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There was a time when pleadings submitted to the trial court were typewritten, and nearly everyone used Courier, because that font came on electric typewriters. (Depositphotos.com image)

Briefly: In briefs, what a difference a font can make

By: Eric J. Magnuson and Rebecca A. Zadaka October 26, 2021

Over the past few years, the importance of picking the right font for an appellate brief has been a topic of discussion among lawyers, publishers and, at times, the courts. The reception has ranged from thoughtful and appreciative to downright dismissive. Lawyers don't like to be creative, and they often don't like anything new. So if you tell them to change the fonts of their brief to something other than Times New Roman, the response might be skeptical, or even hostile. After all, what difference does it make?

The answer is a lot, and apparently the courts think so as well. There have been a number of recent pronouncements by various courts of appeal, and rulings by particular judges, that highlight the importance of picking the right font and avoiding picking the wrong one.

First, some perspective. There was a time when pleadings submitted to the trial court were typewritten, and nearly everyone used Courier, because that font came on electric typewriters. Submissions were limited by the number of pages allowed, with fairly strict requirements on margins and the number of characters per inch that you could cram into a line of type. Today, many judges read briefs on screens—adapting briefs for better screen readability, including font choice, substantially improves the reader's experience. For an in-depth analysis of the issues presented by that fact, see the comprehensive white paper compiled by the Council Of Appellate Lawyers, *The Leap from E-Filing to E-Briefing* (2017), available with this article at minnlawyer.com.



Beginning about the time that Eric started practicing law over 40 years ago, standalone word processors were coming into vogue. These were big, ungainly contraptions that required specialized training by the operators, but they could do what would appear to be magical things in terms of moving text around and shaping how the words looked on the page. (Does anyone remember using a Wang or NBI?)



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It wasn't long before these machines were replaced by personal computers. And most personal computers used Microsoft Word or WordPerfect for word processing. They came with a default set of fonts that was fairly limited.

Courts modified their rules on pleadings and briefs but only in general terms. Most often, they declared that the body of text had to be in a serif font, although headings could be in a non-serif font. The difference is the end of a letter or character – serifs are little extensions that, in theory, make it easier to read because they carry you to the next character. Non-serif fonts are blockier. Not that that's bad – they make great headings, because headings are supposed to be short and stand out.

As Microsoft Word became more sophisticated, the programmers created a set of fonts that gave authors more flexibility, and also made it easier for the typed words to be read on a computer screen by smoothing the pixels that we were looking at. If you're really interested in the details, do a Google search for "ClearType" or Microsoft ClearType Collection. "The ClearType Font Collection is the result of a successful collaboration of both designers and engineers working together with respect, flexibility, and curiosity. ClearType fonts were conceived from the outset as a marriage of technology and the best in design expertise! This improves the appearance of text on certain types of monitors through the use of subpixel rendering technology." ClearType Font Collection, Microsoft (Feb. 13, 2020).

Scholars and typographers jumped on the font-change bandwagon, and began making some pretty firm recommendations about the best fonts to use for readability on paper and on screens. You can find lots of resource materials on this topic at Resources, Robins Kaplan LLP, (last visited Oct. 8, 2021; link available with this article at minnlawyer.com). And if you're really into hearing from the experts on typography, here are some books you can refer to: "The Elements of Typographic Style" by Robert Bringhurst, "Typography for Lawyers" by Matthew Butterick, "The Complete Manual of Typography" by James Felici, "The Chicago Manual of Style," or "The Winning Brief" by Bryan A. Garner.

Courts, however, were not as quick to speak on fonts, at least as far as the rules are concerned. See Fed. R. App. P. 32(a)(5), (a)(6); 7th Cir. R. 32; D.C. Cir. R. 32. A lawyer we know was once handling a case in the Alabama Court of Criminal Appeals. The rules there were silent on typeface and type size. When he called the clerk to ask if the court had any preferences, there was a long pause, and the clerk with whom he was speaking said, "Well, we prefer that the type not be too bitty." He opted for a larger than normal font for his brief, which meant trading words for ease of reading.



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But it still isn't always easy. Even if you technically follow the rules, occasionally you might run into a judge who thought that you were somehow gaming the system if you used a particular font. For example, Garamond is a perfectly acceptable serif font that is much more compact than most others. Accordingly, if you used it, you could get more words on a page if you were operating under a page length limit. The D.C. Circuit, however, recently took the stance discouraging the use of Garamond as it "appears smaller than" Century and Times New Roman, making text "more difficult to read." United States Court of Appeals District of Columbia Circuit, Notice: Preferred Typefaces for

Briefs (March 16, 2021).

Courts also frown upon font manipulation to gain an advantage. The United States District Court for the District of Minnesota took counsel to task for switching from Times New Roman (used in all prior briefing) to Garamond for a reply brief. The result was more words in the same number of pages. The court did not like that even a little: "By using a smaller font, Defendants obtained an advantage with respect to the page limitations imposed by the Court." In Re: RFC & RESCAP Liquidating Tr. Actions, No. 13-3451 (SRN/HB), at *2 (D. Minn. Apr. 12, 2018) (No. 3408). Accordingly, the court gave the other side extra briefing pages and insisted on parties using Times New Roman for all further filings "as it is easier to read." *Id.* While "easier to read" is a relative judgment, trying to game the system, even if allowed by the rules, is probably never a good idea.

More recently, courts have taken to adding much more specificity to the general admonition of the rules about serifs and no serifs, and have begun to make both suggestions and requirements concerning font selection.

Some courts, such as the Seventh Circuit, find font choice so important that they have a guide describing font choices that they believe make briefs easier to read. See United States Court of Appeals for the Seventh Circuit, Requirements and Suggestions for Typography in Briefs and Other Papers, available at: <http://www.ca7.uscourts.gov/ftips/type.pdf>. The Seventh Circuit's guide provides several tips for increasing brief readability. These tips include using proportionally spaced serif-type fonts—preferably those that were designed for books—so that readers can more easily distinguish between letters, thereby increasing reading comprehension. *Id.* at 2, 4.

For example, the guide highlights Times New Roman, which was created by The Times of London to provide its audience a "quick read." *Id.* at 3. Lawyers, on the other hand, don't want their audience to read their briefs quickly and throw them away. Instead, lawyers strive for maximum comprehension and retention, which requires exploring different typefaces. *Id.* Other courts agree. The Eighth Circuit's website directs users to the Seventh Circuit's typography guide. See Rules and Procedures, United States Court of Appeals for the Eighth Circuit, <https://www.ca8.uscourts.gov/rules-procedures> (last visited Oct. 8, 2021).

Other recent articles have highlighted the same concerns regarding how font choice affects readability. Choosing the right font, however, is not as clear-cut as "we sometimes mean different things when we call something readable, [as] what pleases the D.C. Circuit will disappoint the Seventh." Spencer Short, What the Judiciary's Font Recommendations Can Teach Us, Law360 (August 30, 2021). Instead, writers should think of font choice more like a scatter plot, with legibility on one axis and memorability on the other. *Id.* Placement of fonts on such a chart is more of an art than a science. *Id.* Experimentation and adaptability are crucial as "good brief writing requires a different approach, utilizing different typefaces and different column widths and, most importantly, adopting different writing conventions." *Id.*

Font experimentation should only go so far though, as lawyers should pay attention to courts' varying font preferences. Jason Steed, "Font Considerations to Give Your Legal Briefs

an Edge,” Law360 (May 11, 2021). Although courts seem to prefer different fonts, five fonts in particular appear to be safe bets in most of the federal appellate courts—Century, Book Antiqua, Bookman, Equity, and Palatino. *Id.* Despite this, lawyers should always know the local rules and be mindful of any font preferences a court has, as it may win the brief some points. *Id.*

So where does that leave us? The best briefs are those that are easy to read. And that means not only is the prose crisp, simple, and well organized, but that the layout on a page is easy on the eyes, not too crowded, and a pleasure to look at. Magnuson, Eric J. & Bratvold, Diane, ed., Chapter 22: The Appealing Page in *Art of Advocacy: Appeals 19* (Matthew Bender 2020) (ebook).

You do yourself and your clients a favor when you pay attention to what the experts on typography say, and what the court tells you it wants. After all, the point of reading your brief should be to understand the substance of your arguments, and the reader should not be distracted — either consciously or subconsciously — by ugly fonts or messy pages. Sometimes the medium is a large part of the message.

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