

# Attention to Work Product: Errors and Edits—Part I

by Tanya B. Bartholomew

**A**cross the country, federal and state courts are beginning to hold lawyers accountable for being inadequately prepared for their cases and for submitting written documents that indicate incompetence or lack of diligence. Judges are charging lawyers with ethical violations, imposing fee reductions, and employing open criticism.

This article is the first in a two-part series. This first part highlights several egregious instances of poor attorney work product and discusses how courts have responded to that work product. The second part, which will appear in the March 2008 Scrivener column, will provide a systematic method for editing documents to eliminate substantive and technical errors.

## Careless Work Product

In 2004, *Devore v. City of Philadelphia*<sup>1</sup> attracted unprecedented media attention on the issue of the quality of a lawyer's written product. Plaintiff's attorney Brian Purcelli won a \$345,000 verdict in a Title VII, § 1983 case. Purcelli requested \$233,000 in attorney fees. The defense objected for several reasons, including Purcelli's poor work product. The court reduced his fees by 50 percent, stating:

Mr. Purcelli's written work is careless to the point of disrespectful. The Defendants have described it as "vague, ambiguous, unintelligible, verbose, and repetitive." We agree.<sup>2</sup>

The federal judge's decision was widely publicized and prompted considerable discussion in both national media and the legal writing community regarding the ethical obligations of attorneys and the appropriate remedies for their breach.

Although arguably the most widely known case to mete out sanctions for sloppy work product, *DeVore* is by no means the first. In *United States v. Devine*,<sup>3</sup> for example, the Seventh Circuit Court concluded:

The brief was desultory in nature; in general a poorly written product with numerous typographical errors. It was obviously never edited by a caring professional. As a panel of judges already overburdened with cases and paper, we find it insulting to have to dutifully comb through a brief which even its author found little reason to give such attention. We condemn this type of shoddy professionalism.<sup>4</sup>

## Inadequate Case Preparation

In addition to imposing fee reductions, some courts take a more subtle but equally decided approach to responding to ill-prepared attorneys. In *United States v. Dunkel*,<sup>5</sup> the Seventh Circuit criticized an attorney for submitting an inadequately prepared brief:

A skeletal "argument," really nothing more than an assertion, does not preserve a claim, especially not when the brief presents a passel of other arguments, as Dunkel's did. Judges are not like pigs, hunting for truffles buried in briefs.<sup>6</sup>

The Ninth Circuit also addressed the issue of inadequately presented claims. In *Independent Towers of Washington v. Washington*,<sup>7</sup> the court stated:

Our circuit has repeatedly admonished that we cannot "manufacture arguments for an appellant" and therefore we will not consider any claims that were not actually argued in appellant's opening brief. . . . The art of advocacy is not one of mystery. Our adversarial system relies on the advocates to inform the discussion and raise the issues to the court. . . . However much we may importune lawyers to be brief and to get to the point, we have never suggested that they skip the substance of their argument in order to do so. It is no accident that the Federal Rules of Appellate Procedure require the opening brief to contain "the appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies."<sup>8</sup>

## Inaccurate References to Authority

Courts continue to admonish attorneys for failure to accurately update their research. In one case, a court found the attorney in violation of the state's rules of appellate procedure.<sup>9</sup> The case involved an attorney who cited to an appellate case from another jurisdiction that had been reversed by the state's supreme court. The court noted that counsel had failed to comply with Utah Rule of Appellate Procedure 24(j), which requires that all briefs be "concise, presented with accuracy . . . and free from burdensome, irrelevant, immaterial or scandalous matters."<sup>10</sup> The court, instructing the attorney, stated:

The process of "Shepardizing" a case is fundamental to legal research and can be completed in a matter of minutes, especially with the aid of a computer.<sup>11</sup>

### DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through the Scrivener column. Send your questions to: [kkdvvivier@law.du.edu](mailto:kkdvvivier@law.du.edu) or call her at (303) 871-6281.

Associate Professor K.K. DuVivier is on sabbatical during 2007–08. She has been writing this column continually since 1991 and will resume doing so in fall 2008. In her absence, Robert S. Anderson and Tanya B. Bartholomew will be writing the Scrivener articles.

### About the Author:

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The federal courts are equally as direct in admonishing attorneys who fail to update their research:

It is really inexcusable for any lawyer to fail, as a matter of routine, to Shepardize all cited cases. . . . Shepardization would of course reveal that the “precedent” no longer qualified as such.<sup>12</sup>

Experienced attorneys are not immune to careless mistakes, and some courts have been willing to call attention to an attorneys’ experience in their admonitions. For example, in *DeMyrick v. Guest Quarters Suite Hotels*,<sup>13</sup> the court noted:

DeMyrick’s motion is particularly distressing under the circumstances. It is not simply that DeMyrick’s counsel are highly experienced in Illinois personal injury practice and might therefore be expected to keep themselves current on such issues that are of importance of the conduct of such practice and that arise with some frequency. Beyond that expectancy, no counsel ought to cite a case . . . without Shepardizing that case (or without conducting the equivalent electronic search via Westlaw or Lexis).<sup>14</sup>

## Conclusion

Many of the attorneys involved in these cases were not new to the practice of law and, for the most part, the bulk of their work product could not be characterized by carelessness or inattention.<sup>15</sup> However, it is very easy for the attorney work product to suffer when attorneys are pressed for time.

In the second part of this article, I will discuss a systematic method of editing that will help protect practicing attorneys from many of the pitfalls described here. Using a checklist and a specific outline as a guide, attorneys can eliminate the types of errors that plagued the documents addressed in this article.

## Notes

1. *Devore v. City of Philadelphia*, No. 00-3598, 2004 WL 414085 (E.D. Pa. Feb. 20, 2004).
2. *Id.* at \*2.
3. *United States v. Devine*, 787 F.2d 1086 (7th Cir. 1986).
4. *Id.* at 1089.
5. *United States v. Dunkel*, 927 F.2d 955 (7th Cir. 1991) (*per curiam*).
6. *Id.* at 956.
7. *Independent Towers of Washington v. Washington*, 350 F.3d 925 (9th Cir. 2003).
8. *Id.* at 929-30.
9. *Meadowbrook, LLC v. Flower*, 959 P.2d 115 (Utah 1998).
10. *Id.* at 120 n.11.
11. *Id.*
12. *Gosnell v. Rentokil, Inc.*, 175 F.R.D. 508, 510 n.1 (N.D.Ill. 1997).
13. *DeMyrick v. Guest Quarters Suite Hotels*, No. 93C1520, 1997 WL 177838 (N.D.Ill. April 6, 1997).
14. *Id.*
15. *See, e.g., id.* ■

