GETTING YOUR NAME IN PRINT: SOMETIMES IT IS NOT A GOOD THING

Everyone has heard of the famous aphorism, "any publicity is good publicity." The statement - variously credited to P.T. Barnum and Oscar Wilde - is a staple of Hollywood and Rock Music wannabes. However, for attorneys the sentiment is not always true. Definitely not when the publicity arises out of an appellate court opinion concluding that a lawyer "had submitted briefs of 'shockingly poor quality.'" *In re Sobolevsky*, No. 4385, 2012 N.Y. App. Div. LEXIS 2905, *3 (1st Dept., April 19, 2012) (quoting the report of the Second Circuit's Committee on Admissions and Grievances) .

In the past, an attorney receiving such criticism would have had to deal with a very upset client and, perhaps, the story would have gotten around in local bar circles. Yet it was unlikely to have received widespread notoriety. Today, however, the Internet and social media can flash such a damning phrase across the country in minutes. A simple Google search by any prospective client will highlight the language, along with the "piling on" by blog posts.

Whether courts have issued more opinions criticizing appellate lawyers recently, or today's instant global communications have made the cases more visible, is hard to say. What cannot be denied is that a series of written opinions recently has included harsh criticism of individual attorneys. Perhaps this indicates simple exasperation with having to deal with the same mistakes judges describe at any panel discussion on appellate advocacy. Or perhaps it is a view that such educational efforts alone have not produced positive results in the courtroom. Whatever the genesis, attorneys must now consider that their failings could appear in a written opinion and, soon thereafter, on an Internet site near you. Appellate attorneys, therefore, would do well to learn from the mistakes made by the following less-than-stellar representatives of the profession.

One of the more colorful examples of judicial criticism appears in the Seventh Circuit's decision, *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931 (7th Cir. 2011). The court, in criticizing the appellant's counsel for "simply ignor[ing]" its "dispositive precedent," included in the body of the opinion an actual picture of an ostrich burying its head in the sand (followed by a picture of a man in a suit with his head similarly buried in the sand). The court noted that an ostrich is "not a proper model for an appellate advocate." *Id*. at 934. Having thus assured that the decision would attract more than the usual attention, the court went on to identify appellant's counsel by name saying he was "especially culpable" and, while the advocacy of appellant's counsel in the jointly decided case, "left much to be desired, but [his] left more." *Id.* at 935.[1]

The Fifth Circuit, in *Sanches v. Carrollton-Farmers Branch Independent School District*, 647 F.3d. 156 (5th Cir. 2011), went into great detail in criticizing an appellant's brief. The court was obviously not well disposed to appellant's position on appeal, as it began its opinion by stating:

> Reduced to its essentials this is nothing more than a dispute fueled by a disgruntled cheerleader mom over whether her daughter should have made the squad. It is a petty squabble, masquerading as a civil rights matter, that has no place in federal court or any other court.

Id. at 159. Appellant's counsel, therefore, faced an uphill struggle. He did not help his client by not raising the issues "in a professional manner" but rather "launch[ing] an unjustified attack on" the magistrate judge below. *Id*. at 172. The opinion quotes verbatim relevant sentences from appellant's brief, which the court describes as "so poorly written that it is difficult to decipher what the attorneys mean, but any plausible reading is troubling, and the quoted passage is an unjustified and most unprofessional and disrespectful attack on the judicial process in general

[1] Although the decisions discussed herein identify the individual lawyer by name, this article does not. Education, not public shame, is the article's intent.

. . . ." *Id*. This language would be bad enough, but the court added a footnote to point out the specific grammatical errors in the quoted section of the brief were "so egregious and obvious that an average fourth grader would have avoided most of them." *Id*. at 172 n.13.

In re High Sulfur Content Gasoline Products Liability Litigation, 384 Fed. Appx. 299 (5th Cir. 2010), provides an example of written criticism of an attorney in an interesting situation. The appeal was brought by an attorney, claiming that the district court had erred in the amount of attorney's fees awarded him from a class action settlement. The appellees sought sanctions for a frivolous appeal. The court denied the sanctions, but stated "we note the poor quality of [his] brief . . . riddled with typos and grammar mistakes and it does not contain even one citation to the record." *Id*. at 302. The court admonished the attorney "to take more care in drafting documents to be filed with the courts." *Id*. One would have thought the attorney would have done so, in that appeal at least, since he was representing himself! This attorney, however, avoided the additional pain of having to explain the court's criticism to a paying client.

The court in *Stanard v. Nygren*, 658 F.3d 792, 793 (7th Cir. 2011), took the opportunity to criticize the attorney's writing at both the trial and appellate level. It described the appellate briefing as "woefully deficient, raising serious concerns about his competence to practice before this court." The decision pointed out that, even after three extensions, the attorney filed his appellate brief late, and the court struck the brief for failure to include the required jurisdictional statement. *Id*. at 796. Even when that was corrected, he "failed to file a reasonably coherent brief on appeal." *Id*. at 801. The appellate attorney's brief "never directly addressed the issues," citing 81 cases, and "almost all of them are completely irrelevant." *Id*. The court pointed out that the brief was infected by "[a]ll the deficiencies that plagued the various versions of the complaint," whose dismissal below was the substantive issue on appeal. *Id*. In discussing the

legal sufficiency of that complaint, the court noted "the unfortunate reality that poor writing occurs too often in our profession, but [the attorney's] complaint is far outside the bounds of acceptable legal writing." *Id.* at 798 n.7. The court cited as an example a particular 345-word sentence in the complaint (which the court quoted verbatim in a footnote complete with the original errors). *Id*. The court concluded that counsel's "entire approach to this case was alarmingly deficient." *Id*. at 801. As a result, the court ordered the attorney to show cause why he should not be removed or suspended from practice before the court – and directed a copy of the opinion be sent to his state bar disciplinary authority. *Id*. at 802. *See also In re Zeno*, 504 F.3d 64, 65 (1st Cir. 2007) (upholding suspension of an attorney for filings that included "intemperate and unsubstantiated allegations that various judges were guilty of, *inter alia*, dishonesty, partiality, stupidity, or possible criminality").

A recent Second Circuit reference to bad brief writing comes with a unique twist. *In re Spivak*, No. 10-90006-am, 2012 U.S. App. LEXIS 8267, *6-*7 (2d Cir. April 24, 2012), addresses a grievance committee report recommending discipline of an attorney arising out of ten matters over a three-year period. In one of those matters, the attorney submitted a joint appendix, but did not submit a brief. *Id*. at *30. Responding to the grievance committee's inquiry as to why he did not file a brief, the attorney stated "that the brief was of poor quality which is why he submitted only a joint appendix." *Id*. While such self-reporting represents admirable honesty (although perhaps less courageous in the face of a disciplinary hearing), it certainly could not help his reputation or client relations.

Criticism of attorney brief writing in a single case is damaging enough. Some attorneys, however, failed to learn from their own experience and were chastised in repeated decisions. In *Rose v. Utah*, 399 Fed. Appx. 430 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 3069 (2011), the

appellant-attorney had sued the state and the state bar seeking to enjoin a bar disciplinary proceeding against her. One of the appellees sought sanctions for a frivolous appeal and, in support, argued that the appellant-attorney misrepresented a court's evaluation of her performance in another case. *Id.* at 438. The appellant-attorney claimed that the federal court complimented her work, when in fact (as the *Rose* decision notes), in the earlier case the court actually stated her "briefs violated appellate rules and were 'replete with errors of spelling and grammar, and the prose [was] often incomprehensible.'" *Id*. (quoting *McArthur v. San Juan City*, 495 F.3d 1157, 1161-62 (10th Cir. 2007)). The court in *Rose* agreed, stating "the briefs in this appeal are rife with incomprehensible prose' and "miscite legal authority." *Id*. If the attorney did not learn from the earlier criticism, perhaps she learned from this case, where she was ordered to pay sanctions of $5,000. *Id.* at 439.

In re Vialet, No. 09-90132-am, 2012 U.S. App. LEXIS 2452 (2d Cir. Feb. 7, 2012), also involved a disciplinary proceeding. One of the bases of discipline was that "panels of this court have remarked upon poor briefing by [him] on several occasions," citing four prior decisions by the Second Circuit. *Id*. at *13. In imposing discipline, the court ordered its opinion be posted on the court's website and provided to members of the public, *id*. at *8, almost insuring it would pop up on any Internet search. For good measure, the court ordered a copy sent to the state court grievance committee. *Id.*

These attorneys, singled out in written decisions as repeat offenders, however, pale in comparison to one cited in a decision earlier this year. The opinion in *Huang v. Holder*, No. 11-187-ag NAC, 2012 U.S. App. LEXIS 3224 (2d Cir. Feb. 15, 2012), the court included a final footnote stating the court's "concern with the poor quality of the brief filed by Huang's counsel," which "contained a number of substantive, grammatical and typographical errors . . . ." *Id*. at *6

n.1. The court noting that the attorney "had already been warned about her deficient briefing," referred the attorney to the Circuit's grievance panel. *Id.*

The prior warnings had appeared in two earlier decisions. The opinion in *Lin v. Attorney General*, 278 Fed. Appx. 37, 39 (2d Cir. 2008) stated: "[t]he serious deficiencies in the representation provided by Lin's attorney . . . compel us to express our concern. [Her] briefing in this case was of poor quality." The court went on to say, "[c]ounsel is warned that continuing conduct of this nature could result in the initiation of disciplinary proceedings against her." *Id.* Only a month later, a different panel expressed a similar concern, stating her "briefing was of very poor quality" and provided the same warning of possible disciplinary action. *Wen v. Attorney General*, 309 Fed. Appx. 427, 429 n.3 (2d Cir. 2008). The recent decision in *Huang* translated those warnings into action.

Amazingly, this attorney's humiliation was not done. A different panel of the Second Circuit again criticized the quality of her appellate briefs two months after the decision in *Huang*. The opinion in *Chen v. Holder*, No. 11-186-ag NAC, 2012 U.S. App. LEXIS 6685, at *3-*4 n.1 (2d Cir. April 4, 2012), included some of the same criticisms of the briefing from *Huang*, while adding more of its own. The *Chen* decision also referred the attorney to the court's grievance panel. *Id.* at *4 n.1. Given the attorney's history with the Second Circuit, you can expect that her name will appear in a future opinion – one imposing discipline on her.

Another case from last year (although from a federal district court rather than an appellate court), addresses what may be a growing problem in briefs: reliance on alternative media rather than traditional legal sources. In *United States v. Sypher*, No. 3:09-CR-00085, 2011 U.S. Dist. LEXIS 12689, at *9 n.4 (W.D. Ky. Feb. 9, 2011), the court points out that "defense counsel appears to have cobbled much of his statement of the law governing ineffective assistance of

counsel by cutting and pasting, without citation, from the Wikipedia website." The court, highlighting the ethical bars to plagiarism, pointedly "reminds counsel that Wikipedia is not an acceptable source of legal authority . . . ." *Id*.

Courts have not limited their criticism to written briefs only. Although less frequently, courts have included rebukes in their opinions regarding improper oral advocacy. In *Thorgood v. Sears, Roebuck & Co.*, 627 F.3d 289 (7th Cir. 2010), for example, the court went the extra step of issuing a full written decision to deny a petition for rehearing. The decision, which highlighted a number of appellant counsel's "over the top" accusations concerning the initial panel opinion, specifically referred to statements the attorney made in oral argument, including telling the judges to ask their wives about the underlying clothes dryer issue and saying: "[n]ot to be sexist, your honor, but maybe we should have this en banc so some of the female judges on this court could sit and might weigh in." *Id*. at 290. The decision is a critique of counsel's overall conduct as much as a critique of his argument, carrying out what the court sees as "the duty of judges to criticize lawyers who try the patience of other members of the bar, and the courts." *Id*. at 291.

Any visitor to a courtroom may occasionally hear unusual, if not inappropriate, comments. However, the enhanced formality of appellate courts, combined with the opportunity for preparation, makes such statements much less likely than at trial. Still, when it happens, it often becomes the source of comment. Although not included in their written decision, two members of the Connecticut Appellate Court at a recent CLE program separately repeated the statement made by an attorney in the course of oral argument that "You guys have to follow precedent" as shocking and unacceptable: The judges' agitation with this conduct was definitely increased by the fact that one member of the panel (who described the incident) was female.

While sanctions and potential bar discipline may be bad enough, the court in *Lee v. Cook County*, 635 F.3d 969 (7th Cir. 2011), thought further steps were necessary to deal with – and possibly deter – bad appellate advocacy. The decision pointed out the attorney's "sloppy performance" on appeal "marked by procedural gaffes, three of which led to orders to show cause why the appeal should not be dismissed – and one of which led to his client's brief being struck." *Id*. at 973. The court concluded that "events recounted in this opinion show that [he] is a menace to his clients and a scofflaw with respect to appellate procedure." *Id*. at 974. The court not only fined the attorney $500 but also directed him to send copies to his clients "so that they may consider whether to file malpractice suits against him." *Id*.

The penalties imposed on this and other attorneys serve as a cautionary tale to any practitioner. Now the criticism of poor performance appears in print for all with access to the Internet to see. *See, e.g.*, Kate Moser, *Biting Ruling Slams Lawyer for Misleading Appeal Court*, The Recorder (Nov. 29, 2011), http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202533874568&slreturn=1 ("In a scathing opinion Tuesday, a California court of appeal sanctioned a lawyer . . . for recycling a brief and otherwise misleading the court.").

Judges and experienced appellate advocates constantly stress that a lawyer's credibility is his or her most important asset. In every appeal, therefore, attorneys must be vigilant to present quality work of unquestioned integrity. Traditionally, when an attorney appeared regularly before a particular appellate court, the costs of deviation from that standard increased substantially. The attorney's loss of credibility could affect not only the current case, but many others in the future. Instant digital communications, the Internet and new social media mean that today every court is potentially one where an attorney's reputation for credibility precedes him or her. Appellate judges follow the developments of the law. By now, they all have computers and Internet

access. Judges read decisions from other courts. They read (and some even write) the blogs. Criticism of an attorney's appellate advocacy in a written opinion reviewed throughout the Internet has the potential to ruin his or her credibility in any future case in any jurisdiction. To avoid the risks of modern practice, it would be wise to return to old fashioned hard work: knowing the record cold, conducting thorough research, reading the actual cases – not merely the highlighted sections from the electronic search, avoiding overstatement of favorable authorities, addressing unfavorable authorities head on, selecting only a few issues for appeal, avoiding misstatement of the record, reading the rules of appellate procedure, and proofing and re-proofing the brief before filing. Perhaps then the opinion will address your argument, instead of you.