawyers concerned for their private or public reputation for competent

writing can turn for advice to prominent voices steeped in the law. Judge Hugh R. Jones of the New York Court of Appeals was fond of saying that “a lawyer’s reputation is his principal asset,”<sup>34</sup> a truism that should cause lawyers no quarrel. Reputation for competence, like reputation for integrity, is part of the lawyer’s package.

One private or public stumble may be enough. A lawyer’s reputation, wrote Chief Judge Benjamin N. Cardozo when he sat on the New York Court of Appeals, “is a plant of tender growth, and its bloom, once lost, is not easily restored.”<sup>35</sup> Or as Benjamin Franklin taught more pointedly, “It takes many good deeds to build a good reputation, and only one bad one to lose it.”<sup>36</sup>

## ENDNOTES

1 2008 WL 4435939, No. 07-110 (E.D. Pa. Sept. 30, 2008).

2 *Id.* at \*14. See, e.g., *Typos Prove Costly For Pennsylvania Attorney*, available at <http://www.cbsnews.com/stories/2008/10/8/ap/strange/main4510305.shtml> (Oct. 8, 2008); Shannon P. Duffy, *Typos and Errors Lead to Slashed Fees For Attorney*, THE LEGAL INTELLIGENCER, available at <http://www.law.com/jsp/pa/PubArticleFriendlyPA.jsp?id=1202425106317> (Oct. 8, 2008); Michael Kesterton, *A Daily Miscellany of Information*, THE GLOBE AND MAIL (Canada), Oct. 10, 2008, at L6; Debra Cassens Weiss, *Irate Judge Blasts Typos and Errors in Filing, Slashes Fees by \$154K*, A.B.A. J., Law News Now (Oct. 8,

2008).  
3 2008 WL 4435939, No. 07-110 \*1 (E.D. Pa. Sept. 30, 2008).

4 *Id.*  
5 *Id.* at \*1-2.  
6 *Id.* at \*1.  
7 *Id.*  
8 *Id.*  
9 *Id.* at \*7.  
10 *Id.* at \*2 n.4.  
11 *Id.* at \*3.  
12 *Id.* at \*6.  
13 Devore, 2004 WL 414085, No. Civ.A. 00-3598 (E.D. Pa. Feb. 20, 2004) (magistrate judge’s opinion). See also Shannon P. Duffy, *Judge Slashes Lawyer’s Rate for Typos, Careless Writing*, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005538112> (Feb. 25, 2004).

14 Devore, supra note 13, at \*2-3.  
15 *Id.* at \*3.  
16 *Id.*  
17 *Id.*  
18 *Id.* at \*2-3.  
19 Douglas E. Abrams, *The Right to a Reader*, 1 PRECEDENT 38, 38 (Winter 2007).  
20 See, e.g., Glenn Bradford, *Pursuing Perfection in the Practice of Law: An Imperfect Essay by an Imperfect Lawyer*, 65 J. MO. BAR 120 (May-June 2009).

21 Devore, supra note 13, at \* 2.  
22 Judge Hugh R. Jones, *Appellate Advocacy, Written and Oral*, 47 J. MO. BAR. 297, 298 (June 1991). See also ABA Model Rules of Prof’l Conduct, R. 1.1 (“A lawyer shall provide competent representation to a client. . .”).  
23 2008 WL 4435939, No. 07-110 \*4 (E.D. Pa. Sept. 30, 2008).

24 Shannon P. Duffy, supra note 2.  
25 Douglas E. Abrams, *We Are the Products of Editing*, 2 PRECEDENT 12 (Spring 2008).  
26 *Id.*  
27 Shannon P. Duffy, supra note 2.  
28 BENJAMIN FRANKLIN, THE WAY TO WEALTH

2 (1758), available at <http://www.bfranklin.edu/johnhibbs/WayToWealth.pdf>.

29 *Anecdotes by William Seward*, in 2 JOHN-SONIAN MISCELLANIES (George Birkbeck Hill ed., 1897).

30 Shannon P. Duffy, supra note 2.

31 *Id.*

32 *Id.*

33 See, e.g., Stephen Daniels & Joanne Martin, “It’s Darwinism – Survival of the Fittest:” *How Markets and Reputations Shape the Way in Which Plaintiffs’ Lawyers Obtain Clients*, 21 LAW & POL’Y 377, 384-87 (1999) (a lawyer’s reputation among peers determines the type and number of referrals the lawyer receives).

34 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.”).

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

36 Recovery and Reinvestment Spending: Implementing a Bold Oversight Strategy, Hearing Before the S. Homeland Security and Gov’t Affairs Comm., 110th Cong., 1st Sess. (2008) (testimony by Sen. Joseph I. Lieberman) (quoting Franklin).



**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.