

What To Do After You've Screwed Up A Brief

By **Jacob Fischler**

Law360, Washington (April 4, 2016, 3:46 PM ET) -- Your heart pounds. Your palms sweat. You hope you're about to wake from a bad dream.

Even meticulous litigators know the feeling of realizing they've made a crucial mistake. But an error in a brief doesn't have to derail an entire case.

Moving quickly to acknowledge a foul-up and correct it can minimize the damage it causes and get a case back on track, attorneys say. The alternative — hoping no one notices — violates an attorney's duty of candor and can devastate a case.

"Nothing will weaken your credibility more than having the court discover that you have made a factual or legal misrepresentation," said Jack Nadler, a partner in Squire Patton Boggs LLP's global telecommunications group in D.C. "The natural assumption will be, 'Well, if you got this wrong — either intentionally or through carelessness — what else in this brief is wrong?' Nipping this in the bud before it undermines the court's greater confidence is absolutely critical."

Here, Law360 relates the advice of veteran attorneys on the best ways to overcome mistakes.

Come Clean

Judges and even opposing counsels understand mistakes happen and generally forgive an honest oversight. The first step in overcoming a flub is to recognize it, which should be quickly followed by taking responsibility for it, attorneys say.

"I don't see any court ever substantively penalizing you for realizing you've made a mistake and then getting it right before the court has to tell you," said Andrew Carpenter, a complex litigation partner with Shook Hardy & Bacon LLP. "I don't see any downside to that unless you were pretending to be perfect before you went into court, which I know I'm not, so it's not going to fool anybody."

However, if a legal or factual error — for example, misrepresenting a cited case as more favorable to one's argument than it actually was — is seen as an intentional effort to stack the deck, the move can do much more harm than good.

One way to allow an honest mistake to be misinterpreted as nefarious deceit is to "hide the ball" and continue hoping it passes unnoticed, said Gerald Maatman, an employment and appellate partner with

Seyfarth Shaw LLP. Instead, it's important for attorneys to let opposing counsel and the judge know as soon as possible that they have made a mistake and are working to correct it as quickly as possible, he said.

"Failure to do that dooms an appeal because once a court identifies that and you have failed to own up and correct the mistakes, more often than not you're going to lose the appeal," Maatman said. "If your adversary or your court [finds the mistake first], at best you're a sloppy brief writer and at worst you've taken liberties with the record."

And any inaccuracy in a brief requires immediate action, said James K. Langdon, a trial lawyer and partner with Dorsey & Whitney LLP in Minneapolis.

"Your best bet is to come clean as quickly as possible," James Langdon said

In addition to the judge and opposing counsel, clients must also be notified that a mistake has been made as soon as possible.

Follow the Local Rules

Once attorneys realize they have messed up something important in a brief, they must move to correct it. But different courts have different rules for how to that can be done.

"The first step is making sure you understand the rules of the court and how to go about fixing the brief," said Julie Langdon, a senior associate with Chicago intellectual property boutique Dunlap Codding.

Often, judges will allow renewed motions, particularly at the dismissal or summary judgment stages, said Brian Wolfman, the co-director of Stanford Law School's Supreme Court Litigation Clinic. In other cases, the best procedural action might be a formal letter to the judge. What's important though, is that action is taken to make the faulty brief accurate.

If a particular court does not allow corrected briefs, or if a misstep is not noticed until too late in the process, there are usually other ways to make a correction, whether that's in a reply brief or as late as oral argument.

"Even if you can't file an amended version, it's always better to blow the whistle on yourself," Carpenter said. "It's never too late to do a mea culpa, which is a hell of a lot better than trying to fake it."

Judges are likely to be sympathetic to such a situation, as long as it is a genuine mistake, for no other reason than it wastes their time to consider improper filings, according to Julie Langdon.

"Most often, the judge is going to let you do that," Julie Langdon said. "They don't want to read something that is not 100 percent accurate."

Especially for more minor errors, a corrected brief may be unnecessary, attorneys say. Instead, a conversation with legal adversaries can go a long way.

"This is where it's helpful to have developed a good working relationship with your opposing counsel," James Langdon said.

Keep Corrections Focused

An amended brief is not the place to introduce entirely new arguments, lawyers say. Likewise, while Carpenter said he “errs the hell on the side of disclosure,” not every typo or misspelling requires a formal correction. Instead, corrections should be filed only when the original brief contained something inaccurate.

“You definitely should not be filing a corrected brief to change your argument in any way or to change the facts you’ve presented in any way,” Julie Langdon said. “It should really, truly only be used to fix misrepresentations, inaccuracies.”

At the same time, attorneys who do find a mistake that requires a correction should ensure they review the rest of the brief for other possible errors that warrant amendment so that only one corrected brief need be filed, she added.

Others counsel to avoid filing mistakes in the first place through careful review before filing. Attorneys should proofread their work, of course, but it is also helpful to have someone unfamiliar with the case read a brief before it enters a court record.

After several drafts in different briefs on the same case, someone’s eyes can easily glaze over their mistakes. But handing off to a colleague who must read the brief more slowly helps guard against sloppy typos and helps ensure the writing flows logically and accurately.

“It’s critical to have someone with an independent eye go back and read the brief, see if it holds together,” Nadler said.

--Editing by Jeremy Barker and Edrienne Su.
