6th Annual Legal Writing Workshop 2024

COURSE SCHEDULE

8:00 Registration

8:30 **Effective Writing Strategies**
David Spratt, Heather Ridenour
This interactive opening session will cover basic grammar and writing strategies and act as the foundation for the entire workshop. Topics discussed will include the following: the language of the law; noun-pronoun agreement; avoiding misplaced modifiers; avoiding ambiguity; proper use of commas, colons, and semicolons; and sentence and paragraph construction.

10:15 Break

10:30 **Tailoring Your Writing to Your Recipients and Purpose**
David Spratt, Heather Ridenour
This session will discuss the importance and necessity of thinking through a document before beginning to write it. It will cover planning strategies that allow legal writers to write any type of legal document and will help them as they convert one type of legal document to another, e.g., turning an internal office memo into a client letter and/or a trial court brief. This session will also cover specialized documents like e-mails.

11:15 Break

11:30 **Panel Discussion: Ethical Considerations and Professionalism in Legal Writing**
John Bredehoft, L. Steven Emmert, Hon. David W. Lannetti, Program Faculty
This lunch session will address the ethics implications of legal writing content and style. It will first focus on lawyers' possible duty to disclose bad facts and bad law and then cover the ethics rules prohibiting false statements to the court and others and use of AI in legal writing. The session will then turn to legal writing style, including the difference between ethics and professionalism and the rules governing lawyers' criticism of judges.

12:30 Lunch (provided at the seminar)

12:45 **Organization and Rule Synthesis (CREAC)**
David Spratt, Heather Ridenour
This session will teach attendees how to effectively write a discussion or argument section of a memo using an organizational strategy called CREAC (Conclusion/Context, Rules of law, rule Explanation, rule Application, and Conclusion), which is a variation on the IRAC (Issue, Rule, Application, Conclusion) formula most lawyers learned in law school.

1:30 **Contract Drafting: Improving Boilerplate**
David Spratt, Heather Ridenour
This session will discuss drafting and effective use of contract boilerplate by implementing the writing strategies covered during the first two sessions. Contract drafting is not cookie-cutter lawyering, and lawyers should know why each provision is included and the legal effect of such provision.

6th Annual Legal Writing Workshop 2024

2:00 Break

2:10 **Litigation and Transactional Practice Panel Discussion**
John Bredehoft, Soha Mody, Program Faculty
In this session, attendees will receive practice tips and pointers from the group leaders and can ask specific questions concerning legal writing topics relevant to litigation or transactional practice, including the use of generative AI in legal writing.

3:10 Break

3:25 **Oral and Written Advocacy Roundtable**
Program Faculty
Program faculty will discuss the differences between oral and written advocacy, giving an appellate argument versus giving a trial court argument, and offer advice on how to effectively engage in each type of advocacy. The session will model effective oral advocacy techniques and offer best practice pointers from the bar and bench.

4:25 Break

4:35 **Persuasive Writing Exercise (Jack and the Beanstalk)**
David Spratt, Heather Ridenour
This highly interactive session will teach the importance of persuasive characterization and fact emphasis.

5:05 **Closing Remarks: Promoting a Culture of Legal Writing Excellence in Virginia**
Hon. Mary Grace O'Brien, Hon. David W. Lannetti, Hon. Linda Bryant

5:25 Adjourn

6th Annual Legal Writing Workshop 2024

2024 Seminar
Written Materials

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As a result, your support of Virginia CLE is also allowing our thriving charitable work to achieve even greater success. For more information about how to support the Virginia Law Foundation, please visit www.virginialawfoundation.org

ABOUT THE SPEAKERS

Hon. Mary Grace O'Brien, Court of Appeals of Virginia / *Manassas*

Mary Grace O'Brien was elected to the Court of Appeals of Virginia in February 2015. She was reelected for another eight year term in January 2023. Judge O'Brien previously served as a Circuit Court judge and a Juvenile and Domestic District Court judge in the 31st Judicial Circuit (Prince William County, Cities of Manassas and Manassas Park). Judge O'Brien is a former assistant Commonwealth's Attorney in Prince William County, where she specialized in prosecution of major narcotics and sexual assault cases. She began her career as a law clerk to the Honorable Roscoe B. Stephenson, Jr. of the Supreme Court of Virginia. She is a graduate of Washington and Lee University School of Law and received her undergraduate degree from LeMoyne College. Judge O'Brien is a member of the Circuit Court Benchbook Committee and the Operations Committee for the Court of Appeals. She previously served as a member of the Board of Governors of the Virginia State Bar Section on the Education of Lawyers, the Judicial Mentoring Committee, the Model Jury Instruction Committee, the Association of District Court Judges Benchbook Committee and the Virginia State Bar Professionalism Faculty. She lectures at a continuing legal education seminar about legal writing and oral advocacy.

Hon. David W. Lannetti, Norfolk Circuit Court / *Norfolk*

Judge Lannetti began his service as a Norfolk Circuit Court Judge in 2014, and he currently serves as Chief Judge. Prior to taking the bench, he was a partner in the law firm of Vandeventer Black LLP, where he concentrated on civil litigation, including construction and government contracts. He graduated from the U.S. Naval Academy (with distinction), Troy University (M.S. in Management with honors), and William & Mary Law School (Order of the Coif), where he was Executive Editor of the Law Review and a Moot Court Justice. As an attorney, he was recognized as AV®-Preeminent by Martindale-Hubbell, a Virginia "Leader in the Law," a Virginia Law

Foundation Fellow, a Virginia "Super Lawyer," and a member of the Virginia "Legal Elite." Among other activities, he currently serves as Chair of the Virginia State Bar (VSB) Standing Committee on Professionalism and Chair of the Supreme Court of Virginia Benchbook Committee, is an adjunct professor at both William & Mary and Regent University Law Schools, is a Past President of the James Kent American Inn of Court and of the Norfolk & Portsmouth Bar Association (NPBA), is on the Board of Directors of the NPBA Foundation, has published numerous articles in legal journals, and is a frequent lecturer on legal topics. He also is very involved in the local community, including volunteer service with Special Olympics Virginia, the U.S. Naval Academy, and the Boy Scouts of America.

Hon, Linda Bryant, Chesapeake General District Court / *Chesapeake*

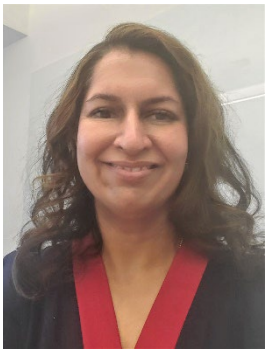
Judge Linda Bryant is currently a General District Court judge in Chesapeake, Virginia. Prior to becoming a judge, she spent nearly three decades years practicing law in state and federal courts. Judge Bryant graduated from the University of Virginia, obtained her law degree from the College of William and Mary (Marshall-Wythe School of Law), and her MBA from the University of Virginia (Darden School of Business). After law school, she served as a JAGC, then engaged in the private practice of law. In 1996 she joined the Norfolk Commonwealth's Attorney's Office where she served as a prosecutor for nearly 17 years. In 2014, she was appointed by the Virginia Attorney General to serve as Deputy Attorney General of the Criminal Justice and Public Safety Division. She has also served as Interim Assistant Superintendent of a large mega-jail in Virginia and as Vice-Chair of Virginia's Parole Board. In 2021, the General Assembly elected her to serve as a General District Court judge in Chesapeake, Virginia. Judge Bryant has also served as an Adjunct Professor at the College of William and Mary (Legal Skills) and Norfolk State University (Legal Environment for Business). She currently serves on the Advisory Committee to the Virginia Supreme Court on Rules of Court, as a faculty member for the Virginia State Bar's Carrico Mandatory Professionalism Course and Professionalism for Law Students Course, and as a facilitator for the National Judicial College. She has served as a consultant for public safety organizations and published articles on topics to include the American with Disabilities Act, Mental Health in Jails, and Digital Evidence. In her spare time, she enjoys reading, listening to podcasts, running in the woods, and spending time with her dogs and family.

John M. Bredehoft, Kaufman & Canoles / *Norfolk*

John Bredehoft is a member of the firm of Kaufman and Canoles in Norfolk. His practice includes all aspects of employment, discrimination, and non-competition law. He is an active litigator and a member of his firm's Credit Union and Consumer Finance initiatives. He is a member, long-time Council member, and former Chair of the Virginia Bar Association section on Labor Relations and Employment Law, which presented him with the Francis V. Lowden Award emblematic of "intelligence, loyalty, and integrity." He formerly served as Chair of the Board of Governors of the Virginia State Bar Section on the Education of Lawyers; for many years John ran the Virginia State Bar program on professionalism for law students, and has been a member of the VSB Standing Committee on Professionalism. He is admitted to practice in Virginia, Maryland, and the District of Columbia. He is an honors graduate of Harvard College and of the Harvard Law School.

L. Steven Emmert, Sykes, Bourdon, Ahern & Levy, P.C. / *Virginia Beach*

Steve Emmert is a partner in the Tidewater firm Sykes, Bourdon, Ahern & Levy, where he limits his practice to appellate advocacy, primarily in the Supreme Court of Virginia. He has chaired the Virginia Bar Association's Appellate Practice Section, the Virginia State Bar's Appellate Practice Committee, and the Boyd Graves Conference, and is a past board member of the American Bar Association's Council of Appellate Lawyers. Steve is listed in The Best Lawyers in America in the category of Appellate Law, and is rated AV by Martindale-Hubbell. He is a fellow of the Virginia Law Foundation and a member of the Virginia Lawyers Hall of Fame. Steve is a Phi Beta Kappa graduate of Richmond College and received his law degree from the University of Virginia. He lives in Virginia Beach with his wife, operatic contralto Sondra Gelb; they have one slightly spoiled daughter, Caroline.



Soha Mody, Managing Associate General Counsel, Freddie Mac, McLean, VA

Soha primarily works on counterparty risk mitigation strategies, including information security and privacy policies, bank receivership issues, mortgage insurance and other credit enhancements. Prior to joining Freddie Mac for the first time in early 2009, she practiced a sundry of real estate related areas, primarily development and financing, in DC at Pilsbury and Saul Ewing, and before that, in Phoenix. At Freddie Mac, Soha is actively involved in leadership development, including with the Association of Corporate Counsel Leadership Academy and Freddie Mac-created programming, and diversity recruiting. Soha is a (mostly) native of the Phoenix area. She attended Whittier Law School and Pepperdine University. She has 8 year-old twins and 2 dogs; Soha and her husband live in Falls Church, Virginia, having just restored a 1961 mid-century split level in their spare and extra time.

Heather E. Ridenour, American University Washington College of Law / *Washington, DC*

Professor Heather Ridenour joined the full-time faculty at American University, Washington College of Law in 2008, where she teaches Legal Rhetoric, Advanced Legal Methods, and Lawyering Fundamentals. Prior to joining the WCL faculty, she worked with the Academic Support Program at Texas Wesleyan University School of Law, now known as Texas A&M University School of Law, where she was Instructor of Academic Support and Legal Writing Specialist. Before taking that position, she had a probate and guardianship practice in Texas. From 2005 to 2007, she was the Guardianship Auditor at the Tarrant County Probate Court working under Judge Patrick Ferchill. She graduated cum laude from the Texas Wesleyan University School of Law in 2004, where she was Associate Editor and Articles Editor on the Texas Wesleyan Law Review. Professor Ridenour is a member of the Legal Writing Institute and frequently writes and speaks nationally and internationally on legal writing, Rhetoric and Shakespeare, academic support, and advocacy. Professor Ridenour was a member of the inaugural faculty of the annual Legal Writing Bootcamp cosponsored by the Virginia CLE, the Virginia State Bar Section on the Education of Lawyers, the Virginia Bar Association Law Practice Management Division, and the Washington College of Law Legal Rhetoric Program, now in its fifth year.

David H. Spratt, American University Washington College of Law / *Washington, DC*

David H. Spratt is a professor at American University, Washington College of Law, where he teaches Contracts, Legal Rhetoric, and Family Law Litigation and Practice. David received a B.A. degree in Government and Psychology from The College of William and Mary and graduated *summa cum laude* from The American University, Washington College of Law. Before joining WCL as a full-time faculty member in Fall 2006, David taught Legal Writing and Research at the George Washington University School of Law, Legal Analysis and Writing at Concord School of Law, and Legal Methods at the Washington College of Law. David is a member of the Virginia and District of Columbia bars, and he is an active participant in state, local, and national bar associations and organizations. He is a past chair of the Virginia Bar Association, Domestic Relations Section and the Northern Virginia Regional Advisory Committee. In the past, he has moderated and/or presented continuing legal education programs on attorney impairment, vocational rehabilitation experts, defined duration support, imputation of income, amendments to the Virginia child support statute, legal ethics, legal writing, academic support, research and citation, the use of electronic evidence in litigation and family law cases, and child custody evaluations. In 2001, David was a founding partner of Schwartz & Spratt, PLC, a family law firm in Fairfax, Virginia. Previously, David worked as an associate at the Law Office of Betty A. Thompson, Ltd., and at The Lewis Law Firm, in Washington, D.C. Professor Spratt writes a regular column, "Writer's Block," for the Virginia Bar Association News Journal. In January 2013, David was appointed to the Virginia State Bar Section on Education of Lawyers Task Force on Legal Writing and planned and implemented a Legal Writing Bootcamp for practicing Virginia attorneys, which now continues annually. David served as the Civil Reporter of Decisions for the Virginia Court of Appeals for more than three years, stepping down in October 2021, and he currently serves as the Chair of the Virginia State Bar Section on Education of Lawyers. David is the 2021 Recipient of the Washington College of Law Excellence in Teaching Award. David is the co-author of *Contracts: A Modern Coursebook*, which was published in February 2023.

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Effective Writing Strategies

David Spratt, Heather Ridenour

THE BASIC PRINCIPLES

What makes a "good" document?
Why do some documents succeed and others fail? The difference between a "good" document and a "bad" one is more than spelling, punctuation, and grammar (although these certainly count in the equation). If we can pin down the qualities of successful documents, we are well on our way to producing them and to helping others produce them.

A. A good document achieves its designated purpose for its specific audience.

To achieve this quality, a writer should ask certain questions before and during drafting and revising:

1. For whom is this document written (audience)?

2. What will that person do with it (purpose)?

3. What question(s) is the document supposed to answer?

4. What is the answer?

In the world of legal discourse, documents are "working documents," not academic exercises. Real people <u>need</u> and use the documents you write to answer significant questions. However perfectly it may be written, a legal document fails if it does not achieve its designated purpose for its designated audience.

B. A good document immediately gives its reader an overall picture of what the document is about, including the question it is answering and the answer. It also leaves the reader with a clear answer.

5. Does the document immediately (i.e. on page one) and clearly present the question or questions it addresses, the answer(s), and a brief explanation of the answer(s)?

6. Does the final sentence or paragraph (conclusion) make the answer crystal clear?

Documents are more useful to readers if they supply context–that is, if they tell the reader what the document is about right away and give the reader an overall picture of what the document will do. Legal documents, in particular, should not be "mystery stories." Give both the question <u>and</u> the answer in the first paragraph.

C. A good document is easy to follow; a reader can tell immediately what a paragraph is about and how paragraphs fit together.

7. Does the first sentence in each paragraph contain the topic of that paragraph?

8. Are all the sentences in that paragraph related to that topic?

9. Is the relationship between paragraphs shown by the effective use of transitions?

10. If appropriate, are subtitles used to guide the reader through the document?

Paragraphs and "white space" in a document are useful organizational tools for a reader, as a reader struggles to understand the meaning. Well-organized paragraphs in which the topic is quickly identified makes the struggle for meaning easier. Effective transitions create "flow" and act as signposts through the document. Subtitles also act as signposts. (Picture the reader on a hike through unfamiliar terrain.)

D. A good document is easy to read.

11. Do sentences rarely exceed twenty-five words (2 ½ typed lines)?

12. Are long sentences controlled with parallel structure?

13. Is sentence length and type varied?

14. Are the first and last words in each sentence the most important?

15. Are important ideas in main clauses and less central information in subordinate clauses or phrases?

Many studies have shown that readers comprehend shorter sentences more easily. At the same time, a document comprised entirely of short sentences is tedious and droning, and sometimes long sentences are useful, as long as they are controlled and not sprawling. Other studies show that readers pay the most attention to the last and first words in sentences ("impact" positions). Also, grammatical structures carry meaning: if information is in the main or independent clause, it is read as important information; if it is in a subordinate or dependent clause, it is seen as less important–dependent or contingent on the important information.

16. Are verbs in the active voice unless you have a specific reason for using another structure?

17. Are "to be" verbs with nominalizations kept to a minimum?

18. Are sentences generally in subject-verb-direct object order?

The clearest, shortest and most direct sentence structure is subject-active verb-direct object. Readers comprehend this structure most easily. Active verbs give your writing clarity and crispness. Nominalizations in the place of active verbs make the writing sound stiff, abstract, and bureaucratic.

19. Are all pronoun referents clear and accurate?

20. Are modifiers kept to a minimum?

21. Are modifying phrases next to the nouns they modify?

22. Is "legalese" eliminated, unless critical to the meaning?

23. Are "clumsy words and phrases" revised?

In legal documents, ambiguity can be deadly. To avoid any chance that the meaning is not clear, use pronouns only when there can be no doubt as to the referent. When in doubt, repeat the noun. Inaccurate use of modifying phrases can also change the meaning. Strong nouns and verbs should carry the writing without the use of many modifiers. Moreover, legal documents are difficult enough to read without the use of unnecessary legalese and four words instead of one (see list of "clumsy words and phrases" on pages 35-37).

**REVISION CHECKLIST*

After you have completed a draft of your document, review it with these questions in front of you. Use this checklist to revise the document. This checklist focuses on strategies that have proven most effective for clarity and economy of language and should be used in writing objective documents.

Verbs

1. Are the verbs in the active voice unless I have a specific reason for using another structure?
2. Are verbs generally next to subjects and sentences in subject, verb, and direct object order?
3. Have I eliminated "there is" (was, are, were) and "it is" from the beginning of sentences?

Nouns

4. Are my nouns precise?
5. If I use synonyms, is my meaning clear?

Pronouns

6. Are all pronoun referents clear and accurate?

Modifiers

7. Have I kept adverbs and adjectives to a minimum, allowing strong nouns and verbs to carry my prose?
8. Are modifying phrases next to the nouns they describe?

Generally

9. Is every word necessary?
10. Is every legal term necessary and defined (if required)?

Sentences

7. Are most sentences in subject, verb, direct object order?
8. Do sentences rarely exceed twenty-five words?
9. Are long sentences controlled with parallel structure?
10. Do I vary sentence length and type?
11. Are the first and last words in each sentence the most important?
12. Are important ideas in main clauses and less central information in subordinate clauses or phrases?

Paragraphs

13. Have I written a context paragraph telling the reader what the document is about and providing a road map?

14. Does the first sentence of each paragraph contain not only the topic but also the paragraph's major assertion (if I read only the first sentence of each paragraph, can I understand the point of the document?)?
15. Does information in each paragraph move from familiar (to the reader) to unfamiliar?
16. Are paragraphs linked with transitions or echoing words and phrases?

Organization

17. Have I provided my reader with signs along the way by effectively using titles, subtitles, etc?
18. Have I avoided the mystery story syndrome by telling my reader what the document is about in the first paragraph?

Overall

19. Have I proofread several times?
20. Am I proud of the finished product? Knowing that my written work gives an irrevocable impression of me, can I sign it without reservation?

***You may also use "The Basic Principles" as a checklist.**

Planning Strategies

Before you begin any writing assignment, answer the following questions as well as you can. Return to the questions as you draft the document and refine your answers. The answers will help you decide *what* to write about and *how* to write it. They also will help you decide what language to use, what to include, and what to omit.

1. What question(s) should this document answer?

2. What is my answer to each question (no more than a few words)?

3. Who is my reader?

4. What is my reader's relationship to me?

5. How much does my reader know about the subject and my answer?

6. What is my reader's attitude about the subject and about my answer?

7. What does my reader need to know to understand my answer? List in "need to know" order.

8. Why am I writing this (to inform, to persuade, to accomplish some other end)?

9. What constraints do I have?

Clumsy Words and Phrases

*From *Academic Legal Writing* by Eugene Volokh

1. Generally

a bad thing.....bad
a good thing.....good
a large number of .....many
a number of.....some *or* several *or* many *or something more precise*
at present.....now
at the place that.....where
at the present time.....now
at this point in time.....now *or* currently *or* at this point (rarely) *or some such*
at this time.....now *or* currently *or some such*
concerning the matter of.....about
does not operate to.....does not
during the course of.....during
during the time that.....while
excessive number of.....too many
for the duration of.....during *or* while
for the reason that.....because
had occasion to.....*omit*
I would argue that.....*omit*
in a case in which.....when *or* where
in accordance with.....by *or* under
in an X manner.....Xly, e.g. "hastily" *instead of* "in a hasty manner"
in circumstances in which.....when *or* where
in close proximity.....near
in point of fact.....in fact (*or omit all together*)
in reference to.....about
in regard to.....about
in the course of.....during
in the event that..... if
is able to.....can
is cognizent of.....knows *or* is aware of
is lacking in.....lacks
is unable to.....cannot
it could be argued that.....*replace with an argument for why the argument is sound (if that's what you mean)*
it has been determined that...*omit*
it is apparent that.....clearly *or omit*
it is arguable that .....*replace with an argument for why the argument is sound (if that's what you mean)*
it is clear that.....clearly *or omit*

it should be noted that.....*omit*
most of the time.....usually
negatively affect.....hurt *or* harm *or* decrease *or some such*
on a number of occasions.....often *or* sometimes
on the part of .....by
piece of legislation.....law *or* statute *or* bill
referred to as.....called
serves to X.....Xs (e.g. exchange *"this only serves to strengthen the opposition"* to *"this only strengthens the opposition"*)
sufficient number of.....enough
the case at bar.....this case
the manner in which.....how
this case is distinguishable.....*all cases are distinguishable; you probably mean "this case is different"*
to the effect that.....that
under circumstances in which…..when or where
with regard to.....about

2. Verbs turned into nouns or adjectives

accord respect to.....respect
during the pendency of X.....while X was pending
for the purpose of doing.....to do
has a deleterious effect on.....hurts *or* harms
has a negative impact on.....hurts *or* harms
is aware that.....knows
is binding on.....binds
is desirious of.....wants
is dispositive of.....disposes of
made negative reference to.....criticized *or* disagreed with
render assistance.....help
was aware that.....knew
with regard to.....about

3. "The Fact That"

The phrase "the fact that" adds an extra conceptual level; you're not just talking about an event or condition ("John sold the land to Mary"), but rather about the fact that the event or condition occured ("the fact that John sold the land to Mary"). Sometimes this extra complexity is necessary--but rarely. The phrase can usually be omited entirely (perhaps with some grammatical adjustment of the following clause, e.g. "John's selling the land to Mary"), or replaced with "that."

because of the fact that.....because
despite the fact that.....despite *or* though
due to the fact that.....because

in light of the fact that.....because *or* since
the fact that.....that

4. *Redundancies*

These are phrases in which one word simply repeats what is already embodied in another; this is sometimes worth doing for emphasis, but only rarely. If you replace the phrases with their simpler equivelants, you'll find that the result is usually clearer, and no less emphatic.

any and all.....all
cease and desist.....stop (*except in* "cease and desist order" *or* "cease and desist letter")
consensus of opinion.....consensus
each and every.....every
null and void.....void
period in time.....time *or* period
point in time..... time *or* point
provision of law.....law
rate of speed.....speed
still remains.....remains
until such time as.....until

Tailoring Your Writing to Your Recipients and Purpose

David Spratt, Heather Ridenour

The Importance of Audience and Purpose

- Planning
- Drafting
- Revising
- Final Editing

Stages of the Writing Process

Planning

- Thinking through—what am I up to this time?
  - Who am I writing to?
  - What am I trying to achieve?

Audience

- Write for your audience
  - Take your audience's current level of knowledge into account
  - Use language your audience knows and feels comfortable with

PLANNING STRATEGIES

Before you begin any writing assignment, answer the following questions as well as you can. Return to the questions as you draft the document and refine your answers. The answers will help you decide *what* to write about and *how* to write it. They also will help you decide what language to use, what to include, and what to omit.

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7. What does my reader need to know to understand my answer? List in "need to know" order.

8. Why am I writing this (to inform, to persuade, to accomplish some other end)?

9. What constraints do I have?

Email (and Text Message) Etiquette

- Email and text messaging are increasingly used by lawyers to communicate with colleagues and clients, and email will be a key communication tool.
- Email is efficient. There are no time zones, and you can answer on your own schedule.
- Speed and spontaneity, however, often result in messages and replies replete with typos, shortcuts, miscalculations of tone, and ill-thought, rushed advice.
- ***Be careful with the medium.***

Audience and Purpose

- To family and friends, email is like a scribbled note or postcard.
  - Friend emails can be extremely informal; abbreviations (LOL), emoticons (☺), slang, and incorrect punctuation, spelling, and grammar can all be appropriate.
- To a work colleague or client, however, an email is like a business letter.
  - Use "business casual" salutations and closings (Hi, Mr. Smith, Best, Susan) and correct grammar, spelling, and punctuation.
  - Take time for a brief pleasantry at the outset.

dear boss,

when can I c u about my memo?

joe

Can u look at this paper for me?

Thx.

Yo, Boss – is that what you meant?

Bad Examples

- Dear Brett,

  I hope you are enjoying the beautiful weather this weekend.

  Is there a good time that I could meet with you about my memo this week? I am free on Tuesday at 1:00 and 1:20.

  Thank you in advance for your time. I look forward to meeting with you.

  Joe

Good Example

Resist the Temptation to Reply Immediately

- Because it is so easy to fire off an email, messages can sometimes be impulsive and offensive.
- Avoid angry, sarcastic emails.
- Write, wait, re-read, and re-think BEFORE hitting "send."

- Email is not a private form of communication.
- At work, an administrator is always able to read your email messages.
- Never put anything in an email unless you'd be comfortable reading it on the front page of the Washington Post.

Your email is never private.

- Email is easily misaddressed and often sent to an unintended recipient.
- Do not hit “Reply All” if you really do not mean to reply to everyone who received the initial email.
- The address field requires the same careful forethought as the text of the email.

Be careful with your address field!

Include an Informative Subject Line

- Treat your subject line as a summary of the email message.
  - The subject line should tell the recipient what the email message is about, when and if action is needed, and when it must be done.

Purpose of Client Letter

- Client letters are somewhere between a conversation with the client and a formal office memo: your goal is to summarize to the client in lay person's terms much of the information that is contained in an office memo.
- Each client is different; your goal is to write a letter that will help the client in a particular case.

Dear Mr. and Mrs. McLean,

It was great meeting with you. After our meeting, I checked out the law regarding "attractive nuisance," and I have some good news. We have a very good shot at collecting money against the Smith's insurance company in the death of your son! The upshot of my research is that the Hurts probably violated the law by leaving the gate to their pool open in which your son was drowned.

Introductory Paragraph: Set the Proper Tone

Dear Mr. and Mrs. McLean,

I enjoyed meeting with you, although I am sorry that it was under such sad circumstances. Following our meeting, I researched Wisconsin law and confirmed that the Smiths, as property owners who own a pool, are responsible for your son's death because he gained access to the pool through an unlocked gate. Based on my research, I believe that we have a very strong case against the Smiths.

Set the Proper Tone

Language

- Avoid legalese. Impress the client with your knowledge of the law, ability to obtain favorable results, and hard work.
- Good client writing can be understood by a lay person in only one reading.
  - Does not ask the reader to slow down to figure things out.
  - Imagine that you are writing a letter to your grandparents (unless your grandparents are lawyers!)

Language

- Avoid cold recitations of law; instead, describe the law's effect on client.
  - "In this state, tax must be paid by the property owner on each lien against real property recorded in the county clerk's office."
  - "If you refinance the mortgage on your home, you will have to pay $1,250 in mortgage tax."

How to project a certain persona

- Level of formality
  - Personal pronouns
    - "You need to review your options."
    - "We need to review your options."
  - Vivid, specific words v. general language
    - "The statute of limitations began to run on the day Mr. Jones slashed the boy's face with a knife and dumped him in an alley to bleed."
    - "The statute of limitations began to run on the day your son was injured."

Tone Techniques

Other considerations

- How much optimism to convey
- Be careful not to convey unwarranted optimism
  - "We stand a reasonably good chance of winning at trial."
- How much pessimism to convey
  - Don't be vague to cushion bad news.
  - "Our chances in litigation are problematic."
  - "It is very unlikely that such a lawsuit would succeed."

Tone Techniques

Additional Pointers

- Use correct spelling and grammar (or lose a client)
- Have legal authority to support your predictions, although you should not usually cite to this authority in a client advice email or letter.
- If you are aware of any special client concerns, address them in the advice email or letter.
- Add a personal touch so that your client feels as if she is more than just a name on a case file.

Panel Discussion: Ethical Considerations and Professionalism in Legal Writing

John Bredehoft, L. Steven Emmert, Hon. David W. Lannetti, Program Faculty

LEGAL WRITING:
ETHICS CONSIDERATIONS
2023 SUPPLEMENT

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Note: These materials supplement the 2016 edition of Thomas Spahn's work, *Legal Writing: Ethics Considerations*.

Part 1: Recent enforcement actions

Recent legal developments have highlighted certain ethical considerations in legal writing. The easiest examples are disciplinary proceedings against lawyers for former President Donald Trump in the wake of the 2020 general election.

Jeffrey B. Clark – Charged by the District of Columbia Bar for authoring the "Georgia Proof of Concept" letter, outlining a strategy for shifting Georgia's electoral votes from Joseph Biden to Trump. Clark suggested to Acting Attorney General Jeffrey Rosen that it could be a template for use in other states to change their electoral votes, too.

The DC Bar has charged Clark with conduct involving dishonesty, violating Rule 8.4; the case is pending.

Rudolph W. Giuliani – Charged with multiple violations of ethics rules for oral and written communications involving dishonesty. The New York and District of Columbia Bars have initiated disciplinary proceedings against Giuliani; the New York Supreme Court, Appellate Division, has taken the highly unusual step of suspending his license to practice pending the outcome of the case. In a unanimous per curiam order

dated June 24, 2021, the court cited "an immediate threat to the public," based on "uncontroverted misconduct" of an "incredibly serious" nature. That "incredibly serious" misconduct is dishonesty.

Sidney Powell – Fined $175,000 by the Michigan State Bar for filing frivolous litigation over voting machines. She also faced disciplinary proceedings in Texas; a judge there dismissed that petition on February 23, 2023, holding that the Commission on Lawyer Discipline had not met its burden, likely because COLD had not properly labeled its exhibits, leading the court to ignore all but two of them.

John C. Eastman – Cited by the California Bar for writing legal memoranda urging the authority of the Vice President, as president of the Senate, to reject states of electors and substitute a new state. Eastman knew that this theory was invalid and told the Vice President's lawyer that it would probably lose unanimously in the Supreme Court.

The Bar issued its Notice of Disciplinary Charges on January 26, 2023; the case is pending.

* * *

In his response to disciplinary charges in New York, Giuliani had asserted that he had a First Amendment right to speak and could not be disciplined. This contention springs from the ruling in *U.S. v. Alvarez*, 567 U.S. 709 (2012), where the Supreme Court held that the Stolen Valor Act, 18 U.S.C. §704, was an unconstitutional infringement of Americans' freedom of speech – even false speech. The Court ruled that there is no general exception to First Amendment protection for false statements; Giuliani claimed that this ruling protected him from disciplinary action,

The Appellate Division rejected this contention because lawyers, unlike laymen, take an oath that includes a duty of honesty. The Rules of Professional Conduct place obligations upon lawyers "to not knowingly misrepresent facts and make false statements in connection with his representation of a client." *See*, *e.g.*, Rule 4.1 ("In the course of representing a client, a lawyer shall not knowingly (a) make a false statement of fact or law…"). Because "speech by an attorney is subject to greater regulation than speech by others," the First Amendment did not shield Giuliani's false statements.

Part 2: Virginia's Rule 3:3

Virginia's Rule 3.3 differs from the ABA's Model Rule. The model requires a lawyer to "disclose to the tribunal legal authority in the controlling jurisdiction" that the lawyer knows is "directly adverse" to his client. Virginia's Rule requires disclosure of "controlling legal authority in the subject jurisdiction" that the lawyer know to be adverse.

The language, while similar, contains two key differences. First, in Virginia, a lawyer must disclose only *controlling* adverse authority. Thus, for example, a lawyer has no duty to disclose an adverse published opinion from a Virginia circuit court when advocating in the Court of Appeals of Virginia, but must disclose adverse authority from the Supreme Court. The former authority is not controlling in the Court of Appeals, while the latter clearly is. The same rule presumably applies to non-controlling dicta, though the boundary between holdings and dicta can be difficult to define with precision.

Second, while the model rule applies to authority that is "directly adverse," its Virginia cousin covers *all* adverse authority (assuming, as above, that it is controlling). The Rules committee deleted the adverb *directly* "in the belief that the limiting effect of that term could seriously dilute the paragraph's meaning."

In Virginia, both appellate courts issue unpublished rulings. Practitioners in the Commonwealth may or may not know about these rulings. (Note that Rule 3.3 imposes a knowledge standard; there is no liability for failing to disclose authority that the lawyer *should have* known.) Despite the availability of unpublished rulings in electronic databases, Rule 3.3 probably does not subject an attorney to discipline for not disclosing them. Given the court's disdain for citation of unpublished opinions and orders, these rulings are probably not controlling in any event. An advocate may still use them as persuasive authority, especially in a lower tribunal.

Part 4: Ethics and professionalism

Additional authority for pp. II-60-61:

Environment Specialist, Inc. v. Wells Fargo Bank Northwest, N.A., 291 Va. 111 (2016). The Supreme Court of Virginia reversed a $1,200 sanction against a lawyer who had refused to consent to extend the time to answer a mechanic's lien suit. (The plaintiff had instructed its lawyer to reject the request.) The defendant accordingly moved the circuit court for an extension of time and for an award of fees and costs for refusing to agree to a routine request.

In reversing the sanction award, the Supreme Court noted that nothing in the law requires an attorney to accede to such a request. There was nothing unethical or sanctionable about the refusal; indeed, the plaintiff's lawyer could have faced a Bar complaint if he had disobeyed his client's specific directive not to consent. The opinion explores in detail the differences between ethics and professionalism, and observes that court and Bar rules cannot enforce the Principles of Professionalism.

Ragland v. Soggin, 291 Va. 282 (2016) – This is another reversal of a small sanction award against two lawyers. The key ruling for our purposes is that a court has the power to sanction a lawyer for tendering an incorrect written jury instruction, counter to what the trial court has approved. This is true despite the absence of a signature requirement for such instructions. *Compare* §8.01 – 271.1 ("The signature of an attorney… constitutes a certificate by him…"). Despite this ruling, the Supreme Court reverses the sanctions because the statute doesn't apply to inadvertent mistakes.

Kambis v. Considine, 290 Va. 460 (2015) – This decision explores the contours of the "improper purpose" component of the sanctions statute. A circuit court overruled a demurrer to a complaint, finding that the original pleading stated a claim for which relief can be granted. But it sanctioned the plaintiff anyway, despite the legal sufficiency, because, the court found, the plaintiff filed it to harass the defendant.

The Supreme Court affirmed the award, noting that the statute's three certifications are in the conjunctive. It can be sanctionable to file a fully meritorious pleading if the pleader does so for an improper purpose.

Environment Specialist, *Ragland* and *Kambis* deal with sanctions, not always the Rules of Professional Conduct. But the actions described in these cases relate – more than just tangentially – to Rule 3.1's admonition: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous…." Comment 2 to the Virginia Rule adds that an action is frivolous "if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person…." *Kambis*, at least, would appear to fit within this comment, while *Environment Specialist* and *Ragland* would not.

* * *

The authors of this supplement gratefully acknowledge the substantial assistance of Timothy J. Heaphy, Esq. of Wilkie Farr & Gallagher for materials relating to ethics investigations of lawyers for former President Trump.

LEGAL WRITING: ETHICS CONSIDERATIONS

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* These analyses primarily rely on the ABA Model Rules, which represent a voluntary organization's suggested guidelines. Every state has adopted its own unique set of mandatory ethics rules, and you should check those when seeking ethics guidance. For ease of use, these analyses and citations use the generic term "legal ethics opinion" rather than the formal categories of the ABA's and state authorities' opinions -- including advisory, formal and informal.

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Disclosing Unfavorable Facts

Lawyers' duties to disclose unfavorable facts vary depending on the type of proceeding -- in a dichotomy that highlights the essential nature of the adversarial system.

In a typical adversarial proceeding, the ethics rules prohibit a lawyer's false statement of fact, or silence in the face of someone else's false statement of material fact.

> A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

ABA Model Rule 3.3(a)(1) (emphasis added).

A comment provides some additional explanation.

> This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

ABA Model Rule 3.3 cmt. [2] (emphasis added).

Interestingly, before the ABA's Ethics 2000 changes (adopted in February 2002), the prohibition only precluded lawyers' false statements of "material" facts.

Of course, lawyers must also remember the two more general rules prohibiting misstatements or deceptive silence. Under ABA Model Rule 4.1,

> [i]n the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Taking even a broader approach (not limited to acting "in the course of representing a client"), Rule 8.4 indicates that it is "professional misconduct" for a lawyer to

> engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . [o]r engage in conduct that is prejudicial to the administration of justice.

ABA Model Rule 8.4(c), (d).

Other rules involving arguably deceptive trial conduct tend to focus on lawyers' presentations of evidence rather than lawyers' own statements to the court. See, e.g., ABA Model Rule 3.3(a)(3) (prohibiting lawyers from knowingly offering evidence that the lawyer "knows to be false").

Although some situations involve the courtroom setting, many cases discussing lawyers' false statements arise in the deposition setting. Not surprisingly, courts consider statements at a deposition to be "to a tribunal" for purposes of the ethics rules -- both because every state's rules of civil procedure essentially analogize the deposition setting to a trial setting, and because deposition testimony frequently will be read in court at a later trial.

The more difficult situations involve a lawyer's silence rather than affirmative misstatements.

In the normal adversarial proceeding, lawyers have very little obligation to disclose unfavorable facts. The very nature of the adversarial proceeding requires each side to use available discovery to uncover helpful facts, then present them to the court or the fact finder. It is usually inconceivable that a court would require a lawyer to voluntarily alert the other side to facts that might assist its case.

Still, some courts have sanctioned lawyers for remaining silent.

- In re Alcorn, 41 P.3d 600, 603, 609 (Ariz. 2002) (assessing a situation in which a plaintiff's lawyer pursuing a malpractice case against a hospital and a doctor faced a difficult situation after the hospital obtained summary judgment; condemning the lawyer's secret arrangement with the doctor that the plaintiff would proceed against the doctor (who agreed not to object to any cross-examination by the plaintiff's lawyer), but under which the plaintiff would voluntarily dismiss his claim against the doctor at the close of the plaintiffs' case; noting that "[t]he purpose of the agreement, as we understand it, was to 'educate' the trial judge as to the Hospital's culpability so he could use this background in deciding whether to reconsider his grant of summary judgment to the Hospital"; noting that the plaintiff's trial against the doctor took ten days over a two- or three-week period; calling the trial a "charade" that was "patently illegitimate"; suspending the lawyer from the practice of law for six months).

- Gum v. Dudley, 505 S.E.2d 391, 402-03 (W. Va. 1997) (assessing a situation in which a defendant's lawyer did not disclose a secret settlement agreement with another party, and remained silent when a lawyer for another party advised the court that none of the parties had entered into any settlement agreements; "First, Mr. Janelle's silence without doubt invoked a material misrepresentation. The question propounded by the circuit court, during the hearing, was whether or not any of the parties had entered into a settlement agreement. Counsel for the Dudleys responded that no settlement agreement existed between the defendants. Unbeknownst to the Dudleys' counsel, a settlement agreement between defendants Baker and Ayr had occurred. Mr. Janelle was fully aware of the fact, but remained silent. This silence created a misrepresentation. The misrepresentation was axiomatically material, insofar as a hearing was held based upon Mrs. Gum's specific motion to determine if any of the defendants had entered into a settlement agreement. Therefore, Mr. Janelle's silence invoked the material

representation that no settlement agreement existed between any of the defendants. Second, the record is clear that the trial court believed as true the misrepresentation by Mr. Janelle. Third, Mr. Janelle intended for his misrepresentation to be acted upon. That is, he wanted the trial court to proceed with the jury trial. Fourth, the trial court acted upon the misrepresentation by proceeding with the trial without any further inquiry into the settlement. Finally, Mr. Janelle's misrepresentation damaged the judicial process."; remanding for imposition of sanctions against the lawyer).

- Nat'l Airlines, Inc. v. Shea, 292 S.E.2d 308, 310-311 (Va. 1982) (assessing a situation in which a plaintiff's lawyer did not advise the court that the defendant airline's lawyer thought that the case was being held in abeyance; explaining that the plaintiff's lawyer did not respond to the defendant's lawyer expressing this understanding, did not advise the court of the understanding, and instead obtained a default judgment and levied on the airline's property; holding that the plaintiff's lawyer "had a duty to be above-board with the court and fair with opposing counsel"; also noting that the plaintiff's lawyer "failed to call the court's attention to the applicability of the Warsaw Convention, which he knew to be adverse to his clients' position"; setting aside the default judgment "on the ground of fraud upon the court").

It can be difficult to point to any provision in the ethics rules requiring disclosure in many situations like this -- although in some contexts a court could justifiably find some implicit misrepresentation that the lawyer should have corrected.

In most situations involving courts sanctioning of lawyers for their silence, the courts rely on their inherent power to oversee proceedings. These courts apparently rely on their role in assuring justice and seeking the truth. Some might think that such judicial actions risk changing the judicial role from a neutral umpire to a more active participant in the adversarial process, but lawyers who ignore this possible judicial reaction do so at their own risk.

Interestingly, the ethics rules are quite different in ex parte proceedings.

> In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

ABA Model Rule 3.3(d). A comment to ABA Model Rule 3.3 explains the basis for this important difference.

> Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

ABA Model Rule 3.3 cmt. [14] (emphases added). Thus, lawyers appearing ex parte must advise the court of all material facts -- even harmful facts. This dramatic difference from the situation in an adversarial proceeding highlights the basic nature of the adversarial system.

The Restatement takes the same approach.

> In representing a client in a matter before a tribunal, a lawyer applying for ex parte relief or appearing in another proceeding in which similar special requirements of candor apply must . . . disclose all material and relevant facts known to the lawyer that will enable the tribunal to reach an informed decision.

Restatement (Third) of Law Governing Lawyers § 112(2) (2000). A comment mirrors the ABA's explanation.

> An ex parte proceeding is an exception to the customary methods of bilateral presentation in the adversary system. A potential for abuse is inherent in applying to a tribunal in absence of an adversary. That potential is partially redressed by special obligations on a lawyer presenting a matter ex parte.

> Subsection (1) prohibits ex parte presentation of evidence the advocate believes is false. Subsection (2) is affirmative, requiring disclosure of all material and relevant facts known to the lawyer that will enable the tribunal to make an informed decision. Relevance is determined by an objective standard.
>
> To the extent the rule of this Section requires a lawyer to disclose confidential client information, disclosure is required by law within the meaning of § 62. On the other hand, the rule of this Section does not require the disclosure of privileged evidence.

Restatement (Third) of Law Governing Lawyers § 112 cmt. b (2000).

Not surprisingly, court decisions take the same approach. In re Mullins, 649 N.E.2d 1024, 1026 (Ind. 1995) (reprimanding a lawyer for not "sufficiently or fully advising [the court in an ex parte proceeding] of all relevant aspects of the pending parallel proceeding" in another court); Time Warner Entm't Co. v. Does, 876 F. Supp. 407, 415 (E.D.N.Y. 1994) ("In an ex parte proceeding, in which the adversary system lacks its usual safeguards, the duties on the moving party must be correspondingly greater.").

In some situations, bars have had to determine if they should treat a proceeding as an adversarial proceeding or as an ex parte proceeding.

For instance, in North Carolina LEO 98-1 (1/15/99), a lawyer represented a claimant seeking Social Security disability benefits. The bar explained the setting in which the lawyer would be operating.

> Social Security hearings before an ALJ are considered non-adversarial because no one represents the Social Security Administration at the hearing. However, prior to the hearing, the Social Security Administration develops a written record which is before the ALJ at the time of the hearing. In addition, the ALJ has the authority to perform an independent investigation of the client's claim.

The North Carolina Bar explained that before the hearing, the claimant's treating physician sent the claimant's lawyer a letter indicating that the physician "believes that the claimant is not disabled." Id.

Interestingly, the North Carolina Bar apparently assumed that a lawyer would not have to disclose this material fact in an adversarial proceeding (hence the debate about whether the administrative hearing should be treated as an adversarial or as an ex parte proceeding). The North Carolina Bar explained that

> [a]lthough it is a hallmark of good lawyering for an advocate to disclose adverse evidence and explain to the court why it should not be given weight, generally an advocate is not required to present facts adverse to his or her client.

Id.

The North Carolina Bar concluded that the administrative hearing should be considered as an adversarial proceeding -- which meant that the lawyer did not have to submit the treating physician's adverse letter to the administrative law judge at the hearing.

> [A] Social Security disability hearing should be distinguished from an ex parte proceeding such as an application for a temporary restraining order in which the judge must rely entirely upon the advocate for one party to present the facts. In a disability hearing, there is a "balance of presentation" because the Social Security Administration has an opportunity to develop the written record that is before the ALJ at the time of hearing. Moreover, the ALJ has the authority to make his or her own investigation of the facts. When there are no "deficiencies of the adversary system," the burden of presenting the case against a finding of disability should not be put on the lawyer for the claimant.

Id. This is an interesting result. Although the legal ethics opinion is not crystal-clear, it would seem that a lawyer pursuing disability benefits after receiving a doctor's letter

indicating that the client is not disabled risks violating the general prohibition on lawyers advancing frivolous claims. ABA Model Rule 3.1. Even if maintaining silence about the doctor's letter does not run afoul of that ethics provision, it would seem almost inevitable that the lawyer would somehow explicitly or implicitly make deceptive comments to the court while seeking disability benefits for a client that the lawyer now knows is not disabled.

Prosecutors' Duty to Disclose Unfavorable Facts

Prosecutors face a very different ethical landscape than civil lawyers engaged in litigation.

Every state acknowledges that prosecutors must "do justice" rather than just try to win cases.

A 2008 addition to the ABA Model Rules provides a detailed explanation of this difference (which all states have not yet adopted, but which every state undoubtedly would affirm).

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard to those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

ABA Model Rule 3.8 cmt. [1] (emphasis added). The Restatement takes the same basic approach. Restatement (Third) of Law Governing Lawyers § 97 cmt. h (2000).

In 2008, the ABA adopted an entirely new rule that extends this duty beyond the end of a criminal trial and its appeal.

> When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
>
> > (1) promptly disclose that evidence to an appropriate court or authority, and
> >
> > (2) if the conviction was obtained in the prosecutor's jurisdiction,
> >
> > > (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
>
> . . . When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

ABA Model Rule 3.8(g), (h). This recent change highlights the very different ethics rules governing prosecutors and civil lawyers.

Not every state has followed this approach. For instance, in 2010 the Ohio Supreme Court explicitly rejected the argument that a prosecutor's ethics duty of disclosure exceeded any statutory requirement to disclose facts to criminal defendants.

> We decline to construe DR 7-103(B) as requiring a greater scope of disclosure than Brady [Brady v. Maryland, 373 U.S. 83 (1963)] and Crim.R. 16 require. Relator's broad interpretation of DR 7-103(B) would threaten prosecutors with professional discipline for failing to disclose evidence even when the applicable law does not require disclosure.

> This would in effect expand the scope of discovery currently required of prosecutors in criminal cases.

Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125, 130 (Ohio 2010).[1]

[1] Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125, 129, 130 (Ohio 2010) (dismissing a complaint against a former chief assistant prosecuting attorney in an Ohio county, charged with failing to disclose to a criminal defendant possibly exculpatory information; noting that the state disciplinary board had recommended a twelve-month suspension (with six months stayed) of the prosecutor; explaining that the prosecutor had not disclosed (to a criminal defendant charged with raping a child under thirteen) evidence indicating that the victim gave contradictory statements about her age at the time of the alleged rape; addressing the issue of whether the Ohio ethics rules require prosecutors to disclose evidence "'that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment'" -- which was then in the old ABA Model Code format (citation omitted); ultimately rejecting the concept that the ethics rules required more than the law required; "We decline to construe DR 7-103(B) as requiring a greater scope of disclosure than Brady [Brady v. Maryland, 373 U.S. 83 (1963)] and Crim.R. 16 require. Relator's broad interpretation of DR 7-103(B) would threaten prosecutors with professional discipline for failing to disclose evidence even when the applicable law does not require disclosure. This would in effect expand the scope of discovery currently required of prosecutors in criminal cases.").

Disclosing Directly Adverse Law: General Rules

As in so many other areas, determining a lawyer's duty to advise tribunals of adverse authority involves two competing principles: (1) a lawyer's duty to act as a diligent advocate for the client, forcing the adversary's lawyer to find any holes, weaknesses, contrary arguments, or adverse case law that would support the adversary's case; and (2) the institutional integrity of the judicial process, and the desire to avoid courts' adoption of erroneous legal principles.

Not surprisingly, this issue has vexed bars and courts trying to balance these principles. Furthermore, their approach has varied over time.

This issue involves more than ethics rules violations. Courts have pointed to a variety of sanctions for lawyers who violate the courts' interpretation of their disclosure obligation.[1]

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[1] Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346 (Fed. Cir. 2003) (affirming a Rule 11 sanction against a lawyer who violated the disclosure obligation); Tyler v. State, 47 P.3d 1095 (Alaska Ct. App. 2001) (denying a petition for rehearing of a rule fining lawyer for violating the rule); In re Thonert, 733 N.E.2d 932 (Ind. 2000) (issuing a public reprimand against a lawyer who violated a disclosure obligation); United States v. Crumpton, 23 F. Supp. 2d 1218, 1219 (D. Colo. 1998) (finding that a lawyer violated the Colorado ethics rules requiring such disclosure; "I find that it was inappropriate for Crumpton's counsel to file her motion and not mention contrary legal authority that was decided by a Judge of this Court when the existence of such authority was readily available to counsel. Counsel in legal proceedings before this Court are officers of the court and must always be honest, forthright and candid in all of their dealings with the Court. To do otherwise, demeans the court as an institution and undermines the unrelenting goal of this Court to administer justice."); Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 355 (Fla. Dist. Ct. App. 1997) (reversing summary judgment granted by the trial court in favor of the lawyer who had not disclosed adverse authority, and remanding); Massey v. Prince George's County, 907 F. Supp. 138, 143 (S.D. Md. 1995) (issuing a show cause order against a lawyer who violated the disclosure obligation; "[T]he Court will direct defense counsel to show cause to the Court in writing within thirty (30) days why citation to the Kopf case was omitted from his Motion for Summary Judgment, oral argument, and indeed from any pleading or communication to date."); Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc., 464 N.W.2d 551 (Minn. Ct. App. 1990) (vacating a judgment in favor of the lawyer who had violated his disclosure obligation, and remanding), aff'd in part and rev'd in part on other grounds, 482 N.W.2d 771 (Minn. 1992); Jorgenson v. County of Volusia, 846 F.2d 1350 (11th Cir. 1988) (upholding Rule 11 sanctions).

ABA Approach

The ABA's approach to this issue shows an evolving increase and later reduction in lawyers' disclosure duties to the tribunal.

The original 1908 Canons contained a fairly narrow duty of candor to tribunals. In essence, the old Canon simply required lawyers not to lie about case law.

> The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.
>
> It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

ABA Canons of Professional Ethics Canon 22 (1908) (emphases added). This provision essentially precluded affirmative misrepresentations of law to the tribunal.

Twenty-seven years later, the ABA issued ABA LEO 146. Citing the lawyer's role as "officer of the court" and "his duty to aid the court in the due administration of justice," the ABA interpreted Canon 22 as requiring affirmative disclosure of "adverse" court decisions.

> Is it the duty of a lawyer appearing in a pending case to advise the court of decisions adverse to his client's contentions that are known to him and unknown to his adversary?
>
> . . . .

> We are of the opinion that this Canon requires the lawyer to disclose such decisions to the court. He may, of course, after doing so, challenge the soundness of the decisions or present reasons which he believes would warrant the court in not following them in the pending case.

ABA LEO 146 (7/17/35) (emphasis added). The ABA did not explain the reach of this duty, but certainly did not limit the disclosure obligation to controlling case law or even to controlling jurisdictions.

The ABA visited the issue again fourteen years later. In ABA LEO 280, the ABA noted that a lawyer had asked the ABA "to reconsider and clarify the [Ethics] Committee's Opinion 146." The ABA expanded a lawyer's duty of disclosure beyond its earlier discussion. To be sure, the ABA began with a general statement of lawyers' duties to diligently represent their clients.

> The lawyer, though an officer of the court and charged with the duty of "candor and fairness," is not an umpire, but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its inherent soundness. Nor is he under any obligation to suggest arguments against his position.

ABA LEO 280 (6/18/49). However, the ABA then dramatically expanded the somewhat vague disclosure obligation it had first adopted in LEO 146.

> We would not confine the Opinion [LEO 146] to "controlling authorities," -- i.e., those decisive of the pending case -- but, in accordance with the tests hereafter suggested, would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.
>
> Of course, if the court should ask if there are any adverse decisions, the lawyer should make such frank disclosure as the questions seems [sic] to warrant. Close cases can obviously be suggested, particularly in the case of

> decisions from other states where there is no local case in point . . . . A case of doubt should obviously be resolved in favor of the disclosure, or by a statement disclaiming the discussion of all conflicting decisions.
>
> Canon 22 should be interpreted sensibly, to preclude the obvious impropriety at which the Canon is aimed. In a case involving a right angle collision or a vested or contingent remainder, there would seem to be no necessity whatever of citing even all of the relevant decisions in the jurisdiction, much less from other states or by inferior courts. Where the question is a new or novel one, such as the constitutionality or construction of a statute, on which there is a dearth of authority, the lawyer's duty may be broader. The test in every case should be: Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?

Id. (emphases added). Thus, the ABA expanded lawyers' disclosure obligation to include any cases (even those from other states) that the court "should clearly consider in deciding the case."

The ABA Model Code of Professional Responsibility DR:7-106(B)(1)[2] (adopted in 1969) and the later ABA Model Rules of Professional Conduct (adopted in 1983) contain a much more limited disclosure duty.

> A lawyer shall not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

ABA Model Rule 3.3(a)(2) (emphases added).

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[2] ABA Model Code of Prof'l Responsibility DR 7-106(B)(1) (1980) ("In presenting a matter to a tribunal, a lawyer shall disclose: (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel." (footnote omitted)).

Comment [4] of the Model Rules provides a fuller explanation.

> Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

ABA Model Rule 3.3 cmt. [4] (emphases added).

The ABA explained some of its evolving approach in a legal ethics opinion decided shortly after the ABA adopted the Model Rules. In ABA Informal Op. 1505, the ABA dealt with a plaintiff's lawyer who had successfully defeated defendant's motion to dismiss a case based on a "recently enacted statute."

> [D]uring the pendency of the case, an appellate court in another part of the state, not supervisory of the trial court, handed down a decision interpreting the exact statute at issue in the motions to dismiss. The appellate decision, which controls the trial court until its own appellate court passes on the precise question involved, can be interpreted two ways, one of which is directly contrary to the holding of the trial court in denying the motions to dismiss.

ABA Informal Op. 1505 (3/5/84) (emphasis added). The plaintiff's lawyer explained that the issue was not then before the court, but "may well be revived because the prior ruling was not a final, appealable order." He asked the ABA whether he had to advise the trial court at that time, or whether he could "await the conclusion of the appeals process in the other case and the revival of the precise issue by the defendants" in his case.

The ABA indicated that the plaintiff's lawyer must "promptly" advise the court of the other decision.

> [T]he recent case is clearly "legal authority in the controlling jurisdiction" and, indeed, is even controlling of the trial court until such time as its own appellate court speaks to the issue. Under one interpretation of the decision, it is clearly "directly adverse to the position of the client." And it involves the "construction of a statute on which there is a dearth of authority."
>
> . . . .
>
> While there conceivably might be circumstances in which a lawyer might be justified in not drawing the court's attention to the new authority until a later time in the proceedings, here no delay can be sanctioned. The issue is potentially dispositive of the entire litigation. His duty as an officer of the court to assist in the efficient and fair administration of justice compels plaintiff's lawyer to make the disclosure immediately.

Id. (emphasis added). Thus, the ABA noted that ABA Model Rule 3.3(a)(3) required the plaintiff's lawyer to promptly disclose such a decision from the "controlling jurisdiction."

Restatement Approach

The Restatement takes essentially the same approach as the ABA Model Rules take, but with more explanation.

> In representing a client in a matter before a tribunal, a lawyer may not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position asserted by the client and not disclosed by opposing counsel.

Restatement (Third) of Law Governing Lawyers § 111(2) (2000).

The Restatement explains what the term "directly adverse" means in this context.

> A lawyer need not cite all relevant and adverse legal authority; citation of principal or representative "directly adverse" legal authorities suffices. In determining what

> authority is "directly adverse," a lawyer must follow the jurisprudence of the court before which the legal argument is being made. In most jurisdictions, such legal authority includes all decisions with holdings directly on point, but it does not include dicta.

Restatement (Third) of Law Governing Lawyers § 111 cmt. c (2000) (emphasis added).

Another comment explains that the duty covers statutes and regulations, as well as case law.

> "Legal authority" includes case-law precedents as well as statues, ordinances, and administrative regulations.

Id. cmt. d. The same comment discusses what the term "controlling jurisdiction" means.

> Legal authority is within the "controlling jurisdiction" according to the established hierarchy of legal authority in the federal system. In a matter governed by state law, it is the relevant state law as indicated by the established hierarchy of law within that state, taking into account, if applicable, conflict-of-laws rules. Ordinarily, it does not include decisions of courts of coordinate jurisdiction. In a federal district court, for example, a decision of another district court or of the court of appeals from another circuit would not ordinarily be considered authority from the controlling jurisdiction by the sitting tribunal. However, in those jurisdictions in which a decision of a court of coordinate jurisdiction is controlling, such a decision is subject to the rule of the Section.

Id. (emphasis added). The Reporter's Note contains even a more specific definition of the decisional law falling under the obligation.

> Case-law precedent includes an unpublished memorandum opinion, . . . an unpublished report filed by a magistrate, . . . and an adverse federal habeas corpus ruling . . . . The duty to disclose such unpublished materials may be of great practical significance, because they are less likely to be discovered by the tribunal itself. . . . Such a requirement should not apply when the unpublished decision has no force as precedent. Nor should it apply, of course, in jurisdictions prohibiting citation of certain decisions of lower courts. Typical would be the rule found in some states

> prohibiting citation of intermediate-appellate-court decisions not approved for official publication.

Id. Reporter's Note cmt. d (emphases added). A comment also explains the timing of a lawyer's obligation.

> The duty under Subsection (2) does not arise if opposing counsel has already disclosed the authority to the tribunal. If opposing counsel will have an opportunity to assert the adverse authority, as in a reply memorandum or brief, but fails to do so, Subsection (2) requires the lawyer to draw the tribunal's attention to the omitted authority before the matter is submitted for decision.

Id. cmt. c.

Unfortunately, the Restatement's two illustrations do not provide much useful guidance. Illustration (1) involves a lawyer arguing to the court that the state law did not give an adversary a cause of action, even though the lawyer knew that a state law did just that. Illustration (2) involves a lawyer representing to a court that the lawyer had cited "all relevant decisions in point" -- despite knowing of another decision adverse to the lawyer's position. Id. cmt. c, illus. 1 & 2. Thus, those two illustrations involve lawyers affirmatively misrepresenting the state of the law when communicating to a tribunal. The illustrations do not explore the much more difficult situation -- involving a lawyer's failure to mention unhelpful case law, but not affirmatively telling the court that there is no contrary decisional law.

Finally, a comment describes the various remedies available to courts hearing cases in which a lawyer falls short of this duty.

> Professional discipline . . . may be imposed for violating the rule of this Section. A lawyer may also be susceptible to procedural sanctions . . . , such as striking the offending brief, revoking the lawyer's right to appear before the tribunal, or vacating a judgment based on misunderstanding

> of the law. Failure to comply with this Section may constitute evidence relevant to a charge of abuse of process.

Id. cmt. e.

State Ethics Rules

Most states follow the ABA Model Rules approach. However, at least one state (Virginia) applies a wildly different standard.

> A lawyer shall not knowingly . . . fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel.

Virginia Rule 3.3(a)(3) (emphasis added). As explained above, the ABA Model Rules require the disclosure of case law from the "controlling jurisdiction," not just "controlling" case law.

Case Law

Courts analyzing lawyers' obligations to disclose adverse law have provided some guidance on a number of issues.

Although all courts apparently agree that a lawyer's disclosure duty extends beyond just those cases that control the decision before the court, some courts take a remarkably broad approach. Several federal courts have continued to follow the old ABA approach -- essentially requiring lawyers to disclose to tribunals any adverse decisions that a reasonable lawyer would think the court would want to consider.

In Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533 (W.D. Pa. 2001), vacated by uncontested joint motion, No. 2:99-cv-01707-RJC, 2002 U.S. Dist. LEXIS 11870 (W.D. Pa. June 14, 2002), the court explained the purpose of the disclosure obligation.

> The Rule serves two purposes. First, courts must rely on counsel to supply the correct legal arguments to prevent erroneous decisions in litigated cases. . . . Second, revealing adverse precedent does not damage the lawyer-client relationship because the law does not "belong" to a client, as privileged factual information does. . . . Counsel remains free to argue that the case is distinguishable or wrongly decided.

Id. at 539 (emphasis added). The court then explained the difference between ABA LEO 280 (6/18/49) and the approach taken by the Pennsylvania Bar Association in April, 2000. The court rejected the Pennsylvania Bar's approach in favor of the fifty-two-year-old ABA approach.

> The ABA explained that this Opinion [ABA LEO 280 (6/18/1949)] Opinion was not confined to authorities that were decisive of the pending case (i.e., binding precedent), but also applied to any "decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.". . . We note that the Pennsylvania Bar Association's Pennsylvania Ethics Handbook § 7.3h1 (April 2000 ed.), opines that for a case to be "controlling," the opinion must be written by a court superior to the court hearing the matter, although it otherwise adopts the test set forth in the ABA Formal Opinion.
>
> Because both the Pennsylvania and ABA standards are premised upon what "would reasonably be considered important by the judge," we briefly explain why we prefer the ABA's interpretation. The reason for disclosing binding precedent is obvious: we are required to apply the law as interpreted by higher courts. Although counsel might legitimately argue that he was not required to disclose persuasive precedent such as Hittle under Pennsylvania's interpretation of Rule 3.3, informing the court of case law that is directly on-point is also highly desirable.
>
> . . . .
>
> In sum, the court is aware of the limitations on the duty of disclosure as interpreted by the Pennsylvania Bar Association. However, at least as applied to cases such as

> the one before the court, it would seem that the ABA position is by far the better reasoned one. Certainly, ABA Formal Opinion 280 comports more closely with this judge's expectation of candor to the tribunal.

Id. at 539-40 (emphases added). Thus, the Western District of Pennsylvania's decision required lawyers to disclose far more than the current ABA Model Rules or the Pennsylvania ethics rules (as interpreted the previous year by Pennsylvania lawyers).

An earlier federal district court decision implicitly took the same approach -- criticizing a lawyer for not disclosing a decision issued by another state's court. In Rural Water System #1 v. City of Sioux Center, 967 F. Supp. 1483 (N.D. Iowa 1997), aff'd in part and rev'd in part on other grounds, 202 F.3d 1035 (8th Cir.), cert. denied, 531 U.S. 820 (2000), the court indicated that a lawyer should have advised the court of a Sixth Circuit case ("Scioto Water") -- but also the lower court decision in that case, and a Colorado Supreme Court Case.

> It is hardly the issue that the rules of professional conduct require only the disclosure of controlling authority, see, e.g., C.P.R. DR 7-106(B)(1), which the decision of a court of appeals in another circuit certainly is not. In this court's view, the rules of professional conduct establish the "floor" or "minimum" standards for professional conduct, not the "ceiling"; basic notions of professionalism demand something higher. Although the decision of the Sixth Circuit Court of Appeals is obviously not controlling on this federal district court in the Eighth Circuit, RWS # 1's counsel's omission of the Scioto Water decision from RWS # 1's opening briefs smacks of concealment of obviously relevant and strongly persuasive authority simply because it is contrary to RWS # 1's position. RWS # 1's counsel did not hesitate to cite a decision of the Colorado Supreme Court on comparable issues, although that decision is factually distinguishable, probably because that decision appears to support RWS # 1's position. This selective citation of authorities, when so few decisions are dead on point, is not good faith advocacy, or even legitimate "hard ball." At best, it constitutes failure to confront and distinguish or discredit

> contrary authority, and, at worst, constitutes an attempt to hide from the court and opposing counsel a decision that is adverse to RWS # 1's position simply because it is adverse.
>
> . . . This court does not believe that it is appropriate to disregard a decision of a federal circuit court of appeals simply because one of the litigants involved in the case in which the decision was rendered disagrees with that decision. Rather, non-controlling decisions should be considered on the strength of their reasoning and analysis, which is the manner in which this court will consider the decisions of the Sixth Circuit Court of Appeals and the U.S. District Court for the Southern District of Ohio in Scioto Water and the Colorado Supreme Court in City of Grand Junction v. Ute Water Conservancy Dist., 900 P.2d 81 (Colo. 1995) (en banc). RWS # 1's counsel should have brought the Scioto Water decision to this court's attention for consideration on that basis. Failure to cite obscure authority that is on point through ignorance is one thing; failure to cite authority that is on point and known to counsel, even if not controlling, is quite another.

Id. at 1498 n.2 (emphases added). Thus, the Northern District of Iowa expected the lawyer to point out Colorado case law.

The court rejected what it called the lawyer's "rather self-serving assertion" that he did not have to cite one of the cases because a party in that case had filed a petition for certiorari with the United States Supreme Court. Id. The court's opinion also reveals (if one reads between the lines) that the lawyer seems to have been taken aback by the court's question at oral argument about the missing cases.

> At oral arguments, counsel for RWS # 1 acknowledged that he should have cited the Scioto Water decision in RWS # 1's opening brief, and explained that his principal reason for not doing so was that he was disappointed and surprised by the result in that case. While the court is sympathetic with counsel's disappointment, such disappointment should not have prevented counsel from citing relevant authority. Counsel was given the opportunity at oral arguments in this case to explain his differences with the Sixth Circuit Court of Appeals and the U.S. District Court

> for the Southern District of Ohio In Scioto Water, and he ably did so. However, the point remains that counsel could, and this court believes should, have seized the opportunity to argue the defects counsel perceives in these decisions by including those decisions in RWS # 1's opening brief.

Id. Despite this criticism, the court seems not to have sanctioned the lawyer -- acknowledging that the lawyer's "omission, as a practical matter is slight." Id.

Other courts have not been quite as blunt as this, but clearly expect lawyers to disclose decisions that the ABA Model Rules and the Restatement approach would not obligate the lawyers to disclose to the court. See, e.g., State v. Somerlot, 544 S.E.2d 52, 54 n.2 (W. Va. 2000) (explaining that it was "disturbed" that a litigant's lawyer had not included a United States Supreme Court decision in his briefing, without explaining whether the decision was directly adverse to the lawyer's position).

Application of the Ethics Rules

Both the ABA Model Rules and the case law require disclosure of directly controlling adverse authority.

Some lawyers confuse the meaning of the term "controlling" in ABA Model Rule 3.3(a)(2).

A lawyer's disclosure duty includes more than "controlling" decisional or other law. ABA Model Rule 3.3(a)(2) requires disclosure of "legal authority in the controlling jurisdiction" (emphasis added). Thus, the term "controlling" applies to the jurisdiction, not to the decisional or other law. This means that any directly adverse law issued by a court or adopted by the legislature, promulgated by an agency, etc. must be disclosed -- if it comes from the controlling jurisdiction. Tyler v. State, 47 P.3d 1095, 1111 (Alaska

Ct. App. 2001) ("'Directly adverse' authority encompass[es] more than 'controlling' authority.").

Presumably, the "controlling jurisdiction" could be another state, if the forum's choice of law principles would look to that other state for the controlling law.

Although ABA Model Rule 3.3(a)(2) does not define the term "legal authority," the Restatement indicates that

> [i]n most jurisdictions, such legal authority includes all decisions with holdings directly on point, but it does not include dicta.

Restatement (Third) of Law Governing Lawyers §111 cmt. c (2000) (emphasis added).

However, as with other issues involving the duty of disclosure, some courts require far more than the ethics rules require.

For instance, the Federal Circuit affirmed the United States Court of International Trade's reprimand of a Department of Justice lawyer for "misquoting and failing to quote fully from two judicial opinions." Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1347 (Fed. Cir. 2003). In that case, the DOJ lawyer had omitted several sentences from decisions she quoted. The Federal Circuit found that the lawyer's omission provided a misleading view of the decisions. In addition,

> she failed to state "emphasis added" for the quoted material in bold face, although she had so stated about the bold face portions of the quotation from McAllister in the text. This difference would lead a reader to assume that the emphasis in Justice Thomas' dissent was provided by him, not by her.

Id. at 1349. Thus, the DOJ lawyer had included "emphasis added" following her quotation from one case, but had not done so following her quotation from a dissent by Supreme Court Justice Clarence Thomas.

The Federal Circuit also rejected the DOJ lawyer's argument that an early United States Supreme Court statement was dictum and therefore not covered by her disclosure obligation -- noting that a 1960 Second Circuit case and Justice Thomas's dissent "believed that the statement was sufficiently important to quote it . . . and to cite it." Id. at 1356.

On its face, ABA Model Rule 3.3(a)(2) does not require disclosure of directly adverse law from another state -- unless that state supplies the controlling law in the case.

However, as explained in the Introduction, some courts ignore the ABA Model Rules and the Restatement, and instead essentially revert to the 1949 ABA legal ethics opinion that required lawyers to disclose law "which would reasonably be considered important by the judge sitting on the case." ABA LEO 280 (6/18/49).

Disclosure Obligation: Knowledge Standard

ABA Model Rule 3.3(a)(2) prohibits only a failure to disclose adverse legal authority "known to the lawyer" (emphasis added). Similarly, the Restatement indicates that a lawyer "may not knowingly" fail to disclose directly adverse authority. Restatement (Third) of Law Governing Lawyers § 111(2) (2000) (emphasis added).

However, at least one court has applied what amounts to a negligence standard.

In Dilallo v. Riding Safely, Inc., 687 So. 2d 353 (Fla. Dist. Ct. App. 1997), a Florida state court seemed to ignore the "knowing" element of the ethics rule.

> Appellee's counsel conceded to this court that he had not checked the effective date of the statute when arguing for summary judgment. We note that the Rules of Professional Conduct of the Florida Bar require candor toward the tribunal, and a duty of competence. Rule 4-1.1 and Rule 4-3.3(3) imply a duty to know and disclose to the court adverse legal authority. We construe these rules to also require an attorney to provide full information to the trial court such that the court has all necessary information to determine the issue presented to it.

Id. at 355 (emphasis added) (reversing the trial court's grant of summary judgment in favor of the lawyer who had not disclosed the statute's effective date, and remanding).

Disclosing Unpublished Case Law

The story of unpublished opinions involves both substantive law and ethics -- with an interesting twist of evolving technology.

The ABA Model Rules do not deal with the lawyer's duty to disclose case law that has not been published, or that the court has indicated should not be cited (although the ABA issued a legal ethics opinion dealing with that issue -- discussed below).

The Restatement contains a comment dealing with this issue.

> Case-law precedent includes an unpublished memorandum opinion, . . . an unpublished report filed by a magistrate, . . . and an adverse federal habeas corpus ruling . . . . The duty to disclose such unpublished materials may be of great practical significance, because they are less likely to be discovered by the tribunal itself. . . . Such a requirement should not apply when the unpublished decision has no force as precedent. Nor should it apply, of course, in jurisdictions prohibiting citation of certain decisions of lower courts. Typical would be the rule found in some states prohibiting citation of intermediate-appellate-court decisions not approved for official publication.

Restatement (Third) of Law Governing Lawyers §111 Reporter's Note cmt. d (2000) (emphases added).

The history of this issue reflects an interesting evolution. One recent article described federal courts' changing attitudes.

> Although some federal circuits, in the 1940s, considered issuing unpublished opinions as a means to manage its [sic] burgeoning caseload, the federal courts of appeals continued to publish virtually every case decision well into the early 1960s. In 1964, however, because of the rapidly growing number of published opinions and the reluctance of federal courts to issue unpublished decisions,

> the Judicial Conference of the United States resolved that judges should publish "only those opinions which are of general precedential value and that opinions authorized to be published be succinct." In the early 1970s, after the federal circuits failed to respond to this original resolution and many circuits had continued to publish most of their opinions, the Judicial Conference mandated that each circuit adopt a "publication plan" for managing its caseload. Furthermore, in 1973, the Advisory Council on Appellate Justice urged the federal circuits to issue specific criteria for determining which opinions to publish. The Advisory Council hoped that limiting publication would preserve judicial resources and reduce costs by increasing the efficiency of judges.

Andrew T. Solomon, Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?, 26 Miss. C. L. Rev. 185, 189-90 (2006/2007) (emphases added; footnotes omitted).

Another article pointed out the ironic timing of the Judicial Conference's recommendation.

> In 1973, just one year after the Judicial Conference recommended adoption of circuit publication plans, Lexis began offering electronic access to its legal research database; Westlaw followed suit soon after in 1975.

J. Lyn Entrikin Goering, Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor, 1 Seton Hall Cir. Rev. 27, 39 (2005).

One commentator explained the dramatic effect that these rules had on circuit courts' opinions.

> Into the early 1980s, federal courts of appeals were publishing nearly 90% of their opinions. However, by the mid-1980s, the publication rates for federal court of appeals decisions changed dramatically. By 1985, almost 60% of all federal court of appeals decisions were unpublished. Today

> [2007], more than 80% of all federal court of appeals decisions are unpublished.

Andrew T. Solomon, Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?, 26 Miss. C. L. Rev. 185, 192-93 (2006/2007) (emphases added; footnotes omitted).

As federal and state courts increasingly issued unpublished opinions, the ABA found it necessary to explain that

> [i]t is ethically improper for a lawyer to cite to a court an unpublished opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to an opinion that has been marked, by the issuing court, "not for publication."

ABA LEO 386R (8/6/94; revised 10/15/95). The ABA noted that as of that time (1994) several states (including Indiana, Kansas, Wisconsin, and Arkansas) prohibited lawyers from citing unpublished cases. In closing, the ABA explained that -- not surprisingly -- lawyers' ethics duties had to mirror the tribunal's rules about unpublished cases.

> [T]here is no violation if a lawyer cites an unpublished opinion from another jurisdiction in a jurisdiction that does not have such a ban, even if the opinion itself has been stamped by the issuing court "Not for Publication," so long as the lawyer informs the court to which the opinion is cited that that limitation has been placed on the opinion by the issuing court. Court rules prohibiting the citation of unpublished opinions, like other procedural rules, may be presumed, absent explicit indication to the contrary, to be intended to govern proceedings in the jurisdiction where they are issued, and not those in other jurisdictions. Thus, the Committee does not believe that a lawyer's citing such and opinion in a jurisdiction other than the one in which it was issued would violate Rule 3.4(c).

Id.

By the mid-1990s, authors began to question courts' approach, given the evolving technology that allowed lawyers to easily find case law.

> These historic rationales for the limited publication/no-citation plans warrant re-examination in light of current technology. Increased access to both published and unpublished legal opinions through the computer brings to the forefront new concerns while relegating some old concerns to the past. Further, as technology alters the available body of law, it exacerbates some of the practical problems with current limited publication/no-citation plans.

Kirt Shuldberg, Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals, 85 Cal. L. Rev. 541, 551 (1997). The author noted that as of that time (1997) "allowing citation to unpublished opinions has gained popularity. Six circuits currently allow citations, up from only two circuits in 1994." Id. at 569.

In 2000, the Eighth Circuit found unconstitutional a court rule that did not allow courts to rely on unpublished opinions. Anastasoff v. United States, 223 F.3d 898 (8th Cir.), vacated as moot, 235 F.3d 1054 (8th 2000) (en banc).

The ABA joined this debate shortly after Anastasoff. In August 2001, the American Bar Association adopted a resolution urging the federal courts of appeals uniformly to:

> (1) Take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and
>
> (2) Permit citation to relevant unpublished opinions.

See Letter from Robert D. Evans, Director, ABA Govtl. Affairs Office, to Howard Coble, Chairman, Subcomm. on Courts, Internet & Intellectual Prop., U.S. House of Representatives (July 12, 2002).

The Anastasoff opinion began a dramatic movement in the federal courts against issuing unpublished opinions that lawyers could not later cite.

A 2003 article reported on this shift. Stephen R. Barnett, Developments and Practice Notes: No-Citation Rules Under Siege: A Battlefield Report and Analysis, 5 J. App. Prac. & Process 473 (Fall 2003). As that article reported, within a few years, nine federal circuits began to allow citation of unpublished opinions. Of those nine federal circuits, six circuits allowed unpublished opinions to be cited for their "persuasive" value, two circuits adopted hybrid rules under which some unpublished opinions were binding precedent and some unpublished opinions were persuasive precedent, and one circuit did not specify the precedential weight to be given to unpublished opinions. Of course, this also meant that four federal circuits still absolutely prohibited citation of unpublished opinions.

The 2003 article also listed all of the many state variations, including:

- States that did not issue unpublished opinions or did not prohibit citation of unpublished opinions (Connecticut, Mississippi, New York, and North Dakota).
- States allowing citation of unpublished opinions as "precedent" (Delaware, Ohio, Texas, Utah, and West Virginia).
- States allowing citation for "persuasive value" (Alaska, Iowa, Kansas, Michigan, New Mexico, Tennessee, Vermont, Wyoming, Virginia, Minnesota, New Jersey, and Georgia).
- States (25 as of that time) prohibiting citation of any unpublished opinion.
- States too close to call (Hawaii, Illinois, Maine, Oklahoma, and Oregon).

Id. at 481-85. The article even noted that there was disagreement among authors about how to categorize the states' approach.

As the crescendo of criticism built, authors continued to explain why the rules limiting publication and citation of decisions made less and less sense.

> No-citation rules artificially impose fictional status on unpublished opinions, contrary to the overarching ethical duty, shared by attorneys and judges alike, to protect the integrity of the American judicial system. To pretend that no-citation rules can be reconciled with norms of professional conduct and rules of ethics is to defend a surreal netherworld that imposes an outmoded and unjustified double bind on the federal bar.

J. Lyn Entrikin Goering, Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor, 1 Seton Hall Cir. Rev. 27, 34 (2005) (footnotes omitted).

This article also explained the dilemma (including the ethical dilemma) facing lawyers in these jurisdictions.

> No-citation rules put attorneys in a double bind: If appellate counsel conscientiously abides by the duty of candor to the tribunal, the attorney risks the imposition of sanctions by that very court for citing opinions designated as "unpublished," in violation of the rules of the court and the ethical rules requiring attorneys to follow them. On the other hand, if appellate counsel abides by local rules that prohibit or disfavor the citation of "unpublished" opinions, the attorney risks the imposition of sanctions for violating the ethical duty of candor, the requirements of Fed. R. Civ. P. 11, the obligations on appellate counsel set forth in Fed. R. App. P. 46, and the duty to competently represent the client.

Id. at 79 (footnote omitted).

The constant drumbeat of criticism eventually changed the Judicial Conference's approach.

> The controversy ultimately induced the Judicial Conference in 2005 to propose Federal Rule of Appellate Procedure 32.1, which was recently adopted by the Supreme Court. The rule allows lawyers to cite unpublished opinions issued on or after January 1, 2007 in federal courts nationwide. If unaltered by Congress, the rule will take effect beginning in 2007.

Dione C. Greene, The Federal Courts of Appeals, Unpublished Decisions, and the "No-Citation Rule", 81 Ind. L.J. 1503, 1503-04 (Fall 2005) (footnotes omitted).

New Federal Rule of Appellate Procedure 32.1 had some effect, but did not end the debate.

One article described the continuing issue.

> From 2000 to 2008, more than 81% of all opinions issued by the federal appellate courts were unpublished. See Judicial Business of the United States Courts: Annual Report of the Director, tbl. S-3 (2000-2008). During that period, the Fourth Circuit had the highest percentage of unpublished opinions (92%), and more than 85% of the decisions in the Third, Fifth, Ninth and Eleventh circuits were unpublished. Even the circuits with the lowest percentages during that period -- the First, Seventh and District of Columbia circuits -- issued 54% of their opinions as unpublished. Id. . . . Unpublished decisions are much more accessible today -- on Westlaw, Lexis and West's Federal Appendix -- than they were years ago. Still, given the federal circuits' treatment of unpublished decisions as having limited or no precedential value, practitioners who receive a significant but unpublished appellate decision may wish to ask the court to reconsider and issue a published opinion. The federal circuit rules on moving for publication vary. The Fourth, Eighth and Eleventh circuits allow only parties to petition for publication, while the District of Columbia, First, Seventh and Ninth Circuits allow anyone to petition. Two states, California and Arizona, have an extraordinary practice of allowing their state supreme courts, on their own motion, to 'depublish' intermediate appellate court decisions. In California, anyone can petition the state Supreme Court to depublish any appellate court opinion. See California R. Ct. 8.1125; Arizona R. Civ. App. P. 28(f).

Aaron S. Bayer, Unpublished Appellate Decisions Are Still Commonplace, The National Law Journal, Aug. 24, 2009.

State courts have also continued to debate whether their courts can issue unpublished decisions, or decisions that lawyers cannot cite.

For instance, on January 6, 2009, the Wisconsin Supreme Court changed its rules (effective July 1, 2009) to allow lawyers to cite some but not all unpublished opinions.

> [A]n unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31(2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

Wis. Stat. § 809.23(3)(b) (effective July 1, 2009); In re Amendment of Wis. Stat. § 809.23, Sup. Ct. Order No. 08-02 (Wis. Jan. 6, 2009). The accompanying Judicial Council Note provided an explanation.

> Section (3) was revised to reflect that unpublished Wisconsin appellate opinions are increasingly available in electronic form. This change also conforms to the practice in numerous other jurisdictions, and is compatible with, though more limited than, Fed. R. App. P. 32.1, which abolished any restriction on the citation of unpublished federal court opinions, judgments, orders, and dispositions issued on or after January 1, 2007. The revision to Section (3) does not alter the non-precedential nature of unpublished Wisconsin appellate opinions.

Id. Judicial Council Note, 2008. Interestingly, the court indicated that it

> will convene a committee that will identify data to be gathered and measured regarding the citation of

> unpublished opinions and explain how the data should be evaluated. Prior to the effective date of this rule amendment, the committee and CCAP staff will identify methods to measure the impact of the rule amendment and establish a process to compile the data and make effective use of the court's data keeping system. The data shall be presented to the court in the fall of 2011.

Id.

One of the Wisconsin Supreme Court justices dissented -- noting that "[t]his court has faced three previous petitions to amend the current citation rule" and that "[n]o sufficient problem has been identified to warrant the change." In re Amendment of Wis. Stat. § 809.23, Sup. Ct. Order No. 08-02 (Wis. Jan. 6, 2009) (Bradley, J., dissenting). The dissenting justice indicated that she "continue[d] to believe that the potential increased cost and time outweigh any benefits gained." Id.

One recent article explained the remaining issue facing lawyers litigating in courts that no longer prohibit citation of unpublished opinions.

> For federal circuits with unpublished opinions issued after January 1, 2007, and for all other jurisdictions which have banned no-citation rules, attorneys may now cite to unpublished opinions. But does this mean that attorneys must cite to unpublished opinions if those opinions are directly adverse?
>
> Although unclear, the word "authority" in the Model Rule leads to the conclusion that whether an attorney must disclose an adverse unpublished opinion depends upon how the jurisdiction treats unpublished opinions and, more particularly, whether it treats the unpublished opinion as precedent, or rather, as "authority." Furthermore, the comment to the Model Rule 3.3 states that the duty to disclose only relates to "directly adverse authority in the controlling jurisdiction." Therefore, unless the unpublished opinion is adverse controlling authority, the attorney would not be obligated to cite it. An attorney's obligation to cite to an unpublished opinion adverse to her client's opinion does not rest upon the rationale that the other side may not have

> equal access to unpublished opinion, as some commentators have argued.

Shenoa L. Payne, The Ethical Conundrums of Unpublished Opinions, 44 Willamette L. Rev. 723, 757 (Summer 2008) (emphases added). Although this article erroneously concluded that the disclosure obligation applied to controlling authority (as opposed to authority from the controlling jurisdiction), it accurately described lawyers' continuing difficulty in assessing their ethics obligations.

Recent decisions have also highlighted the confusing state of the ethics rules governing lawyers in states that continue to limit citation of published opinions.

> Subsection (a)(3) speaks to a different issue, because it requires a lawyer to disclose court opinions and decisions that constitute "legal authority in the controlling jurisdiction," even if that authority is directly contrary to the interest of the client being represented by the attorney. The obligation to disclose case law, however, is limited somewhat by the impact of Rule 1:36-3, which provides that "[n]o unpublished opinion shall constitute precedent or be binding upon any court." Even that limitation, however, is not unbounded, as an attorney who undertakes to rely on unpublished opinions that support his or her position must, in compliance with the duty of candor, also disclose contrary unpublished decisions known to the attorney as well. Nevertheless, this Rule continues to define the demarcation line between opinions considered to be "binding" authority and other opinions, even though the latter, in many cases, are now readily available through the internet or through media outlets in printed format.

Brundage v. Estate of Carambio, 951 A.2d 947, 956-57 (N.J. 2008) (emphasis added). In that case, the court also noted that New Jersey courts "have recognized that the decision of one trial court is not binding on another." Id. at 957. Relying both on this principle and on an earlier decision's status as "unpublished," the court concluded that a

lawyer litigating a case before the court did not have a duty to bring the earlier decision to the court's attention.

> [I]f we were to conclude that an attorney has an affirmative duty to advise his adversary or the court of every unpublished adverse ruling against him, we would create a system in which a single adverse ruling would be the death knell to the losing advocate's practice. And it would be so even if the first adverse ruling eventually were overturned by the appellate panel or by this Court. Such a system would result in a virtual quagmire of attorneys being unable to represent the legitimate interests of their clients in any meaningful sense. It would not, in the end, advance the cause of justice because the first decision on any issue is not necessarily the correct one; the first court to speak is just as likely to be incorrect in novel or unusual matters of first impression as it is to be correct.

Id. at 968.

In 2011, the Northern District of California addressed the constitutionality of a rule prohibiting citations to unpublished cases.

- Lifschitz v. George, No. C 10-2107 SI, 2011 U.S. Dist. LEXIS 8505, at *2 (N.D. Cal. Jan. 28, 2011) (finding that the U.S. Constitution did not prohibit a rule prohibiting lawyers from citing unpublished California court opinions; noting that under the California rule lawyers are "'only permitted to cite or mention opinions of California state courts that have been designated as 'certified for publication' or ordered officially published ('published' cases), and are forbidden from citing or even mentioning any other cases to the California state or any other courts.'" (internal citation omitted); upholding the provision).

California lawyers' ethics requirements presumably parallel the substantive law governing citations of such opinions.

Disclosing Statutory Law and Affirmative Defenses

ABA Model Rule 3.3 deals with lawyers' duty to disclose adverse law.

> A lawyer shall not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

ABA Model Rule 3.3(a)(2) (emphases added).

The Restatement explicitly indicates that

> "[l]egal authority" includes case-law precedents as well as statues, ordinances, and administrative regulations.

Restatement (Third) of Law Governing Lawyers §111 cmt. d (2000) (emphasis added). Thus, the term "legal authority" apparently includes statutory law as well as case law. See, e.g., Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc., 464 N.W.2d 551 (Minn. Ct. App. 1990), aff'd in part and rev'd in part on other grounds, 482 N.W.2d 771 (Minn. 1992); Nat'l Airlines, Inc. v. Shea, 292 S.E.2d 308, 310-11 (Va. 1982) (assessing a situation in which a plaintiff's lawyer did not advise the court that the defendant airline's lawyer thought that the case was being held in abeyance; explaining that the plaintiff's lawyer did not respond to the defendant's lawyer expressing this understanding, did not advise the court of the understanding, and instead obtained a default judgment and levied on the airline's property; holding that the plaintiff's lawyer "had a duty to be above-board with the court and fair with opposing counsel"; also noting that the plaintiff's lawyer "failed to call the court's attention to the applicability of the Warsaw Convention, which he knew to be adverse to his clients' position"; setting aside the default judgment "on the ground of fraud upon the court").

The disclosure obligation under ABA Model Rule 3.3(a)(2) requires disclosure of statutory law prohibiting assertion of a claim. In fact, the very assertion of the claim itself probably violates ABA Model Rule 3.1 -- which prohibits assertion of claims that are not well grounded in fact or law.

It is unclear how the ethics rules would treat a litigant's failure to disclose a statute (such as a statute of limitations) that provides the adversary an affirmative defense.

Although a statute of limitations would seem to be "legal authority" that is "directly adverse to the position of the client," the ABA and every other bar have indicated that lawyers may ethically file time-barred claims. See, e.g., ABA LEO 387 (9/26/94) ("We conclude that it is generally not a violation . . . to file a time-barred lawsuit, so long as this does not violate the law of the relevant jurisdiction. The running of the period provided for enforcement of the civil claim creates an affirmative defense which must be asserted by the opposing party . . . . [W]e do not believe it is unethical for a lawyer to file suit to a time-barred claim."); Oregon LEO 2005-21 (8/05); North Carolina LEO 2003-13 (1/16/04); Pennsylvania LEO 96-80 (6/24/96). Although several courts have disagreed with this analysis, as a matter of ethics it seems clear that lawyers may file a knowingly time-barred claim.

It is difficult to imagine that a lawyer may ethically file a time-barred claim, but then be ethically obligated to disclose the statute of limitations to the court.

Avoiding False Statements to the Court

Preparing fact witnesses to testify involves some flat ethics prohibitions, but a surprising amount of flexibility in seeking to avoid those prohibitions.

The ABA Model Rules and every state's ethics rules contain several general provisions that might govern a lawyer's witness preparation conduct.

First, some of these general provisions address what lawyers might do themselves.

Under ABA Model Rule 8.4

> [i]t is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

ABA Model Rule 8.4(b).

By referring to "criminal" acts, this rule obviously incorporates various anti-perjury and witness tampering criminal statutes, the violation of which would surely "reflect adversely" on the lawyer's "honesty, trustworthiness or fitness" to practice law.

Under ABA Model Rule 8.4

> [i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

ABA Model Rule 8.4(c) (emphasis added). This rule is somewhat more vague than ABA Model Rule 8.4(b), because it does not incorporate the criminal statutes, but rather more generic requirements of honesty.

The ABA Model Rules also contain an often-criticized provision prohibiting a lawyer's conduct that is "prejudicial to the administration of justice." ABA Model Rule 8.4(d).

Second, in addition to prohibiting lawyers from themselves engaging in wrongdoing, the ABA Model Rules prohibit lawyers from helping their clients engage in general misconduct.

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

ABA Model Rule 1.2(d) (emphases added).

Two comments deal with this general rule.

> [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.
>
> [10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a).

> In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

ABA Model Rule 1.2 cmts. [9], [10] (emphases added).

Third, the ABA Model Ethics Rules also contain somewhat more focused provisions dealing with lawyers offering evidence.

Several of these provisions provide guidance to lawyers acting before they offer evidence.

The ABA Model Ethics Rules contain several provisions dealing with lawyers' involvement with evidence that the lawyer knows to be false.

Starting with the most general prohibition,

> [a] lawyer shall not: . . . falsify evidence, counsel or assist a witness to testify falsely . . . .

ABA Model Rule 3.4(b). This provision prohibits a lawyer's direct involvement in evidence falsification, as well as the lawyer's advice or assistance to any witness (presumably a client or a non-client) to testify falsely.

ABA Model Rule 3.3 indicates that

> [a] lawyer shall not knowingly: . . . offer evidence that the lawyer knows to be false . . . .

ABA Model Rule 3.3(a)(3) (emphases added). This prohibition applies to clients and non-clients.

> Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes.

ABA Model Rule 3.3 cmt. [5].

Unlike ABA Model Rule 3.4(c), this provision contains a knowledge requirement. The Ethics Rules' Terminology section contains the following definition:

> "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

ABA Model Rule 1.0(f). Thus, the prohibition on lawyers offering evidence that the lawyer "knows" to be false requires actual knowledge -- although a disciplinary authority or court could show such actual knowledge without a lawyer's confession.

The ABA Model Rules contain a very useful comment, which provides additional guidance on this issue.

> The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

ABA Model Rule 3.3 cmt. [8] (emphases added).

States take varied approaches. For example, a Virginia comment has both a forward-looking and backward-looking (remedial) component.

> When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Virginia Rule 3.3 cmt. [6] (emphases added).

The ABA Model Rules also contain guidance for lawyers who do not "know" that evidence is false, but suspect that it is false.

In essence, the ABA Model Rules provide a safe harbor for lawyers who refuse to offer such evidence.

> A lawyer may refuse to offer evidence . . . that the lawyer reasonably believes is false.

ABA Model Rule 3.3(a)(3) (emphasis added).

This provision immunizes the lawyer from criticism under other ethics rules that require the lawyer to diligently represent the client. See ABA Model Rule 1.3.

The ABA Model Rules and every state's ethics rules contain very specific provisions describing a lawyer's responsibility if a client states an intent to commit fraud in a tribunal, or admits to past fraud on a tribunal. Because these deal more with issues of confidentiality (and how a lawyer's duty of confidentiality interacts with the lawyer's duty to the system), this analysis does not deal with that situation.

The Restatement contains essentially the same provisions as the ABA Model Rules and most states' ethics rules.

> (1) A lawyer may not:
>
> > (a) knowingly counsel or assist a witness to testify falsely or otherwise to offer false evidence;
> >
> > (b) knowingly make a false statement of fact to the tribunal;
> >
> > (c) offer testimony or other evidence as to an issue of fact known by the lawyer to be false.
>
> (2) If a lawyer has offered testimony or other evidence as to a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures and may

> disclose confidential client information when necessary to take such a measure.
>
> (3) A lawyer may refuse to offer testimony or other evidence that the lawyer reasonably believes is false, even if the lawyer does not know it to be false.

Restatement (Third) of Law Governing Lawyers § 120 (2000).

The Restatement provides a much more detailed and useful discussion than the ethics rules of lawyers' knowledge (and ignorance) that triggers various requirements.

The Restatement first discusses the standard for a lawyer's "knowledge."

> A lawyer's knowledge may be inferred from the circumstances. Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry. However, a lawyer may not ignore what is plainly apparent, for example, by refusing to read a document . . . . A lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false.

Restatement (Third) of Law Governing Lawyers § 120 cmt. c (2000) (emphasis added).

The Restatement also addresses lawyers' knowledge in its discussion of false testimony.

> False testimony includes testimony that a lawyer knows to be false and testimony from a witness who the lawyer knows is only guessing or reciting what the witness has been instructed to say. This Section employs the terms "false testimony" and "false evidence" rather than "perjury" because the latter term defines a crime, which may require elements not relevant for application of the requirements of the Section in other contexts. For example, although a witness who testifies in good faith but contrary to fact lacks the mental state necessary for the crime of perjury, the rule of the Section nevertheless applies to a lawyer who knows that such testimony is false. When a lawyer is charged with the criminal offense of suborning perjury, the more limited definition appropriate to the criminal offense applies.

Restatement (Third) of Law Governing Lawyers § 120 cmt. d (2000) (emphasis added).

The Restatement also defines the type of wrongful evidence that a lawyer may not participate in offering.

> A lawyer's responsibility for false evidence extends to testimony or other evidence in aid of the lawyer's client offered or similarly sponsored by the lawyer. The responsibility extends to any false testimony elicited by the lawyer, as well as such testimony elicited by another lawyer questioning the lawyer's own client, another witness favorable to the lawyer's client, or a witness whom the lawyer has substantially prepared to testify (see § 116(1)). A lawyer has no responsibility to correct false testimony or other evidence offered by an opposing party or witness. Thus, a plaintiff's lawyer, aware that an adverse witness being examined by the defendant's lawyer is giving false evidence favorable to the plaintiff, is not required to correct it (compare Comment e). However, the lawyer may not attempt to reinforce the false evidence, such as by arguing to the factfinder that the false evidence should be accepted as true or otherwise sponsoring or supporting the false evidence (see also Comment e).

Id. (emphasis added).

Interestingly, a lawyer may elicit false evidence for purposes other than assisting a client's case.

> It is not a violation to elicit from an adversary witness evidence known by the lawyer to be false and apparently adverse to the lawyer's client. The lawyer may have sound tactical reasons for doing so, such as eliciting false testimony for the purpose of later demonstrating its falsity to discredit the witness. Requiring premature disclosure could, under some circumstances, aid the witness in explaining away false testimony or recasting it into a more plausible form.

Restatement (Third) of Law Governing Lawyers § 120 cmt. e (2000) (emphasis added).

Illustration 4 indicates that a lawyer who settles a case after eliciting false testimony from a witness (not in furtherance of the lawyer's client's case) does not violate Restatement § 120 by failing to disclose the witness's false statement.

The Restatement emphasizes the lawyer's duty to work with clients or witnesses who intend to or who have offered false evidence.

> Before taking other steps, a lawyer ordinarily must confidentially remonstrate with the client or witness not to present false evidence or to correct false evidence already presented. Doing so protects against possibly harsher consequences. The form and content of such a remonstration is a matter of judgment. The lawyer must attempt to be persuasive while maintaining the client's trust in the lawyer's loyalty and diligence. If the client insists on offering false evidence, the lawyer must inform the client of the lawyer's duty not to offer false evidence and, if it is offered, to take appropriate remedial action (see Comment h).

Restatement (Third) of Law Governing Lawyers § 120 cmt. g (2000).[1]

In discussing reasonable remedial measures that the lawyer must take if such consultation has not been successful, the Restatement again offers much more detailed guidance than the ethics rules.

> If the lawyer's client or the witness refuses to correct the false testimony (see Comment g), the lawyer must take steps reasonably calculated to remove the false impression that the evidence may have made on the finder of fact. (Subsection (2)). Alternatively, a lawyer could seek a recess and attempt to persuade the witness to correct the false evidence (see Comment g). If such steps are unsuccessful, the lawyer must take other steps, such as by moving or stipulating to have the evidence stricken or otherwise withdrawn, or recalling the witness if the witness had already

[1] Interestingly, the Restatement does not require private lawyers to inform non-client witnesses of their Fifth Amendment rights. Restatement (Third) of Law Governing Lawyers § 106 cmt. c (2000) ("A lawyer other than a prosecutor . . . is not required to inform any nonclient witness or prospective witness of the right to invoke privileges against answering, including the privilege against self-incrimination.").

> left the stand when the lawyer comes to know of the falsity. Once the false evidence is before the finder of fact, it is not a reasonable remedial measure for the lawyer simply to withdraw from the representation, even if the presiding officer permits withdrawal (see Comment k hereto). If no other remedial measure corrects the falsity, the lawyer must inform the opposing party or tribunal of the falsity so that they may take corrective steps.

Restatement (Third) of Law Governing Lawyers § 120 cmt. h (2000) (emphases added).

The Restatement includes an explicit statement confirming that "[a] lawyer may interview a witness for the purpose of preparing the witness to testify." Restatement (Third) of Law Governing Lawyers § 116(1) (2000).

Not surprisingly, the Restatement prohibits "[a]ttempting to induce a witness to testify falsely as to a material fact." Restatement (Third) of Law Governing Lawyers § 116 cmt. b (2000) (referring to Comment l of Section 120).

The Restatement also contains an interesting discussion of actions that lawyers generally may take in preparing witnesses to testify.

> In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following: discussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact (see §120(1)(a)).

Id. § 116 cmt. b (emphases added).

Legal ethics opinions from other jurisdictions provide some guidance to lawyers preparing witnesses for testimony.

For instance, the D.C. Bar dealt with these issues in D.C. LEO 79. Interestingly, the D.C. Bar indicated that

> [i]t is not, we think, a matter of undue difficulty for a reasonably competent and conscientious lawyer to discern the line of impermissibility, where truth shades into untruth, and to refrain from crossing it.

D.C. LEO 79 (12/18/79). The case law and other authorities belie this statement.

The D.C. Bar indicated, among other things, that lawyers may suggest specific wording of testimony to their clients, as long as the substance remains the client's truthful statement.

> [T]he fact that the particular words in which testimony, whether written or oral, is cast originated with a lawyer rather than the witness whose testimony it is has no significance so long as the substance of that testimony is not, so far as the lawyer knows or ought to know, false or misleading. If the particular words suggested by the lawyer, even though not literally false, are calculated to convey a misleading impression, this would be equally impermissible from the ethical point of view.

Id. (emphasis added). The D.C. Bar also dealt with the propriety of a lawyer's suggestion that the client include information from other sources.

> The second question raised by the inquiry -- as to the propriety of a lawyer's suggesting the inclusion in a witness's testimony of information not initially secured from the witness -- may, again, arise not only with respect to written testimony but with oral testimony as well. In either case, it appears to us that the governing consideration for ethical purposes is whether the substance of the testimony is something the witness can truthfully and properly testify to. If he or she is willing and (as respects his or her state of

> knowledge) able honestly so to testify, the fact that the inclusion of a particular point of substance was initially suggested by the lawyer rather than the witness seems to us wholly without significance.

Id. (emphasis added). Finally, the D.C. Bar indicated that a lawyer failing to prepare a witness for testimony may not have been sufficiently diligent.

> We turn, finally, to the extent of a lawyer's proper participation in preparing a witness for giving live testimony -- whether the testimony is only to be under cross-examination, as in the particular circumstances giving rise to the present inquiry, or, as is more usually the case, direct examination as well. Here again it appears to us that the only touchstones are the truth and genuineness of the testimony to be given. The mere fact of a lawyer's having prepared the witness for the presentation of testimony is simply irrelevant: indeed, a lawyer who did not prepare his or her witness for testimony, having had an opportunity to do so, would not be doing his or her professional job properly. This is so if the witness is also a client; but it is no less so if the witness is merely one who is offered by the lawyer on the client's behalf.

Id. (emphasis added). In reaching these conclusions, the D.C. Bar repeatedly emphasized the curative nature of cross examination. Id.

In 1994, the Nassau County (New York) Bar Association held that the New York Ethics Code (which generally follows the old ABA Model Code rather than the new ABA Model Rules) permits a lawyer to make the following statement "[p]rior to discussing the case" with his client -- "as long as the attorney in good faith does not believe that the attorney is participating in the creation of false evidence." Nassau County (New York) LEO 94-6 (2/16/94).

> Before you tell me anything . . . I want to tell you what you have to show in order to have a case. Just because you got hurt it doesn't mean you have a case. I can't tell you what to say happened because I wasn't there. And I am bound by

> what you tell me happened and it must be the truth. Now, I know the intersection.
>
> Main Street [place where the accident took place] is governed by a Stop Sign. If you went through the Stop Sign without stopping -- you will most likely have no case. If you stopped momentarily and then proceeded through the intersection you might have a case. If you stopped at the intersection and before proceeding to enter the intersection looked carefully and saw no cars that you believed would impede your proceeding then you have a much better case.

Id. (emphasis added). Accord Nassau County (New York) LEO 91-23 (9/25/91), [1991-1995 Ethics Ops.] ABA/BNA Law. Manual on Prof. Conduct 1001:6253 (holding that a lawyer "may inform a prospective client of relevant law regarding issues of a case before listening to the client's statement").

There are surprisingly few articles dealing with the ethical limits of witness preparation.

Perhaps the most often-cited article is Joseph D. Piorkowski, Jr., Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching", 1 Geo. J. Legal Ethics 389 (1987-1988). This article cites an earlier treatise which described what the article calls the "primary objectives" of witness preparation.

> One treatise on witness preparation specifies thirteen primary objectives for this procedure: "help the witness tell the truth; make sure the witness includes all the relevant facts; eliminate the irrelevant facts; organize the facts in a credible and understandable sequence; permit the attorney to compare the witness' story with the client's story; introduce the witness to the legal process; instill the witness with self-confidence; establish a good working relationship with the witness; refresh, but not direct, the witness' memory; eliminate opinion and conjecture from the testimony; focus the witness' attention on the important areas of testimony; make [sure] the witness understands the importance of his

> or her testimony; teach the witness to fight anxiety, and particularly to defend him or herself during cross-examination." Although some of these goals are directed at enhancing attorney effectiveness, the overwhelming focus of the procedure is to ensure that the witness testifies truthfully, accurately, concisely, and convincingly.

Id. at 390-91 (footnotes omitted). Elsewhere, the article provides a list of safe instructions that lawyers may give their clients about to testify.

> Aron and Rosner [authors of an earlier treatise] recommend that the attorney advise the witness to answer truthfully, to maintain neutrality, to only answer the question asked, to give only the best present recollection, to refrain from volunteering information, to testify only from personal knowledge, to use everyday language, to testify spontaneously, to avoid memorization, to pause before answering, to admit to lack of knowledge where appropriate, and to clarify any unclear questions.

Id. at 391 n.9.

The Georgetown article discusses a number of areas it describes as "gray." For instance, the article discusses testifying witness's use of specific words. The article suggests such "safe" recommendations as avoiding phrases such as "to tell the truth," or "I think I saw." Id. at 399. The article also indicates that lawyers may safely advise their testifying clients to "avoid technical jargon or colloquial expressions," or the use of "sophisticated, 'formal' speech." Id. at 400. Lawyers may also tell their witnesses to avoid pejorative or offensive phrases to refer to certain people.

However, the article warns that lawyers may not change the substance of a witness's statement.

> The attorney's recommendation that the witness modify his intended meaning is clearly prohibited conduct. The most difficult issue, therefore, involves whether an attorney can encourage the substitution of words that do not

> change the witness' intended meaning, but that modify the potential emotional impact associated with the witness' original choice of words.

Id. (emphasis in original). Because of this risk, "[a]ttorneys should exercise the utmost caution . . . in recommending changes in word choice to a witness." Id. at 402.

The article also discusses a lawyer's suggestions about a testifying client's demeanor. Most lawyers would find such suggestions acceptable, but the article warns that there are limits.

> It is at least arguable that when an attorney encourages a witness to appear confident, and during testimony the witness displays a sense of confidence while making an assertion about which he is not in fact confident, the attorney has encouraged the witness to testify "falsely" or to engage in "misrepresentation." For example, suppose a witness in a criminal case is fifty-one percent certain that the defendant was the perpetrator of a given crime. If the prosecutor's statement to the witness to "appear confident" results in the jury perceiving a ninety percent certainty, then the outcome of the litigation may well be altered.

Id. at 404-05 (emphases added). The article generally finds acceptable a lawyer's suggestions about what the client should wear, or what mannerisms the client should use while testifying.

> This class of conduct is best illustrated by the use of polite mannerisms and speech or by wearing a suit to court. This behavior is usually intended to convey the message that the witness is a fine, upstanding citizen who would never dream of lying in a court of law. Due to the very general nature of the message, it would be difficult to construe components of demeanor in this category as capable of being falsified or misrepresented.

Id. at 406.

The article also warns of the possible risk in another type of lawyer suggestion about a testifying witness's demeanor.

> The last category -- conduct intended to communicate a specific message -- is capable of being false, misrepresentative, or deceitful. Components of demeanor in this class include vocal inflections, emphasis on certain words or phrases, and gestures. Moreover, behavior such as the appearance of surprise or display of emotion may fall within this class to the extent that such conduct is premeditated or feigned. Some aspects of demeanor within this category, such as gestures, clearly cannot be falsified. However, other forms of demeanor intended to convey a specific message may provide a basis for disciplinary liability if a witness were coached to use this demeanor to mislead a jury.

Id. at 406-07 (emphases added).

There is surprisingly little case law providing guidance to lawyers preparing witnesses for testimony.

The United States Supreme Court has provided the absolutely true but remarkably unhelpful directive that

> [a]n attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it.

Geders v. United States, 425 U.S. 80, 90 n.3 (1976).

As would be expected, courts have dealt severely with lawyers who persuade witnesses to testify falsely. See, e.g., In re Attorney Discipline Matter, 98 F.3d 1082 (8th Cir. 1996) (disbarring a lawyer from practicing in federal court after he was disbarred from Missouri state courts for having arranged for a witness's false testimony); In re Oberhellmann, 873 S.W.2d 851 (Mo. 1994) (disbarring a lawyer who arranged for a client's false testimony).

Maryland's highest court provided useful guidance.

> Attorneys have not only the right but also the duty to fully investigate the case and to interview persons who may be

> witnesses. A prudent attorney will, whenever possible, meet with the witnesses he or she intends to call. The process of preparing a witness for trial, sometimes referred to as "horse shedding the witness," takes many forms, and involves matters ranging from recommended attire to a review of the facts known by the witness. Because the line that exists between perfectly acceptable witness preparation on the one hand, and impermissible influencing of the witness on the other hand, may sometimes be fine and difficult to discern, attorneys are well advised to heed the sage advice of the Supreme Court of Rhode Island: "[I]n the interviews with and examination of witnesses, out of court, and before the trial of the case, the examiner, whoever he may be, layman or lawyer, must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses."
>
> It is permissible, in a pretrial meeting with a witness, to review statements, depositions, or prior testimony that a witness has given. It also may be necessary to test or refresh the recollection of the witness by reference to other facts of which the attorney has become aware during pretrial preparation, but in so doing the attorney should exercise great care to avoid suggesting to the witness what his or her testimony should be. In some instances, as in the case of an expert witness who will be asked to express an opinion based upon facts related by others, and who is not a factual witness whose testimony could be influenced by reading what others have said under oath, there is little danger in having the witness review the depositions of others. When, however, the testimony in the deposition bears directly on the facts that the reviewing witness will be asked to recount, and particularly when, as here, the testimony is known by the witness to be exactly that which will be used at trial, and is presented in its most graphic form by videotape, the potential for influencing the reviewing witness is great.

State v. Earp, 571 A.2d 1227, 1234-35 (Md. 1990) (footnote omitted).

One well-publicized incident provides an interesting insight into how far lawyers may go when preparing witnesses.

In August, 1997, a lawyer from the asbestos plaintiff's firm of Baron & Budd turned over a witness preparation memorandum that the firm used when preparing its asbestos clients to testify. According to an ABA/BNA article about witness preparation, the Baron & Budd memorandum contained the following statements.

> How well you know the name of each product and how you were exposed to it will determine whether that defendant will want to offer you a settlement.
>
> . . .
>
> Remember to say you saw the NAMES on the BAGS.
>
> . . .
>
> The more often you were around it, the better for your case. You MUST prove that you breathed the dust while insulating cement was being used.
>
> Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsites.
>
> . . .
>
> It is important to emphasize that you had NO IDEA ASBESTOS WAS DANGEROUS when you were working around it.
>
> . . .
>
> It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER.
>
> . . .
>
> You will be asked if you ever used respiratory equipment to protect you from asbestos. Listen carefully to the question! If you did wear a mask for welding or other fumes, that does NOT mean you wore it for protection from asbestos! The answer is still "NO"!

> . . .
>
> Do NOT mention product names that were not listed on your Work History Sheets.
>
> . . .
>
> Do NOT say you saw more of one brand than another, or that one brand was more commonly used than another . . . . Be CONFIDENT that you saw just as much of one brand as all the others.
>
> . . .
>
> Unless your Baron & Budd attorney tells you otherwise, testify ONLY about INSTALLATION of NEW asbestos material, NOT tear-out of the OLD stuff.
>
> . . .
>
> You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered!
>
> . . .
>
> If there is a MISTAKE on your Work History Sheets, explain that the "girl from Baron & Budd" must have misunderstood what you told her when she wrote it down.

Joan C. Rogers, Special Report, Trial Conduct-Witness Preparation Memos Raise Questions About Ethical Limits, 14 ABA/BNA Law. Manual on Prof. Conduct, No. 2, at 48, 49 (Feb. 18, 1998).

As of the date of that special report (February, 1998), the Texas Bar had already dismissed allegations of wrongdoing by Baron & Budd, and no court had yet found anything improper in the memorandum (the ABA/BNA article mentions that Baron & Budd took the position that it also provided its witnesses another memorandum advising

the witnesses to tell the truth when they testify, ameliorating the impact of the absence of such a specific instruction in the witness memorandum itself).

According to the ABA/BNA article, several national ethics experts disagree about the ethical propriety of the memorandum.

Interestingly, then-Professor William Hodes of Indiana University School of Law - Indianapolis (then and now a noted ethics expert) acted as a consultant for Baron & Budd. According to Hodes, the memorandum "did not violate legal ethics rules." Id. at 51. As paraphrased in the ABA/BNA article, Hodes explained that "[u]nless there is inconsistency with independently established facts, or a radical departure from a client's unequivocal prior statements, a lawyer is obligated to give the client the benefit of the doubt." Id.

Later case law does not indicate any sanctions imposed on Baron & Budd, which means that the law firm apparently avoided all ethical or court-driven punishment or criticism.

More recently, Mitsubishi Motor Manufacturing criticized a letter distributed by the EEOC to Mitsubishi employees. The EEOC letter contained what it called "a short list of 'memory joggers' that we suggest that you begin thinking about." Id. at 52 (Excerpts from EEOC Letters). The ABA/BNA article recites these "memory joggers," which include particular phrases, comments, actions that the plaintiffs might have experienced at Mitsubishi. Although well-known Professor Ronald Rotunda (then at the University of Illinois) provided an affidavit in support of Mitsubishi's motion for sanctions, a federal judge denied the motion. Id. at 51.

Difference Between Ethics and Professionalism

It is important to distinguish between ethics and professionalism/civility.

Every state's ethics rules represent a balance between lawyers' primary duty to diligently represent their clients, and some countervailing duty to others within the justice system (or sometimes, to the system itself). In many situations, lawyers following the ethics rules might have to take steps that the public could consider unprofessional. For example, lawyers often must maintain client confidences when the public might think they should speak up -- disclosing a client's past crime, warning the victim of some possible future crime, etc. In less dramatic contexts, lawyers generally must remain silent if their adversary's lawyer misses some important legal argument or defense, etc. Thus, ethics principles focus on lawyers' duties to their clients, and the limited ways in which those duties can be "trumped" by duties to others.

In contrast, professionalism has a much more modest focus. Professionalism speaks to lawyers' day-to-day interactions with other lawyers, with clients, with courts, and with others. Professionalism involves courtesy, civility, and the Golden Rule. When the ethics rules require lawyers to disagree with adversaries or their lawyers, professionalism calls for lawyers to do so without being personally disagreeable.

Applicable Ethics Rules

To be sure, the bar can discipline lawyers for extreme misconduct amounting to a lack of courtesy.

For instance, under ABA Model Rule 4.4(a),

> [i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

ABA Model Rule 4.4(a) (emphasis added). The ABA Model Rules Preamble similarly explains that

> [a] lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.

ABA Model Rules Preamble [5] (emphasis added).

The ethics rules thus set a very low minimum standard of conduct. They do not condemn all actions that "embarrass, delay, or burden" third persons. Instead, the ethics rules only prohibit actions that "have no substantial purpose" other than to prejudice third persons in that way. Not surprisingly, not many actions fall below this line. Even the dimmest of lawyers can normally find some other arguable reason to have undertaken an unprofessional act.

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Lawyers' Communications About Judges: Basic Principles

Nonlawyers' criticism of judges implicates basic First Amendment issues, without the ethics overlay.

- See, e.g., Conservatives, Liberals, Media Advocates Rally Behind Man Jailed For Criticizing Indiana Judge, FoxNews.com, Mar. 3, 2013 ("A group of free-speech advocates is rallying behind an Indiana inmate serving two years for his online rants against a judge who took away his child-custody rights during a divorce case."; "There's no disputing that Daniel Brewington's words were strong and angry -- found in hundreds of emails over the course of the related, two-year divorce case."; "But the group is asking the state's highest court to decide whether they indeed amounted to criminal behavior."; "Brewington was convicted in 2011 of perjury, intimidating a judge and attempting to obstruct justice -- with the attorney general's office successfully arguing that his threat was to expose the judge to 'hatred, contempt, disgrace or ridicule.'"; "However, the group recently filed an amicus brief with the state Supreme Court arguing an appeals court decision in January upholding the felony intimidation charge threatens constitutionally protected speech about public officials."; "The court will decide after the March 11 filing deadline on whether to take up the case."; "The appeals court argued that some of Brewington's claims against Judge James D. Humphrey were false. It also argued their truthfulness were not necessarily relevant to prosecution because the harm, which in this case was striking fear in the victim, occurred 'whether the publicized conduct is true or false,' according to Reason magazine."; "The group is led by University of California Los Angeles law professor Eugene Volokh and includes conservative lawyer James Bopp, a former executive director of the Indiana Civil Liberties Union, the Indiana Association of Scholars, The Indianapolis Star and the James Madison Center for Free Speech."; "Volokh wrote in the brief that the appeals court decision 'endangers the free speech rights of journalists, policy advocates, politicians and ordinary citizens.'"; "In his rants, Brewington called the judge a 'child abuser' and 'corrupt' and accused him of unethical or illegal behavior.").

The ethics rules' limit on lawyers' public criticism of judges includes phrases drawn from another area of the law, but applied very differently.

ABA Model Rule 8.2 limits what lawyers may say about judges.

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

ABA Model Rule 8.2(a) (emphasis added). Interestingly, none of the comments to ABA Model Rule 8.2 actually discuss this black-letter rule. Instead, the first two of the three comments to this Rule deal with judges running for election, and the third comment encourages lawyers to defend unjustly criticized judges.

The ABA Model Code of Professional Responsibility also addressed this issue, and explained one of the reasons why lawyers should refrain from criticizing judges -- because judges are essentially unable to defend themselves.

> Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

ABA Model Code of Prof'l Responsibility EC 8-6 (1980) (footnotes omitted; emphases added).

The Restatement follows the same basic formulation.

> A lawyer may not knowingly or recklessly make publicly a false statement of fact concerning the qualifications or integrity of an incumbent of a judicial office or a candidate for election to such an office.

Restatement (Third) of Law Governing Lawyers § 114 (2000) (emphasis added).

ABA's Reliance on the *New York Times* Standard

For some reason, the ABA looked to the law of defamation when articulating its limit of lawyer criticism of judges.

In New York Times Co. v. Sullivan, 376 U.S. 254, 298 (1964), the United States Supreme Court held that a public official could not recover for defamatory statements unless the public official established that the defendant had made a false and defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." In later cases, the United States Supreme Court explained that "reckless disregard" means a "high degree of awareness of . . . probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74 (1964). Both standards (knowing falsity and reckless disregard) are purely subjective standards. Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n.6 (1974).

Thus, the New York Times constitutional malice standard focuses only on defendants' subjective belief in the truth of their statements. Because opinions can never be objectively proven true or false, they cannot support a defamation action under this standard.

Some courts use defamation principles when interpreting the identical language in Rule. 8.2.

- In re Oladiran, No. MC-10-0025-PHX-DGC, 2010 U.S. Dist. LEXIS 106385, at *5, *8, *8-9, *9 (D. Ariz. Sept. 21, 2010) (suspending for six months a former Greenberg Traurig associate who filed a motion in an action (in which he represented himself pro se) that he marked as assigned to the "Dishonorable Susan R. Bolton," and which contained the following language: "'This motion is filed by [Oladiran], pursuant to the law of, what goes around comes around. Judge Bolton, I just read your Order and am very disappointed in the fact that a brainless coward like you is a federal judge. . . . Finally, to Susan Bolton, we shall meet again you know where [followed by a smiley face]." (emphases added); finding a violation of Rule 8.2, but requiring evidence of falsity; "Ethical Rule 8.2(a) applies to statements about judges: 'A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge[.]' ER 8.2(a). This Circuit has made clear that 'attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false[.]' Yagman, 55 F.3d at 1438 [Standing Comm. on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995)]. It follows that the statements must be 'capable of being proved true or false; statements of opinion are protected by the First Amendment[.]' Id."; "Mr. Oladiran's motion refers to Judge Bolton as 'dishonorable' and a 'brainless coward.' These statements do not have 'specific, well-defined meanings [that] describe objectively verifiable matters,' but instead appear to be meant in a 'loose, figurative sense.' Id. The statements constitute 'rhetorical hyperbole, incapable of being proved true or false,' and 'convey nothing more substantive than [Oladiran's] contempt for Judge [Bolton].' Id. at 1440. As a result, they are protected by the First Amendment and cannot be found to violate Ethical Rule 8.2(a)."; "Without proof of falsity, Mr. Oladiran's motion is not sanctionable for impugning the integrity of Judge Bolton.").

- Smith v. Pace, 313 S.W.3d 124, 126-27 (Mo. 2010) (reversing a jury's conviction of a lawyer for a criminal contempt resulting from a lawyer's filing of a pleading critical of the presiding judge at the trial court; explaining the factual background; "Smith was prosecuted for criminal contempt of court for strong words he used in petitioning the court of appeals for a writ seeking to quash a subpoena issued for a grand jury in Douglas County. Referring to the prosecuting attorney and the judge overseeing the grand jury, Smith wrote: 'Their participating in the convening, overseeing, and handling the [sic] proceedings of this grand jury are, in the least, an appearance of impropriety and, at most, a conspiracy by these officers of the court to threaten, instill fear and imprison innocent persons to cover-up and chill public awareness of their own apparent misconduct using the power of their

positions to do so.'"; holding that "[w]ith respect to lawyers, however, it is not nearly as clear what protection the First Amendment provides. The United States Supreme Court held that states may use a lesser standard than that applied to non-lawyers to decide if a lawyer should be disciplined for his or her speech."; "Since Gentile [Gentile v. State, 501 U.S. 1030 (1991)], numerous state courts have considered the regulation of lawyer speech. Almost all of these cases, however, have involved situations in which a lawyer is disciplined under his or her state's ethics rules."; "In any event, cases involving lawyers' statements require some knowledge of falsity or, at the very least, a reckless disregard for whether the false statement was true or false. The disciplinary process may be a more suitable forum than a contempt proceeding for ascertaining a lawyer's knowledge as to the truth or falsity of the lawyer's statements. Monetary sanctions pursuant to Rule 55.03(c) rather than incarceration also may be more suitable." (footnote omitted); finding that the jury was not properly instructed, because the instructions did not require a mental state; "There can be no doubt that the First Amendment protects truthful statements made in judicial proceedings. It is essential, therefore, to prove that the lawyer's statements were false and that he either knew statements were false or that he acted with reckless disregard of whether these statements were true or false. In this case, there was no mental state (mens rea) requirement in the jury instruction. The instruction did not require the jury to find that Smith knew his statements were false or that Smith showed reckless disregard for the truth. The only contested issue the instruction asked the jury to find was whether Smith's written statements to the court of appeals 'degraded and made impotent the authority of the Circuit Court of Douglas County, Associate Circuit Division and impeded and embarrassed the administration of justice.'" (footnote omitted)).

- In re Green, 11 P.3d 1078, 1085 (Colo. 2000) (assessing a lawyer's pleading indicating that a judge was a "racist and bigot"; holding that such statements were pure opinion and therefore incapable of punishment).

- Standing Comm. on Discipline of U.S. Dist. Court v. Yagman, 55 F.3d 1430, 1440 (9th Cir. 1995) (addressing a lawyer's statement that a judge was "ignorant, ill-tempered, buffoon, sub-standard human, right-wing fanatic, a bully, one of the worst judges in the United States" (internal quotations omitted); declining to impose any sanctions, because the lawyer's statements were rhetorical hyperbole and opinion).

Other courts have explicitly rejected application of the defamation law standard -- instead adopting an objective test in analyzing Rule 8.2.

- Florida Bar v. Ray, 797 So. 2d 556, 558-59 (Fla. 2001), cert. denied, 535 U.S. 930 (2002) ("Although the language of rule 4-8.2(a) closely tracks the

subjective "actual malice" standard of New York Times, following a review of the significant differences between the interests served by defamation law and those served by ethical rules governing attorney conduct, we conclude that a purely subjective New York Times standard is inappropriate in attorney disciplinary actions. The purpose of a defamation action is to remedy what is ultimately a private wrong by compensating an individual whose reputation has been damaged by another's defamatory statements. However, ethical rules that prohibit attorneys from making statements impugning the integrity of judges are not to protect judges from unpleasant or unsavory criticism. Rather, such rules are designed to preserve public confidence in the fairness and impartiality of our system of justice.").

- In re Dixon, 994 N.E.2d 1129, 1133-34, 1134, 1136, 1137, 1138 (Ind. 2013) (holding that a lawyer cannot be disciplined for criticizing a judge in filing required support in a motion to disqualify the judge; "The parties dispute the standard that should be used to determine whether an attorney's statement about a judge violates Rule 8.2(a)."; "One possibility is the 'subjective' standard enunciated in New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). . . . Although Respondent cities treatises favoring the 'subjective' New York Times test, there appaer to be few, if any, attorney discipline actions that apply the Harte-Hanks [Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657 (1989)] test (i.e., serious doubts about the truth of the statement; high degree of awareness of probable falsity)."; "This Court has never decided squarely whether a subjective or objective test applies to the truth or falsity of attorney statements about judges. Our prior cases, though, imply a rejection of the 'subjective' standard applied in defamation cases, and have applied what is in practice an 'objective' test."; "The prohibition against making a statement about a judge that the lawyer knows to be false is fairly straightforward, even though such actual knowledge might be difficult to prove in many cases. Not surprisingly, it is the prohibition against making a statement about a judge with reckless disregard as to its truth or falsity -- as charged in this case -- that is more often disputed. For such cases, we are now persuaded to join the majority view of other jurisdictions and expressly adopt an objective standard for determining when a statement made by an Indiana attorney about a judicial officer violates Rule 8.2(a)."; "Respondent's statements were made not just within, but as material allegations of, a judicial proceeding seeking a change of judge on three grounds, each of which affirmatively requires alleging personal bias or prejudice on the part of the judge."; "But even though Rule 8.2 holds attorneys to a higher disciplinary standard than New York Times does in defamation cases, we also recognize that attorneys need wide latitude in engaging robust and effective advocacy on behalf of their clients -- particularly on issues, as here, that require criticism of a judge or a judge's ruling."; "We will therefore interpret Rule 8.2(a)'s limits to be the least restrictive when an attorney is engaged in good faith professional

advocacy in a legal proceeding requiring critical assessment of a judge or a judge's decision.").

- Board of Prof'l Responsibility v. Davidson, 205 P.3d 1008, 1014, 1016 (Wyo. 2009) (explaining that "[d]eterminations of recklessness under Rule 8.2(a) are made using an objective, rather than a subjective standard. . . . In other words, the standard is whether a reasonable attorney would have made the statements, under the circumstances, not whether this particular attorney, with her subjective state of mind, would have made the statements."; "'Reckless disregard for the truth' does not mean quite the same thing in the context of attorney discipline proceedings as it does in libel and slander cases." (citation omitted); "Numerous courts agree with Graham [In re Disciplinary Action Against Graham, 453 N.W.2d 313 (Minn. 1990)] that the standard for judging whether an attorney has acted with reckless disregard for the truth under rules equivalent to Rule 8.2 is an objective standard, and that the attorney's failure to investigate the facts before making the allegation may be taken into consideration.").

- Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71, 80 (Iowa 2008) (explaining that "[t]he Supreme Court has not applied the New York Times test to attorney disciplinary proceedings based on an attorney's criticism of a judge. It appears a majority of jurisdictions addressing this issue has concluded the interests protected by the disciplinary system call for a test less stringent than the New York Times standard. . . . Courts in these jurisdictions have held that in disciplining an attorney for criticizing a judge, 'the standard is whether the attorney had an objectively reasonable basis for making the statements.'" (citation omitted).

- In re Cobb, 838 N.E.2d 1197, 1205, 1212 (Mass. 2005) (assessing a lawyer's claim that his adversary "must have some particular power or influence with the trial court judge" because the judge had not sanctioned what the lawyer thought was his adversary's unethical conduct (internal quotations omitted); noting the debate among states about the standard for punishing lawyers; "At least three States have said that disciplining an attorney for criticizing a judge is analogous to a defamation action by a public official for the purposes of First Amendment analysis. They apply the 'actual malice' or subjective knowledge standard of New York Times Co. v. Sullivan, 376 U.S. 254, 279-281, 84 S. Ct. 710, 11 L.Ed. 2d 698 (1964), to such proceedings [listing cases from Colorado, Oklahoma, Tennessee and California] . . . . A majority of State courts that have considered the question have concluded that the standard is whether the attorney had an objectively reasonable basis for making the statements."; adopting the majority view).

- United States Dist. Court v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993) (upholding a six month suspension of a lawyer who accused a judge of altering a transcript; "In the defamation context, we have stated that actual

malice is a subjective standard testing the publisher's good faith in the truth of his or her statements. . . . The Supreme Courts of Missouri and Minnesota have determined that, in light of the compelling state interests served by RPC 8.2(a), the standard to be applied is not the subjective one of New York Times, but is objective. . . . We agree. While the language of WSRPC 8.2(a) is consistent with the constitutional limitations placed on defamation actions by New York Times, 'because of the interest in protecting the public, the administration of justice, and the profession, a purely subjective standard is inappropriate. . . . Thus, we determine what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.").

- Committee on Legal Ethics of W. Va. State Bar v. Farber, 408 S.E.2d 274, 285 (W. Va. 1991) ("There is courage, and then there is pointless stupidity. No matter what the evidence shows, respondent never admits that he is wrong. Indeed, sincere personal belief will, in the sweet bye and bye, be an absolute defense when we all stand before the pearly gates on that great day of judgment, but it is not a defense here when the respondent's deficient sense of reality inflicts untold misery upon particular individuals and damage upon the legal system in general."), cert. denied, 502 U.S. 1073 (1992).

Decisions Punishing Lawyers for Criticizing Judges

Numerous courts have sanctioned lawyers[1] for criticizing judges. Some of these decisions rely on the ethics rules, while others rely on statutes, rules or the court's inherent powers.

- Lawrence Buser, Memphis Lawyer Vows To Fight 60-Day Suspension For Criticizing Judge, Commercial Appeal, Jan. 6, 2013 ("Few colleagues have

[1] Most cases, ethics opinions and disciplinary actions involve lawyers' criticism of judges handling cases in which the lawyer is representing a party. However, in some situations courts have had to decide whether a lawyer who was also a party falls under the ethics rules' restrictions. See, e.g., Polk v. State Bar of Texas, 374 F. Supp. 784, 786, 788 (N.D. Tex. 1974) (overturning the Texas Bar reprimand of a lawyer who made the following statement in his capacity as the DUI defendant: This was "'one more awkward attempt by a dishonest and unethical district attorney and a perverse judge to assure me an unfair trial.'"; "This court rejects the contention urged by the defendants that in order to maintain the general esteem of the public in the legal profession both professional and non-professional conduct of an attorney in all matters must be above and beyond that conduct of non-lawyers. While this "elitist" conception may be applicable in non-First Amendment circumstances, the interest of the State in maintaining the public esteem of the legal profession does not rationally justify disciplinary action for speech which is protected and is outside the scope of an attorney's professional and official conduct. Where the protections of the Constitution conflict with the efficiency of a system to ensure professional conduct, it is the Constitution that must prevail and the system that must be modified to conform. For the foregoing reasons this court is of the opinion that the reprimand if issued would be violative of Polk's First Amendment rights.").

ever accused veteran Memphis lawyer R. Sadler Bailey of being subtle, including the three-member disciplinary panel that recently recommended he be suspended for 60 days."; "The suspension, which Bailey plans to appeal, stemmed from the 'disrespect and sarcasm' in comments he made to Circuit Court Judge Karen Williams during a medical malpractice trial in 2008 that the panel described as 'contentious, combative and protracted.'"; "Bailey called opposing counsel a liar in court and told Williams she might 'set a world record for error' in her rulings."; "'The primary issue before this panel is whether, even under very difficult circumstances, an attorney can justify making rude, insulting, disrespectful and demeaning statements to the judge during open court,' said the opinion of the Tennessee Board of Professional Responsibility panel."; "'We do not believe that such conduct can be justified no matter how worthy or vulnerable the attorney's client may be, or how poorly the judge may be performing or how difficult or unethical the adversary counsel may be. . . . Simply abusing or insulting the court to get rulings in your favor cannot ever be endorsed or justified by our rules and our system of professional conduct.'").

- Disciplinary Counsel v. Shimko, 983 N.E.2d 1300, 1302, 1303, 1303-04, 1304, 1305, 1306, 1307, 1309 (Ohio 2012) (in a 4-3 decision, suspending a lawyer for one year based on the lawyer's criticism of a judge, but staying the suspension; explaining that the lawyer Shimko made the following derogatory comment about the trial judge in the courtroom; "'Mr. Shimko: Well, Your Honor, I think we have all avoided speaking about the 400-pound gorilla elephant that's in the room. And I still must go on the record to say that the Angelini Defendants have no confidence that they can obtain a fair trial in this case.'"; "'Mr. Shimko: Unless they call them in their direct case-in-chief, and that's what they did. And I'm entitled to cross-examine in his case-in-chief, Your Honor. The Court: I appreciate your position. Mr. Shimko: Don't appreciate yours.'"; also explaining that Shimko made the following statements in briefs: "'When the trial court realized that the Answers to the Interrogatories mandated a judgment in favor of Jeffrey Angelini and against First Federal, the trial court's bias once again surfaced and he contrived a means to find that the jury was now somehow confused, even though they had followed his instructions to the letter. The court's ruling, motivated by its own agenda, was nothing but an abuse of discretion. Throughout the trial, the trial judge was so vindictive in his attitude toward appellant's counsel that he became an advocate for First Federal. In short, the trial judge was trying First Federal's counsel's case for him.'"; "'The absurdity of the trial court's conduct in this instance ought to underscore the whimsical lengths to which it was willing to go to deny Jeffrey Angelini his verdict. In fact, the trial court felt that its contention that the jury was confused was so thin that it had to resort to manufacturing allegations of attorney misconduct to obscure his own abuse of discretion. When the trial court realized that the jury had returned a verdict for Jeffrey Angelini, he arbitrarily disregarded the protocol he had originally adopted, and fabricated allegations of attorney misconduct to camouflage his

own unreasonable and injudicious conduct.'"; explaining that the lawyer defended himself by arguing that he believed his statements to be true; "Shimko does not deny writing any of the above comments in his briefs or affidavits. He indicates that he believed them to be true. He denies that he intended them to impugn Judge Markus's integrity and claims that to find a violation of Prof. Cond. R. 8.2(a) and 8.4(h) would chill the right of future litigants to file affidavits of bias. Shimko argues that he had a 'firmly held belief that Judge Markus violated his duty as a judge and that Shimko had a right to complain about the conduct of Judge Markus. He refers to Gardner [Disciplinary Counsel v. Gardner, 793 N.E. 2d 425 (Ohio 2003)], which cited with approval the rationale from courts of other states that 'an objective malice standard strikes a constitutionality permissible balance between an attorney's right to criticize the judiciary and the public's interest in preserving confidence in the judicial system: Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken.'" (citation omitted); rejecting a subjective analysis; "The board found such a subjective test unworkable for the test of falsity or reckless disregard of it. We note that the difference between acceptable fervent advocacy and misconduct is not always distinguishable."; ultimately concluding that the lawyer's statements were false, but not dealing with the reckless disregard standard; "The board considered numerous statements concerning Judge Markus, which Shimko admits to writing. The board concluded that these statements were proved by clear and convincing evidence to be unreasonable and objectively false with a mens rea of recklessness."; "There is, admittedly, a fine line between vigorous advocacy on behalf of one's client and improper conduct; identifying that line is an inexact science."; "Shimko could have and should have presented his allegations one at a time, pointing to the record and using words that were powerful, but less heated. It is his choice of language, not his right to allege bias in his affidavits and in his appellate briefs, that brought him before the Disciplinary Counsel."; three judges joined in the dissent, which included the following criticism of the majority opinion: "[T]he majority does damage to the bright-line Gardner rule by waxing poetic about the 'fine line between vigorous advocacy on behalf of one's client and improper conduct; identifying that line is an inexact science.' . . . I do not agree that the line is so fine.").

- John Caber, Albany District Attorney Censured for Criticism of Judge in a Pending Case, N.Y. L.J., May 25, 2012 ("An upstate appellate panel has censured Albany County District Attorney P. David Soares for his 'reckless and misleading' criticism of a local judge who had removed him from a case and appointed a special prosecutor."; "[T]he district attorney released the following statement: 'Judge Herrick's decision is a get-out-of-jail-free card for every criminal defendant in New York State. His message to defendants is: 'if your District Attorney is being too tough on you, sue him, and you can get a new one.' The Court's decision undermines the criminal justice system and the DAs who represent the interest of the people they serve. We are seeking

immediate relief from Judge Herrick's decision and to close this dangerous loophole that he created.'").

- Scialdone v. Commonwealth, 689 S.E.2d 716, 718 (Va. 2010) (reversing and remanding a contempt finding entered by a trial court judge against two lawyers for allegedly tampering with evidence and violating a Virginia statute by using a Yahoo username "westisanazi" during a case presided over by Judge Patricia West; explaining that Judge West found (among other things) that the lawyers violated Virginia Code Section 18.2-456 [which indicates that the "courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following: . . . (3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect to any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding"]; ultimately holding that the trial court had not provided sufficient due process before holding the lawyers in contempt).

- Moseley v. Virginia State Bar ex rel. Seventh Dist. Comm., 694 S.E.2d 586, 588, 589 (Va. 2010) (suspending for six months a lawyer for criticizing a judge; "Moseley sent an email to colleagues in which he stated that the monetary sanctions award entered by the circuit court judge was 'an absurd decision from a whacko judge, whom I believe was bribed,' and that he believed that opposing counsel was demonically empowered." (emphasis added); "Moseley clearly made derogatory statements about the integrity of the judicial officer adjudicating his matters and those statements were made either with knowing falsity or with reckless disregard for their truth or falsity. Therefore we hold that Moseley's contentions that Rule 8.2 is void for vagueness and that his statements were not a proper predicate for discipline under that Rule are without merit.").

- In re Oladiran, No. MC-10-0025-PHX-DGC, 2010 U.S. Dist. LEXIS 106385, at *5, *8, *8-9, *9 (D. Ariz. Sept. 21, 2010) (suspending for six months a former Greenberg Traurig associate who filed a motion in an action (in which he represented himself pro se) that he marked as assigned to the "Dishonorable Susan R. Bolton," and which contained the following language: "'This motion is filed by [Oladiran], pursuant to the law of, what goes around comes around. Judge Bolton, I just read your Order and am very disappointed in the fact that a brainless coward like you is a federal judge. . . . Finally, to Susan Bolton, we shall meet again you know where [followed by a smiley face]." (emphases added); finding a violation of Rule 8.2, but requiring evidence of falsity; "Ethical Rule 8.2(a) applies to statements about judges: 'A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge[.]' ER 8.2(a). This Circuit has made clear that 'attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false[.]' Yagman, 55 F.3d

at 1438 [Standing Comm. on Discipline v. Yagman, 55 F.3d 1430 (9th Cir. 1995)]. It follows that the statements must be 'capable of being proved true or false; statements of opinion are protected by the First Amendment[.]' Id."; "Mr. Oladiran's motion refers to Judge Bolton as 'dishonorable' and a 'brainless coward.' These statements do not have 'specific, well-defined meanings [that] describe objectively verifiable matters,' but instead appear to be meant in a 'loose, figurative sense.' Id. The statements constitute 'rhetorical hyperbole, incapable of being proved true or false,' and 'convey nothing more substantive than [Oladiran's] contempt for Judge [Bolton].' Id. at 1440. As a result, they are protected by the First Amendment and cannot be found to violate Ethical Rule 8.2(a)."; "Without proof of falsity, Mr. Oladiran's motion is not sanctionable for impugning the integrity of Judge Bolton.").

- Board of Prof'l Responsibility v. Davidson, 205 P.3d 1008, 1013, 1014, 1016 (Wyo. 2009) (suspending a lawyer for two months and awarding costs of the proceedings, for a number of acts of wrongdoing, including alleging that the presiding judge must have had an improper ex parte communication with the adversary; rejecting the lawyer's argument that she was merely stating an opinion; finding that the statement accused the judge of actually engaging in ex parte communications; also rejecting a lawyer's argument that "even if the statements were false, she did not know them to be false, and under the applicable objective standard, she did not recklessly disregard the truth"; explaining that "[d]eterminations of recklessness under Rule 8.2(a) are made using an objective, rather than a subjective standard. . . . In other words, the standard is whether a reasonable attorney would have made the statements, under the circumstances, not whether this particular attorney, with her subjective state of mind, would have made the statements."; "'Reckless disregard for the truth' does not mean quite the same thing in the context of attorney discipline proceedings as it does in libel and slander cases." (citation omitted); "Numerous courts agree with Graham [In re Disciplinary Action Against Graham, 453 N.W.2d 313 (Minn. 1990)] that the standard for judging whether an attorney has acted with reckless disregard for the truth under rules equivalent to Rule 8.2 is an objective standard, and that the attorney's failure to investigate the facts before making the allegation may be taken into consideration.").

- Columbus Bar Ass'n v. Vogel, 881 N.E.2d 1244, 1247 (Ohio 2008) (suspending for two years an Ohio lawyer for interfering with a trial by insisting that he represented the criminal defendant whom he was never appointed to represent; noting that the lawyer told the judge: "'This is an attempt to force this young man [Winbush] to make a plea for ten years to something that he didn't do. And forgive me, but this is a result of collusion between yourself and the prosecutor's office.'").

- Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71, 79, 80, 82, 90 (Iowa 2008) (suspending for three months a lawyer (and former judge) for accusing the judge handling a DUI case against him of "not being honest" in statements to a reporter; also analyzing the lawyer's second drunk driving charge, and finding that the offense "reflected adversely on his fitness to practice law"; explaining that "[w]hether an attorney's criminal behavior reflects adversely on his fitness to practice law is not determined by a mechanical process of classifying conduct as a felony or a misdemeanor"; explaining that in any analysis of the lawyer's criticism of a judge, "'truth is an absolute defense'" (citation omitted); further explaining that "[t]he Supreme Court has not applied the New York Times test to attorney disciplinary proceedings based on an attorney's criticism of a judge. It appears a majority of jurisdictions addressing this issue has concluded the interests protected by the disciplinary system call for a test less stringent than the New York Times standard. . . . Courts in these jurisdictions have held that in disciplining an attorney for criticizing a judge, 'the standard is whether the attorney had an objectively reasonable basis for making the statements'" (citation omitted); ultimately concluding that "[w]e are persuaded by the rationale given in support of applying an objective standard in cases involving criticism of judicial officers"; ultimately finding that the lawyer's statements about the judge could result in discipline; "We conclude Weaver did not have an objectively reasonable basis for his statement that Judge Dillard was not honest when he stated his reasons for sentencing Weaver to the Department of Corrections. Therefore, Weaver's conduct reflects a reckless disregard for the truth or falsity of his statement. Accordingly, this statement is not protected speech"; "Weaver did not claim he was expressing an opinion that Judge Dillard was 'intellectually dishonest,' in the sense that Judge Dillard's sentencing decision might have been based upon an unstated premise or hidden bias. . . . Instead, Weaver accused a judge of a specific act of dishonesty which he characterized at the hearing before the Commission as a 'knowing concealment' of the judge's reasons for sentencing him. He was utterly unable to provide a reasonable basis for this charge at the hearing. Under these facts, we conclude that the First Amendment does not protect Weaver from being sanctioned for professional misconduct.").

- Jordana Mishory, Attorney who pleaded guilty to disparaging remarks about a judge says they fall under protected speech, Daily Business Review, July 16, 2008 ("Fort Lauderdale criminal defense attorney Sean Conway agreed he was in the wrong when he called a controversial Broward judge an 'evil, unfair witch' and 'seemingly mentally ill' two Halloweens ago.").

- Williams & Connolly, LLP v. People for Ethical Treatment of Animals, Inc., 643 S.E.2d 136, 138-39, 142, 144, 145, 146 (2007) (affirming the entry of sanctions against several lawyers from Williams & Connolly for having filed a pleading accusing Fairfax County Circuit Court Judge David T. Stitt of allegedly improper ex parte communications with PETA, Williams &

Connolly's client's adversary; noting that pleadings filed by Williams & Connolly lawyers accused Judge Stitt of "inexcusable" consideration of PETA's ex parte communication and of "ignoring the basic tenets of contempt law"; "Initially, we are compelled to observe that the Feld Attorneys' [Williams & Connolly and a Virginia firm] brief filed with this Court contains a striking omission. The Feld Attorneys do not mention the fact that in the motions, they used language that directly accused Judge Stitt of unethical conduct. These allegations of unethical conduct were stark and sweeping, stating that Judge Stitt '[v]iolated [h]is [e]thical [o]bligations,' 'ignored his ethical responsibilities,' and 'acted directly counter to [those ethical responsibilities].' We therefore must consider the Feld Attorneys' arguments in the additional context of those written statements contained in the motions."; "Although the Canons of Judicial Conduct are not a source of law, we nevertheless consider the cited provision from the Canons because they are 'instructive' on a central issue before us, namely, whether the Feld Attorneys had an objectively reasonable basis in law for contending that Judge Stitt violated his ethical duties in considering the ex parte petition and in issuing the rule to show cause."; "Reasonable inquiry by the Feld Attorneys would have shown that the routine practice of the Circuit Court of Fairfax County is to consider ex parte petitions for a rule to show cause and to issue rules to show cause upon the filing of a sufficient affidavit by the petitioning party. At the time the Feld Attorneys made the motions, there was a long-standing published order entered in the Circuit Court of Fairfax County stating: 'It is the practice of this Court to issue summons on a rule to show cause upon affidavit or ex parte evidence without notice. . . .' The published order in Alward, available upon simple legal research, would have informed the Feld attorneys that Judge Stitt merely followed the routine practice of the Circuit Court of Fairfax County when he considered the petition and issued the rule to show cause. In addition, the record shows that counsel for PETA obtained this same information concerning this routine practice of the Circuit Court of Fairfax County by placing a telephone call to a deputy clerk of the circuit court."; "The fact that the Feld Attorneys were seeking the recusal of the trial judge did not permit them to use language that was derisive in character. Yet they liberally employed such language. As stated above, the Feld Attorneys alleged in the motion to recuse that Judge Stitt 'ignore[ed] the basic tenets of contempt law,' 'create[d] an appearance, at the very least, that [he] will ignore the law in order to give a strategic advantage to PETA,' and 'ignored his ethical responsibilities [and] acted directly counter to them.'"; "We hold that the record before us demonstrates that the Feld Attorneys' motions were filed for an improper purpose and, thus, violated clause (iii) of the second paragraph of Code § 8.01-271.1. Contemptuous language and distorted representations in a pleading never serve a proper purpose and inherently render that pleading as one 'interposed for [an] improper purpose,' within the meaning of clause (iii) of the second paragraph of Code § 8.01-271.1. Such language and representations are wholly gratuitous and serve only to deride the court in an apparent effort to provoke a desired response.";

upholding that Judge Stitt's imposition of $40,000 sanctions against the lawyers, and revoking pro hac vice admission of a Williams & Connolly lawyer).

- Brandon Glenn, Lawyer's 'Happy Meal' comment eats at judge, Crain's Chicago Business, May 29, 2007 ("A Chicago lawyer's comment to a bankruptcy judge in court has gotten him in some hot water, or perhaps more appropriately, hot oil. 'I suggest with respect, Your Honor, that you're a few french-fries short of a Happy Meal in terms of what's likely to take place,' William Smith, a partner with Chicago-based McDermott Will & Emery LLP, said during a hearing May 7 in Miami in front of Judge Laurel Myerson Isicoff, according to court documents. Mr. Smith's comment represents 'conduct that appears to be inconsistent with the requirements of professional conduct,' Judge Isicoff wrote in an order for Mr. Smith to appear before her June 25 'to show cause why he should not be suspended from practice before this court.' Though he's not licensed to practice in Florida, Mr. Smith has been granted permission to appear in this particular case. Judge Isicoff could revoke that permission at the June 25 hearing. Mr. Smith, a clerk for the court, both parties in the case and a lawyer from the opposing firm did not return calls seeking comment. In a statement, McDermott Will & Emery said: 'We expect our lawyers to observe established rules and protocols of professional conduct in the courtroom. Any departure from that standard is of concern to us and we look forward to a resolution of this matter.'" ((emphasis added)).

- Office of Disciplinary Counsel v. Wrona, 908 A.2d 1281, 1284-86 (Pa. 2006) (disbarring a Pennsylvania lawyer for an escalating series of criticisms of a judge; noting that the criticisms began in 1997, and included such statements as allegations that the judge "'has a personal bias or prejudice,'" "'has knowledge of criminal misconduct in this matter,'" "'engages in criminal misconduct,'" engages in conduct that "'was similar to that of priests who molested young boys,'" is a "'despicable person'" who was "'perpetrating more harm to America than the Al Quida [sic] bombers did on September 11, 2001.'" (internal citations omitted)), cert. denied, 549 U.S. 1181 (2007).

- Taboada v. Daly Seven, Inc., 636 S.E.2d 889, 890 (Va. 2006) (suspending a well-known Roanoke, Virginia, lawyer's right to practice before the Virginia Supreme Court for one year and fining him $1,000; explaining that the Virginia Supreme Court held that a well-known Virginia lawyer had violated the Virginia equivalent of Rule 11 by including intemperate language in a petition for rehearing in the Virginia Supreme Court; as the Virginia Supreme Court explained, "Barnhill made numerous assertions in the petition for rehearing regarding this Court's opinion. Barnhill described this Court's opinion as 'irrational and discriminatory' and 'irrational at its core.' He wrote that the Court's opinion makes 'an incredible assertion' and 'mischaracterizes its prior case law.' Barnhill states: 'George Orwell's fertile imagination could

not supply a clearer distortion of the plain meaning of language to reach such an absurd result.' Barnhill argued in the petition that this Court's opinion 'demonstrates so graphically the absence of logic and common sense.' Barnhill wrote in boldface type that 'Ryan Taboada may be the unfortunate victim of a crazed criminal assailant who emerged from the dark to attack him. But Daly Seven will be the unfortunate victim of a dark and ill-conceived jurisprudence.' Barnhill also included the following statement in the petition: '[I]f you attack the King, kill the King; otherwise, the King will kill you.'").

- Notopoulous v. Statewide Grievance Comm., 890 A.2d 509, 512 n.4, 514 n.7 (Conn.) (assessing a lawyer's letter to the court staff accusing the judge of "abuses" and "extortion," and calling the judge "not merely an embarrassment to this community but a demonstrated financial predator of its incapacitated and often dying elderly whose interests he is charged with the protection" (internal quotations omitted); holding that the disciplinary authorities bear the "initial burden of evidence to prove the ethics violation by clear and convincing evidence," after which the lawyer must "provide[] evidence that he had an objective, reasonable belief that his statements were true"; finding that the lawyer had failed to defend his statements, and could be punished despite acting pro se as a conservator of his mother's estate; rejecting the lawyer's First Amendment argument; affirming a public reprimand), cert. denied, 549 U.S. 823 (2006).

- Anthony v. Va. State Bar ex rel. Ninth Dist. Comm., 621 S.E.2d 121, 123 (Va. 2005) (affirming a public reprimand of Virginia lawyer Joseph Anthony, who had written several letters directly to the Virginia Supreme Court, accusing its justices of "'an extreme desire/need to protect some group and/or person'" because the court had declined to disclose what Anthony alleged to have been improper ex parte communications between the Supreme Court justices and parties in a case that he was handling; rejecting Anthony's First Amendment claims), cert. denied, 547 U.S. 1193 (2006).

- Pilli v. Va. State Bar, 611 S.E.2d 389, 392, 397 (Va.) (suspending for 90 days a lawyer who filed a pleading in which he accused a state court judge of "negligently and carelessly" failing to consider matters, "'skewing . . . the facts,'" and "'failing to tell the truth'"; noting that the lawyer wrote that "I cannot tolerate a Judge lying . . . . He is flat out inaccurate, and wrong." (internal quotations omitted); upholding a 90-day suspension; noting that the pleading attacked the judge's "qualifications and integrity" in "the most vitriolic of terms" -- even though Rule 8.2 goes only to the substance of the criticism and not the style; finding that the lawyer's statements were fact rather than opinion, and therefore concluded that "we need not address the issue whether statements of pure opinion, in the absence of any factual allegations, are subject to disciplinary review under Rule 8.2"; not addressing the lawyer's First Amendment argument, because the lawyer had not raised it before the disciplinary authorities), cert. denied, 546 U.S. 977 (2005).

- In re Cobb, 838 N.E.2d 1197, 1205, 1212 (Mass. 2005) (assessing a lawyer's claim that his adversary "must have some particular power or influence with the trial court judge" because the judge had not sanctioned what the lawyer thought was his adversary's unethical conduct (internal quotations omitted); noting the debate among states about the standard for punishing lawyers; "At least three States have said that disciplining an attorney for criticizing a judge is analogous to a defamation action by a public official for the purposes of First Amendment analysis. They apply the 'actual malice' or subjective knowledge standard of New York Times Co. v. Sullivan, 376 U.S. 254, 279-281, 84 S. Ct. 710, 11 L.Ed. 2d 698 (1964), to such proceedings [listing cases from Colorado, Oklahoma, Tennessee and California] . . . . A majority of State courts that have considered the question have concluded that the standard is whether the attorney had an objectively reasonable basis for making the statements."; adopting the majority view).

- In re Nathan, 671 N.W.2d 578, 581-82, 583 (Minn. 2003) (indefinitely suspending a lawyer who wrote that one judge was "'a bad judge'" who "'substituted his personal view for the law'" and "'won election to the office of judge by appealing to racism'"; also noting that "[t]wo days later Nathan sent the judge a letter stating that if the judge did not schedule a hearing and provide 10 items of relief he was requesting, he would publish an article in area newspapers. Enclosed was an article entitled The Young Sex Perverts with the judge's name prominently displayed below the title. Nathan published the article in the St. Paul Pioneer Press as a paid advertisement on November 3, 2000, shortly before election day.").

- In re Wilkins, 777 N.E.2d 714, 715-16 (Ind. 2002) (addressing the following footnote from the brief filed by an experienced appellate lawyer from the large Indianapolis, Indiana, law firm of Ice Miller who was signing as local counsel; "'Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).'"; initially suspending Wilkins for thirty days, although later reducing the punishment to a public reprimand. In re Wilkins, 782 N.E.2d 985 (Ind.), cert. denied, 540 U.S. 813 (2003)).

- Hanson v. Superior Court, 109 Cal. Rptr. 2d 782 (Cal. Ct. App. 2001) (upholding contempt finding against a lawyer who told the jury that his criminal defense client had not received a fair trial).

- In re Delio, 731 N.Y.S.2d 171 (N.Y. App. Div. 2001) (lawyer censured for calling judge irrational, pompous, and arrogant).

- In re McClellan, 754 N.E.2d 500 (Ind. 2001) (publicly reprimanding lawyer for filing a pleading in which the lawyer criticized a decision as being like a bad lawyer joke).

- In re Dinhofer, 690 N.Y.S.2d 245, 246 (N.Y. App. Div. 1999) (suspending lawyer for 90 days for telling a judge she was "corrupt" in a phone conference).

- Idaho State Bar v. Topp, 925 P.2d 1113 (Idaho 1996) (public reprimand of lawyer for statements to the media that the judge was motivated by political concern), cert. denied, 520 U.S. 1155 (1997).

- Ky. Bar Ass'n v. Waller, 929 S.W.2d 181, 181, 182 (Ky. 1996) (noting that a lawyer had included the following language in his memorandum entitled "Legal Authorities Supporting the Motion to Dismiss": "'Comes defendant, by counsel, and respectfully moves the Honorable Court, much better than that lying incompetent ass-hole it replaced if you graduated from the eighth grade . . . .'"; noting that the lawyer had included the following statement in another pleading: "'Do with me what you will but it is and will be so done under like circumstances in the future. When this old honkey's sight fades, words once near seem far away, the pee runs down his leg in dribbles, his hands tremble and his wracked body aches, all that will remain is a wisp of a smile and a memory of a battle joined -- first lost -- then won.'"; noting that the lawyer had responded to a motion to show cause why he should not be held in contempt in a pleading entitled: "Memorandum In Defense of the Use of the Term 'As-Hole' (sic) to Draw the Attention of the Public to Corruption in Judicial Office"; noting that the lawyer had added the following "P.S." in another pleading: "'And so I place this message in a bottle and set it adrift on a sea of papers -- hoping that someone of common sense will read it and ask about the kind of future we want for our children and whether or not the [corruption in] the judiciary should be exposed. My own methods have been unorthodox but techniques of controlling public opinion and property derived from military counter-intelligence are equally so. My prayer is that you measure reality not form . . . [o]r is it too formitable (sic) a task and will you yourself have to forego a place at the trough? There is a better and happier way and -- with due temerity I claim to have found it -- it requires one to identify an ass hole when he sees one.'" (alterations in original), cert. denied, 519 U.S. 1111 (1997).

- In re Palmisano, 70 F.3d 483, 485-86, 486, 487 (7th Cir. 1995) (affirming disbarment of a lawyer who included the following statements in correspondence with judges, court administrators and prosecutors: "'Judge Siracusa is called "Frank the Fixer" or "Frank the Crook".'"; "'Like [Judge Robert] Byrne, Frank the Crook is too busy filling the pockets of his buddies to act judicially.'"; "'Judge Lewis, another crook, started in about me . . .'."; "The crooks calling themselves judges and court employees . . .'."; "'I believe

and state that most of the cases in Illinois in my experience are fixed, not with the passing of money, but on personal relations, social status and judicial preference.'"; "Chief Justice Peccarelli [sic], your response is illustrative of the corruption in the 18th Judicial District.'"; '"When I stand outside the Court stating that Judge Peccarelli is a crooked judge who fills the pockets of his buddies, I trust Judge Peccarelli will understand this his conduct creates the improper appearance, not my publication of his improper conduct.'"; "'I believe [Justices Unverzagt, Inglis, and Dunn] are dishonest. . . . If the case has been assigned to any of these three, I would then petition the court for a change of venue. Everyone should be assured that the court is honest and not filing [sic] the pockets of those favored by the court.'"; explaining that "[f]ederal courts, no less than state courts, forbid ex parte contacts and false accusations that bring the judicial system into disrepute. . . . Some judges are dishonest; their identification and removal is a matter of high priority in order to promote a justified public confidence in the judicial system. Indiscriminate accusations of dishonesty, by contrast, do not help cleanse the judicial system of miscreants yet do impair its functioning -- for judges do not take to the talk shows to defend themselves, and few litigants can separate accurate from spurious claims of judicial misconduct."; holding that "[e]ven a statement cast in the form of an opinion ('I think that Judge X is dishonest') implies a factual basis, and the lack of support for that implied factual assertion may be a proper basis for a penalty."; explaining that the court would have had to deal with the criticism if the lawyer had "furnished some factual basis for his assertions," but noting that he had not; "Palmisano lacked support for his slurs, however. Illinois concluded that he made them with actual knowledge of falsity, or with reckless disregard for their truth or falsity. So even if Palmisano were a journalist making these statements about a public official, the Constitution would permit a sanction.").

- In re Atanga, 636 N.E.2d 1253, 1256, 1257 (Ind. 1994) (addressing statements made by lawyer Jacob Atanga, a self-made immigrant from Ghana, who graduated from law school when he was 36 and became president-elect of his local bar association; explaining that Atanga told a local court that he could not attend a hearing in a criminal matter because he had a previously scheduled a hearing in another city; noting that the judge had changed the hearing date, but later reset the hearing for the original date after the prosecutor's ex parte application to reschedule; noting further that the day before the hearing, Atanga sought a continuance because of the conflicting hearing that had been scheduled in the other city; explaining that the local judge refused, and warned Atanga that he would be held in contempt if he did not attend the hearing; noting that Atanga did not attend, and was arrested, fingerprinted, photographed and even given a prisoner's uniform -- which Atanga wore even though the judge eventually accepted Atanga's apology and removed the contempt; noting that Atanga later told the local newspaper that he thought the judge was """ignorant, insecure, and a racist. He is motivated by political ambition."""; eventually upholding a thirty-day

suspension, although acknowledging that the local court's procedures were "unusual"; "Ex parte communication between the prosecution and the court, without notice to opposing counsel of record, should not be done as matter or course. Jailing an attorney for failure to appear due to a conflict of schedule is also a questionable practice, albeit within the sound discretion of the trial court. And having an attorney appear in jail attire with his client creates a definite suggestion of partiality.").

- United States Dist. Court v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993) (upholding a six-month suspension of a lawyer who accused a judge of altering a transcript; "In the defamation context, we have stated that actual malice is a subjective standard testing the publisher's good faith in the truth of his or her statements. . . . The Supreme Courts of Missouri and Minnesota have determined that, in light of the compelling state interests served by RPC 8.2(a), the standard to be applied is not the subjective one of New York Times, but is objective. . . . We agree. While the language of WSRPC 8.2(a) is consistent with the constitutional limitations placed on defamation actions by New York Times, 'because of the interest in protecting the public, the administration of justice, and the profession, a purely subjective standard is inappropriate. . . . Thus, we determine what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.").

- Kunstler v. Galligan, 571 N.Y.S.2d 930, 931 (N.Y. App. Div.) (holding in criminal contempt the well-known civil rights lawyer William Kunstler who made the following statement to a judge in court: "'You have exhibited what you partisanship is. You shouldn't be sitting in court. You are a disgrace to the bench. . . . You are violating every stand of fair play.'"), aff'd, 79 N.Y.2d 775 (N.Y. 1991).

Some lawyers' criticism of judges goes unsanctioned. For instance, lawyers representing alleged terrorists imprisoned at Guantanamo Bay apparently faced no sanctions for harsh language they included in a Supreme Court pleading.

- Reply Brief of Appellant-Petitioner at 3-4, 3 n.5, 6, Al-Adahi v. Obama, No. 10-487, 2010 U.S. Briefs 487 (U.S. Dec. 29, 2010) (in a pleading filed by lawyers from King & Spalding and Sutherland Asbill & Brennan, criticizing a District of Columbia circuit court decision; "To avoid [purported precedent], the Court of Appeals created a new 'conditional probability' rule permitting it to substitute its judgment for that of the district court. The fallacious basis for the rule and its use to transform a disagreement about the facts into legal error are discussed in Al-Adahi's petition. The circuit created a standard, contrary to [the precedent], permitting it to substitute its own fact-finding for the district court's, even in cases involving live testimony." (footnotes omitted);

> "'Conditional probability' is rightly described by the dissent as 'a bizarre theory' and 'gobbledy-gook' -- strong words -- in the probable cause decision that gave rise to it. Prandy-Binett, 995 F.2d at 1074, 1077 (dissenting opinion)."; "The author of Al-Adahi in the Court of Appeals also wrote [other decisions]. . . . As a senior judge, the author of Al-Adahi is added to randomly assigned two-judge panels and often hears Guantánamo cases. He has all but announced a public agenda. In his lecture entitled 'The Guantanamo Mess', he stated publicly that this Court erred in Boumediene. Judge A. Raymond Randolph, The Guantanamo Mess, The Center for Legal and Judicial Studies -- Joseph Story Distinguished Lecture (Oct. 10, 2010), http://www.heritage.org/Events/2010/10/Guantanamos-Mess. No prevailing petitioner has survived a trip to that court, and multiple petitions for certiorari now pending -- and more are coming -- in Guantánamo cases seeking this Court's attention. The court of appeals radically departed from this Court's dispositive precedent in [the earlier case], creating a new standard of review applicable to all civil non-jury cases. It is one thing to argue about detention standards and this Court's decision in Boumediene, but to announce a wholesale departure from a settled rule of appellate review just to ensure the continued detention of a single Guantánamo detainee is difficult to explain, except as flowing from the circuit court's passionate animosity to the Guantánamo cases and, perhaps, this Court's repeated reversals of its decisions." (footnote omitted)).

Geoffrey Fieger's Dispute with the Michigan Judicial System

The long-running battle between well-known Michigan lawyer Geoffrey Fieger and Michigan state court judges (as well as the federal government) provides a case study in lawyers' public communications about judges.

Fieger had been very critical of Judge Clifford Taylor, then serving on the Michigan Court of Appeals. A dissenting Michigan Supreme Court judge (in the case discussed below) recounted some of Fieger's statements about Judge Taylor.

> In 1994, complaining about two then-recent Court of Appeals cases, Mr. Fieger publicly insulted Chief Justice (then-Court of Appeals Judge) Clifford Taylor, calling him "amazingly stupid" and saying:
>
> > Cliff Taylor and [Court of Appeals Judge E. Thomas] Fitzgerald, you know, I don't think they ever practiced law, I really don't. I think they got a law degree and said it will be easy to get a - they get paid $ 120,000 a

> year, you know, and people vote on them, you know, when they come up for election and the only reason they keep getting elected [is] because they're the only elected officials in the state who get to have an incumbent designation, so when you go into the voting booth and it says "Cliff Taylor", it doesn't say failed Republican nominee for Attorney General who never had a job in his life, whose wife is Governor Engler's lawyer, who got appointed when he lost, it says "Cliff Taylor incumbent judge of the Court of Appeals," and they vote for him even though they don't know him. The guy could be Adolf Hitler and it says "incumbent judge" and he gets elected.

Mr. Fieger said more about Chief Justice (then Court of Appeals Judge) Taylor:

> [T]his guy has a political agenda . . . . I knew in advance what he was going to do . . . . We know his wife is Governor Engler's Chief Counsel. We know his wife advises him on the law. We know-we knew-what he was going to do in advance, and guess what, he went right ahead and did it. Now you can know somebody's political agenda affects their judicial thinking so much that you can predict in advance exactly what he's going to do[,] . . . his political agenda translating into his judicial decisions.

Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129 (Mich. 2006), cert. denied, 549 U.S. 1205 (2007) (emphases added).

Unfortunately for Fieger, Judge Taylor was later elected Michigan's Chief Justice. Judge Taylor was later defeated in a reelection effort, and replaced with a Democrat-supported judge. That judge later resigned days before being indicted for felony fraud charges -- to which she later plead guilty.

- Jacob Gersham, Michigan Ex-Justice Admits Guilt in Fraud, Associated Press, Jan. 29, 2013 ("Former Michigan Supreme Court Justice Diane Hathaway pleaded guilty Tuesday to a felony fraud charge in connection with a real-estate scheme that allegedly helped her avoid a debt payment of up to $90,000. The case is the latest setback for Michigan Democrats, who waged a bruising, high-profile election battle last fall for three of the court's seven

> seats, but failed to tip the balance of power in the court, occupied by four Republicans. Governor Rick Snyder is expected to fill Ms. Hathaway's seat with a member of his party, widening the slim Republican majority. On Tuesday, Ms. Hathaway admitted to making fraudulent claims in a debt-forgiveness application to ING Direct, now a subsidiary of Capital One Financial Corporation. She pleaded guilty to a single felony charge of bank fraud in federal court in Ann Arbor. Ms. Hathaway couldn't be reached for comment. Federal prosecutors on January 18 accused Ms. Hathaway of lying about a Florida home she owned in order to dodge a payment of as much as $90,000 as she sought ING's approval for a short sale on a Michigan property. In a short sale, a home is sold for less than the mortgage owed. Ms. Hathaway, 58 years old, had abruptly announced her retirement from the court days before the prosecutors filed criminal charges. Earlier, the state's judicial watchdog had called for her suspension, describing the allegations as 'unprecedented in Michigan judicial disciplinary history.' . . . . Ms. Hathaway was on a trial court for 16 years before she was elected to an eight-year term on Michigan's high court in 2008.").

Perhaps the most notorious Fieger issue that reached the Michigan Supreme Court involved Fieger's criticism of several Michigan appellate court judges during his daily radio program -- condemning those judges for reversing a trial court verdict for one of his clients.

The Michigan Supreme Court recited Fieger's statements.

> Three days later, on August 23, 1999, Mr. Fieger, in a tone similar to that which he had exhibited during the Badalamenti trial and on his then-daily radio program in Southeast Michigan, continued by addressing the three appellate judges in that case in the following manner, "Hey Michael Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too." Mr. Fieger, referring to his client, then said, "He lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses." Two days later, on the same radio show, Mr. Fieger called these same judges "three jackass Court of Appeals judges." When another person involved in the broadcast used the word "innuendo," Mr. Fieger stated, "I know the only thing that's in their endo should be a large, you know, plunger about the size of, you know, my fist." Finally, Mr. Fieger said, "They say under their name, 'Court of Appeals Judge,' so anybody

> that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think--what was Hitler's--Eva Braun, I think it was, is now Judge Markey, she's on the Court of Appeals."

Fieger, 719 N.Y.2d at 129 (emphasis added).

According to newspaper accounts, Fieger's lawyer said "the comments were made in [Fieger's] role as a radio show host, not as a lawyer, and enjoyed absolute protection under the First Amendment." Dawson Bell, Fieger's case at center of free speech debate, Detroit Free Press, Mar. 9, 2006.

The Michigan Supreme Court ultimately found that the ethics rules applied to Fieger. The Court's opinion is remarkable for several reasons, including the majority's accusation that a dissenting justice was pursuing a "personal agenda" driven by "personal resentment," and had "gratuitously" and "falsely" impugned other Supreme Court justices.[2]

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[2] Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129, 144, 145, 146, 153 (Mich. 2006) (in a 76-page invective-laden, 4-3 decision, reversing the Michigan Attorney Disciplinary Board's holding that the Michigan ethics rules governing lawyer criticism of judges violated the Constitution; addressing statements made by lawyer and radio talk show host Geoffrey Fieger after a 3-judge panel reversed a $15 million personal injury verdict for Fieger's client and criticized Fieger's behavior during the trial; describing Fieger's criticism of the judges as follows: "Three days later, on August 23, 1999, Mr. Fieger, in a tone similar to that which he had exhibited during the Badalamenti trial and on his then-daily radio program in Southeast Michigan, continued by addressing the three appellate judges in that case in the following manner, 'Hey Michael Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too.' Mr. Fieger, referring to his client, then said, 'He lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses.' Two days later, on the same radio show, Mr. Fieger called these same judges 'three jackass Court of Appeals judges.' When another person involved in the broadcast used the word 'innuendo,' Mr. Fieger stated, 'I know the only thing that's in their endo should be a large, you know, plunger about the size of, you know, my fist.' Finally, Mr. Fieger said, 'They say under their name, "Court of Appeals Judge," so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think--what was Hitler's--Eva Braun, I think it was, is now Judge Markey, she's on the Court of Appeals.'"; concluding that Fieger's "vulgar and crude attacks" were not Constitutionally protected; also condemning the three dissenting judges' approach, which the majority indicated "would usher an entirely new legal culture into this state, a Hobbesian legal culture, the repulsiveness of which is only dimly limned by the offensive conduct that we see in this case. It is a legal culture in which, in a state such as Michigan with judicial elections, there would be a permanent political campaign for the bench, pitting lawyers against the judges of whom they disapprove."; especially criticizing the dissent by Justice Weaver, which the majority

The saga then continued in federal court. Fieger sued the Michigan Supreme Court in federal court, challenging the constitutionality of the ethics rules under which the Supreme Court sanctioned him. The Eastern District of Michigan agreed with Fieger, and overturned Michigan Rule 3.5(c) (which prohibits "undignified or discourteous conduct toward the tribunal") and Rule 6.5(a) (which requires lawyers to treat all persons involved in the legal process with "courtesy" and "respect"; and which includes a comment explaining that "[a] lawyer is an officer of the court who has sworn to uphold the federal and state constitutions, to proceed only by means that are truthful and honorable, and to avoid offensive personality" (emphasis added)).[3]

However, the Sixth Circuit reversed -- finding that the district court had abused its discretion in granting Fieger the declaratory relief he sought.[4]

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attributed to "personal resentment" and her "personal agenda" that "would lead to nonsensical results, affecting every judge in Michigan and throwing the Justice system into chaos"; noting that "[i]t is deeply troubling that a member of this Court would undertake so gratuitously, and so falsely, to impugn her colleagues. This is a sad day in this Court's history, for Justice Weaver inflicts damage not only on her colleagues, but also on this Court as an institution."; "The people of Michigan deserve better than they have gotten from Justice Weaver today, and so do we, her colleagues."; in dissenting from the majority, Justice Weaver argued that the Justices in the majority should have recused themselves, because they had made public statements critical of Fieger, and Fieger had made public statements critical of them), cert. denied, 549 U.S. 1205 (2007).

[3] Fieger v. Mich., Civ. A. No. 06-11684, 2007 U.S. Dist. LEXIS 64973, at *19 & *22 (E.D. Mich. Sept. 4, 2007), vacated and remanded, 553 F.3d 955 (6th Cir. May 1, 2009), cert. denied, 558 U.S. 1110 (2010).

[4] Fieger v. Mich. Supreme Court, 553 F.3d 955, 960, 957 (6th Cir. 2009) (holding that well-known lawyer Geoffrey Fieger did not have standing to challenge the constitutionality of the Michigan ethics rules prohibiting critical statements about judges; noting that "plaintiffs [Fieger and another lawyer] neither challenged the Michigan Supreme Court's determination that the courtesy and civility rules were constitutional as applied to Fieger's conduct and speech, nor sought to vacate the reprimand imposed on Fieger; rather, plaintiffs raised facial challenges to the courtesy and civility provisions. Specifically, plaintiffs asserted that the rules violate the First and Fourteenth Amendments of the United States Constitution."; noting that the district court had held certain provisions of the Michigan ethics rules unconstitutionally vague, but reversing that decision, and remanding for dismissal; "We vacate the judgment of the district court and remand with instructions to dismiss the complaint for lack of jurisdiction. We hold that Fieger and Steinberg lack standing because they have failed to demonstrate actual present harm or a significant possibility of future harm based on a single, stipulated reprimand; they have not articulated, with any degree of specificity, their intended speech and conduct; and they have not sufficiently established a threat of future sanction under the narrow construction of the challenged

Perhaps not coincidently, Fieger played a prominent role in a later case involving limits on lawyers' advertisements that might be seen as tainting a jury pool. The federal government prosecuted Fieger for campaign contribution violations involving his support for Democratic primary candidate John Edwards (the jury ultimately acquitted Fieger). Just before his trial, Fieger ran several advertisements implying that the Bush Administration was attempting to silence him. The district court handling the criminal prosecution prohibited Fieger from running the advertisements.

> The Court finds these two commercials are unequivocally directed at polluting the potential jury venire in the instant case in favor of Defendant Fieger and against the Government. As Magistrate Judge Majzoub correctly found, the issue of selective prosecution is one of law not fact, and therefore, arguing such a theory to the potential jury pool through commercials, creates the danger of those jurors coming to the courthouse with prejudice against the Government.

United States v. Fieger, Case No. 07-CR-20414, 2008 U.S. Dist. LEXIS 18473, at *10-11 (E.D. Mich. Mar. 11, 2008).

Judges' Criticism of Other Judges

Interestingly, judges can be extremely critical of their colleagues, usually without any consequence.

Some majority opinions severely criticize dissenting judges.

- Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129, 144, 145, 146, 153 (Mich. 2006) (in a 76-page invective-laden, 4-3 decision, reversing the Michigan Attorney Disciplinary Board's holding that the Michigan ethics rules governing lawyer criticism of judges violated the Constitution; addressing statements made by lawyer and radio talk show host Geoffrey Fieger after a 3-judge panel reversed a $15 million personal injury verdict for Fieger's client and

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provisions applied by the Michigan Supreme Court. For these same reasons, we also hold that the district court abused its discretion in entering declaratory relief."), cert. denied, 558 U.S. 1110 (2010).

> criticized Fieger's behavior during the trial; describing Fieger's criticism of the judges as follows: "Three days later, on August 23, 1999, Mr. Fieger, in a tone similar to that which he had exhibited during the Badalamenti trial and on his then-daily radio program in Southeast Michigan, continued by addressing the three appellate judges in that case in the following manner, 'Hey Michael Talbot, and Bandstra, and Markey, I declare war on you. You declare it on me, I declare it on you. Kiss my ass, too.' Mr. Fieger, referring to his client, then said, 'He lost both his hands and both his legs, but according to the Court of Appeals, he lost a finger. Well, the finger he should keep is the one where he should shove it up their asses.' Two days later, on the same radio show, Mr. Fieger called these same judges 'three jackass Court of Appeals judges.' When another person involved in the broadcast used the word 'innuendo,' Mr. Fieger stated, 'I know the only thing that's in their endo should be a large, you know, plunger about the size of, you know, my fist.' Finally, Mr. Fieger said, 'They say under their name, "Court of Appeals Judge," so anybody that votes for them, they've changed their name from, you know, Adolf Hitler and Goebbels, and I think--what was Hitler's--Eva Braun, I think it was, is now Judge Markey, she's on the Court of Appeals.'"; concluding that Fieger's "vulgar and crude attacks" were not Constitutionally protected; also condemning the three dissenting judges' approach, which the majority indicated "would usher an entirely new legal culture into this state, a Hobbesian legal culture, the repulsiveness of which is only dimly limned by the offensive conduct that we see in this case. It is a legal culture in which, in a state such as Michigan with judicial elections, there would be a permanent political campaign for the bench, pitting lawyers against the judges of whom they disapprove."; especially criticizing the dissent by Justice Weaver, which the majority attributed to "personal resentment" and her "personal agenda" that "would lead to nonsensical results, affecting every judge in Michigan and throwing the Justice system into chaos"; noting that "[i]t is deeply troubling that a member of this Court would undertake so gratuitously, and so falsely, to impugn her colleagues. This is a sad day in this Court's history, for Justice Weaver inflicts damage not only on her colleagues, but also on this Court as an institution." (emphasis added); "The people of Michigan deserve better than they have gotten from Justice Weaver today, and so do we, her colleagues."; in dissenting from the majority, Justice Weaver argued that the Justices in the majority should have recused themselves, because they had made public statements critical of Fieger, and Fieger had made public statements critical of them), cert. denied, 549 U.S. 1205 (2007).

In some situations, one judge's criticism of a colleague paralleled a lawyer's statement that drew sanctions. As explained above, an experienced appellate lawyer from a large Indianapolis, Indiana, law firm was punished for signing (as local counsel) a brief that contained the following footnote:

> "[T]he Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)."

In re Wilkins, 777 N.E.2d 714, 715 n.2 (Ind. 2002) (emphasis added). In the same year, the West Virginia Chief Justice and one of his colleagues included the following criticism of a majority opinion in a vigorous dissent.

> In the final analysis, it is clear that the majority opinion was merely seeking a specific result which can be supported neither by the record nor by the applicable law. Therefore, to achieve the desired outcome, the majority opinion completely avoids any discussion of the evidence or the law. With this irreverent approach to judicial scholarship, I strongly disagree.

State ex rel. Ogden Newspapers v. Wilkes, 566 S.E.2d 560, 569 (W. Va. 2002) (emphasis added).

Appellate courts have also criticized lower courts in surprisingly strident language.

- HSBC Bank USA, N.A. v. Taher, 962 N.Y.S.2d 301, 304 (N.Y. App. Div. 2013) (using harsh language and criticizing a trial judge; "[W]e take this opportunity to remind the Justice of his obligation to remain abreast of and be guided by binding precedent. We also caution the Justice that his independent internet investigation of the plaintiff's standing that included newspaper articles and other materials that fall short of what may be judicially noticed, and which was conducted without providing notice or an opportunity to be heard by any party . . . , was improper and should not be repeated." (emphasis added)).

- Gatz Props., LLC v. Auriga Capital Corp., 59 A.3d 1206, 1220 (Del. 2012) (criticizing Delaware Court of Chancery Chief Judge Leo Strine; "[T]he court's excursus on this issue strayed beyond the proper purview and function of a judicial opinion. 'Delaware law requires that a justiciable controversy exist before a court can adjudicate properly a dispute brought before it.' We remind Delaware judges that the obligation to write judicial opinions on the issues presented is not a license to use those opinions as a platform from

> which to propagate their individual world views on issues not presented. A judge's duty is to resolve the issues that the parties present in a clear and concise manner. To the extent Delaware judges wish to stray beyond those issues and, without making any definitive pronouncements, ruminate on what the proper direction of Delaware law should be, there are appropriate platforms, such as law review articles, the classroom, continuing legal education presentations, and keynote speeches." (footnotes omitted) (emphasis added)).

Judges have also criticized their colleagues in other contexts. In one newsworthy situation, a judge received widespread publicity for criticizing another judge with whom he serves. That judge had sent an email containing the following language to colleagues on the bench, criticizing the judge who was then handling the murder case of Brian Nichols, a criminal defendant who gained national notoriety by murdering a judge and then escaping from the courthouse:

> 'Is there any way to replace the debacle and embarrassment Judge Fuller is. He is a disgrace and pulling all of us down. He is single handedly destroying the bench and indigent defense and eroding the public trust in the judiciary. See his latest order. He can not [sic] tell the legislature what to do. ENOUGH IS ENOUGH. Surely he can be replaced. He is a Fool. How is it done. Seek mandamus for a trial? We should investigate if it can be done.'

Greg Land, Ga. Judge Blasts Judge in Courthouse Murder Case as a "Fool" and "Embarrassment", Fulton County Daily Report, Nov. 1, 2007. The judge handling the Nichols case later recused himself from handling the case.

Application of the Ethics Rules

No ethics rules totally prohibit lawyers' criticism of opinions or judges.

On their face, the ABA Model Rules (and parallel state rules) apply to public and nonpublic statements.

This contrasts with the ABA Model Rules' limitations on lawyers' statements about an investigation or litigated matter, which applies only to statements "that the lawyer knows or reasonably should know will be disseminated by means of public communication." ABA Model Rule 3.6(a) (emphasis added). The latter rule obviously focuses on the possibility of affecting a proceeding. However, one might have thought that the public interest in favor of respecting the judicial system's integrity and public reputation would have supported a similarly expansive view of the rule limiting lawyers' criticism of judges.

Not many courts or bars have dealt with this issue. One decision essentially forgave a lawyer for an ugly but private statement about a judge.

- In re Isaac, 903 N.Y.S.2d 349, 350, 351 (N.Y. App. Div. 2010) (holding that the bar would not discipline a lawyer for calling a judge a "prick" in a private conversation; "[W]e agree with the Panel that respondent's comments about this Court and his ability to influence the Court, made in a private conversation, are not subject to professional discipline as they were uttered 'outside the precincts of a court.'" (citation omitted)).

Of course, the lack of bar analysis or case law might simply reflect the difficulty of discovering lawyers' private comments about judges.

As explained above, most bars judge a lawyer's conduct under an objective standard, despite the use of the defamation standard in the rule -- which in the world of defamation is a completely subjective standard.

The current limit on lawyers' criticism of judges goes to the substance rather than the style of what lawyers say.

Interestingly, at least one state's former ethics code limited how a lawyer criticized the judge, rather than the criticism itself. See former Va. Code of Prof'l Responsibility EC 8-6 ("While a lawyer as a citizen has a right to criticize [judges and

other judicial officers], he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system.").

n 12/11; b 3/1

Organization and Rule Synthesis (CREAC)

David Spratt, Heather Ridenour

CREAC: Detailed Primer

C (conclusion/prediction and the reason behind the prediction):

The court is likely to find that Mr. Johnson did not execute a valid will because he was able to sign his name, but he instead chose to sign an "X."

R (part of the rule comes from the statute, which should be quoted, and the rest of the rule was synthesized from two cases and is paraphrased):

"No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature." Va. Code Ann. § 64.1-49 (2007). To satisfy the signature requirement, a person must sign her name to the fullest extent that she is able. Smith v. Cato, 723 F. Supp. 2d 34, 37 (E.D. Va. 1994); Jones v. Day, 34 Va. 456 (1976).

E (once you have stated the rules for the reader, prove them – show the reader how the rules work in practice to "prove" that the rule is what you say it is. This process usually requires discussing the relevant facts, holding, and reasoning of precedent cases IN THAT ORDER):

If a decedent is unable to sign his full name, a partial signature will satisfy the signature requirement. (**This thesis sentence sets forth the point of the subsequent rule explanation, so that the reader knows what point is going to be explained – the whole reason that you are discussing a case).** In Smith, an "X" was written by a decedent who, because of lack of strength, was unable to sign her full name. The court held that the X satisfied the "signature" requirement because it signified her intent to make the will valid. Id. at 39. The court did not want to prevent the decedent from being able to leave a will, stating "to hold otherwise would cause the decedent, who clearly wanted to leave a will, to die intestate." Id. Conversely, in Jones, the decedent, fully capable of writing and in good health, signed only his last name to a will. The court held that when a decedent is capable of signing his full name, only signing his last name did not constitute a full signature and found his will invalid.

A (now show the reader how the rules you have articulated and explained will likely apply to the facts of the client's case – usually done by analogical reasoning) :

Mr. Johnson did not execute a valid will because he was physically able to sign his name, but he instead chose to mark only an "X" as his signature. (**This thesis sentence sets forth the point of the rule application, so the reader knows up-front what conclusion the writer has reached and can read the application with the writer's conclusion in mind).** In the instant case, unlike the decedent in Smith, who was unable to sign her name to a will except by making an "X," (cite omitted), and like the decedent in Jones who was capable of signing his full name, (cite omitted), Mr. Johnson was capable of ensuring that his will would be upheld by normally signing his name, and

he chose not to do so. The Jones court found that signing only a last name did not constitute a signature when the decedent could have signed his full name. (Citation omitted). Similarly, a court will not likely find that an "X" constitutes a full signature since Mr. Johnson could have signed his full name to his will.

C (reiterate the ultimate conclusion/prediction to wrap up the CREAC):

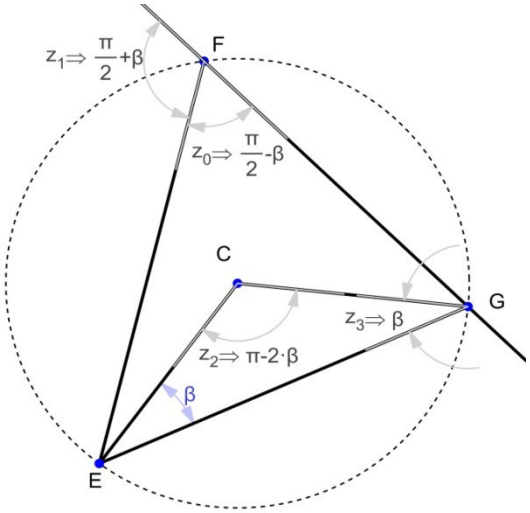
Accordingly, the court is likely to find that Mr. Johnson's will is not valid.

Note: For illustration purposes only, this end C of CREAC is one sentence. Avoid one sentence paragraphs by attaching a one-sentence C to the end of the A section.

Organization of a Discussion/Argument Section

What is CREAC?

- **THE WAY** you structure legal analysis.
- Think "Geometry Proof," rather than "Mystery Novel." The law-trained reader is busy!
- Start with your Conclusion, then explain, unpack, and "prove" it.



Conclusion/Context (CREAC)

Tell the reader up-front your prediction – gives the immediate answer and provides context for the rest of the analysis.

- Predict
- Briefly give the reasons behind your prediction

Rules of Law (cREAC)

Now that the skeptical, law-trained reader knows your prediction, you need to tell the reader which rules of law apply to the issue being analyzed.

Rule Explanation (CR**E**AC)

Now your reader understands the rules generally, but the reader is not sure how those rules would work in actual factual scenarios.

Show the reader how the rules were applied (or were not applied) in previous cases to explain to the reader how the rules work in practice.

- To fully explain a case, provide the reader with the key facts and the court's holding and reasoning (usually in that order).

"E" Section

- Have a purpose for explaining the case -- must be more than just because you cited it in your rule.
  - Will you analogize or distinguish the facts from your case?
  - Will you analogize or distinguish the court's reasoning?
- Give enough information about the case that the reader does not have to look it up to understand it or why it is being used.

"E" Section

- Use quotes sparingly
- Avoid "hornbook" recitations of the rule – remember audience and purpose – the only reason you are talking about a case is to explain how a rule works and later to compare the case to the facts of your case – you are not briefing a case for class.

A bartender can obtain actual knowledge of intoxication by observing unusual behavior of a regular patron. In *Gressman*, the patron was a regular at the bar; the bartenders knew that she was normally lady-like and reserved. (cite) When the patron began openly kissing a man she had just met, the bartender stopped serving her further drinks. (cite) The court held that the bartender had actual knowledge of the patron's intoxication because she was behaving unusually. (cite)

Rule Application (CREAC)

Now that the reader understands the general rules of law (R) and the way that the rules work in practice (E), the reader wants to know how the rules will likely apply to your client's set of facts.

- The more similar your case is to one of the discussed cases, the more likely the same result; the less similar, the less likely the same result.

Analogical Reasoning

- Analogies and distinctions should be explicit and obvious – apples to apples
  - Compare people to people and actions to actions
    - The grapefruit in *A* is similar to the orange in *B* because both are fruits with rinds that must be peeled before eating.
- Further analogize by comparing/distinguishing case law based on court's reasoning.

Rule Application

- Show the reader:
  - the rule + facts of your case= your conclusion
  - Client "reappears" in the A
- Primary reasoning tools:
  - Rule-based reasoning (statute)
  - Analogical reasoning (common law)
    - Justifies a result by making DIRECT factual comparisons/distinctions between the precedent case's key facts and your client's key facts
    - Persuasive because of *stare decisis*

KEEP IT IN ORDER

- Only after you have set forth the rules of law and explained them generally should you apply the law to the facts of your client's case.
- RE, before A
- Your client's facts should be mentioned in the CAC of CREAC, but not in the RE.

Conclusion (CREAC)

Reiterate your prediction to your reader. You will feel as if you are repeating yourself, but lawyers like to hear themselves talk (and write)!

C: The court is likely to find that Mr. Johnson did not execute a valid will because he was able to sign his name, but instead chose to sign an "X."

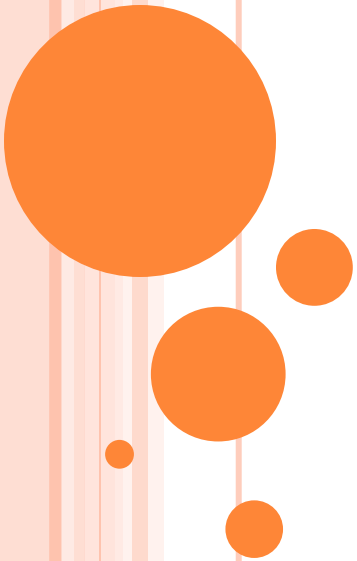
R: "No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature." Va. Code Ann. § 64.1-49 (2007). To satisfy the signature requirement, a person must sign her name to the fullest extent that she is able. Smith v. Cato, 723 F. Supp. 2d 34, 37 (E.D. Va. 1994); Jones v. Day, 34 Va. 456 (1976).

E: If a decedent is unable to sign his full name, a partial signature will satisfy the signature requirement. In Smith, an "X" was written by a decedent who, because of lack of strength, was unable to sign her full name. The court held that the X satisfied the "signature" requirement because it signified her intent to make the will valid. Id. at 39. The court did not want to prevent the decedent from being able to leave a will, stating "to hold otherwise would cause the decedent, who clearly wanted to leave a will, to die intestate." Id.

Conversely, in Jones, the decedent, fully capable of writing and in good health, signed only his last name to a will. The court held that when a decedent is capable of signing his full name, only signing his last name did not constitute a full signature and found his will invalid.

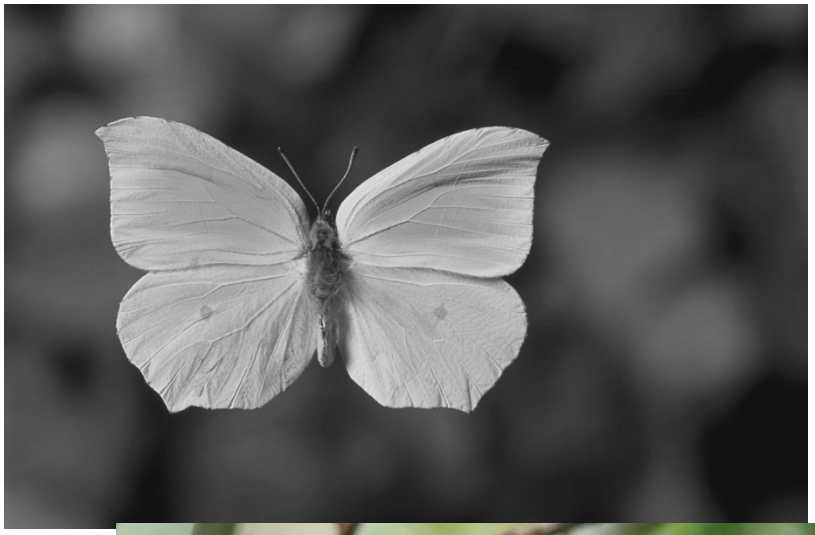
A: Mr. Johnson did not execute a valid will because he was physically able to sign his name, but he instead choose to mark only an "X" as his signature. In the instant case, unlike the decedent in Smith, who was unable to sign her name to a will except by making an "X," and like the decedent in Jones who was capable of signing his full name, Mr. Johnson was capable of ensuring that his will would be upheld by normally signing his name, and he chose not to do so. The Jones court found that signing only a last name did not constitute a signature when the decedent could have signed his full name. Similarly, a court will not likely find that an "X" constitutes a full signature since Mr. Johnson could have signed his full name to his will.

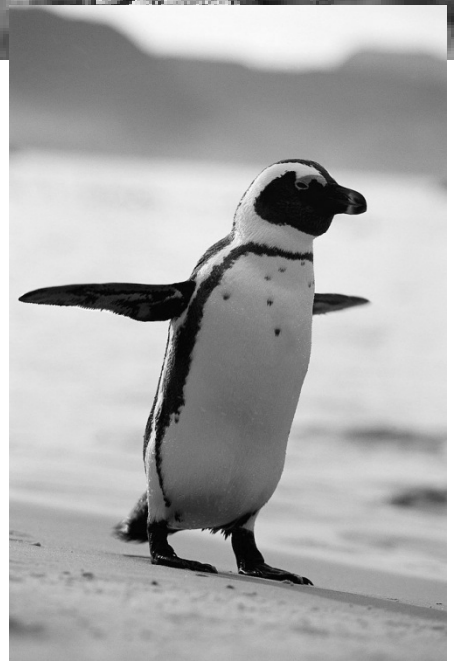
C: Accordingly, the court is likely to find that Mr. Johnson's will is not valid.



Rule Synthesis

Which does not belong?





The Unstated Rules of Crabby Ms. Pointer

A rule synthesis exercise

Your Task

You are a member of the local community association. Numerous citizens have complained about Ms. Pointer, the mayor's elderly sister. Since she is the mayor's sister, you can't really do anything publicly about her actions. You have been asked by the rest of the Board to figure out what causes Ms. Pointer to spray people with her water hose, so that you can warn the community about "The Unstated Rules of Crabby Ms. Pointer."

Sunday

On Sunday, Brandon Turtle waved to Ms. Pointer from the sidewalk, and Ms. Pointer waved him over, calling “Brandon Turtle, come out of the sun for a spell and have some Milwaukee’s Best with me on the porch.” Brandon ambled up the driveway past the “Keep Out” signs and primed water hose and sat with Ms. Pointer, nodding repeatedly as Ms. Pointer regaled him with details of her on-going battle with hedgehogs.

Monday

On Monday, two neighborhood boys, Sam Merlotte and Jason Stackhouse, sneaked onto Ms. Pointer's property, to taunt Ms. Pointer's dog, Damien, with sticks. Ms. Pointer came off the porch and doused the boys with water from the garden hose, yelling "You boys get off my lawn before I shoot you dead!" The boys ran away screaming and shouting.

Tuesday

On Tuesday, Veronica Mars walked onto Ms. Pointer's property to pick honeysuckles for a bonnet she was making for the Sunday sock-hop. Ms. Pointer sprang from behind the bushes with the garden hose, spraying Veronica and ruining her new pen-size security camera. Ms. Pointer shouted, "Veronica Mars, you brazen hussy, you better get off my lawn before I shoot you dead!" Veronica high-tailed it off of Ms. Pointer's property in a flash, sobbing the whole way home.

Wednesday

On Wednesday, the town had its annual Founding Fathers Parade. Don Draper was dressed as Abe Lincoln in a top hat and was walking down the street on stilts when suddenly a pig escaped from one of the 4-H cages, knocking Don over and onto Ms. Pointer's property. Having seen the incident, Ms. Pointer (even though not a big fan of Abe Lincoln) came over, dusted Don off and offered him some lemonade. The hose remained untouched.

Thursday

On Thursday, Michael Scott was being chased by a swarm of hornets, so he ran onto Ms. Pointer's property and dove into the pond in the backyard. Ms. Pointer saw the whole incident and laughed so hard, she fell clear off her rocking chair. She didn't bother with the garden hose or the shotgun.

Friday

On Friday, Neil Caffrey was chased onto Ms. Pointer's property by Sara Ellis, who was wielding a hockey stick and threatening to bash Neil's head in for fixing Alex Hunter's plumbing. In running from Sara, Neil trampled Ms. Pointer's patch of cucumbers (which she intended to sell at the county fair) and damaged the gate to Ms. Pointer's chicken coop. Ms. Pointer did not spray Neil with water, given the ferocity of Sara's swats with the hockey stick, but she immediately demanded that they reimburse her for the damaged cucumbers and chicken coop.

Rule Synthesis

Once you have determined the propositions or rules for which each case stands, join or synthesize the rules in a coherent manner.

If there are any inconsistencies, note them and try to reconcile them.

Sun:	One may enter the property without getting squirted when invited.
Mon/Tues:	One who purposely enters the property without permission for any reason will be squirted.
Wed:	One who involuntarily enters the property will not be squirted.
Thurs:	If entry was necessary to protect one's self from physical danger or, if the person entering causes laughter, she will not be squirted.
Fri:	If one enters Ms. Pointer's property out of necessity, she will not squirt you, but you are responsible for property damage.

Rule Synthesis

Synthesis is the binding together of several opinions into a whole that stands for a rule or expression of policy.

Synthesis finds and explains collective meaning that is not apparent from any individual case read in isolation from the others.

A synthesis is plausible if it is logical, reasonable, and consistent with public policy.

To synthesize these scenarios as a means of predicting Ms. Pointer's behavior in future cases, we might state that these cases/factual scenarios collectively stand for this proposition/rule:

"A person who voluntarily enters Ms. Pointer's property without permission will be doused, unless entry is necessary to avoid physical danger, in which case a person is liable only for actual damage to the property."

Spud Gun Exercise

Deductive Syllogism

Law	A person who assaults another with a gun, knife, iron bar, club, or other DANGEROUS WEAPON is guilty of a felony.
Facts	Our client is charged with assaulting a person with a spud gun.
Conclusion	?

Rule Synthesis
(a/k/a Inductive Generalization)

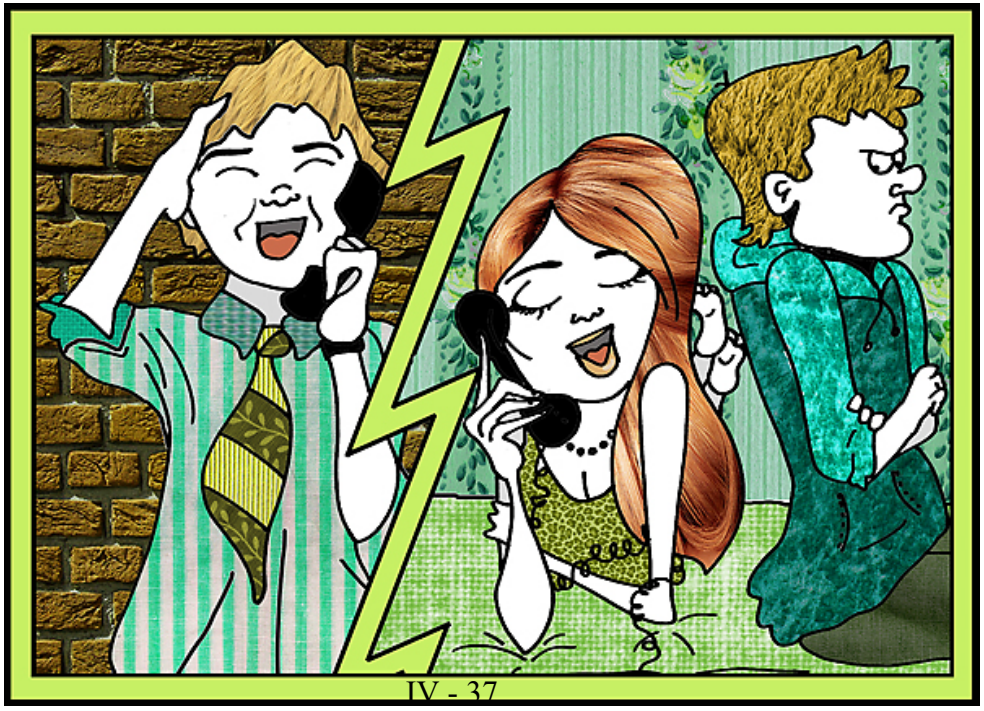
The Solution?

Our client is charged with assaulting a person with a dangerous weapon under Michigan Compiled Laws section 750.82(1), which provides:

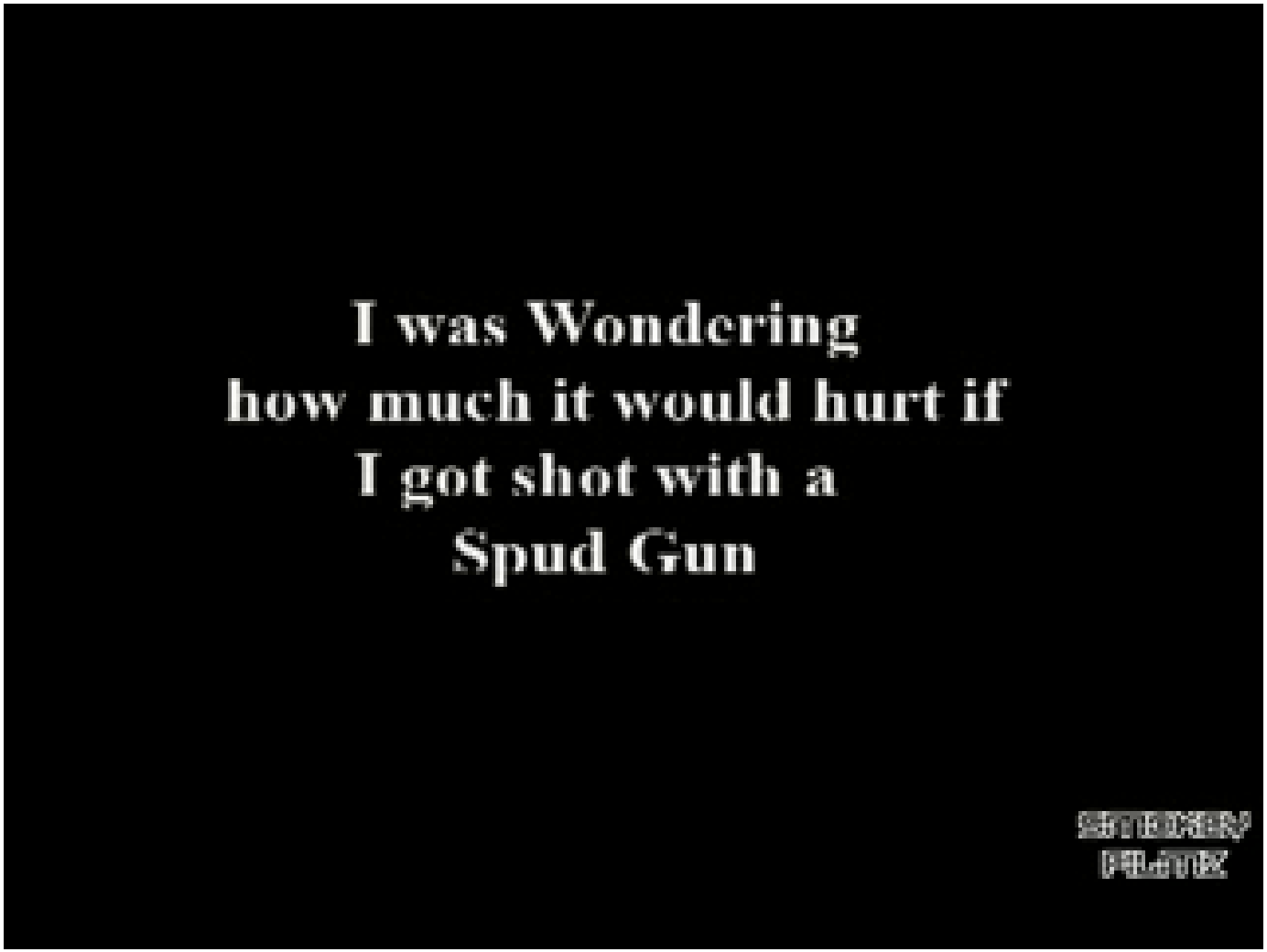
A person who assaults another with a gun, knife, iron bar, club, brass knuckles, or other dangerous weapon is guilty of a felony.

Client's Alleged Assault

Client shot at his best friend with a spud gun after he learned that the victim had stolen his girlfriend.



Client's Spud Gun


I was Wondering
how much it would hurt if
I got shot with a
Spud Gun

Search Results

Case 1

A trebuchet is a dangerous weapon.

Case 2

A ping-pong rocket is a dangerous weapon.

Case 1: Trebuchet

Case 2: Ping-Pong Rocket

Distilling General Rule

Case 1: A trebuchet is a dangerous weapon. Defendant filled a piano with pig manure, lit it on fire, and flung it at his neighbor. The court said that anything that could fling an upright piano is a dangerous weapon. Its accuracy and capability to inflict great injury make it dangerous.

Case 2: A ping-pong rocket is a dangerous weapon. In this case, the ping-pong ball was aimed at the victim's head. A hard plastic ball propelled by an explosion could potentially create blindness or other serious injury. Thus, it is a dangerous weapon.

What do cases have in common?

- Trebuchet and ping-pong rocket are instruments.
- Piano and ping-pong ball are projectiles.
- In each case, the court based its dangerous weapon holding on the fact that each instrument was capable of inflicting serious injury.

Synthesized Rule

An instrument that mechanically or explosively propels a projectile that is capable of inflicting a serious injury is a dangerous weapon.

Law	A person who assaults another with a gun, knife, iron bar, club, or other DANGEROUS WEAPON is guilty of a felony. An instrument that mechanically or explosively propels a projectile that is capable of inflicting a serious injury is a dangerous weapon.
Facts	Our client is charged with assaulting a person with a spud gun.
Conclusion	A spud gun is a dangerous weapon because it's an instrument that propels a projectile with an explosion and is capable of causing serious injury.

Apply the Articulated Rule

- A spud gun is a dangerous weapon because it is an instrument that propels a projectile with an explosion and is capable of causing serious injury. Unlike a trebuchet, which hurls large, life-threatening objects, a spud gun cannot hurl large, life-threatening objects, like a piano. A spud gun does, however, propel dense, fist-sized projectiles – spuds – at excessive speeds. These spud projectiles, propelled with such an explosion, could obviously inflict more injury than a hollow ping-pong ball. Therefore, a spud gun is a dangerous weapon.

CREAC in Action

Evans Sample Memo Example

Evans Memo Example (p. 5).

C: The loose railing was not latent because it was readily apparent to the general class of recreational users in that Evans marked it with duct tape.

Evans Memo Example (p. 5).

R: A condition is latent if it is not readily apparent to the general class of recreational users; what a particular user who examines the condition as a whole sees or does not see is immaterial. *See Ravenscroft v. Wash. Water Power Co.*, 969 P.2d 75, 82 (Wash. 1998); *Widman v. Johnson*, 912 P.2d 1095, 1098 (Wash. Ct. App. 1996); *Tennyson v. Plum Creek Timber Co.*, 872 P.2d 524, 527 (Wash. Ct. App. 1994).

Evans Sample Memo

E: What a general recreational user easily can see determines whether a condition is latent, whether the injured individual actually saw it. In *Ravenscroft*, a boater was riding in a boat on a human-made reservoir when the boat hit a submerged tree stump. 969 P.2d at 77-78. The boat driver testified that he did not see the submerged stumps, and witnesses stated that other boats had also hit the stumps, indicating that the stumps were not readily apparent. *Id.* at 83. Because the stumps were not obvious or readily apparent, the court held that submerged stumps could constitute a latent condition for purposes of the recreational use statute, finding that summary judgment declaring the condition not latent was inappropriate. *Id.*

Evans Sample Memo

Conversely, in *Widman*, a trucker was driving on a logging road that intersected with a state highway. 912 P.2d at 1098. The trucker did not see the intersection, drove directly across the highway, and collided with a truck on the highway. *Id.* The court found that the intersection was not latent because it was readily apparent to a general class of users, even though the individual trucker did not see the intersection. 912 P.2d at 1097.

Evans Sample Memo

E: In determining whether a condition is readily apparent to users, the perspective of users who examine the condition as a whole is considered, and an individual's failure to discover a condition has no bearing on whether the condition was latent. *See Tennyson*, 872 P.2d at 527. In *Tennyson*, a rider fell from his motorcycle on a gravel mound where one side was excavated. *Id.* The court found that the excavation was not latent because it was in plain view and readily apparent to anyone who examined the gravel mound as a whole, even if the rider himself did not see the excavation. *Id.* at 526-28.

Evans Sample Memo

A: In Evans' case, the loose railing was probably not latent because it was readily apparent to the general class of recreational users. The tape that was wrapped around the rail contrasted with the wood. This one rail differed from all the other rails because it had duct tape at its junction with the tower. The duct taped-railing is similar to the condition in *Widman* because duct tape wrapped around a wood railing is readily apparent to general users just as an intersection with a state highway is readily apparent to general users. Jones may argue that a duct-taped railing is less obvious than an intersection with a state highway since a railing is smaller and not as visible from a distance. The duct-taped railing, however, was apparent to any user who examined the condition as a whole, unlike the submerged tree stumps in *Ravenscroft*, which no one could see. Even if Jones failed to see the obvious duct-taped railing, just as the trucker in *Widman* failed to observe the intersection, the duct taped-railing was still not latent, as general users of the tower would have noticed it.

Evans Sample Memo

A: That no other users were injured on the tower before Jones' accident also supports the conclusion that the duct-taped railing was not likely a latent condition. Unlike the situation in *Ravenscroft*, when numerous other boaters hit the submerged stumps before the boater's accident, no one else was injured on the observation tower before Jones fell. The railing had been broken for five months, but as far as Evans knows, no other users were injured. Because the general class of users has never been injured from using the tower, the defect in the loose railing was most likely obvious to the users.

Evans Sample Memo

A: Most users who examined the observation tower as a whole would have noticed the duct-taped railing, thereby further supporting that the railing was not a latent condition. Like the excavation in *Tennyson* that was readily apparent to anyone who examined the gravel mound as a whole, the loose railing was readily apparent to anyone who examined the tower as a whole because that particular railing was bound with duct tape. None of the other railings on the tower was taped.

Evans Sample Memo

C: As a result, the loose railing was not latent, and a court will likely find that Evans is immune from liability.

Questions?

Contract Drafting: Improving Boilerplate

David Spratt, Heather Ridenour

BY DAVID H. SPRATT
PROFESSOR, AMERICAN UNIVERSITY

Debunking the Efficacy of Standard Contract Boilerplate: Part 1

During the past few months, we were all stuck at home. Instead of wrestling with our inner thoughts, fears, and demons, many turned to home improvement projects (aka obsessive cleaning rituals). Seeking to fill time normally occupied by dining out, shopping, or socializing in person with friends, we searched for ways to declutter and improve our surroundings and make a physical fresh start.

At my house, we started by organizing drawers, moved to cleaning out the garage, dabbled with digitizing old photos, and finally settled on cleaning out the attic. For my family, cleaning out the attic is truly a monumental task. The attic is huge. Filled with pretty much everything one could possibly need (or at one time think she needed), my attic could double for an Amazon warehouse of misfit toys and other objects. Each week, we make progress, laugh at items we forgot we had, and reminiscence about stories and memories we hadn't thought of in years.

Which brings me to the point of this column: I would guess that many lawyers in Virginia and elsewhere need to declutter their documents. Most lawyers, I imagine, haven't revisited their contract boilerplate provisions in some time. After all, the boilerplate has been used for years, even decades, to great success, right? Perhaps, but one can always improve on what has worked well in the past using tools of the trade and conventions that might not have existed before. After all, as best articulated by British economist John Maynard Keynes: "The difficulty lies not so much in developing new ideas, as in escaping old ones."

In the next few columns, I will walk through some typical contract boilerplate and encourage — ahem, implore — you to review the contract boilerplate used in your office. Here is another way to declutter, develop new ideas and eschew those that are outdated, and move forward with more effective and tailored boilerplate language. Now, I am not saying revisiting old boilerplate will bring back a flood of old memories, but being more contemporary and easier to understand might bring in a flood of more satisfied clients.

DOCUMENT TITLE

Make sure to change the document title to reflect the main topics covered by the contract. Simply stating "Agreement"

as the document title could lead to confusion or require extra investigation to determine the document's scope, particularly in cases where a client has executed numerous contracts. Being specific, for example, by calling the document "CUSTODY AND CHILD SUPPORT SETTLEMENT AGREEMENT," immediately tells the reader what subjects the contract addresses.

INTRODUCTION

Many contracts start with an introductory paragraph like this one:

THIS AGREEMENT is made and entered into said 5th day of June, 2020, by and between JOHN JONES (hereinafter referred to as "Jones") and MARY SMITH (hereafter referred to as "Smith"), hereinafter referred to together as "the parties."

Where do I find my red pen? There are so many problems with this introduction, I might run out of ink.

First, the phrase "made and entered into" is redundant. Perhaps in the old days, a lawyer wearing a white wig, using a quill pen, and hunching over a Dickensian desk, might have found legal significance in these words. The phrase "made" *might* have referred to entering into a bargain, i.e., a meeting of the minds or simply to the act of drafting; the phrase "entered into" might have referenced an act of voluntariness. Conversely, even back then, these words might have carried no independent meaning. But today, the words mean the same thing, and by choosing just one, you can eliminate the archaic and repetitive legalese.

Even more alarming and outdated is the phrase "said 5th day of June, 2020." First, never use "said" as a synonym for "the"; only use "said" as a synonym for "stated." It does not read or sound like a badge of upper-class society, and we are not living at Downton Abbey. If you were conducting a deposition at opposing counsel's office and needed to use the restroom, would you say, "Where is said restroom?" Of course not! Use plain language. Enough said. (And just write out the date like we all learned in elementary school: June 5, 2020).

Next, we move to "by and between." Is there any difference between these two words? Not that I can think of. Eliminate redundant phrases to make the sentence more readable and concise.

Finally, banish the old stalwart "hereinafter referred to as." When I was in law school, legal writers were taught to use this language, and it still appears in far too many documents. Why? Because it has always been so. Is this reason enough to keep churning out dusty, clunky contracts? No Siree Bob!

Fortunately, times seem to be changing — slowly. Several years after I started practicing, the phrase "hereinafter referred to as" was shortened to "hereinafter," e.g., "(hereinafter 'JONES')." More recently, the correct way to designate a shortened reference was simply this: ("JONES"). Most recently, legal writing scholars recommend eliminating the shortened reference entirely unless doing so would otherwise cause reader confusion. So, in the example, if there was only one JONES and only one SMITH, using those shortened references would not require any explanation.

Accordingly, applying all of these revisions, your new-and-improved introduction would now read more concisely as follows:

THIS AGREEMENT is entered into on June 5, 2020, between JOHN JONES and MARY SMITH, together "the parties."

WITNESSETH

Take a look at a contract or two in your files. I hazard to guess that in many of these contracts, the heading after the introduction is a centered word: "WITNESSETH."

This "word" — and I use that term loosely — is one that was made up more than 500 years ago. It is part of contract lore, and, for some unknown reason, many legal drafters are afraid to remove it. Why? If you ask these drafters, I would love to hear their answers. *It has always been there.* Perhaps, but so what? *It is in all the forms we have in our files.* Again perhaps, but doesn't good lawyering demand creativity and adaptability to current times? *It needs to be there to ensure the legal significance and import of the document.* No, it doesn't. The word, in fact, has no legal impact whatsoever and can be freely eliminated. To bring the document into the current century, if you must retain the heading, use the more descriptive "RECITALS" instead.

Sadly, I am at the end of my column and haven't touched upon the recitals or actual boilerplate. More next time! ■

COMES NOW, your loyal columnist, and says unto you, comments of any and all parties, as long as the same are well-edited (unlike said sentence), are welcome at dspratt@wcl.american.edu.

BY DAVID H. SPRATT
PROFESSOR, AMERICAN UNIVERSITY

Improve Recitals and Consideration Clauses with Plain Language

During much of last year, most of us were atypically hyper-connected. We were glued to our smartphones, computers, tablets, and other personal devices, as we sought to make sense of and communicate with the outside world. As the parent of a now 14-year-old son who had just finished eighth grade, I, like many others, faced the unenviable challenge of having to motivate and guide a child through online ungraded education. At first, I judged and compared myself to other parents who immediately posted on Facebook detailed daily "homeschool" schedules, lessons, and craft and exercise activities. I felt inadequate, as if by taking less of a drill sergeant approach, I was failing my son. But thankfully, these feelings were temporary. I soon realized that there is no parenting manual from which one can cut and paste. There is no one-size-fits-all method to raising a child, no tried-and-true method handed down from generation to generation that works perfectly and the same for every child. Instead, each parent (in theory) should know and implement what best addresses his or her child's individual personality and needs, despite what might work or have worked for other parents.

Just like there is no perfect guide for parenting a child, there is no one fail-safe, perfect legal recipe for drafting contract boilerplate. One can and should adapt and change. Here is the second column in the ongoing series on how to improve upon and tailor contract boilerplate.

RECITALS

Recitals come before the operative provisions and are often referred to as "WHEREAS" clauses. Below is an example of a recital that usually appears in a Virginia custody agreement:

> WHEREAS, there was one (1) child born of the marriage, to wit: John Jones, born January 1, 2010 ("the minor child").

As used in a "WHEREAS" clause, the term "whereas" simply means "considering that" or "that being the case." There is no legal effect to the word "whereas." It, like many other words used in standard contract boilerplate, is left over from some long-forgotten era of legal writing when lawyers used big words and legalese to impress clients with their intelligence and to justify their bills. These times have (or at least should have) passed. Today, documents must be accessible to those who use them: in most cases the clients for whom such documents are drafted.

Recitals act as a preamble to the contract and provide the reader with general information about the parties involved, its major subject matter, and why the parties have executed the contract. Recitals should not contain any obligations or legal substance and should explain only the reason, foundation, and scope of the contractual relationship. Regardless, take care when drafting the recitals, as

they can and often are used by courts when substantive contractual language is ambiguous and the court seeks to discern the parties' intent in executing the contract.

So, time to deconstruct the above example. First, delete the word "WHEREAS." If you are wary, try it. Wait a few seconds. Did your computer self-destruct? Did your law school diploma come crashing off the wall? Doubtful. Removing the word "WHEREAS" does not cause mass destruction or change the meaning of a recital, and it brings your writing into the contemporary world of plain language.

Next, look at the phrase "there was one (1) child born of the marriage." There are two problems with this phrase. First, there is no need to cloud up the writing with including the number in parentheses after spelling out the number. What? But lawyers do it all the time in recitals and elsewhere. Historically, this practice arose to prevent fraudulent alterations to a contract. Bewigged lawyers of yesteryear thought it would be harder for someone to convincingly alter both a word and number. Today, however, including both the word and number in parentheses potentially invites an ambiguity on the face of the document (if the number and word do not match) and implicates the parol evidence rule. Did you just tremble and flash back to your 1L contracts class?

Second, let's look at the entire phrase, now revised as "there was one child born of the marriage." It sounds stilted. Simply write "The parties had one child." If the child was illegitimate or born to one party but not both, then clarify, but typically such scenarios do not need to be addressed. Exercise the KISS principle in everything you write. Before you think I am calling you stupid, the term as I use it means "Keep It Simple, Solicitor."

Finally, the phrase "to wit." This expression basically means "that is." Unless you are one who still handwrites letters with a quill pen and seals them with candle wax, banish this expression from your contract. Replace "to wit" with the word "namely" or even better, simply use a colon, a punctuation mark that means (you got it) —"namely." Accordingly, as revised, this recital would now read: "The parties had one child: John Jones, born January 1, 2010 ("the minor child")."

CONSIDERATION CLAUSE

No matter how long you have been practicing law or whether you draft contracts for a living, you remember the three basic elements of contract formation: offer, acceptance, and consideration. Well, there might actually be four elements in some cases — the contract must be in writing if it is covered by the Statute of Frauds (sorry, I teach contracts to 1Ls, and I can't control myself).

Oversimplified, consideration means that each party must have given and received something from the other party. There must be a mutual give and take on each side of the bargain; each party must undertake a detriment and receive a benefit.

To wit: Unless you are one who still handwrites letters with a quill pen and seals them with candle wax, **banish this expression** from your contract.

Look at your contract boilerplate or any contract that you have drafted. Does it contain a provision like this one?

> NOW, THEREFORE, in consideration of the mutual promises and covenants herein set forth, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, each party by his or her signature below do contract and agree to be bound by the terms herein.

I would guess your answer was yes. Most standard contracts contain this type of provision, known as a "consideration clause." Historically lawyers were taught to expressly state that consideration existed in a contract. But such a provision is superfluous. The presence of this clause does absolutely nothing to enforce a contract if there is no mutual give and take. All that is needed to satisfy consideration are mutual promises and obligations in the contract. Still, if you can't bring yourself to relinquish a consideration clause, simply state "The parties agree as follows:" at the end of the recitals.

Once again, I must bid you adieu. Stay tuned for the next column where I will finally get to the actual contract boilerplate provisions. ■

In Consideration of you reading this column, questions or comments are welcome via email: **dspratt@wcl.american.edu**

BY DAVID H. SPRATT
PROFESSOR, AMERICAN UNIVERSITY

Debunking the Efficacy of Standard Contract Boilerplate – Part III

In November, what was meant to be a simple toilet repair revealed asbestos in my bathroom and utility room. To remove the asbestos, the floors in both rooms had to be demolished. Although it would have been quicker, cheaper, and less emotionally taxing to simply replace the flooring and toilet, we decided to fully remodel. Both rooms had served their purposes, but after all these years, it was time to update. The result was worth the effort, as both rooms are more contemporary and enhance the home's aesthetic and resale value.

Today, we continue our journey into updating contract boilerplate. Although my experience is grounded in family law, similar paragraphs are found in all contracts, and the legal writing principles I address apply to all disciplines. Although your contract boilerplate might have served its purpose well for decades, like my bathroom and utility room, do not shy away from updating the language. Doing so will bring you into the 2020s, be easier for your clients to understand and perform, and improve your marketability and aesthetic as a lawyer.

'Any' and 'all' mean the same thing; **eliminate the redundancy**.

In most family law agreements, parties must keep one another apprised of where they live and how they can be contacted. Below is a standard provision used by many family lawyers:

KNOWLEDGE OF RESIDENCE

> For so long as the minor children are less than eighteen years of age and/or either Party still has obligations hereunder, each shall keep the other informed of his or her address of residence and business and home telephone number.

There are several things wrong with this paragraph. First, the heading "Knowledge of Residence" is underinclusive, as the paragraph concerns more than where each party lives. A more inclusive and effective heading would be "Knowledge of Contact Information." Second, the introductory phrase is ambiguous, as one could read "for so long as the minor children are less than eighteen years of age" as requiring the parties to exchange information only until one of the parties' children turns 18. Moreover, "eighteen years of age" is archaic and clunky legalese. Keep it simple, solicitors: "eighteen" or "age eighteen" would suffice. Applying these revisions, the introductory phrase now reads "Until the parties' youngest child turns eighteen."

An even more egregious example of outdated asbestos language (catchy, right?) is "address of residence." Who says that? Perhaps a bewigged barrister in the 1700s, but no one in 2021 should use such language. If you are putting a friend's contact information into your smartphone, do you say, "Now, give me your address of residence"? Of course not. You would instead say "home address." Finally, just because this provision served its purpose for years (like my bathroom and utility room) does not mean that it should not be updated. Require the parties to also exchange cell phone numbers and email addresses.

Another standard contract provision follows:

ENFORCEMENT

> The parties agree that if one party incurs any reasonable expenses in the successful enforcement of any of the provisions of this Agreement, the other party will be responsible for and pay forthwith any and all reasonable expenses, including attorney's fees, thereby incurred; provided, however, that in the event compliance occurred on the eve of, or on the date of, a hearing scheduled to compel such compliance, then all fees and costs reasonably incurred by the party seeking compliance shall be borne and paid by the other party forthwith. Any such costs incurred by a party in the successful defense of any such enforcement action shall be reimbursed by the party seeking to enforce compliance.

This paragraph effectively motivates both parties to fully perform their duties under the contract because it requires the prevailing party in an enforcement hearing to pay the other party's attorney's fees. But it uses far too many words to make its point, and a layperson may not see the benefit of complete performance because she cannot understand what the paragraph means. Contract language should be accessible to its parties; if they cannot figure out what the provision says, then it is extremely difficult for them to know what they are supposed to do and when they are supposed to do it.

First, the phrase "[t]he parties agree that" can be deleted from this and all other provisions in a contract. Every provision represents the parties' agreement – that is the whole point of entering into a contract: reciprocal promises. Including this kind of throat-clearing phrase in each provision is superfluous and distracts the reader. Second, the phrase "the other party will be responsible for and pay forthwith any and all reasonable expenses" can be much more concise. "Any" and "all" mean the same thing; eliminate the redundancy and pick one word. Also, writing "promptly pay all reasonable expenses" would be much clearer to the parties.

Next, tighten up the writing whenever possible to eliminate excess words without sacrificing substance. "[I]n the event" can be replaced by "if." "[O]n the eve of, or on the date of" can be replaced by "the night before or the day of."

There you have it. Even though boilerplate is tried and true, it does not mean that each provision is perfect and cannot be improved. Just like renovations take forever, so does updating outdated contracts. See you next time for more language remodels. ■

This columnist agrees that you are welcome and may endeavor to send any and all asbestos-free comments to dspratt@wcl.american.edu.

David H. Spratt is a professor of legal rhetoric at The American University, Washington College of Law, where he teaches legal writing, contracts, and family law litigation and practice. In 2001, he was a founding partner of Schwartz & Spratt, PLC, a family law firm in Fairfax, Virginia. Previously, he worked as an associate at the Law Office of Betty A. Thompson, Ltd., and at The Lewis Law Firm. Professor Spratt joined the VBA in 1995 and is a member of the Domestic Relations Section. He also serves as the civil reporter of decisions for the Court of Appeals of Virginia.

BY DAVID H. SPRATT
PROFESSOR, AMERICAN UNIVERSITY

Debunking the Efficacy of Standard Contract Boilerplate – Part IV

In early June, my 15-year-old son was unexpectedly diagnosed with Type 1 diabetes. As part of an annual physical, he had a blood test; when his doctor received the results, she immediately called and told us to head straight to the emergency room to be evaluated and ultimately admitted to the hospital. All newly diagnosed Type 1 diabetes patients and their parents are treated to a one- to two-day hospital stay, which allows monitoring, but basically acts as an intensive, educational bootcamp on how to treat, understand, and accept a new way of eating, exercise, and everyday life.

And learn we did. This experience was a master class and entry to a "club" that we never sought to join. As part of this club, we had to evaluate what, when, and how many carbs our son ate, how and when he should exercise, and take comprehensive stock of our family's health and well-being. Although we had been trying to eat well and stay active during the pandemic, we were forced to change much of what we *thought* had been working for us.

Enough said; "said" should only be used as a synonym for "stated."

In the last three installments of this column, I asked you to take comprehensive stock of your contract boilerplate, and now we continue this journey of self-exploration. Just because you might *think* that your boilerplate has "worked" for years does not mean it is the best for you or your clients. Pretend that you have been diagnosed with outdated boilerplate, a disease that seems to invite many legal writers to its club. Together, we will move forward to make changes that will allow you to live a healthier and more fulfilling life as a contract drafter.

Below is a standard provision that appears in many contracts:

> **TIME IS OF THE ESSENCE**
>
> Time is of the essence in the performance of all obligations set forth in this Agreement.

In terms of writing, this provision looks pretty good. However, simply including this provision in a contract does not mean that a court will automatically find that one party breached the contract by not timely performing his obligation. If time truly is "of the essence," build language into the provision itself that the obligations in that provision must be timely performed, such as penalties for late payment. Also consider adding a statement that says, "Failure to timely perform the obligation set forth in this paragraph is a material breach of contract." Does the inclusion of such a statement mean that a court will find a material breach? Of course not, but the statement more strongly suggests that timeliness in the performance of the obligation was part of the negotiated bargain.

Here is another common boilerplate provision:

> **MODIFICATION OR WAIVER**
>
> It is understood that no modification of the terms of this Agreement shall be valid unless such modification is in writing and signed by both parties with the same formalities as said Agreement. No waiver of any default of said Agreement shall constitute a waiver of any other or subsequent default.

This paragraph states the law correctly; two parties cannot modify an existing contract without entering a new contract with respect to any modified provisions. Therefore, to have the "same formalities" as the existing contract, a contract modification requires offer, acceptance, and consideration. Not every contract must be in writing (only those contracts that fall within the Statute of Frauds must be in writing); however, this provision requires the modification to be in writing, which is a good idea, because it makes enforcement easier and prevents either party from denying the existence of the modification. As an aside, how many of you just felt a little nauseated reading the term "Statute of Frauds" and flashed back to law school?

The paragraph itself is not particularly well-written. First, the phrase "[i]t is understood that" can be deleted from this and all other provisions in a contract. Every provision represents the parties' understanding – that is the whole point of entering into a contract: a mutual meeting of the minds. Including this kind of throat-clearing phrase in each provision is superfluous and distracts the reader. Second, the phrase "said Agreement" appears twice in this provision. Do not use the word "said" as a synonym for "the." Those who use "said" in this manner are trying too hard to sound lawyerly, and it stands out to those of us unafraid to use plain language. You are not in a bad television legal drama where the actors all attempt to sound highly educated and fail miserably. No one speaks that way. If you encountered me at a conference and were looking for the restroom, you would not approach me and state, "Where is said restroom?" So, why would you write that way? Enough said; "said" should only be used as a synonym for "stated."

And here is one more standard provision:

> **GOVERNING LAW**
>
> This Agreement shall be construed under and governed by the laws of the Commonwealth of Virginia existing at the time of the execution of said Agreement, irrespective of the fact that one or more of the parties now is, or may become, a resident of a different state.

We have belabored the archaic and prohibited use of "said" as a synonym for "the." But this paragraph needs more work. First, the phrase "irrespective of the fact that" is wordy and could be replaced with the plain language alternative of "even though." Second, "one or more of the parties now is, or may become, a resident of a different state" also could be streamlined. The phrase is easy enough to understand but cut to the chase. Replacing this phrase with "either party now or later resides in a different state" does the trick. ■

Now that we have fully embraced healthy living *and* contract drafting, send any low-carb comments to dspratt@wcl.american.edu.

David H. Spratt is a professor of legal rhetoric at his alma mater, The American University, Washington College of Law, where he teaches legal writing, contracts, and family law litigation and practice and is acting director of the Legal Rhetoric Program. A VBA member since 1995, he is also a member of the Domestic Relations Section. In 2001, he co-founded Schwartz & Spratt, PLC, a family law firm in Fairfax, Virginia. Previously, he worked as an associate at the Law Office of Betty A. Thompson, Ltd., and at The Lewis Law Firm. Professor Spratt is vice chair of the Virginia State Bar Section on the Education of Lawyers and was formerly the civil reporter of decisions for the Court of Appeals of Virginia.

BY DAVID H. SPRATT
PROFESSOR, AMERICAN UNIVERSITY

Debunking the Efficacy of Standard Contract Boilerplate – Part V

My son made the JV baseball team this year as a starting pitcher. He was elated. Countless hours of conditioning, practice, and Little League and travel team games had finally paid off. Unfortunately, the elation was short-lived. The day after he made the team, he tore his meniscus. At first, given the pain he experienced when he moved his knee, we thought his season had ended before it began. After meeting with his doctor and coaches, however, we realized that with some adaptations to the way he typically pitched, he could play out the season before having surgery. And play he did! He was the first starter on his team to pitch a winning game.

I am clearly a proud papa. But that's beside the point! My son's willingness to "change up" the way he pitched for the season to combat his injury (pun intended, baseball fans!) is applicable to legal writing. Do not be wedded to your contract boilerplate simply because it has always worked well in the past. Do not assume that change cannot lead to victory. Sometimes, adapting to changing circumstances by employing contemporary legal writing best practices makes a good thing even better.

In the past four installments of this column, I have dissected standard contract boilerplate to remove extraneous or redundant words and phrases and eliminate legalese. Lucky for you, I have even more to say about the subject and how to make your writing clearer, more concise, and to chalk up a "win" for your clients.

Below is a standard provision seen in many contracts

INCORPORATION INTO COURT ORDER AND/OR DECREE

> The parties agree that this Agreement shall be submitted to the Circuit Court of _____ County and it shall be ratified, approved, and shall be incorporated, but not merged, into and made a part of a court order of that action. The parties each agree not to oppose such incorporation, and they agree that subsequently, said Agreement shall be enforceable as part of said order or independently as a contract between the parties.

In previous installments, I advised that the phrase "the parties agree that" should be eliminated from contract drafting because every paragraph in a contract represents an agreement between the parties. And, I hope, I have *said* enough already about the archaic and stuffy use of the word "said" as a synonym for "the."

But this provision has more problems. First, the word "it" is almost always subject to ambiguous interpretation and should be avoided in legal writing whenever possible. Instead, be specific with what "it" means, so your reader can figure out what the provision requires. Second, an increasing number of legal writers now eschew the word "shall"; this group includes the judges on the Supreme Court of Virginia, who in November 2020 amended the Rules of Court to eliminate the word "shall" from almost every rule. What *shall* I do instead? I *will* tell you. To state a mandatory provision, use "will" or "must." To state a permissive or optional provision, "may" is most appropriate.

Implementing these suggestions and a few other minor changes, the provision now reads as follows:

> This Agreement will be submitted to the Circuit Court of _____ County to be ratified, approved, and incorporated, but not merged, into and made a part of a court order. Neither party will oppose such incorporation, and subsequently, this Agreement will be enforceable as part of the order or independently as a contract between the parties.

Here is another standard boilerplate provision:

PRIOR AGREEMENTS INVALID

> In consideration of the covenants and agreements contained herein, the parties do hereby cancel, nullify, and invalidate any and all prior agreements as to the subject matter covered in said Agreement, and the parties acknowledge that this Agreement contains their entire understanding of the subject herein.

Admittedly, this provision is not particularly hard to understand. Nevertheless, the provision is chock full of redundancy and legalese. First, the introductory consideration clause is not necessary because each provision does not need to recite consideration. Consideration is present when both parties have rights and obligations under the Agreement. Second, is there a legally significant difference between the words "cancel," "nullify," and "invalidate"? Yes and no. Technically, in contract lingo, "cancel" means to cross out something with lines, and "nullify" means to make legally invalid, i.e., to invalidate. So, at a minimum, we can use "nullify" or "invalidate," not both terms. Third, if "any" prior agreements are invalidated by this Agreement, aren't "all" prior agreements invalidated by this Agreement? Strike out one of these two words because they have identical meanings. Finally, for utmost clarity and to cover all your bases (this will be the last baseball pun, I promise), be specific with "the subject herein," e.g., "of custody, timesharing, and other issues pertaining to the minor children."

Accordingly, stripped free of extraneous words, the provision now reads as follows:

> The parties cancel and nullify all prior agreements concerning the subject matter covered in this Agreement. This Agreement contains the parties' entire understanding of custody, timesharing, and other issues pertaining to the minor children.

And finally, here is another boilerplate favorite:

CAPTIONS

> The captions are inserted only for convenience of reference and in no way define, limit, or describe the scope or intent of this Agreement or of any particular paragraph or section thereof, nor the proper construction thereof.

Now, I have no problem with the language itself. In any interpretation issue, contracting parties want the court to read the text of the provisions and not simply rely on a caption (or paragraph heading) to discern meaning or determine each party's rights and responsibilities. Remember, however, that the contracting parties must understand the contracts they sign to be able to abide by their terms. The parties must also be able to easily find a particular provision in the contract. Accordingly, draft the captions to be reflective of the subject matter that follows. For example, if the provision talks about real property, then the caption should be "Real Property." Think of the captions as an index or table of contents that acts as a signpost of the terms that follow. For the same reason, do not talk about personal property or anything other than real property issues under the "Real Property" caption.

After five installments, we can end our discussion of contract boilerplate. We have slashed the outdated language and emerged as a clear and contemporary legal writer. Be willing to adapt what has worked well in the past because change is the foundation of human ingenuity. ■

Please send any comments or other adaptations of contract boilerplate that you find helpful to dspratt@wcl.american.edu. Who knows, maybe a future column can be based on reader submissions?

David H. Spratt is a professor of legal rhetoric at his alma mater, The American University, Washington College of Law, where he teaches legal writing, contracts, and family law litigation and practice and is acting director of the Legal Rhetoric Program. A VBA member since 1995, he is also a member of the Domestic Relations Section. In 2001, he co-founded Schwartz & Spratt, PLC, a family law firm in Fairfax, Virginia. Previously, he worked as an associate at the Law Office of Betty A. Thompson, Ltd., and at The Lewis Law Firm. Professor Spratt is vice chair of the Virginia State Bar Section on the Education of Lawyers and was formerly the civil reporter of decisions for the Court of Appeals of Virginia.

AGREEMENT

THIS AGREEMENT made and entered into said 5th day of June, 2020, by and between **JOHN JONES** (hereinafter referred to as "Jones"), and **MARY SMITH** (hereinafter referred to as "Smith"), hereinafter referred to together as “the parties.”

W I T N E S S E T H:

WHEREAS, the parties were lawfully married to each other on June 30, 1995, in Las Vegas, Nevada; and

WHEREAS, there was one (1) child born of the marriage, to-wit: John Jones, born January 1, 2010 (hereinafter referred to as “the minor child”); and

WHEREAS, as a result of unhappy and irreconcilable differences, the parties separated on or about the 15th day of June, 2018, and the parties have continued to live separate and apart without any cohabitation and without interruption from that date to present, and it is their intention to continue to live separate and apart permanently; and

WHEREAS, the parties desire to settle and determine all custody rights and obligations concerning said minor child.

NOW, THEREFORE, in consideration of the mutual promises and covenants herein set forth, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, each party by his or signature below do contract and agree to be bound by the terms herein:

KNOWLEDGE OF RESIDENCE

1. For so long as the parties’ child is less than eighteen (18) years of age and/or either Party still has obligations hereunder, each shall keep the other informed of his or her address of residence and business and home telephone numbers.

ENFORCEMENT

2. The parties agree that if one party incurs any reasonable expenses in the successful enforcement of any of the provisions of this Agreement, the other party will be responsible for and pay forthwith any and all reasonable expenses, including attorney's fees, thereby incurred; provided, however, that in the event compliance occurred on the eve of, or on the date of, a hearing scheduled to compel such compliance, then all fees and costs reasonably incurred by the party seeking compliance shall be borne and paid by the other party forthwith. Any such costs incurred by a party in the successful defense of any such enforcement action shall be reimbursed by the party seeking to enforce compliance.

TIME IS OF THE ESSENCE

3. Time is of the essence in the performance of all obligations set forth in this Agreement.

MODIFICATION OR WAIVER

4. It is understood that no modification of the terms of this Agreement shall be valid unless such modification is in writing and signed by both parties with the same formalities as said Agreement. No waiver of any default of said Agreement shall constitute a waiver of any other or subsequent default.

GOVERNING LAW

5. This Agreement shall be construed under and governed by the laws of the Commonwealth of Virginia existing at the time of the execution of said Agreement, irrespective of the fact that one or more of the parties now is, or may become, a resident of a different state.

INCORPORATION INTO COURT ORDER AND/OR DECREE

6. The parties agree that this Agreement shall be submitted to the Circuit Court of _____ County and it shall be ratified, approved and shall be incorporated, but not merged, into and made a part of a court order of that action. The parties each agree not to oppose such incorporation, and they agree that subsequently, said Agreement shall be enforceable as part of said order or independently as a contract between the parties

PRIOR AGREEMENTS INVALID

7. In consideration of the covenants and agreements contained herein, the parties do hereby cancel, nullify, and invalidate any and all prior agreements as to the subject matter covered in said Agreement, and the parties acknowledge that this Agreement contains their entire understanding of the subject herein.

CAPTIONS

8. The captions are inserted only for convenience of reference and in no way define, limit, or describe the scope or intent of this Agreement or of any particular paragraph or section thereof, nor the proper construction thereof.

Litigation and Transactional Practice Panel Discussion

John Bredehoft, Soha Mody, Program Faculty

Litigation and Transactional Practice Session

Practice Session

Transactional Practice – Contract Drafting

Contract:

a. Traditional legal definition of (i) offer, (ii) acceptance, and (iii) consideration or exchange of value.
b. At its core, contracting is about setting mutual goals and establishing a paradigm to keep the parties' expectations and interests aligned over the term of their relationship.

Objective: Create certainty through a clear and concise roadmap, allowing the parties to: (i) evidence that there is an agreement; (ii) identify the rights and obligations of each party, and the manner of performance; (iii) specify how breaches will be dealt with; and (iv) confirm the length of the contractual relationship – how and when it ends.

I. Pros and cons of using a Term Sheet prior to a final, written agreement
   a. Identify areas in which there are still gaps in the parties' understanding
   b. Expedite the negotiation of the written agreement
   c. Provide some certainty, especially if the written agreement will take some time to document or execute
   d. Binding versus non-binding

II. Pre-drafting considerations:
   a. Version control
   b. Metadata
   c. Ethical considerations – Client to client or client to lawyer interactions/negotiations
   d. The value of lawyer only discussions

III. Know your audience and their purpose in reaching an agreement on the subject
   a. Your client
   b. Who will be overseeing/administering the performance of the contract?
   c. Who are the other parties to the contract?
   d. Positives and negatives of using prior agreements between some/all of the parties as a template
      i. Is there an established relationship between the parties?
      ii. Is this a one-off transaction?

IV. Define the objective of your agreement before you start drafting
   a. Consider an internal pre-drafting meeting
   b. Who on your legal team or client team are the drivers of the agreement terms?
      i. Subject matter experts, both business and legal professionals
      ii. Decision makers and stakeholders

c. Are there any key safeguards or standards?
    i. Will third parties be involved in any aspect of the contract performance?
    ii. Is information being exchanged as part of the contract, especially nonpublic or confidential information?
    iii. Are audit or access rights needed or wanted?
        1. Regulatory compliance
        2. Reporting obligations – By whom and how will reporting be done?
            a. By the parties
            b. Between the parties
            c. To third parties
            d. How often?
            e. Form of report needed as an exhibit or appendix to the agreement?

V. Drafting Considerations
a. Role of Recitals – Whereas clauses
    i. What background should be provided?
    ii. The level of detail
    iii. Create a record of the transaction for later review/reference
    iv. If there are multiple agreements that make up a transaction, should uniform recitals be used across all agreements?
b. What are the core terms of the agreement?
    i. Scarcity or uniqueness of the contracted for services or products
    ii. Are there readily available substitutes from other vendors?
    iii. If not, in the event of a breach, what back up plans are in place or may need to be implemented?
c. Payment terms – manner/method, timing of payments
    i. Late fees
    ii. Who will be responsible for related taxes?
d. What representations or warranties are key to the contract?
e. Non-disclosure and confidentiality provisions
f. Non-competition clauses
g. Limitations of liability and other disclaimers
h. Term, Termination rights (including length of any required notice), extensions, amendments
i. Insurance
    i. Insurer (including any ratings requirements)
    ii. Proof of coverage
    iii. Additional insured requirements
j. Indemnification
k. Force Majeure clauses
l. Choice of law provisions
m. Venue for adjudicating disputes

n. Waiver of jury trial provision, if applicable
o. Alternative dispute resolution options
p. Liquidated Damages provisions
q. Confessions of Judgment
r. DocuSign and other electronic commerce and signature provisions

VI. The mechanics of contracting
  a. Defined terms
    i. Consistency of use
    ii. Ease of reference
    iii. Consider use of a definitions section or a glossary to consolidate all defined terms
  b. Boilerplate provisions
    i. Integration or merger clause
    ii. Time is of the essence
  c. Exhibits, schedules, appendixes
  d. Notice requirements – for changes, breaches
    i. Consider use of an exhibit containing notice addresses and contact information, which can more easily be amended
  e. Use of headings that help create a logical progression to the contract
  f. Use of numbered paragraphs and subparagraphs to break up thoughts for greater clarify, ease of reference and amendment
  g. Use of plain English, rather than legalese = Proactively reduce risk of misunderstandings and disputes by using easily understood language and terms
    i. Use of plain language does not eschew complexity of subject matter or detail
    ii. Lack of clarity is generally construed against the drafter of the contract
  h. Review the final written agreement in hard copy, and ensure that your clients do the same = Easier to proofread and discuss
  i. Execution of the contract
    i. Authorized signatories
      1. Value of an executive summary
    ii. Who maintains the official copy of the contract (versus a convenience copy)
    iii. Tracking performance metrics, renewals and extensions

Oral and Written Advocacy Roundtable

Program Faculty

LEGAL WRITING FOR LITIGATORS

Virginia CLE/Virginia State Bar Section on Education of Lawyers
April 26, 2024 // Washington, DC

John M. Bredehoft
Kaufman & Canoles, P.C.
Former Chair, Board of Governors,
VSB Section on Education of Lawyers

Trends both in law firm management technology and federal and state court practice have made legal writing more important than ever for civil litigators.

- Both federal and state courts, particularly outside of Northern Virginia, are holding fewer live motions hearings in civil matters, and civil jury trials largely have gone the way of the mastodon.

- Nationwide, fewer than one percent of all civil cases filed actually go to trial.[1] In Calendar Year 2023, 0.7% of all civil cases went to trial, and that includes civil cases filed by the United States.

- In the federal courts for the Eastern and Western Districts of Virginia, a total of 3,511 (Eastern) and 1,263 (Western) civil cases were filed; 3,292 (Eastern) and 1,162 (Western) were terminated. Twenty three got to trial in the Eastern District, and eleven in the Western District, including civil cases filed by the United States. This represents about three-quarters of one percent of all cases terminated, in line with the national average (and this

[1] Table C-4—U.S. District Courts–Civil Statistical Tables For The Federal Judiciary (December 31, 2023) https://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2023/12/31 (last visited April 17, 2024). See https://www.uscourts.gov/sites/default/files/data_tables/jff_4.10_0930.2022.pdf, last visited 4/12/2023; in 2022, approximately 308,000 civil cases were terminated in the federal district courts. Of these, fewer than 1500 were terminated during or by a jury trial, approximately 0.7%. This includes civil cases in which the plaintiff was the United states..

includes cases ending without completing the trial, by settlement or on motion).

- In 2019, the last full year before the pandemic skewed the figures downward, 2,239 civil cases were filed, 439 lasted to pretrial, and only 30 were disposed of "during trial."[2]

- In calendar 2023, 4th circuit terminated 2355 appeals on the briefs, on the merits, and only 335 after oral argument.[3]

- One sign suggestive of how many federal appellate cases are decided without oral argument is the fact that in 2022, some 28,500 appeals were disposed of. Of these over 86% were unpublished dispositions, and only 3500 decisions were both published and signed by a judge.[4]

- Only approximately 47 of the first-quarter 2023 Virginia Court of Appeals decisions in 2023 were published, while 124 were unpublished. While unpublished does not always mean no oral argument, an unpublished decision is more likely to bear the following on its first page:

> After examining the brief and record in this case, the panel unanimously agrees that because "the appeal is wholly without merit," oral argument is unnecessary. Therefore, we dispense with oral argument in accordance with Code § 17.1-403(ii)(a) and Rule 5A:27(a).

[2] U.S. District Courts – Median Time Intervals . . . by District and Method of Disposition, During the 12-Month Period Ending December 31, 2018, https://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-december-2018 (last visited 4/10/2019). These numbers exclude land condemnation, prisoner petition, deportation reviews, recovery of overpayments, and enforcement of judgments.

[3] Table B-1—U.S. Courts of Appeals Statistical Tables For The Federal Judiciary (December 31, 2023) https://www.uscourts.gov/statistics/table/b-1/statistical-tables-federal-judiciary/2023/12/31 (last visited April 12, 2024).

[4] https://www.uscourts.gov/sites/default/files/data_tables/jff_2.5_0930.2022.pdf (last visited 4/12/2023).

- At the same time, the ubiquity of computer-assisted research tools at a wide variety of price points, and even free access to many reported and unreported appellate decisions, has made judges less forgiving of litigators whose written product is less than comprehensive, regardless of the resources of the lawyer's firm.

Written briefs and legal memoranda regarding motions have long been the source of the court's first impression as to the merits of an argument. Today, and increasingly, those written submissions may be the court's only impression of the argument, the litigator, and the parties.

Even for those litigators who are well-known to and well-respected by the court, the litigator's written product may be the first or only impression of the judge's law clerk, who will brief the case and may have significant input in drafting the final opinion. It has never been advisable to submit a bare-bones brief and hope to win a motion at the oral argument. Today, it may be fatal to a case to litigate in that manner.

One of the seminal experiences I had as a very young litigator was when I received a decision from a federal court (in which I had been admitted *pro hac vice*). The court's opinion tracked, almost word-for-word (and notice I could have said, but did not say, *in hac verba*) the brief I wrote. This remains my goal in writing as a litigator: remain an advocate, because our system depends on adversary actions. But try to write a brief that the court can adapt with minimal changes as the opinion of the court. Be even-handed. Do not over-claim the effect of case law, and cite and distinguish persuasive adverse authority even if it is not controlling. Be fair, be polite, and be even-handed. It works.

Accordingly, this paper provides a few suggestions and hints for effective legal writing in litigation.

I. BREVITY IS THE SOUL OF WIT[5]

Every word in a brief, or a complaint, should be there for a reason.

Our first principle is not intended to remind you to quote William Shakespeare in your brief, although if you can do it appropriately and well, please feel free. *See, e.g., U.S. v. Holbrook,* 368 F.3d 413, 429 n.4 (4th Cir. 2004) (en banc) (King, J. dissenting), *vacated on grounds other than literary allusions,* 545 U.S. 1125 (2005) ("The majority's construction of the Agreement, which ignores the Government's obligation to Holbrook under the Trial Remedy, recalls Shakespeare's cynical observation that "[o]ft expectation fails, and most oft there / where most it promises." William Shakespeare, All's Well that Ends Well, Act II, Sc. 1."); *In re: A.H. Robbins Co.,* 86 F.3d 364, 367 (4th Cir. 1996) ("Four hundred years ago William Shakespeare observed that lawyers 'dream on fees.' During the ensuing centuries, few lawyers, even in their wildest dreams, have envisioned fees such as those that have resulted from mass tort litigation.") (footnote omitted).

Rather, our first principle is a reminder that, in crafting a written litigation product, less often is more. As the Court of Appeals reminds us, "The Fourth Circuit encourages short, concise briefs." Local Rule 32(b) of the Rules of the U.S. Court of Appeals for the Fourth Circuit.

Federal judges themselves are enjoined to be brief. "Be succinct and direct. Brevity promotes clarity. Writing that makes its point briefly is more likely to be understood than writing that is lengthy. Writing succinctly also forces the writer to think clearly and focus on what he or she is trying to say." *Judicial Writing Manual: A Pocket Guide for Judges* (2d Ed. 2013), Federal Judicial Center, at 23.

[5] W. Shakespeare, *Hamlet*, Act 2, scene 2. Polonius uses eight lines to tell Hamlet's stepfather that his "noble son is mad," protesting that to "expostulate . . . [w]hat day is day, night night, and time is time, Were nothing but to waste night, day, and time." While the sentiment is sound, the method is not, which led Freud to call Polonius "the old chatterbox." S. Freud, *Jokes and their Relation to the Unconscious* at 4 (1905). *See also* B. Pascal, *The Provincial Letters* at Letter 16 (1657) ("I have only made this letter longer because I have not had the time to make it shorter.")

Some folks, however, do not seem to get the message. Consider the case of *Thousand Oaks Barrel Co. v. Deep South Barrels LLC,* 241 F. Supp. 3d 708 (E.D. Va. 2017):

> Plaintiff's initial complaint in this case, filed in August 2016, consisted of 294 pages, 1134 numbered paragraphs, and hundreds of pages of exhibits.
>
> Because that complaint was inappropriately prolix, it was dismissed *sua sponte* without prejudice for failure to comply with Rule 8, Fed. R. Civ. P. *See Thousand Oaks Barrel Co., LLC v. Deep South Barrels LLC*, No. 1:16–cv–1035 (E.D. Va. Aug. 30, 2016) (Order). Plaintiff was given leave to file an amended complaint, which it did. Plaintiff's amended complaint is 107 pages, which is still too long. . . .

Although some judges will make the effort to wade through an overly-long brief or complaint, it will not endear counsel to the Court. *See, e.g, Gordon v. Richmond Public Schools,* No. 3:13cv113, 2013 WL 3957807 (E.D. Va. July 30, 2013) (Hudson, J.):

> In no fewer than 233 paragraphs, the factual allegations are essentially a scattershot of various complaints about Gordon's employment. Many of Gordon's allegations are repeated several times in his First Amended Complaint and presented in an illogical order. In this way, his pleading is generally difficult to follow, despite having been drafted by counsel. While not necessarily a basis for dismissal, such pleading is generally inconsistent with Rule 8(a)(2)'s admonition that pleadings provide "a short and plain statement." *See, e.g., Bennett v. Schmidt,* 153 F.3d 516, 518 (7th Cir.1998) (Easterbrook, J.) ("Prolixity is the bane of the legal profession but a poor ground for rejecting potentially meritorious claims."). Thus, "[f]at can be ignored, confusion or ambiguity dealt with by means other than dismissal." *Id.* To that end, the Court has done its best to distill the relevant facts from Gordon's allegations, despite the awkward manner in which the facts are set forth.

When I started out in legal practice – a time, unfortunately, prior to the advent of page limits on briefs, fiddling with the margins to cram in more words, and even prior to the advent of WORD – I believed that each judge was a black box. All I needed to do was to input the correct legal phrases, arguments, and case citations; the judge would then, perhaps magically, undertake a detailed analysis of all I said, all my benighted opponent said, and all of the cases cited by either side (and all of the cases cited by all of the cases cited by either side). The judge would then come to a result, either favoring my client or mistaken.

But judges are not black boxes. Judges generally are human, and certainly are greatly overburdened. (It is one of the often-neglected facts of the judicial system that judges work far harder than lawyers; no judge ever has "nothing to do today but to look at the briefs in the X case.") One important goal of litigation writing is to make the life of the judge (or the clerk) easier, not more difficult. This means rigorous selection of arguments, as well as deletion of extraneous matter.

Do not make arguments you are certain to lose, unless you are doing so for a strategic reason to draw your opponent's fire.

Do not use string cites unless they make sense in context. Do you really need to cite five cases for the standard for deciding a demurrer, or the standard for summary judgment in federal court? Take one recent, controlling, decision and cite it – if you need to cite anything at all. The judge knows the standard to apply, and your citation of a dozen cases from four federal circuits on how to review a motion for summary judgment will be counterproductive. A few years back I was involved in a series of cases involving the same legal issue, scores of which had been filed around the country, but none of which had been decided by a federal appellate court. At oral argument before the Fourth Circuit Court of Appeals, the panel was interested solely in actions taken by other federal appellate courts; there were none, and my distinguished opponent did not advance his cause by insisting that the Eastern District of Michigan agreed with him in an unpublished decision. I received a motion by that same opponent in another federal appellate case on the same issue, asking for leave to submit a supplemental brief to discuss the score or so of district court cases elsewhere in the country that have ruled his way – in the face of a published Fourth Circuit on point and adverse. I would be surprised in any case if an appellate court would be interested in a brief discussing what is the minority view, and solely in inferior courts.

Do not be afraid to plagiarize court decisions (or even other folks' briefs) if they say exactly what you want to say in a concise manner. If the Court of Appeals recently has issued a decision (even an unpublished one, valuable only for persuasive effect) citing the cases you want to cite and reaching the conclusion you want to cite, by all means use a block quote rather than re-writing the entire analysis in your own words. Outside of a very few constitutional and common-law contexts, litigators do not get extra points for "original expression." Heck, the fact that the Court of Appeals said the same thing you want to say might even impress someone – perhaps the trial court.

Brevity in a reply brief is even more important. Do not insert a new argument into the mix—the judge will figure out a response to it if the other side cannot. Do not reiterate your opening brief, or re-cite the same cases. Rather, summarize and synthesize: speak about the unarticulated disasters waiting if the court adopts your opponent's unthinking response to your arguments.

Every word in a brief, or a complaint, should be there for a reason.

II. ESCHEW OBFUSCATION

Your selection of every word in a brief, as opposed to a synonym, is made for a reason.

Erudition for the sake of erudition makes no sense. Yes, it may impress the client, although it is more likely to confuse her. And it will not impress the court: the judge will either know what you are saying and be mad you did not say it plainly, or the judge will not know what you are saying, which would be even worse.

Former Chief Judge Richard Posner of the Court of Appeals for the Seventh Circuit was famous for using plain language in legal decisions. In one of my favorite opinions, he said, "it is not that labels control – they don't – but rather. . . ." It struck me that almost all lawyers, and many courts, would have cited a dozen or two cases for the proposition that "labels do not control." Decades if not centuries of legal evolution, from pleading trespass on the case through the Field Code, the Rules Enabling Act, and modern interpretations of Fed. R. Civ. P. 8, are encompassed in those two words: "they don't."

Another example, again from the Seventh Circuit, is found in *Seventh Avenue, Inc., v. Shaf. Int'l, Inc.*, 909 F.3d 878 (7th Cir. 2018). At issue was a determination as to which lawyer, lead counsel or local counsel, dropped the ball in failing to respond to or attend a hearing where their client was held in contempt. The firms argued long and hard why the response deadline should not have been enforced strictly: a lawyer was on vacation; a secretary was out of the office; the lawyer had too many e-mails to notice when he returned; an aardvark ate the notice, *et cetera.* The federal Court of Appeals addressed the finger-pointing and excuse-ridden exercise in two words:

"Deadlines matter."

Can anyone be left to doubt what principles matter to that court in deciding that case?

Former Chief Judge Posner also was a master of the appropriate use of the sentence fragment to clarify meaning. The U.S. Supreme Court boasts an adherent of the same practice. Justice Gorsuch is the author of a couple of examples:

- *Washington State Dept. of Licensing v. Cougar Den, Inc.,* No. 16-1498 (U.S. 3/19/2019): "Meanwhile, the Tribe submits that the treaty guarantees tribal members the right to move their goods to and from market freely. So that tribal members may bring goods, including gasoline, from an out-of-state market to sell on the reservation without incurring taxes along the way."

- *Air and Liquid Systems Corp. v. DeVries*, No. 17-1104 (U.S. 3/19/2019) (dissent): "Decades ago, many of the defendants before us sold "bare metal" products to the Navy. Things like the turbines used to propel its ships."

While this may not be perfectly in accord with formal rules of grammar, both examples are perfectly clear. We will see more of this in the future.

Unclear, overly-technical writing also may afford the Court an opportunity to take you to task, or even gently chide (i.e., mock) you, which is never good for client relations. Take an example from Judge Kent down in Texas:

> Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact complete with hats, handshakes and cryptic words to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins.

Bradshaw v. Unity Marine Corp., Inc., 147 F. Supp. 2d 668, 670 (S.D. Tex. 2001). Yes, it is nice the Court called you "extremely likable." But the rest of this paragraph will make your clients wonder exactly what they have been paying you for.

One particular practice bears additional mention. Legal jargon usually obfuscates, not clarifies. There is no need for a summary judgment brief to refer to the grant of summary judgment "pursuant to the within motion in the heretofore mentioned civil action." There is, really, seldom even need to refer to a motion for relief "in this case." In what other case would your motion filed in this case seek relief?

A few years back, Chief Justice Beth Walker of the West Virginia Court of Appeals "tweeted" a list of words she has banned from opinions she authors. The forbidden terms include such old chestnuts as aforementioned, aforesaid, arguendo, herein, hereinafter, hereunder, instant case, instanter, notwithstanding, per, said (i.e., said royalty), same (i.e., returned same), subsequent to, such (i.e., such

royalty), thereafter, thereat, therein, thereunder, to wit, vel non, and wherefore.[6] In other words:

- Of course the "aforementioned plaintiff in the instant action" is the person we are talking about. Just say "plaintiff" or, still better, "Mr. Jones." The Court will get it.

- Of course "said statement made by the aforementioned plaintiff" is what the guy said. Just say, "plaintiff's statement."

- Is there ever a time when "subsequent to" does not just mean "after"?

Now, one may quibble around the edges with some of the words selected by Chief Judge Walker. In my own field of employment law, for example, the phrase, "discrimination *vel non*" is a critical part of our litigation vocabulary, inflicted upon us by the United States Supreme Court. But the underlying principle is clear.

Even lawyers seem to detest this kind of writing. "In a study published in Proceedings of the National Academy of Sciences, [researchers] from the Massachusetts Institute of Technology and the University of Edinburgh tried to find out. Contracts written in 'legalese,' as well as simplified versions conveying identical concepts, were shown to American lawyers and laypeople. It turns out that lawyers struggle with, and dislike, legal language almost as much as their clients."[7]

Writing documents evidencing the transfer of land which was first stolen from the indigenous peoples and granted to a pirate by King Charles II may require some antiquated legal terminology; writing a motion for summary judgment does not.

Your selection of every word in a brief, as opposed to a synonym, is made for a reason.

[6] Chief Justice Beth Walker @bethwlkr, February 22, 2019.

[7] *The Economist,* May 31, 2023 "Why Legal Writing Is So Awful."

III. PERSONALIZE AND CONTROL THE FLOW OF READING

Control the reader's pace and attention. Not only every word, but every blank space, and every "huh moment" in a brief, must be there for a reason.

I sometimes refer to this principle as "Sockdologizing" There are times in a brief or other litigation-related document when I want the judge to Stop. And. Think. All of us, and particularly the overburdened judiciary and their clerks, tend to read at a relatively rapid pace. And that is a good thing. But on occasion, it often helps to grab the court figuratively by the collar and yell, "Hey, read this sentence/paragraph again." Personalized words are a good way to do this. My favorite, although I do not use it (because that would be plagiarism, see below) is the word, "Sockdologer." Those of you who are Civil War buffs may recall the last words Abraham Lincoln heard: "You sockdolgizing old mantrap!" This was intended to be one of the key laugh lines in the play, "Our American Cousin," being performed at Ford's Theatre, and the laughter – as intended – drowned out the sound of John Wilkes Booth's small pistol shot.

Sockdologer actually refers to something decisive, the key argument or fact. (One of the supposedly-funny things about its use in the play was that the unsophisticated character saying it was, in fact, misusing it.) Judge Bruce Selya of the United States Court of Appeals for the First Circuit has adopted the "sockdolager" and made it his own, through frequent usage. *See, e.g., Gould v. Morgan,* 907 F.3d 659 (1st Cir. 2018); *In re: PCH, Inc. Shareholder Litigation,* 894 F.3d 419 (1st Cir., 2018); *United States v. Almonte-Baez,* 857 F.3d 27 (1st Cir. 2017). Every time a reader is informed that "the sockdologer is. . . ." the reader stops. And. Thinks.

I had the great good fortune, back when Judge Selya was sitting in the District of Rhode Island, to litigate a case in front of him. His rulings were straightforward: I remember plaintiff's attempt to file another amended complaint being denied as "simply another exercise in abject futility." But the wonderful thing was that each of his opinions over the course of several years contained at least one word I had never seen. I learned the meaning, for example, of "anent." No one could read these opinions and possibly miss the important parts. *See also, Green v. Military Sales and Service Corp*., No. 14-1178 (1st Cir. Dec. 19, 2014) ("the remainder of Green's asservational array is more prosaic. Upon careful persecution, we discern no reversible error. . . .").

One of Judge Selya's former law clerks wrote in the *National Law Journal*, "to assist me in performing my duties in Selya's Chambers, I purchased a word-a day-calendar. My co-clerks and I then tried to see who could successfully plant a word of the day in a published Selya opinion. 'Crapulous,' meaning stinking drunk, was a calendar word that fit perfectly into a dram shop case. . . ." (https://www.law.com/nationallawjournal/almID/1201169140964/, last visited 4/12/2023).

Senior Judge T.S. Ellis, III, of the Alexandria Division of the U.S. District Court for the Eastern District of Virginia has, similarly, made the word "pellucid" his own. *See, e.g., Bloch v. Executive Office of the President,* 167 F. Supp. 3d 841 (E.D. Va. 2016); *Arkansas Chronicle v. Easley,* 321 F. Supp. 2d 776 (E.D. Va. 2004); *Eaton v. National Broadcasting Co.,* 972 F. Supp. 1019 (E.D. Va. 1997). Every time the word is used in a written opinion, it invites the reader to pay special attention.

This is not to suggest that good litigators should find obscure words and use them in every brief; that would hardly be consistent with avoiding obfuscatory tactics! Rather, I suggest that good litigation writers choose the words in a brief to control the ebb and flow of the reader's attention. Some sentences may be glossed over without adverse consequence, while others should be read twice. Exercise word choice to encourage this.

The order in which you address arguments also can be used to signal to the court the relative importance of each principle. There is no need for you to follow the order of your opponent's brief. If, for example, your client's standing to bring suit is seriously in doubt, address that first. That will create a better reading experience for the judge than beginning the brief detailing all of the abuse your client has suffered at the hands of the defendant – a worthy magnum opus that the judge will gloss over while thinking about whether you have standing.

It also is possible to exercise control over the reader's pace and attention by using non-standard punctuation – like dashes – and other techniques. Sentence

fragments, as discussed above. And starting a sentence with a conjunction or even, horrors, a preposition.[8]

In fact, one of the best ways to personalize a brief and indicate the relative importance of various arguments, sentences, and phrases is in the use of white space. No brief is finished until you have checked the bottom margins, exercised control of where the eye is supposed to go. Unless you are bumping up against page limitations – you shouldn't – you can personalize your brief and tell the judge or law clerk what really matters. Without saying, "This really matters." (Because, after all, what does that say about the rest of the brief?)

Finally, do not forget to summarize and conclude your argument, particularly if it is complex or lengthy. In many briefs, the "Conclusion" section may be the most important one: it is your chance to tell the Court exactly what you want done, and remind the Court why. All too often, we leave writing a conclusion to the seven minutes we have left before the brief must be electronically-filed. Bad idea. A conclusion that says, "The motion should be granted," adds nothing; of course that is your position. Better to say, "The statutory claim should be dismissed with prejudice, because the plaintiff failed to comply with a statutory prerequisite for suit." Not long: just remind the court.

And summaries can also be included in the body of the brief, if appropriate. In *Vega v. Tekoh*, for instance, Justice Samuel Alito "boils down" his own points about why Miranda rules are merely prophylactic:

[8] To Winston Churchill famously is attributed the statement, "Ending a sentence with a preposition is something up with which I shall not put." Most of the earlier sources attributing this to Churchill use a somewhat different formulation. *See, e.g., Chicago Tribune*, "Tedious Report Draws Rebuke From Churchill," Feb. 28, 1944 at 1; *New York Times*, "Much Too Long a Minute," Feb. 28, 1944 at 9. The statement, or a variation on it, actually appears first attributed to an un-named staff editor at "The Strand," a British magazine to which Churchill was a contributor; the earlier story does not mention Churchill. *Wall Street Journal*, "Pepper and Salt," Sept. 30, 1942. Nevertheless, Churchill <u>should</u> have said it, and no one who knows the quote will violate the rule of grammar.

> What all this boils down to is basically as follows. The *Miranda* rules are prophylactic rules that the Court found to be necessary to protect the Fifth Amendment right against compelled self-incrimination. In that sense, *Miranda* was a "constitutional decision" and it adopted a "constitutional rule" because the decision was based on the Court's judgment about what is required to safeguard that constitutional right.

597 U.S. __, __, Slip Op. at 12 (2002).

Control the reader's pace and attention. Not only every word, but every blank space, and every "huh moment" in a brief, must be there for a reason.

IV. COMPUTERS ARE EVIL

You are responsible for the brief. Not Bill Gates.

"The past is a foreign country. They do things differently there."[9] When I began practicing law, I drafted things in longhand. A draft was typed by an experienced professional secretary, a wonder of the age renowned for knowledge of grammar, spelling, word usage, and substantive law. I then reviewed and revised the typed draft. The secretary reviewed and revised my revisions. Sometimes a senior partner (or, more importantly, a senior partner's secretary) reviewed that. And after four or six pairs of eyes on the document over a period of days, the document was finalized, printed on cotton bond paper, and sent to the recipient, be it court or client.

Now, I dictate e-mail responses while lying in bed at 5:10 a.m. and send them out before making, much less drinking, coffee. O tempora o mores.[10]

[9] L.P. Hartley, *The Go-Between* (1953) at 1.

[10] Marcus Tullius Cicero, *First Oration Against Catiline* (November 8, 63 B.C.E.).

Spell-check is a frightening thing upon which to rely. It will not catch your cephalopodic error of alleging *squid pro quo* sexual harassment. If you are representing the Defendant and you write that you are the Plaintiff, nothing in your lap top will alert you to the error.

It is good litigation practice to draft, then print, then read the hard copy of the brief. Take a break and read it again. Get someone uninvolved in the case to read it. Errors appear in hard copy that we simply gloss over when reading a computer screen.

One of the stories I use to help me remember to read carefully is drawn from the case of *Whittaker v. Associated Credit Services, Inc.,* 946 F.2d 1222 (6th Cir. 1991). The plaintiff sued several defendants for a federal statutory violation; statutory damages were $500 per violation. One of the defendants, TransUnion, decided to offer judgment for $500 under Fed. R. Civ. P. 68. This was a great strategy, but its implementation left something to be desired. Due to a "computer error" – that is, a typo that no one caught – TransUnion served an offer of judgment in the amount of $500,000.00. Unsurprisingly, the plaintiff promptly accepted and filed the judgment for a half-million dollars. Was the error eventually undone? Yes, after great embarrassment to counsel, numerous hearings in the district court, and a federal appeal – each costing, no doubt, many times the $500 that the case may have been worth.

You are responsible for the brief. Not Bill Gates.

V. BE NICE

Make the Court want to rule in your favor.

The entire point of litigation is to win. There may be some exceptions to this rule, but they are few and far between. And while it is true that a grudging and reluctant victory from the court is better for your client than a laudatory and enthusiastic loss, your choice of arguments, words, and tactics should be designed to make the court want to rule in your favor.

I believe the best way to address the court, in writing as well as orally, is to treat the judges as intellectual peers who do not happen to have a client involved in the case. We can then all reason together, given the facts and the law, to decide the outcome of the matter. Just as an oral argument is not the opportunity for you to prepare an oration to present to the court as audience, so your written product is not intended to deflect the court or your opponent from the governing law, facts, and issues. We are all lawyers, we are all officers of the court, and although we have different perspectives we should be able to figure this out – without sarcasm, without invective, without having our client figuratively throw her pencil to the table.

Two reminders come to us from the Virginia Supreme Court. In *Taboda v. Daly Seven, Inc.,* 272 Va. 211 (2006), a well-respected attorney apparently transcended his polite and civil personality in filing an abusive petition for re-hearing with the Court. Granted, the legal issue was a difficult and ill-defined one under pre-existing Virginia common law, and the Court frankly could have ruled either way. But it is hard to see how that would justify a petition for reconsideration containing the following:

- The Court's decision was "irrational and discriminatory" and "irrational at its core."

- "George Orwell's fertile imagination could not supply a clearer distortion of the plain meaning of language to reach such an absurd result."

- The Court's opinion "demonstrates so graphically the absence of logic and common sense."

- His client was the victim of the Court's "dark and ill-conceived jurisprudence."

Amazingly, the Court did not find these reasons sufficiently compelling to re-hear the case. Rather, the Court *sua sponte* sanctioned the attorney under Va. Code 8.01-271.1. The Court struck the petition for re-hearing without prejudice, imposed a monetary fine on the attorney personally, and barred him from appearing before the Court for a year. And no, the subsequent petition for re-hearing was not granted either.

In *Williams and Connolly LLP v. People for the Ethical Treatment of Animals, Inc.,* 273 Va. 498 (2007), the Court upheld sanctions imposed by Fairfax County Circuit Judge David Stitt against a number of attorneys and their law firm. The conduct is complex, and likely arose out of non-Virginia attorneys' unfamiliarity with local practice. However, it is never a good idea to say the judge "ignor[ed] the basic tenets of contempt law," "ignored the law in order to give an advantage to [one side]," demonstrated "actual bias," violated his ethical duties, and the like. Particularly when there was no basis at all for such allegations, other than D.C. counsel's apparent ignorance of how unrecorded bench conferences and orders to show cause are managed.

Make the Court want to rule in your favor.

And finally, remember that good legal writing is ***good writing***. Review and revise. Think. Outline. Read the draft another day. Susannah Barton Tobin, director for the past 14 years of Harvard Law School's First-Year Legal Research and Writing Program, wrote in *Harvard Law Today* (Sept. 22, 2023, "Legal Writing in Focus"):

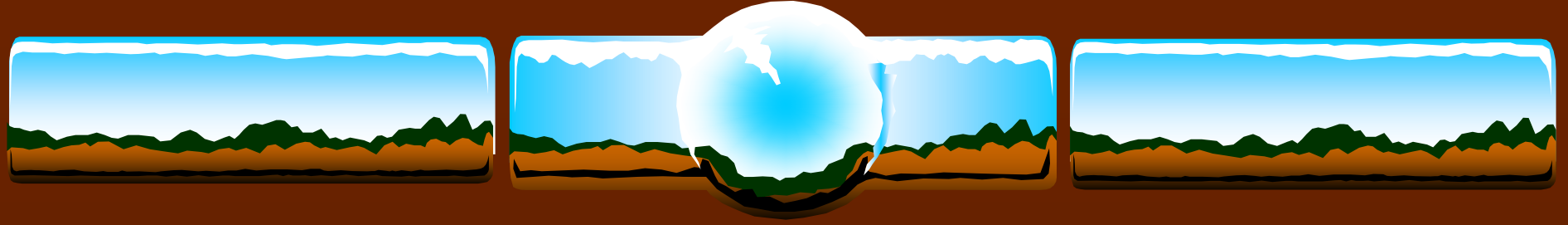
> I agree with the hypothesis that there's path dependency bound up in legal writing, and particularly in the United States, where our common law tradition makes us want to stick with what has worked. But ***a simpler reason why some legal writing is bad is the same reason why some non-legal writing is bad: Writing well takes a lot of time and patience,*** particularly when you're trying to explain complicated ideas, which lawyers almost always are trying to do.

(Emphasis added.) Just so.

John M. Bredehoft
Kaufman & Canoles
April 2024 ©

Persuasive Writing Exercise (Jack and the Beanstalk)

David Spratt, Heather Ridenour



Jack and the Beanstalk

Persuasive Fact Characterization

"Make the facts tell a story. The facts give the fix; spend some time amassing them in a compelling way for your side but do not omit the ones that go the other way. Tackle these uncooperative facts and put them into perspective."

-- The Honorable Patricia M. Wald,
D.C. Circuit Court of Appeals

Developing a Case Theory

- A good story, or theory of the case, appeals to both the head and the heart.
- My client should win because _____.
- This case is about _____.
- Two more ways to develop a case theory:
  1. Look at what happened through your client's eyes; is there law that supports your client's view of what happened?
  2. Look at cases involving the same issue in which the court reached the same result you want the court to reach – what was the winning's party theory of the case?

We identify with heroes & their flaws.

- Overcome obstacles & achieve goals
- Gain knowledge & wisdom
- Character who changes the most

Your client is on a heroic life path

outlaw

warrior

creator/ruler

sage

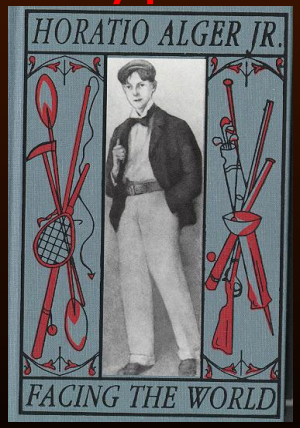
caregiver

explorer/innocent

jester

orphan

everyperson



Emphasize Favorable Facts

- Word Choice:
  - State the facts in more detail.
  - Use active voice and interesting vocabulary.
  - Avoid adjectives and slanted language that may distort the facts.
- Organization:
  - Place facts close together to show a causal connection.
  - Place facts in positions of emphasis: beginning & end of paragraphs; end of sentences.

De-emphasize Unfavorable Facts

- Word Choice:
  - State facts summarily (less detail, but not omitted).
  - Use bland, inactive vocabulary.
  - Instead of omitting facts, characterize them from your client's point of view.
- Organization:
  - Separate facts to avoid causal connection.
  - Hide facts in the middle of sentences & paragraphs; put facts in dependent, subordinate clauses.

Point of View

On the evening of May 17, 2001, William Strong was standing on the corner of Lincoln and Chicago in Tacoma talking to a friend when Officer Hanson approached him and began questioning him. Standing only a foot or two from Mr. Strong, Officer Hanson asked Mr. Strong to identify himself and to explain what he was doing in the area. Mr. Strong willingly answered Officer Hanson's questions.

At about 10:40 p.m. on May 17, 2001, Officer Hanson was called to the corner of Lincoln and Chicago to investigate a report of drug activity. After completing his investigation, Officer Hanson noticed the defendant, an individual he did not recognize, standing in the corner. Because he makes a point to meet the people in his patrol area, Officer Hanson initiated a social contact.

Airtime

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Detail

After questioning Mr. Strong, Officer Hanson returned to his patrol car, got into the car, and drove about a block and a half down the hill. He then ran a criminal history check, **which showed that Mr. Strong had prior arrests but there were no outstanding warrants.**

Officer Hanson then got into his car and began to leave the area. **After driving about one and a half blocks, Officer Hanson stopped and ran a criminal history check on the defendant. The check showed that the defendant had a long criminal history, including numerous arrests for drug-related crimes.**

Sentence Length

- **As the patrol car came toward him,** Mr. Strong walked quickly off the road. He then walked two or three steps toward an apartment complex, *dropped what appeared to Officer Hanson to be a package behind a tree*, and then turned and walked two or three steps back toward Officer Hanson. **Mr. Strong then stopped.**

Sentence Construction

- **Officer Hanson immediately turned his car around and began driving toward Mr. Strong.** *As Mr. Strong began moving toward the side of the street*, **Officer Hanson accelerated, turned on his spotlight, and focused the spotlight on Mr. Strong.**

- Because it was difficult to see, Officer Hanson turned on his spotlight, illuminating the general area. The defendant ignored the spotlight and continued walking.

Active and Passive Voice

- Officer Hanson approached Mr. Strong and began questioning him.

- Strong was approached by Officer Hanson.

Persuasive Fact Checklist

- Have you included all key facts, background facts, and contextual facts?
- Have you chosen an organizational method that tells the story persuasively?
- Have you started with a punch?
- Have you advanced your case theory throughout?
- Have you emphasized favorable facts?
- Have you de-emphasized unfavorable facts?
- Have you humanized your client?

Closing Remarks: Promoting a Culture of Legal Writing Excellence in Virginia

Hon. Mary Grace O'Brien, Hon. David W. Lannetti, Hon. Linda Bryant

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Improving Your Writing

Judge David W. Lannetti

General

- Be concise and deliberate. Do not feel that compelled to approach the applicable page limit. Usually, more words are not better, but rather just more.
- Clarity is key. Avoid using "big" words when simple words will do, but be precise. Legalese is often unnecessary and usually undesirable unless the use of terms with inherent legal significance is essential to make your point.
- Be organized. Be direct and clear when you present your arguments. Keep separate arguments separate, lest the court inadvertently conflate your points.
- Edit, edit, edit. Take the time to review and edit the final brief to make it more readable for the judge. Trim the content so that all that remains is the meat of the argument. For example, the background section should include only those facts necessary to frame the position, and the number of legal arguments normally should be limited. Excessive information can be confusing, and it may distract the reader from your point.
- Avoid common mistakes. In addition to editing for readability and flow, look for common mistakes such as those articulated herein. Credibility can easily be lost with a few typos and sloppy citations.
- Proofread your brief before submitting it to the court. Consider asking a colleague to read it and provide comments. Having someone who is completely unfamiliar with the case review your brief may elicit constructive feedback that you completely overlooked, e.g., feedback regarding whether the arguments in the brief flow logically and whether the court is likely to have any unanswered questions.
- Adhere to the Local Rules. Most courts have page limitations, formatting rules, and other procedural and substantive requirements that should be consulted and followed before filing.

Structure of the Brief/Article

- Should you write like you speak?
    - Writing doesn't allow for the inflection and emphasis available when speaking
    - Some writing really does sound like speaking (*e.g.*, blogs, informal articles), but courts typically expect more formal writing

- Should you use “big” words?
    - Usually a matter of preference, although “big” words arguably have more precise meanings that may be helpful
    - Most courts appreciate precise writing
- Use active voice instead of passive voice
    - “The reason he left the room was that the woman embarrassed him in front of his friends.” → “He left the room after the woman embarrassed him in front of his friends.”
    - Note that verb forms of “be” (*e.g.*, am, is, are, be, was, were) often identify passive voice
- Keep paragraphs short (although unusual, single-sentence paragraphs generally are acceptable, particularly for emphasis)
- Use clear topic sentences for each paragraph
- Maintain verb tense in the same paragraph (and preferably in the whole brief/ article); rules are in present tense (they still exist) while facts from past cases are in past tense
- Never use more words than necessary
    - Think Gettysburg Address → virtually no adjectives
    - Encourages active voice
    - “owing to the fact that since” → “because”
    - “in spite of the fact that though” → “although”
    - Eliminate “the fact that” in almost all situations
    - “Whether or not” → “whether” (unless you are using it to indicate “regardless of whether”)
    - Avoid “clearly” in briefs → if it was clear, it likely would not be before the court (you risk losing credibility with the reader)
    - Avoid writing that the other party “misrepresents” something → some courts view this as an improper allegation when you actually mean “misstates” or “misunderstands”

<u>Sentence structure</u>

- Dependent vs. independent clause
    - Use a comma to separate independent clauses if FANBOYS (for, and, nor, but, or, yet, so); also applies to “as” when used instead of “because”; not needed for, *e.g.*, while, although, because

    - "I will hold the target, and Joe will shoot the arrow."
    - "Amy will shut the fence, as she will be the last one to go through."
- Noun-verb mismatch
    - "The herd of horses *is* getting restless."
        - Hint – omit any prepositional phrases.
    - "The City *feels* that this is a bad idea." (cities do not have emotions)
    - "The decision *says* the defendant is liable." (decisions do not speak)
- Faulty agreement in number
    - "Or" is singular
        - "Joe, Sue, or Sally is responsible for cleaning the dishes."
    - "And" is plural
        - "Joe, Sue, and Sally are responsible for cleaning the dishes."
    - Watch for gender neutral issues: "Each student needs to clean their room." (although some recognize they/their/them as a gender-neutral singular pronoun, better to avoid) → "Each student needs to clean his or her room." OR "The students need to clean their rooms."
- Split infinitives
    - Most current authorities say they are allowed
    - "Will sometimes drink" ("sometimes" splits "will" and "drink") vs. "sometimes will drink"
    - Exception for some adverbs ("to boldly go," although could write "to go boldly")
    - Use what sounds best
- Hyphenate compound adjectives (unless independently descriptive or ending in "ly")
    - "Second-to-last sentence"
    - "Chocolate chip cookie"
    - "Highly objectionable position"
- Dangling (or misplaced) participle
    - A participial phrase at the beginning of a sentence must refer to the grammatical SUBJECT of the sentence.
        - Wrong: "As the largest reptiles ever to have lived, small mammals could not compete with the dinosaurs."

        - Repaired: “Being small and defenseless, small mammals could not compete with the dinosaurs.” or “As the largest reptiles ever to have lived, dinosaurs ensured no competition from small mammals.”
        - “I have for sale an antique dresser for women with thick legs and large drawers.”
            - Place as close as possible to subject being modified → “I have for sale an antique dresser, with thick legs and large drawers, for women.” or “I have for sale an antique women’s dresser with thick legs and large drawers.”
- Dangling Modifier
    - “Hopefully, the project will succeed.” (“Hopefully” appears to modify “project” but that doesn’t make sense.) → “We hope that the project will succeed.”
- Proper pronoun Usage
    - Comparison uses nominative: “She writes better than I (do).”
    - Eliminate the proper nouns to check: “Fred, Sue, and I liked the way that Sam and she presented their case.” → Check with “*I* liked the way that *she* presented their case.” (note that there may be some subject-verb *dis*agreement in the check)
    - For the verb “to be,” reverse the sentence to check
        - “It is she.” → Check with “She is it.” (“Her” would not make sense.)
    - Pronoun confusion: “Jacob called a neighbor to ask about his car.” (Jacob’s car or his neighbor’s car?)
- Possessive case with gerund
    - “I would appreciate your attending the meeting.”
    - “It is all contingent on the President’s signing the bill.”
    - May be easier to just re-word.
- If the “h” is pronounced, use “a” and not “an” → a historical; an hour
- “Due to” vs. “because of”
    - “Due to” modifies nouns and generally is used after some form of the verb to be (*e.g.*, is, are, was, were) → “Jan’s success is due to talent and spunk.” (“due to” modifies success)
    - “Because of” modifies verbs → “Ted resigned because of poor health.” (because of modifies resigned)

- Dangling preposition → *controversial*
    - Correct by using a form of "which" or "whom"
        - "That's the attorney I had dinner with." → "That's the attorney with whom I had dinner."
        - "This is something we need to work on." → "This is something on which we need to work." (not how most people talk)
        - "What did you step on?" (acceptable by most)

<u>Improperly Used Words</u>

- The obvious (but common) mistakes
    - "Your" vs. "you're"
    - "It's" vs. "its"
    - "There" vs. "their" vs. "they're"
    - "Affect" vs. "effect"
    - "Accept" vs. "except"
    - "Assure" vs. "ensure" vs. "insure"
        - "Assure" means to say or write the guarantee: He *assured* me that the product would be delivered tomorrow.
        - "Ensure" means to do something to make sure or guarantee that something happens: A firewall helps to *ensure* that hackers don't attack your PC.
        - "Insure" means to guarantee something with insurance or other financial instruments: In most countries you need to *insure* your car against accidents.
    - "Principle" vs. "principal"
    - "Discrete" vs. "discreet"
    - "Good" (an adjective) vs. "well" (an adverb)
        - "Tom is a good writer." "Tom writes well."
- "Since" vs. "because" (although some grammarians disagree)
    - "Since" connotes the passage of time; "because" connotes a cause-and-effect relationship
    - "*Since* she is my friend, I invited her to dinner." → "*Because* she is my friend, I invited her to dinner."
    - "Since last summer, she lost thirty pounds."

- "While" vs. "although" (although some grammarians disagree)
    - "While" connotes a duration of time
    - "*While* too scared to submit one of her own paintings, she happily attended the art show." → "*Although* too scared to submit one of her own paintings, she happily attended the art show."
    - "While I waited in the reception area, Sally met with her doctor."
- "That" vs. "which"
    - "That" is used with a dependent clause; "which" is used with an independent clause.
    - When properly using "which," you can eliminate the independent clause and the sentence still makes sense.
    - "Which" normally is preceded by a comma
    - "The Van Gogh *that* had hung in the foyer, which we purchased in 1929 for $10,000, was stolen."
- "Which" vs. "who" or "whom" ("which" is for things; "who" or "whom" are for people)
    - Entities are things; parties typically are *not* people.
    - "Al Smith, Inc., *which* failed to pay, was the first-breaching party."
- "Toward" vs. "towards" → actually, either is acceptable
- "Who" vs. "whom"
    - Preposition always demands whom
    - Answer the question (subject = who; predicate = whom)
        - "Whom did you ask?" (I asked him {or her} → whom)
        - "Who went to the store?" (He {or she} went to the store → who)
        - "It typically is a question of who hit whom first." (she hit him)
    - Same rule for "whoever" and "whomever"
- Y'all and all y'all → NOT
- "*E.g.*" vs. "*i.e.*"
    - *e.g.* = for example
    - *i.e.* = in other words
- Proper Possessives
    - Charles's (Charles is singular, so add apostrophe s)
    - Women's

    - Boys' coats
- Proper pluralizing
    - Attorneys General
    - Commonwealth's Attorneys
    - Courts of Appeals
    - Rules of law

<u>Punctuation</u>

- Comma
    - Used to separate items in a listing (including before the last item if you use the Oxford comma, *e.g.*, "Sally, Joe, and Sue")
    - Oxford / Harvard / Serial / Series Comma (comma before the last in a series of three or more) – arguably adds clarity (an issue of great debate among grammarians)
        - "Dedicated to my parents, Ayn Rand and God" (without)
        - BUT "Dedicated to my mother, Ayn Rand, and God" (with)
    - Used to separate independent clauses
    - Need comma after year and state in mid-sentence.
        - "I was born on May 5, 1990, in Philadelphia."
        - "I was born in Philadelphia, Pennsylvania, in 1990."
- Semi-colon
    - Used to joint two separate sentences
    - Can be used for clarification → "Several fast-food restaurants can be found in London, England; Paris, France; Dublin, Ireland; and Madrid, Spain."
    - Use of conjunction after semi-colon → "I like to eat cows; however, I do not like to be eaten by them."
        - Avoid starting a new sentence with a conjunction that refers to the previous sentence
- Colon
    - Can use commas or semi-colons to separate subsequent items (use semi-colons if any of the independent segments include a comma)
    - Most authorities say that the portion of the sentence prior to the colon must be a *complete* sentence

        - "The available colors were: red, blue, and green" → "The available colors were as follows: red, blue, and green."

- Dashes (hyphen, em dash, en dash)
    - Use a hyphen in hyphenated words
    - Use an en dash to indicate ranges: "pp. 5-10" → "pp. 5–10" (note that *Bluebook* allows either en dash or hyphen)
    - Use em dashes to offset a clause in a sentence (no spaces per *Chicago Manual of Style*) → "The em dash often demarcates a parenthetical thought—like this one—or some similar interpolation."
    - Consider using commas, instead of em dashes, to offset a clause (more traditional)
    - Note: MS Word will automatically insert em dash (double dash with no space) and en dash (although need to insert space, hyphen, space, and then delete the spaces, or use Alt-dash {the dash on the number keypad})
- Parentheses
    - Generally discouraged to set off an unnecessary clause in more formal writings (can use commas or em dashes instead)
    - Can be used to indicate supplementary information, such as "Senator Tim Kaine (D., Virginia) spoke at length." or as shorthand to indicate "either singular or plural" for nouns, *e.g.*, "the claim(s)."
- Quotation marks
    - Placement of quotation marks (after period and comma; before semi-colon, colon, and question mark)
    - Quotes within quotes (single quotes within double quotes – double quotes within single quotes if needed)
    - Per the *Bluebook*, no quotation marks and full justification for block quotes (≥ 50 words); single quotes not needed if internal quotes are for the entire quoted text
- Apostrophe
    - Used to indicate possessive (as discussed above)
    - Do not use with abbreviations or numbers: CLEs, 1990s
- Contractions – avoid in formal writing

Common *Bluebook* Errors

- Use of ellipses
    - Space required between periods
    - Not needed for quoting only a sentence fragment
- Use of brackets in quotes
    - "in favor of Acme Paint's position" → "in favor of [plaintiff's] position" (allows the reader to apply the finding or holding to the current case)
- Use a gerund as the first word in an explanatory parenthetical unless you are quoting a complete sentence (possible exception for string cites, which normally should be avoided → see below)
    - *Smith*, 936 F.3d at 5 (holding that non-payment constitutes a first breach)
    - "finding" vs. "holding"
    - *Smith*, 936 F.3d at 5 ("[N]on-payment constitutes a first breach.")
- *Generally*, use citation to state reporter in same-state court briefs and regional reporter in federal or other-state court briefs → need to check local rules
- Citing unpublished cases → most courts now allow, but check local rules (attach copies of cases to briefs)
- See *Bluebook* Blue Pages for Court Documents
    - See Table BT1 for Court Document Abbreviations
- Use *italics* or underlining (not small caps) in court documents
    - Both short *and long form* case names are italicized in court documents
- Use pinpoint citations
- Avoid string cites
    - Possible exception for "accord" when demonstrating that multiple jurisdictions agree
    - Need parenthetical for second (or subsequent) cite
- Proper Italics / Underlining – *See, e.g.*, (second comma is not italicized)
- Proper Spacing – n.2; E.D. Va.; F.2d; F. Supp. 2d (an ordinal counts as a single letter)
- Page numbers
    - 15 Va. 95, 95 (2004) (example of pinpoint cite to first page of opinion)
    - 15 Va. at 105–06 (example of a cite to a proposition that spanned across the page)

- Use Table 6 to abbreviate case names in citations
- Use Table 10 to abbreviate geographical terms in citations
- Use Table 13 to abbreviate periodical names (including law reviews)
- Table 12 gives the proper month abbreviations for cites (note “June,” “July,” and “Sept.”)

Choosing Cases to Cite

- Jurisdiction (assume E.D. Va. motion)
    - Good – District Court in 4th Circuit
    - Better – E.D. Va. Case
    - Best – 4th Circuit Case
    - BUT consider citing the judge who will read the brief
- Substance
    - Good – Supporting Case
    - Better – Supporting Case Affirmed
    - Best – Non-Supporting Case Reversed

Promoting a Culture of Excellence in Writing Outline

Some basic tips:

1) Accuracy. Legal writing is not like horseshoes and hand grenades – close is not good enough. Be absolutely certain that the facts you are representing are accurate. Don't shade them, don't qualify them, don't be guilty of the 'sin of omission.' Similarly, be very careful that you correctly state the holding of a case you are citing: what it is, not what you hope / wish it was. (Accuracy extends to checking – and acknowledging – subsequent history of cases). Address contrary authority. Embrace it (if you can) by distinguishing it. At a minimum, acknowledge it. Remember that there is a big difference between saying something in error (misspeaking) and writing something inaccurate (which remains forever).

2) Style. Limit lateral shots. Refute your opponent's argument (preferably with case / statutory authority); don't critique it. Unprofessional, waste of time and ultimately unpersuasive. Along those lines, when responding to your opponent's argument, take a hard look at the adjectives you're using. Adverbs, too. Most can go.

3) Collaborate. Take a deep breath and ask someone to read your document and critique it. Preferably, someone who is unfamiliar with the issues. Even better, someone who you believe writes well.

4) Easy on the eye. Make your document inviting. Keep paragraphs short (definitely less than a page). Sentences, too. Headings are helpful, especially if set out in boldface. Avoid footnotes. They are distracting and annoying – occasionally necessary, but often not.

5) Write in English. Avoid colloquialisms, jargon, unnecessary quotation marks. Distracting, diverts from your message. Transitional words ("additionally, however") are helpful; space-fillers ("in order that" "on the occasion of") are not.

6) Edit. Every way possible. Evaluate each sentence: necessary? Look at each word in the sentence: helpful? When in doubt, cut and see if message still comes through.

7) Proofread. Proofread again. Print document out, review on paper. Read it aloud. Step away for a few hours – even overnight – and come back to the document (ahem: hard to do if you've waited until the last moment to draft it). Start at the end and read each paragraph separately. Don't rely on spell-check. ("there, their, they're").

8) Don't judge...the writing style of outlines. Just a collection of ideas and talking points. Not presented as an example of good writing.

Mary Grace O'Brien

Suggested Books

- William Strunk, Jr., *The Elements of Style* (4th ed. 2022)

- Richard C. Wydick, *Plain English for Lawyers* (6th ed. 2019)

- Benjamin Dreyer, *Dreyer's English* (2019)

- Bryan A. Garner, *The Redbook – A Manual on Legal Style* (4th ed. 2018)

- University of Chicago Press Editorial Staff, *The Chicago Manual of Style* (17th ed. 2017)

- Ross Guberman, *Point Made* (2nd ed. 2014)

- Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Briefs* (3rd ed. 2014)

- Bryan A. Garner & Antonin Scalia, *Making Your Case: The Art of Persuading Judges* (4th ed. 2008)

Promoting a Culture of Excellence in Writing:

A district court judge's perspective

- Follow all the advice you've heard today…
  BUT ALSO….
- Assume the judge did not read your written submission.

- Make everything you say, do, and present **EASILY DIGESTIBLE**, e.g.,
  - Diagrams
  - Binders with Dividers (e.g., medical documents in a personal injury case, bank records in an embezzlement case)

- If you cite a case, always have a copy of it for the judge and opposing counsel.

- Consider a judge's perspective on self-represented litigants.