SILLY LAWYER TRICKS

This issue the Committee is starting a new regular feature. (The title is an homage to recently-retired David Letterman). Often as much can be learned from watching other people's mistakes (and hoping not to repeat them) as from seeing the very best in action. Sometimes appellate mistakes make the news, as when the Supreme Court threatens to sanction a counsel for a certiorari petition full of unintelligible acronyms, or when a firm misses the deadline to file a multi-million dollar appeal. Usually, however, such mistakes are less widely reported, serving only as cautionary tales for the local bar.

This column will share lessons from across the country with our members, reporting real mistakes made by real appellate lawyers, frequently with disastrous results for their clients. The Committee would like this feature to be interactive. So, we invite all of you to send us for publication in upcoming issues any cases on mistakes by lawyers on appeal.

Nixon v. City & County of Denver, 784 F.3d 1364 (10th Cir., April 30, 2015)

In this tale of woe – or as the court describes it "a tale of apparent injustice" – the lawyer left a critical element out of his brief: the argument. *Id.* at 1366. The opinion reports that the lawyer recited at length the story of injustice done to his client, but never stated why the district court's decision was wrong. The court points out that, unfortunately, lawyers often waive an argument by failing to adequately brief it, but distinguishes this as the rare case where no pertinent issue was adequately briefed. *Id*., at 1368.

The court ultimately identifies a single sentence (in an 18 page brief) that it treats as relevant argument, while noting that the sentence "fails to satisfy minimal standards for intelligibility." *Id*., at 1370. The court generously addresses what it believes the attorney was

trying to argue in that sentence – and then succinctly rejects it. The injustice to his client about which the attorney expressed such concern, may have been surpassed by the injustice done by the attorney on appeal.

Pi-Net International v. JP Morgan Chase, 600 Fed. Appx. 774 (Fed. Cir., April 20, 2015).

An appellate lawyer may get in trouble for saying too much as well as for not saying enough. In this case, a lawyer – obviously cramped by the court's word limit – tried to get around word count by removing the spaces between words, in one instance compressing 14 words in a case citation into a single word. When ordered to show cause why the brief should not be stricken, the lawyer submitted a new "corrected brief" that still did not bring the actual word count within the limit. *Id*. at 774. The court pointed to tricks in the new brief such as replacing phrases and case citations with made-up abbreviations and cross-references "so poorly explained that it is nearly incomprehensible." *Id*. The court refused to accept the new brief and ordered the appeal dismissed.

Lehman Bros. Holdings v. Gateway Funding, 785 F.3d 96 (3d Cir., May 7, 2015)

In this case, appellant's counsel failed to follow the rules, and the court sanctioned appellant by holding that it had forfeited an argument. The trial court had conducted oral argument by phone on the parties' motions for summary judgment. In its subsequent ruling, the trial court held that the defendant had abandoned one ground initially raised in opposition to summary judgment. On appeal, the defendant contended that it did not abandon this ground, but failed to supply a copy of the transcript of the oral argument. When the appellee provided the transcript with its brief, the appellant replied that it had assumed there was no transcript because the hearing was by phone. Further, it contended, because the appellee had now made the transcript part of the record, its failure was irrelevant.

The Court of Appeals did not agree. It relied on F.R.A.P. 10, which requires the appellant to order the portions of the transcript necessary for the issues raised. Recognizing that the sanction of dismissal of an appeal for failure to comply with the procedural rule was to be "sparingly used," the court nevertheless held that the appellant forfeited its claim that the trial court erred in finding abandonment below. *Id*., at 101. The court may well have been influenced by a concern that appellant's counsel's failure to provide the transcript was an intentional attempt to deceive the court. Without deciding that question, the court still concluded that the "remarkable lack of diligence" in failing to provide the transcript was sufficient to justify the harsh sanction imposed. *Id*.

Thompson v. Thompson, 2015 W. Va. LEXIS 772 (No. 14-1058, W. Va. June 15, 2015).[1]

The follies of appellate lawyers are not limited to federal courts. In this case, the West Virginia Supreme Court dismissed an appeal for the failure of the petitioner to submit a brief in compliance with the court's rules. The court begins its Memorandum Decision with a boilerplate recitation that the arguments are adequately presented and there is no need for oral argument. However, the court goes on to say that the petitioner's brief is "wholly inadequate" and fails to comply with the appellate rules and administrative orders. The court notes that the petitioner's brief does not contain the standard of review, "cite to any legal authorities, or contain any specific citations to the record." *Id.,* at *1. Finding these flaws fatal, the court declined to consider petitioner's assignment of error and dismissed the appeal.

Lessons Learned

Most readers will say, "I would never do that." But appeals are being lost regularly due to such basic errors by lawyers. While these may be "silly" mistakes, real clients suffered as a

[1] Thanks to one of our members, Amy Smith of Steptoe & Johnsen PLLC, Bridgeport, West Virginia, for bringing this case to my attention.

result. We should take time out from laughing at these lawyers' faux pas, to silently promise we will ensure that this never happens to our clients.