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Briefly: Line Dancing for Lawyers, Take 2

By: Sandra J. Badin and Eric J. Magnuson, Special to Minnesota Lawyer August 16, 2022

We have written here before about the importance of not switching line spacing or typeface settings in an attempt to squeeze more words into a brief—especially after the court has rejected your request for additional pages. *See*, Eric J. Magnuson, "Briefly: Line Dancing for Lawyers," Minnesota Lawyer (Sept. 15, 2015); Eric J. Magnuson and Rebecca A. Zadaka, "Briefly: In briefs, what a difference a font can make," Minnesota Lawyer (Oct. 26, 2021).

Parties doing so may face a variety of sanctions — from having the court give their opponents unsolicited page or word enlargements in subsequent briefing, to having their non-conforming briefs stricken in part or altogether. For the lawyers involved, the impression of dishonesty and gamesmanship they make on the court may be even more damaging. When you find yourself needing more room for your arguments, and your request for an enlargement has been denied, don't experiment with line spacing or typeface options — focus on making better editing choices instead.

The issue of switching line spacing settings mid-case was recently addressed by the Northern District of Georgia in *Doubleday Acquisitions LLC v. Envirotainer AB*, No. 21-cv-03749, slip op. (N.D. Ga. July 1, 2022). The case serves as a good example of what not to do and provides a compelling and thorough analysis of why following the rules is the right way to go.

During the course of the proceedings, defendants moved for a stay. They formatted their motion and supporting brief with the default double-spacing option provided for in Microsoft Word. Plaintiff later moved for a preliminary injunction. Its supporting brief used the same default double-spacing option provided by Word.

Before responding to plaintiff's motion, defendants requested a 15-page enlargement of the page limit from 25 pages to 40. Defendants' motion requesting the additional pages also used Word's default double-spacing option. Plaintiff opposed the motion, but the court granted it in part, allowing defendants an extra 10 pages for their opposition, instead of the 15 pages they had requested.

Defendants filed a 35-page opposition to plaintiff's motion for a preliminary injunction, but instead of using Word's default double-spacing option, they used Word's exact spacing option. Because their brief was in 14-point font, they set the exact spacing option to 28 points. For those of you not skilled in the details of Word, this is done by modifying the style of your text (select Style – Modify – Format – Paragraph – Line Spacing), changing it from Double to Exactly and specifying 28 points.

Plaintiff moved the court to disregard defendants' opposition on the grounds that it violated the local rules and was an improper attempt to circumvent the court's partial rejection of defendants' request for an extra 15 pages. Plaintiff showed that if defendants had used the default double-spacing option, their opposition brief would have been 44 pages—even longer than the 40 pages they had requested.

Defendants countered that they complied with the local rules by using "precise 28 point double-spacing" in the brief, and argued that because they used a 14-point font, "double spacing is therefore 28 points." They also argued that Word's default double spacing is an obsolete relic of the typewriter era that increases the space between lines beyond "true," "precise," or "exact" double spacing. They asked the court to deny plaintiff's motion to disregard their opposition and argued that they should be allowed to use exact spacing in their briefs. In response, Plaintiff pointed out that defendants had previously used the default double-spacing option and had only switched to exact spacing when the court partially denied their request for extra pages.

During the hearing on plaintiff's motion for a preliminary injunction, the court questioned defendants' counsel about the line spacing issue. The drafting attorney stated that he had previously used exact spacing in other cases before the court, without reprimand. But when the court noted that defendants used exact spacing only after the court had not given them the entire page extension they had requested, counsel for defendants apologized. The court took the line spacing issue under advisement and said it would address it after ruling on the pending motions to stay and for a preliminary injunction.

Having decided those motions, the court turned back to the question of whether defendants violated the local rules and the court's order partially denying defendants' requested extension, by using Word's exact spacing option instead of the default double-spacing option. The court began its analysis by noting that the local rules provide that "motions[] and other documents presented to the Court for filing must … be double-spaced between lines." N.D. Ga. LR 5.1(C)(2). The court acknowledged that the local rules did not specify whether the district's double-spacing requirement is limited to Word's default double spacing, or whether it may encompass exact spacing.

The court also found no orders from the district discussing whether the Local Rules allow for exact spacing, but it did find an order by another judge in the district admonishing a party for using a narrower line spacing option than Word's default double-spacing without prior leave of court. *Thornton v. Jackson*, 998 F. Supp. 2d 1365, 1367 (N.D. Ga. 2014) (noting that "the improperly spaced brief is twenty-nine pages long, and if properly spaced, the brief would be closer to forty pages"). As a sanction, the *Thornton* court deemed two of plaintiffs' claims—those discussed at the end of their brief—abandoned. *See id.*

The court then turned to an analysis of the authorities cited by the parties for and against the use of exact spacing. The court found defendants' cited authorities unpersuasive. For one thing, they did nothing to help the court interpret the double-spacing requirement under the local rules; they merely provided normative opinions offering typographic advice. (As a caveat, typographers pretty much all agree that spacing lines closer than the Word default actually makes text easier to read.) In addition, the court noted that two of defendants' sources "appear to recommend using exact spacing as a means to squeeze more lines into a brief." Slip op at 6 n.5.

The court found plaintiff's cited authorities much more helpful, and found "especially instructive" a recent order issued by Judge Kenneth D. Bell of the Western District of North Carolina in *Duke Energy Carolinas, LLC v. NTE Caroinas II, LLC*, No. 19-cv-00515, 2022 WL 1081850 (W.D.N.C. Apr. 11, 2022). Judge Bell's case management order provided that parties' briefs were to "be double spaced," in at least 12 point proportional type, and that all principal briefs were to be 25 pages. *Id.* at *1.

The plaintiff in *Duke Energy* had used Word's standard double-spacing option in its many pretrial briefs until it filed its summary judgment brief. Before moving for summary judgment, the plaintiff sought an enlargement of the page limits for summary judgment briefs from 25 to 60 pages. The court denied the request in part, giving the parties an extra 10 pages only. Plaintiff then filed a 35-page summary judgment brief that used exact 24 point spacing. It was the first time in the proceedings that the plaintiff had departed from Word's default double-spacing option. (The plaintiff also made other changes from its former practice, like moving long string citations from the body to footnotes, to fit more words into its allotted 35 pages.)

The North Carolina court called plaintiff's tactics "a deliberate attempt to at least skirt if not evade the page limits set by the Court." *Duke Energy Carolinas*, 2022 WL 1081850, at *1. It observed that "Plaintiff had to deliberately change the typical 'double' spaced setting in WORD to a special different setting, and the only reason to do so was for Duke to fit more lines on each of its allotted pages after the Court refused its request to file a sixty-page brief." *Id.* at *2. The censure was harsh. The court said it would "not countenance Duke's behavior, which not only reflects poorly on counsel, but undermines the Court's authority to fairly set the parameters of arguments to the Court." *Id.*

The *Doubleday* court went on to review several other cases that plaintiff had cited in support of its motion to disregard defendants' opposition to their motion for a preliminary injunction—all of them holding that the common understanding of "double spaced" refers to Word's default double spacing option. *See, e.g.*, *Al-Ahmed v. Twitter*, 553 F. Supp. 3d 118, 123 n.3

(S.D.N.Y. 2021) (holding argument that counsel "had interpreted the Court's double-spacing requirement to allow 24 point spacing" to be "hard to credit …, especially as [ ] counsel have properly double spaced their filings in many of their other cases"); Everlight Elecs. Co. v. Nichia Corp., No. 12-CV-11758, 2014 WL 12662249, at *1 (E.D. Mich. June 18, 2014) (same); Colon v. Twitter, Inc., 2019 WL 13060895, at *2 (M.D. Fl. Dec. 2, 2019) (citing cases holding that 24 point type is not double spaced).

cases"); *Everlight Elecs. Co. v. Nichia Corp.*, No. 12-CV-11758, 2014 WL 12662249, at *1 (E.D. Mich. June 18, 2014) (same); *Colon v. Twitter, Inc.*, 2019 WL 13060895, at *2 (M.D. Fl. Dec. 2, 2019) (citing cases holding that 24 point type is not double spaced).

As the court explained, at heart, the issue is one of fairness: "This District provides formatting requirements in its Local Rules to establish uniformity, which begets fairness. In other words, requiring uniform formatting ensures that parties get a relatively equal opportunity to present their arguments to the court." *Doubleday*, slip op. at 10. "Because most litigants seem to have interpreted the Local Rules to require default double spacing, the Court believes that departing from such formatting—especially if doing so allows a litigant to fit more lines into a brief—does not serve fairness." *Id.* at 10-11.

In the end, the court in *Doubleday* expressed a common-sense conclusion: "[S]harper editing is the better path to complying with a court's page-limit requirements." Slip op at 6 n.5. We couldn't agree more. We have never met a judge who said, after putting down a brief the went to the limits of page length or word count, "Gosh, I wish they had made that a few pages longer." Conciseness and clarity are far more persuasive than density and length. Persuasive arguments can and should be made succinctly.

And there is another lesson here. Judges have long memories. Impressions of dishonesty and gamesmanship linger long after a case has ended. If the court has denied your request for more pages, don't get creative with line spacing or typeface options, or the overuse of footnotes and block quotes, which will only make your brief harder to read. Find a way of saying what you have to say in fewer words. Or ask a colleague not involved in the briefing to identify places to cut. Submitting a shorter brief that conforms to the common understanding of the formatting rules will not only save you from a public reprimand, but will likely make your brief more readable and, ultimately, more persuasive.

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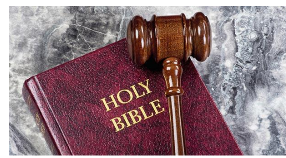

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