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Encourage Students to Eliminate the Brown M&Ms from Their Legal Writing

By Joe Fore¹

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Over the past three decades, the story of how Van Halen banned brown M&Ms has gone from backstage to boardroom. For legal writing instructors, this same tale provides a convenient metaphor for students about the importance of watching the smallest details in their writing. Let's see how David Lee Roth can help teach our students about why it's crucial to sweat the small stuff.

The legend of Van Halen's brown M&M clause

The story has been shared widely in recent years,² but perhaps a quick refresher is in order. As Van Halen toured the world in the 1970s and 1980s, the band brought along its contract rider, a thick document that detailed what the promoter was required to provide at the concert venue, including numerous food and drink demands.³ Buried among the rider's extensive food and drink requests was

¹ Special thanks to Megan E. Boyd, Legal Writing Instructor at Georgia State School of Law for her encouragement in putting this idea into print. An earlier version of this piece appeared on her terrific blog, Lady (Legal) Writer. See Joe Fore, *Eliminate the Brown M&Ms from Your Legal Writing*, LADY (LEGAL) WRITER (Apr. 18, 2016), <http://ladylegalwriter.blogspot.com/2016/04/eliminate-brown-m-from-your-legal.html>.

² See, e.g., *This American Life: Fine Print*, CHICAGO PUBLIC RADIO (July 24, 2009), <http://www.thisamericanlife.org/radio-archives/episode/386/fine-print>; Jacob Ganz, *The Truth About Van Halen and Those Brown M&Ms*, NPR: THE RECORD (Feb. 14, 2012), <http://www.npr.org/sections/therecord/2012/02/14/146880432/the-truth-about-van-halen-and-those-brown-m-ms>; *Brown Out*, SNOPE.S, <http://www.snopes.com/music/artists/vanhalen.asp>.

³ *Van Halen's Legendary M&M's Rider*, THE SMOKING GUN (Dec. 11, 2008), <http://www.thesmokinggun.com/documents/crime/van-halens-legendary-mms-rider>.

one very specific candy commandment: "M&M's (WARNING: ABSOLUTELY NO BROWN ONES)."⁴ The consequences for violating the clause were severe: one version of the clause warned that if brown M&Ms were found in the backstage area, "the promoter will forfeit the show at full price."⁵

For years, the brown M&Ms ban was panned as an outrageous act of rock-star decadence—pampered musicians making a ludicrous demand just because they could. But, as lead singer David Lee Roth later explained, the chocolate clause served a purpose.

You see, at the time, Van Halen had perhaps the most complex stage show in rock history. And the band took that show into smaller venues that weren't used to hosting such a massive event. Such a complicated show had many technical needs—from having enough electrical outlets to ensuring that the building's structures were sufficiently strong to support the stage and light rigs.⁶ Those requirements were spelled out in the contract rider, but promoters often didn't read it carefully, creating disruptions, delays, and even potentially dangerous conditions.⁷

Van Halen's front man devised the brown M&Ms clause as a test—a canary in the backstage coal mine. If the promoter had paid enough attention to remember to remove the brown M&Ms, chances are they had paid attention to the big stuff, too. And if not ... well, Roth describes the situation:

When I would walk backstage, if I saw a brown M&M in that bowl, well, line check the entire production. Guaranteed you're going to arrive

⁴ *Id.*

⁵ *Brown M&Ms*, VIMEO (last viewed Apr. 20, 2016), <https://vimeo.com/36615187> at 2:25-2:35.

⁶ *Id.* at 0:48-1:59.

⁷ *Id.*

“Van Halen’s front man devised the brown M&Ms clause as a test—a canary in the backstage coal mine. If the promoter had paid enough attention to remember to remove the brown M&Ms, chances are they had paid attention to the big stuff, too.”

at a technical error. They didn't read the contract. Guaranteed you'd run into a problem. Sometimes it would threaten to destroy the whole show. Sometimes, literally, life threatening.⁸

Applying the brown M&Ms principle to legal writing

OK, it's a fun story, but what does it have to do with legal writing? Well, in the same way that the brown M&Ms hinted at larger problems with Van Halen's massive stage show, small defects in a letter, memo, motion, or brief can undermine the reader's confidence in the bigger stuff—the accuracy of the analysis, the rigor of research, or the understanding of the facts. Small errors tell the reader: “I didn't care enough to get the small things right, so you should also be skeptical about whether I cared enough to get the bigger things right, too.”

While there are many possible “brown M&Ms” that can taint legal writing, here are three, in particular, that I warn my students about: (1) violations of court rules; (2) visually unappealing writing; and (3) typos and grammatical errors.

1. Court rule violations

From state civil procedure codes to local court rules to individual judges' orders, lawyers are beset by technical rules of all sorts: page limits, typography rules, citation practices, and filing specifications. These requirements are not always intuitive, and they can differ greatly from venue to venue. For example, while some new lawyers may know that the U.S. Supreme Court requires that briefs be written in a 12-point Century font,⁹ most probably don't realize that for other federal appeals, the Federal Rules of Appellate Procedure mandate 14-point.¹⁰ Even citation practices can vary; some courts have their

own citation preferences,¹¹ while others require strict adherence to *Bluebook* conventions.¹²

Overlooking or flouting these instructions sends the message that the lawyer isn't committed to finding or following the rules—hardly a desirable reputation for an attorney. But ignoring local court requirements can have even more significant consequences than just annoying a judge. Courts can strike or deny motions for all manner of local rule violations, including missing local deadlines¹³ and other technical deficiencies.¹⁴ These outcomes can have serious consequences for both the client and the attorney. A rejected filing could undermine a client's case. And for the lawyer, such behavior could lead to sanctions.¹⁵

¹¹ See FLA. R. APP. P. 9.800 (setting out a Uniform Citation System for citing to Florida and federal sources of law).

¹² See, e.g., *North Valley GI Med. Group v. Prudential Invs. LLC*, No. 15-03268, 2016 WL 4447037, at *1 (D. Md. Aug. 23, 2016) (chastising the parties for putting citations in footnotes, quoting the BLUEBOOK's assertion that “[i]n non-academic legal documents ... citations generally appear with the text of the document,” and warning that “[f]uture noncompliant filings will be stricken without prior notice”).

¹³ See, e.g., *Smith v. Look Cycle USA*, 933 F. Supp. 2d 787, 790 (E.D. Va. 2013) (striking opposition to motion that was filed after 14-day deadline imposed by local rules).

¹⁴ For example, the U.S. District Court for the Middle District of Florida has Local Rule 3.01(g), which requires nearly all non-dispositive motions in civil cases to be accompanied by a statement “(1) certifying that the moving counsel has conferred with opposing counsel and (2) stating whether counsel agree on the resolution of the motion.” Judges in the district are empowered to—and routinely do—deny or strike motions where counsel fail to confer or to include the required certification. See, e.g., *Garrett v. Townley Foundry & Mach. Co.*, No. 11-00077, 2011 WL 4953017, at *2 (M.D. Fla. Oct. 18, 2011) (denying motion where counsel failed to confer before filing motion and urging “counsel to familiarize himself with the requirements of Local Rule 3.01(g) and insure that all future motions comply with the Rule”).

¹⁵ See, e.g., *Advanced Cardiovascular Sys., Inc. v. Medtronic, Inc.*, No. 95-03577, 1996 WL 467293, at *13 n.11 (N.D. Cal. July 24, 1996) (noting that the parties had violated the court's rules for font size and spacing and cautioning that “violation of these rules is grounds for sanctions”); Elie Mystal, *Benchslap: Judge Orders Local Attorney to “Re-Read ... FRCP,” ABOVE THE LAW* (Sept. 21, 2009), <http://abovethelaw.com/2009/09/benchslap-judge-orders-local-attorney-to-re-read-frcp/> (relating the story of a Florida federal judge who not only denied an attorney's motion for multiple rules violations but also ordered the attorney to re-read the court's local rules and the Federal Rules of Civil Procedure and deliver a copy of the order to the attorney's client).

⁸ *Transcript*, 386: *Fine Print*, THIS AMERICAN LIFE, <http://www.thisamericanlife.org/radio-archives/episode/386/transcript> (quoting DAVID LEE ROTH, *CRAZY FROM THE HEAT* (1998)).

⁹ See SUP. CT. R. 33(1)(b).

¹⁰ See FED. R. APP. P. 32(a)(5)(A).

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“The lesson for students is clear: find and follow any formatting and filing requirements when practicing in a new venue.”

And failing to follow technical rules can also suggest something more than mere carelessness or inattentiveness. It can lead a reader to think that the writer *purposefully* evaded the rules to gain an advantage.¹⁶ Judge Alex Kozinski of the Ninth Circuit cautions that defying something as minor as a font-size requirement can “tell[] the judges that the lawyer is the type of sleazeball who is willing to cheat on a small procedural rule and therefore probably will lie about the record or forget to cite controlling authority.”¹⁷ This warning may seem hyperbolic, but judges don’t take kindly to attorneys’ attempts to skirt procedural rules. For example, in 2014, attorneys representing oil giant BP in a case relating to the 2010 Deepwater Horizon oil spill attempted to squeeze in additional words by using spacing that was slightly less than the court-mandated double-spacing.¹⁸ District Judge Carl Barbier was not amused and issued a stern warning:

The Court should not have to waste its time policing such simple rules—particularly in a case as massive and complex as this. Counsel are expected to follow the Court’s orders both in letter and in spirit. ... Counsel’s tactic would not be appropriate for a college term paper. It certainly is not appropriate here.

Any future briefs using similar tactics will be struck.¹⁹

The lesson for students is clear: find and follow any formatting and filing requirements when practicing in a new venue. First, check any

¹⁶ See Heidi K. Brown, *Converting Benchslaps to Backslaps: Instilling Professional Accountability in New Legal Writers by Teaching and Reinforcing Context*, 11 LEGAL COMM. & RHETORIC: JALWD 109, 122-23 (2014) (discussing relevant cases and concluding that “courts may perceive attorneys who disregard court-imposed procedural and formatting rules as trying to garner an unfair advantage”).

¹⁷ Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325, 327 (1992).

¹⁸ Jeff Brady, *BP Lawyers Use Old-School Trick: Judge Not Amused*, NPR: THE TWO-WAY (Sept. 16, 2014), <http://www.npr.org/sections/thetwo-way/2014/09/16/349006089/bp-lawyers-use-old-school-trick-judge-not-amused>.

¹⁹ In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, No. 10-md-02179, Order at 2-3 (E.D. La. Sept. 15, 2014).

applicable procedural codes—the federal or state civil procedure codes for litigators, or similar procedural codes for other types of regulatory or transactional work. Then, check court or agency websites for any specific technical requirements spelled out in the venue’s local rules. Lastly, check for any requirements promulgated by the individual or group that will be presiding over their matter. And one more important reminder: local rules and technical requirements—just like other aspects of the law—are constantly revised and amended, so check regularly for changes.

2. *Sloppy or visually unappealing formatting*
First impressions matter. And “first impressions” don’t just mean the opening sentence of a memo or the question presented; it includes how the writing appears visually on the page or screen. A final, written product that looks sloppy, rushed, or poorly thought-out sends the same message about the substance of the attorneys’ work.

Again, it’s imperative to follow any of the venue’s, employer’s, or client’s specific formatting rules. But after students have done that, they should apply best practices to make their writing inviting and easy-to-read.²⁰ And visual considerations are even more important when writing for the increasing numbers of judges and colleagues who are reading on screens, where layout and typography are crucial for preserving a document’s meaning in digital form.²¹

There are many terrific resources for thoughtful and persuasive legal writing formatting and typography.²² Students should read these practical

²⁰ See ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 136 (2008) (“A brief that is in an ugly typeface, with crowded lines, will not invite careful perusal.”).

²¹ See Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 LEGAL COMM. & RHETORIC: JALWD 1, 15-27 (2015) (discussing typography, document design, and layout considerations for making legal writing easily readable for readers using electronic devices); Jason P. Steed, *5 Tips for Writing Briefs for Tablets*, LAWYERIST.COM (Sept. 22, 2014), <https://lawyerist.com/76679/5-tips-writing-briefs-tablets/>.

²² See, e.g., MATTHEW BUTTERICK, *TYPOGRAPHY FOR LAWYERS* (2d ed. 2015); Derek H. Kernan-Johnson, *Telling Through Type: Typography and Narrative in Legal Briefs*, 7 LEGAL COMM. &

guides and apply the lessons in their own writing. And before sending that memo to the client or e-filing that pleading, students should look at the document as a whole and ask themselves:

- Does it look neat and polished?
- Have I balanced text and white space on the page?²³
- Have I used headings and paragraphing to conveniently label and “chunk” related ideas?²⁴
- Have I limited the use of dense, uninviting blocks of text in footnotes and block quotes?²⁵
- Have I made my formatting convenient for readers using computers or handheld devices by breaking up longer paragraphs into shorter ones and by using bullet points and numbered lists?²⁶

Lastly, we should remind students that it’s not enough to check the last electronic version of the document and then hand the task of printing or filing to a support-staff member. Writers should convert electronic documents to PDF or another, similar stable format, and review the final version of the document to ensure the

document looks the same as they expect.²⁷ And they should print and physically inspect each page of final paper documents before sending to verify that the copying was done properly, that all text is legible, and that the stapling or other fastening was done in a careful way so that the document will remain bound with pages neatly aligned.²⁸

3. *Typos and grammatical errors*

The odd typo here or there in a long piece of legal writing is inevitable. But an error-ridden brief or motion sends one of several messages to the reader:

- (a) the writer was unaware of the proper grammatical rule or spelling;
- (b) the writer was too inattentive to notice the error when editing; or
- (c) the writer saw the error but was too lazy to fix it.

Applying the brown M&Ms principle, a reader might infer that the same writer might be incompetent, inattentive, or lazy in other areas beyond editing.²⁹ Such an inference might be justified. In their 2015 book *The Science Behind the Art of Legal Writing*, Catherine Cameron and Lance Long share preliminary research showing that attorneys who had been disciplined by their state bar had statistically significant higher rates of “careless” writing errors in their memos and legal briefs than nonsanctioned attorneys.³⁰

RHETORIC: JALWD 87 (2010); Ruth Anne Robbins, *Painting with print: Incorporating concepts of typographic and layout design into the text of legal writing documents*, 2 LEGAL COMM. & RHETORIC: JALWD 108 (2004); Seventh Circuit Court of Appeals, *Requirements and Suggestions for Typography in Briefs and Other Papers*, <http://www.ca7.uscourts.gov/rules/type.pdf>.

²³ See Robbins, *supra* note 22, at 124 (suggesting that a 50/50 balance of text and white space); see also BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH* 124 (2001) (“To the modern eye, densely printed pages are a turnoff. Readers find them discouraging. So you’ll need some methods to break up dense passages with white space.”).

²⁴ See Robbins, *supra* note 22, at 125-26 (defining “chunks” as “groups of related information” and noting that using headings to “chunk” related ideas can help readers process and retain the writer’s ideas).

²⁵ See Kozinski, *supra* note 17, at 329 (“[Block quotes] take up a lot of space[,] but nobody reads them.”); see also SCALIA & GARNER, *supra* note 20 at 128 (“Be especially loath to use a lengthy, indented quotation. It invites skipping. In fact, many block quotes have probably never been read by anyone.”).

²⁶ See Margolis, *supra* note 21 at 18; Steed, *supra* note 21.

²⁷ See Steed, *supra* note 21 (“Before you file your e-brief, be sure you actually open it up on a tablet and see how it looks.”).

²⁸ See Kozinski, *supra* note 17, at 326-27 (warning against copying errors that leave faded text or “annoying lines on every page,” cautioning that “[t]he judge won’t even be able to decipher what you wrote, much less what you meant”).

²⁹ See Brown, *supra* note 16, at 123-24 (collecting cases and noting that “several courts have emphasized that unprofessionally presented work product causes the bench to question the competency of the attorney’s representation of her or her client”).

³⁰ CATHERINE J. CAMERON & LANCE N. LONG, *THE SCIENCE BEHIND THE ART OF LEGAL WRITING* 132-33 (2015).

“Writers should convert electronic documents to PDF or another, similar stable format, and review the final version of the document to ensure the document looks the same as they expect.”

A quick grammar refresher from an online tool or pocket guide,³¹ an editing checklist,³² and careful proofreading—preferably on paper³³—can minimize the chance of having such errors in their writing.

* * * *

Legal writers spend a huge amount of time trying to understand the law and then communicating that information in a clear, organized way.

In their practice, students will work hard to produce a final product that is accurate, well-researched, and well-reasoned. We must urge them to sweat the small stuff and make sure that “brown M&Ms” in their legal writing don’t send the reader a different message.

³¹ See, e.g., *Core Grammar for Lawyers*, <http://www.coregrammarforlawyers.com/> (last visited June 2, 2016); Suzanne E. Rowe, *Subjects, Verbs, Complete Sentences and Active Voice*, OR. ST. B. BULL., Dec. 2010, at 13, <https://www.osbar.org/publications/bulletin/10dec/legalwriter.html>; TEXAS LAW REVIEW, MANUAL ON USAGE & STYLE (13th ed. 2015).

³² Jennifer M. Romig, *Checklists for Powerful, Efficient Legal Writing*, 17 GEORGIA B. J. 4, 51 (2011); Evan Schaeffer, *Write Better Legal Documents with an Editing Checklist*, LAWYERIST.COM (Apr. 15, 2016), <https://lawyerist.com/81296/write-better-legal-documents-editing-checklist/>.

³³ Nick Stockton, *What’s Up with That: Why It’s So Hard to Catch Your Own Typos*, WIRED SCIENCE (Aug. 12, 2014), <http://www.wired.com/2014/08/wuwt-typos/>.

Micro Essay: Print Matters?

PRINT MATTERS for ...

- ... context!** Legal materials are organized by jurisdiction, type, and source. When you’re holding a book, it’s easy to know what you’ve found. Online, especially to new researchers, every legal resource looks the same.
- ... citation!** Citation reflects where *in the books* authorities are located. Applying citation rules to digital authorities is awkward and confusing. Two words: star pagination.
- ... cost!** Without a fundamental understanding of how authorities are organized and cited, new attorneys waste billable hours locating, evaluating, and properly referencing them. The more abstract “the books” become, the more these costly errors will likely occur.

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