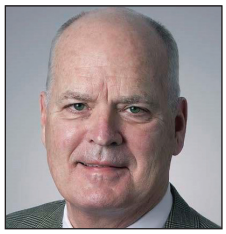
Judges Guard Their Space

by Norm Tabler



Norm Tabler is a member of the health law/FDA practice group of Faegre Baker Daniels LLP and former senior vice president and general counsel of Indiana University Health. He is editorial board vice chairman of the American Bar Association Health Law Section *publication* The Health Lawyer *and a former member of the Law360 Health Editorial Advisory Board. He was educated at Princeton (BA), Yale (MA), and Columbia (JD). He may be reached at* Norman.Tabler@FaegreBD.com *or (317) 569-4856.*

A recent court order stands as a reminder that federal judges need their space, and they guard it zealously. It also provides an example of the importance of choosing the correct theory of textual interpretation.

The Facts and the Issue

The issue arose when a lawyer filed a memorandum with 24-point spacing between the lines.[1] What's wrong with 24-point spacing? To answer that, we need to (1) find the relevant authority, (2) decide which theory of interpretation to apply, and (3) apply the chosen theory to the authority.

Relevant Authority

The first step is easy. The relevant authority is the § II.D. of the court's *Individual Rules of Practice*. It provides that all memoranda "should be double-spaced and in 12-point font."

Theory of Interpretation

The second step—choosing a theory of interpretation—is trickier. Different theories produce very different results. Take the verb "should" in the rule. The *plain-meaning* theory would interpret the word as precatory—as *suggesting* or *recommending*.

In contrast, *originalism*, the theory espoused by the late Justice Antonin Scalia, would look to the intention of the author or the adopter of the rule. In this case, the above-quoted text appears in this court's *Individual Rules of Practice*. That title tells us that this very court wrote the rule, or adopted it, or both.

It's no contest. Originalism wins hands down. Why? Because the ultimate arbiter of the rule's meaning is this court, so what counts is what the court intended by the rule.

Applying the Theory

Using originalism, we have no difficulty interpreting the word "should." The court surely *intended* that lawyers do what it suggested they do—in this case double-space. In practical terms, therefore, "should" means "shall."

Now for the substantive requirements of the rule: "double-spaced and in 12-point font." As every schoolchild knows, a "point" is 1/72 of an inch. So "12-point font" means that each letter is 12/72 of an inch high. The lawyer with the questionable spacing got that part right.

The requirement at issue is the one specifying that memoranda be "double-spaced." What does that mean? The spacing between lines of text is measured by the height of the font. From Johannes Guttenberg forward, "single-spaced" has meant font-high space, and "double-spaced" has meant twice that.

Two times 12 is 24. Therefore, "double-spaced" in Rule II.D. means that memoranda should have 24-point spacing, right? *Wrong.* The plain-meaning theory would interpret it that way. But originalism dictates that we look to the court's *intention*.

We know from this and other cases that when federal courts say "double-spaced," they don't *intend* that the term have its normal English meaning. They *intend* that it have its Microsoft Word meaning.

Microsoft isn't bound by the normal rules of English interpretation. Some years ago Microsoft decided that "single-spaced" should mean 115 percent—not 100 percent—of font height. Why? Because 15 percent more white space makes a document more visually attractive and easier to read. Therefore, "double-spaced" means 230 percent of font height.

A lawyer who interprets "double-spaced" in English rather than in Microsoft Word is as far off base as a lawyer who interprets "should" as a suggestion. He has mistakenly relied on the plain-meaning theory in a context crying out for originalism.

The Case Law of Double-Spacing

This wasn't a case of first impression. Federal case law provides spot-on precedents. Two cases are as noteworthy for the identity of the clients as for the judges' reactions.

In 2010 the client was none other than Microsoft itself. Its attorneys were caught red-handed, violating local rules "by not being fully double spaced." How fitting that the company that expanded the definition of "double-spaced" should suffer for failure to hew to its own expanded definition. It's as though the cobbler, as well as his children, had no shoes.

As for the sanction, the court's order reads, "The Court **STRIKES** [the four offending documents] and **GRANTS** leave to refile the documents within one business day" (capitals and bold in original).[2]

In 2012 a Southern District of New York judge was confronted with noncompliant spacing by counsel for a corporation with a name perfect for the controversy: The Gap Inc. When counsel for the Gap filed a document with 24-point spacing, the plaintiff's lawyers cried foul, calling it "1.75 line spacing" (but resisting the urge to use the term "gap insufficiency").

The Gap attorneys responded by invoking the plain-meaning rule: "the brief employs 12 point … font … with the line spacing set at exactly 24 points, *i.e.*, double the line height." But, of course, in a court that speaks Microsoft Word rather than English, that was effectively a guilty plea. The result? The plaintiff was granted the five extra pages of briefing it requested in order to even the playing field that the Gap attorneys' spacing had rendered uneven.[3]

The Outcome

In the case we are considering, it was inevitable that the court would rule that the 24-point-spaced document was unacceptable. On March 30 the court issued an order to the firm that filed the memorandum requiring that it (1) replace the document with a properly spaced memorandum and (2) pay "a monetary sanction" equal to the cost of preparing and filing the replacement.

The Lessons

The lessons of these cases are clear; no need to read between the lines. First, when it comes to local rules of practice, don't rely on the plain-meaning theory of interpretation. What counts is what the court *intends.* Second, judges fiercely guard their space, and woe unto the lawyer who invades it. Third, when there's doubt about formatting, it pays to provide a margin of error. ⊙

Endnotes

[1]*CafeX Commc'ns Inc. v. Amazon Web Servs.*, Case 1:17-cv-01349 (S.D.N.Y., *order filed* Mar. 30, 2017).
[2]*VirnetX Inc. v. Microsoft Corp.*, Case 6:07-cv-00080 (E.D. Tex., *order filed* Apr. 29, 2010).
[3]*Lopez v. The Gap Inc.*, Case 11-cv-3185 (S.D.N.Y., *order filed* May 3, 2012).

President's Message *continued from page 3*

time to educate your fellow citizens about the good, independent work done by our judges and our legal system on a daily basis; invite our schoolchildren into your courts to learn about the American justice system; and then mentor a younger attorney to follow in your footsteps. The FBA has a program in place to help accomplish each step along the way. I hope you'll join us.

When speaking of the constitutional checks that our Constitution distributes to each branch of government, President Washington said, "To preserve them must be as necessary as to institute them."[7] As lawyers—as FBA members—that's our job: to preserve the independence of the judicial branch of government, so that it may continue its constitutional role in our democracy. With your help, the FBA will continue to deliver on President Washington's charge. ⊙

Endnotes

[1]George Washington, Washington's Farewell Address, S. Doc. No. 106-21, at 19.
[2]*Id.*
[3]Federalist No. 78, at 5 (Alexander Hamilton).
[4]Robert Frost, *Choose Something Like a Star,* in Collected Poems, Prose & Plays (1995).
[5]Federalist No. 78, *supra* note 3, at *.
[6]Statement of the FBA Board of Directors on Judicial Independence, http://www.fedbar.org/Leadership/Judicial_Independence (February 2017)
[7]Washington's Farewell Address, *supra* note 1.