APPELLATE ETHICS

by

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Relevant Cases

1. ***People v. Lassalle***, 20 NY3d 1024 (2013)

Defendant, facing multiple felony charges, pleaded guilty to one count of robbery in the first degree. He was adjudicated a second felony offender and was sentenced to 15 years' imprisonment, to be served concurrently with another sentence. At his 2006 plea, he was not advised that his sentence included five years of postrelease supervision. Defendant now maintains that he received ineffective assistance of appellate counsel when his attorney did not brief that issue in his 2008 direct appeal (*see People v. Louree*, 8 N.Y.3d 541 [2007]; *People v. Catu*, 4 N.Y.3d 242 [2005]).

On the present record, defendant has not shown that there was no strategic or other legitimate basis for appellate counsel's failure to raise what would have been a dispositive argument against the plea bargain (*see People v. Rivera*, 14 N.Y.3d 753, 754 [2010]; *People v. Turner*, 5 N.Y.3d 476, 480 [2005]). For all that appears in this record, counsel did not make the argument because defendant did not want to withdraw his plea if the other ground for his appeal proved unsuccessful. We note however that where a defendant in a coram nobis points to a clear error on the face of the County Court record, there are avenues to more fully explore potentially meritorious claims (*see e.g. People v. D'Alessandro*, 13 N.Y.3d 216, 220–221 [2009]; *People v. Bachert*, 69 N.Y.2d 593, 600 [1987]). If a new coram nobis petition is filed, the Appellate Division should consider whether those avenues should be followed.

2. ***People v. Brun***, 15 NY3d 875 (2010).

The order of the Appellate Division should be reversed, defendant's application for a writ of error coram nobis granted, the Appellate Division's January 2009 order of modification (58 A.D.3d 862, 872 N.Y.S.2d 188 [2d Dept.2009]) vacated, and the matter remitted to the Appellate Division for a de novo determination of the People's appeal.

Pursuant to the Rules of the Appellate Division, Second Department, on a People's appeal to that court, if a defendant was represented by assigned counsel at the trial court,

> such assignment shall remain in effect and counsel shall continue to represent the defendant as the respondent on the appeal until entry of the order determining the appeal and until counsel shall have performed any additional applicable duties imposed upon him by these rules, or until counsel shall have been otherwise relieved of his assignment (22 NYCRR 671.3[f]).

Here, although he informed defendant of the People's appeal, defendant's assigned trial counsel failed to represent defendant on that appeal. The Appellate Division, apparently unaware that defendant had been represented by assigned trial counsel, determined the People's appeal, noting no appearances by defendant (58 A.D.3d 862, 872 N.Y.S.2d 188 [2009]).

Defendant thereafter applied for a writ of error coram nobis, alleging that he had been deprived of counsel on the People's appeal in violation of section 671.3(f). The Appellate Division denied the writ, stating that defendant "failed to establish that he was denied the effective assistance of appellate counsel" (64 A.D.3d 611, 612, 881 N.Y.S.2d 331 [2d Dept.2009]).

[1] [2] Because defendant's trial counsel failed to comply with the terms of 22 NYCRR 671.3(f), defendant was deprived of appellate counsel to which he was entitled. Accordingly, the Appellate Division should have granted defendant's application for a writ of error coram nobis. Although a writ of error coram nobis generally raises the claim that defendant received ineffective assistance of appellate counsel, the writ is also a proper vehicle for addressing the complete deprivation of appellate counsel that occurred here.

3. ***Dombrowski v. Bulson***, 19 NY3d 347 (2012).

The Court unanimously reversed the Fourth Department, which had held that a plaintiff who has been wrongfully convicted as a result of his criminal defense attorney's malpractice could recover compensatory damages for loss of liberty, emotional damages and other losses directly attributable to his imprisonment. The court instead agreed with the First Department's conclusion in *Wilson v. City of New York*, 294 AD2d 290 (1st Dep't 2002), that the prohibition against awarding nonpecuniary damages in malpractice actions arising out of civil representation also applies to criminal representation.

Plaintiff spent over five years in prison following his conviction for attempted rape, sexual abuse and endangering the welfare of a child. His petition to the County Court to vacate the conviction due to ineffective assistance of counsel was denied without a hearing. He then sought a writ of habeas corpus in federal court. A Magistrate Judge in the Western District of New York held an evidentiary hearing, concluded that defendant's errors made it difficult for the jury to reliably assess the victim's credibility, and conditionally granted the petition unless the People commenced further proceedings within 60 days, which they did not do.

Dombrowski's malpractice complaint was dismissed by Supreme Court on the grounds that nonpecuniary damages are not recoverable in a malpractice action and

that plaintiff had not suffered any pecuniary damages because he had continued to receive Social Security disability benefits while imprisoned. In reversing, the Fourth Department observed that the risk of imprisonment due to attorney malpractice is the "primary risk" in most criminal cases, and analogized the cause of action for criminal malpractice to those for false arrest and malicious prosecution, for which damages for loss of liberty are recoverable in New York. The Appellate Division also noted that the trend in other states was to allow for nonpecuniary damages for criminal malpractice, even in states that, like New York, do not allow such damages for civil malpractice.

Chief Judge Lippman's opinion for the Court observed that criminal attorney malpractice requires a showing that the plaintiff has "at least a colorable claim of actual innocence – that the conviction would not have resulted absent the attorney's negligent representation," but is not an intentional tort, unlike false arrest and malicious prosecution (which require a showing of actual malice). The crux of the decision, however, concerned policy issues. Specifically, the court expressed concern that a contrary ruling could have "devastating consequences for the criminal justice system" and discourage the "already strapped defense bar" from representing indigents in criminal cases. As a result, it held that nonpecuniary damages are not available in New York to a former client who was the victim of his criminal defense lawyer's malpractice.

APPELLATE ETHICS

By: Patricia Morgan, 2009

Retired Chief Clerk,

Appellate Division, Fourth Department

ETHICS IN APPELLATE PRACTICE

I. "CIVILITY" should govern all dealings with the Appellate Division

A. Suggestions for dealing with Clerk's Office staff at the Appellate Division, Fourth Department

1. Telephone contact with Court staff:

a. Read the Court rules and other information on the Court's website (www.courts.state.ny.us/ad4) before calling and asking questions.

b. Avoid asking for strategic or legal advice. The Clerk's Office staff may answer procedural questions and answer factual questions. The staff is prohibited, however, from giving legal or strategic advice.

c. Please contact staff attorneys directly to inquire about an appeal/motion rather than having a paralegal, secretary or other support staff member call on your behalf.

2. Filing with the Appellate Division:

a. Shipping and receiving is open from 9 a.m. until 5 p.m. Monday through Friday, to accept filings, unless it is a Court holiday. Security is required to screen all filings with the Appellate Division, including x-raying all filings.

b. The shipping and receiving staff are not permitted to remain in the building after 5 p.m., so please arrive at the courthouse with sufficient time for the staff to process and screen the filing before 5 p.m.

c. Please remember that the Appellate Division staff has no control over the Post Office, UPS, or Fed Ex. If you ship your filing to the Appellate Division using one of those services and the filing does not arrive when promised, that is not our fault.

d. A filing is not complete until all of the documents arrive at the courthouse. Staff may not accept and hold a partial filing until the rest of the filing arrives.

3. **On the day of your oral argument:**

a. Please check in with the receptionist by 10 a.m.

b. The calendar is called at 10 a.m., and, although, for the most part, the cases are called in the order listed on the calendar, additional submissions, or traffic and weather issues may result in cases being called earlier than anticipated. Staff members have been specifically instructed to avoid estimating the time that a particular case will be heard, so please do not ask.

c. If you have reserved time for oral argument and decide not to attend, please call the Clerk's office in advance and advise us that you will be submitting. Also, please call the Clerk's office if at all possible when you are delayed. If staff knows that you're delayed, we can inform the Court and sometimes, in the discretion of the Presiding Justice or Justice Presiding, they will postpone calling your case. If we don't know, and the case is called, the case is deemed submitted and oral argument is not permitted.

d. On the other hand, if you have indicated on your brief that you are submitting, and you decide that you want to argue, you must obtain the permission of the Court. Because your opponent may have decided to submit based upon your submission, the Court will not allow you to argue unless you have requested permission with sufficient notice to your opponent.

e. Please check whether you are scheduled to argue in Courtroom I or Courtroom II. Although our receptionist will make every effort to remind you which courtroom you are in when you sign in, it is your responsibility to know where you are supposed to be.

B. Dealing with other parties

1. Stipulating to or settling the record:

a. Appellants - begin the process with sufficient time to allow respondents to review the proposed record and make suggestions for additions or deletions. It is appellant's obligation to put together the record and respondent is not obligated to stipulate to the record. If you cannot obtain a stipulation to the record, you must make a motion before the trial court to settle the record.

b. Respondents - do not unreasonably withhold your stipulation to the record. Although there is no obligation to stipulate to the record, it speeds up the process and saves money if the parties can agree. Do not insist on including items in the record that are not appropriate, such as items that were not before the trial court, or memoranda of law that are not considered properly to be part of the record. Our experience indicates that trial courts do not look favorably upon avoidable or unnecessary motions to settle the record on appeal. Also, you should be aware that Rule 3.2 of the Rules of Professional Conduct is directed to lawyers using tactics that have no substantial purpose other than to delay, prolong or cause needless expense.

c. All parties to the appeal must actually sign the stipulation. You may not authorize a printer to sign a stipulation on your behalf.

II. Ethical considerations in brief writing

A. Statement of facts:

1. "Pay Fidelity to the Record." The facts should be recited with precision and without exaggeration. Note that Rule 3.3 of the Rules of Professional Conduct provides that lawyers shall not knowingly make false statements of fact.

2. Acknowledge facts that are not in your favor - if you don't, your opponent may point them out or the Court will discover them, and your credibility will suffer.

3. Include page citations to the record for every fact.

4. Do not rely on any facts that cannot be found in the record. The Court is bound by the record and cannot consider matters outside the record.

5. Don't sacrifice clarity for the sake of sounding like a lawyer. Refer to parties in a manner least likely to confuse the reader (ex: use "plaintiff" rather than "plaintiff-respondent-cross-appellant").

6. Avoid editorializing in the factual statement (ex: don't say things like "defendant's papers inadequately opposed the motion" or "the trial court incomprehensibly denied the motion").

B. Legal argument:

1. Use citations to cases that support your contentions. Make sure the case says what you say it says. Do not paraphrase or exaggerate the holdings of the cases upon which you rely.

2. Acknowledge case law that is not in your favor and attempt to distinguish it. Note that Rule 3.3 of the Rules of Professional Conduct requires disclosure of controlling legal authority that is directly adverse to your position.

3. If the case law that is not in your favor cannot be distinguished in any way, you must acknowledge that fact. At that point, your argument should focus on why the precedent should be changed for policy reasons.

4. When quoting from cases or statutes, do not omit language from the quote that is not in your favor. The Court will "fill in the blanks" and your credibility will suffer.

III. Ethical considerations for oral argument

A. Obligations from the date of submission of your brief until the date of oral argument:

1. The Court does not render advisory opinions. Consequently, if the case is withdrawn or discontinued prior to oral argument, the rules of the Court require counsel to inform the Court promptly and withdraw the appeal (22 NYCRR 1000.18 [b]).

2. If the passage of time renders your appeal or any issue therein moot, or if there is a settlement of an appeal or proceeding or any issue therein, the rules of the Court require that counsel promptly notify the Court (22 NYCRR 1000.18 [c]).

3. If case law issues from a Court whose precedent is legally binding upon the Appellate Division, Fourth Department, the Court should be notified and your opponent copied on the communication.

B. At oral argument:

1. Know your record but be aware that the Court is familiar with the facts of your case. Lengthy factual recitations are generally not permitted.

2. When you are unable to answer a factual question asked by a member of the panel, acknowledge that you do not know the answer and offer to make a post-argument submission. Do not run the risk of misstating facts or incorrectly characterizing facts in the record.

3. Do not attempt to present arguments to the Court that were not included in your brief.

4. Answer the questions put to you by the Court when the questions are asked. Do not attempt to avoid the question until later in your presentation.

5. Do not denigrate your opponent or the trial judge. Remember that Appellate Division Justices are all Supreme Court Justices, and the trial judges are their colleagues.

6. Do not: interrupt a Justice before he or she has finished their question; raise your voice; show disrespect for a member of the Court; interrupt your adversary, or make faces or exaggerated "stage gestures" in reaction to anything your adversary says; or, leave your cell phone or pager on in the courtroom.

   NOTE that Rule 3.3 of the Rules of Professional Conduct provides that in appearing before a tribunal, a lawyer shall not engage in undignified or discourteous conduct or engage in any conduct intended to disrupt the tribunal.

Patricia L. Morgan, Esq., Clerk of the Court
Appellate Division, Fourth Department
September, 2009

CLARITY AND CANDOR ARE VITAL IN APPELLATE ADVOCACY

by

Hon. David O. Boehm

Retired Associate Justice
Supreme Court, Appellate Division, Fourth Department

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Harris, Beach LLP
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View From the Bench

Clarity and Candor Are Vital in Appellate Advocacy

BY DAVID O. BOEHM

Many lawyers deplore what, in their view, is the superficial treatment of their appeals in our state intermediate appellate courts. They cite what they regard as the short and cursory, sometimes inscrutable, written memoranda that fall regrettably short of explaining the thinking behind the court's decision. Full opinions that provide a comprehensive discussion of the issues and the rationale behind the determination, they say, are too few and far between.

This criticism is voiced not only by the lawyers for the parties but also by lawyers who were not engaged in the case. They complain that they are unable to discern from reading the decision what the cases are about, and that the decision is no help as a guide for what may be similar cases.

Although not every case merits extended discussion, the criticisms are not without some substance, and, if it is any consolation, there are appellate judges who share them. They are acutely aware of the quality of the work produced by their courts and are not at all happy when the product does not meet their own high expectations. Such deficiencies are not, however, entirely of their own making.

Let me refer to my own experience. In the Fourth Department, as in others, the judges are required to complete their assigned cases on or before a deadline. The average term is two weeks. The deadline is generally four weeks from argument. That four-week period is the interval between one term and the next. Some terms are separated by only three weeks, and then the deadline is reduced accordingly. Each judge is responsible for writing on 20 to 25 cases every term, not including the preparation of dissents. When there were vacancies on the bench, the workload of each judge naturally increased, and during such times there were anywhere from 36 to 43 cases to deal with in four weeks. That's a total of 28 days, including Saturdays and Sundays, or more than one case a day to review and write on.

Working nights and weekends made it possible to get the work done on time, but it did little to enhance the quality. Unfortunately, such a schedule only enhanced the stress and pressure on the judges and their law secretaries. I know of one case where a law secretary, after only three months, told his judge that he was under such strain that he could not sleep and asked to be relieved. He had been that judge's law secretary for eight years on the trial bench and handled that responsibility without a problem. But there the time that was needed to properly research and prepare a decision was not circumscribed by an inflexible deadline.

The unremitting task before appellate judges is to finish the work and meet the deadline. Then it immediately becomes necessary to leap into the briefs and reports for next term's cases; not only into those cases assigned to you but into every case calendered for the five or six days in which you sit, running anywhere from 100 to 130 cases. That burden does not leave much time for deep reflection or thoughtful elegance of language. And, hard as we try, given the pressure and the haste, judges occasionally overlook something that should not have been overlooked. But then, even Homer nodded, and he had a lifetime to finish his work.

This lamentation is not intended to invite sympathy, it is intended to make a point that is perhaps best illustrated by the *New Yorker* cartoon of a judge telling the lawyer arguing before him: "Learned counsel should use

smaller words. Learned counsel should remember that the judge was not an A student."

Applying Thoreau's Suggestion

Appellate counsel should follow Thoreau's suggestion and "simplify." Simplify the brief and the thoughts and the language in it. Make them easily comprehensible so that the judges, hard-pressed as they are, may read while they run. The purpose of this discussion is to give some tips on how to do this.

I would first point out that the members of the court usually receive the briefs well before oral argument and have read them before going on the bench. It is not surprising, therefore, that they come on the bench with some predisposition regarding the merits of a case. Oral argument is important, but rarely, except in close cases, is it sufficient to overcome the impact of a well-written and persuasive brief. As Chief Justice William H. Relinquist said in his remarks to the Appellate Practice Institute of the American Bar Association on May 29, 1998: "[A]n ability to write clearly has become the most important requisite for an American appellate lawyer."[1]

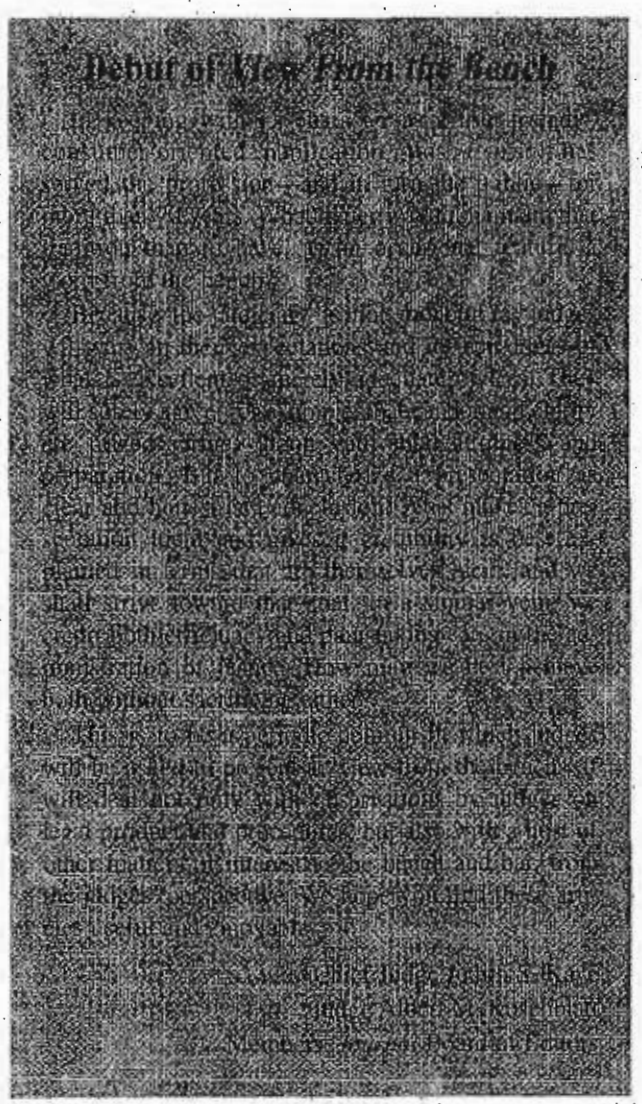
In those same remarks, Chief Justice Rehnquist said:

> If oral advocacy is an art, brief writing can be called a combination of art and science. When a case first lands on an appellate lawyer's desk, it more often than not is a confusing and complicated jumble of facts, lower court rulings, procedural questions, and rules of law. The brief writer must immerse himself in this chaos of detail and bring order to it by organizing—and I cannot stress that term enough—by organizing, organizing and organizing, so that the brief is a coherent presentation of the arguments in favor of the writer's client.[2]

I would add the word "clear" to Justice Rehnquist's "coherent." Here are some suggestions to achieve the goals of coherence and clarity.

Not all judges are blessed with the vision of their youth. Make the brief easy to read. Don't use small type. Double space the lines. Use only one side of the page. Clean, uncluttered space makes the brief more legible and easier to read; thus, easier to comprehend.

The old language rules are fundamental and always apply. Correct spelling, correct punctuation and, above all, correct grammar are essential. Those are the structures on which sentences are erected. An error jars the process of absorbing the meaning of a sentence. Serious errors may utterly collapse the argument you are carefully striving to construct, because the focus of the reader shifts to the error. It's like being with someone who has a smudge on his face; the smudge distracts you from what he is saying. Such errors also reflect on the intelligence of the author and, consequently, on the validity and strength of the argument. Those unnecessary mental interruptions stand in the way of the effort to achieve comprehensibility.



One way to make your brief interesting is to keep its contents on the level of a conversation, rather than that of a lecture. And because good and correct English, like good manners, is necessary for all conversation, I refer you to some excellent guides that will help you to avoid loutish gaucheries of language. They include *The Elements of Legal Style* and *A Dictionary of Modern Legal Usage*, both by Bryan A. Garner; *The Careful Writer* by Theodore Menline Bernstein; a good thesaurus such as *Roget's 21st Century Thesaurus* edited by Barbara Ann Kipfer; and, always, the small but enduring text, *The Elements of Style* by William Strunk and E.B. White.

Not only will these guides help you to avoid errors of language, they will also provide considerable help in fa-

cilitating unhampered understanding of what you are endeavoring to put forward. As the guides suggest, write short, declarative sentences. Use active rather than passive sentences; they have more punch. Avoid lengthy, complex sentences, abstruse language and long Latinate words. And, as Mark Twain admonished, "As to the adjective, when in doubt strike it out." Do not try to impress the court with your erudition. Your effort should be directed solely toward persuading the court of the merit of your case by clear, comprehensible argument, framed in clear, comprehensible language.

Setting Forth the Facts

In setting forth the facts, avoid like the plague a witness-by-witness recital of testimony. Such a recital frequently includes testimony that is neither relevant nor material to the issues on appeal. It imposes upon the judge the burden of separating the wheat from the chaff, a burden that is not welcomed. Nor does it advance the goal of facilitating comprehension. Refer to or quote the testimony of a specific witness only when it is useful. Otherwise, condense the testimony into a narrative that provides a concise and clear foundation for the legal argument.

Make the factual recital coherent, comprehensive and, that word again, comprehensible. The more complicated or technical the evidence is, the more you must endeavor to make its recital clear. And try to make the narrative interesting. You don't have to be a John Grisham or Scott Turow, but strive to engage the judge's interest from the moment he or she opens the brief. You ordinarily begin the brief with the facts. If you have not set them forth clearly, the judge, after wrestling unsuccessfully to understand them, will turn to the respondent's brief with the hope that the facts are clearer there. Do not allow this to happen. Further, it is a good idea to incorporate at the beginning a summary of the issues and your argument. It provides a quick familiarity for the judge.

A not very pleasant, but necessary, requirement is that you include all evidence that is material, even though it may be unfavorable. It is not easy, but do it. An admirable quality in an appellate lawyer is candor, and the court appreciates being advised of all the proof that is material to the case without discovering it for the first time in the respondent's brief. When that happens, the reaction takes the form of a question: Why didn't the appellant disclose this evidence? The further advantage of such disclosure is that it gives you the opportunity to deal with the unfavorable evidence first. But don't be rattled if you are unable to distinguish or minimize it. You have demonstrated the consolable grace of disclosing something that should have been disclosed, and would have been disclosed in any event. In the process, you have added to your credibility. As noted by a federal court in Missouri, "Facts do not cease to exist because they are ignored."[3]

Such candor governs references to case law, as well. In *Cicio v. City of New York*,[4] the court reminded counsel that the function of an appellate brief is to assist the court, not to mislead it. "Counsel have an affirmative obligation," the court pointed out, "to advise the Court of adverse authorities, though they are free to urge their reconsideration."[5] Lord Birkenhead termed this the "obligation of confidence."[6]

Candor is not only an obligation. It also has honesty's special engaging quality of encouraging open and unencumbered communication. It encourages the listener to give sympathetic attention to what you are saying. That attentive ear is precisely what you want from the court. Thus, candor is foremost among the essential elements of appellate success.

Earlier, I likened a brief to a conversation with the court. Being courteous and pleasant is a requisite for all conversations. Don't be belligerent, sarcastic or bombastic. People recoil from a contentious, disagreeable person, and judges are people. It is better, perhaps even advantageous, to be offended against; you will earn the sympathy and respect of the court by keeping your composure and not responding in kind to *ad hominem* attacks or abusive comments.

A sense of humor is not inappropriate. It can lighten up the weight of a turgid paragraph or two, and is useful as an amiable response to a nasty thrust by your adversary. Wit in its place can shine, but don't be a wise guy.

Organizing the Brief

The Fourth Department has a 70-page limit for an appellant's brief. Don't even come close, unless the case absolutely demands it, and very few do.

Don't write a law review article. The court is familiar with the legal principles that appear in its cases term after term. For example, the court has more than a passing acquaintance with a motion for summary judgment, what is required to support it and what will defeat it. The

judges are not strangers to *Alvarez v. Prospect Hospital*,[7] and *Zuckerman v. City of New York*.[8]

It is not necessary to inform the court at length of the leading cases in frequently appealed areas of the law, such as, under the Labor Law, *Rocovich v. Consolidated Edison Co.*[9] and *Ross v. Curtis-Palmer Hydro-Electric Co.*[10] There are many similar "leading" cases in other areas of the law. If your own research does not enlighten you regarding how long and how often such cases have been referred to, the court certainly will. It's okay to cite to them in passing, but don't exhaust time and space by reintroducing the court to them. Going on at length indicates your own unfamiliarity with well-traveled passages of the law.

It is a good idea, however, to briefly recite the facts of cases that strongly support your position or that give a damaging blow to your adversary's. It is an effective way of showing the kinship of those cases with your case. A good rule of thumb is to cite only those authorities that have direct precedential value. If you have direct authority, don't bother with cases that are only marginally supportive. Avoid citing a horde of cases; they may demonstrate ardent and exhaustive research but hardly good judgment. In other words, don't string cite.

And while on the subject, be careful about the cases that you do cite. It hardly needs mention that you do not cite a case that is inapplicable, or that you quote language taken out of context. Doing so is inexcusable and obviously reflects adversely on both your credibility and competence. It also wreaks havoc with your argument.

There may be a legitimate place for footnotes, but there is no place for them in the Fourth Department; Rule 1000.4(f)(6) of the Uniform Rules of Court forbids them. Before the prohibition was added to the rules, some lawyers were getting around the page limit by including voluminous footnotes in microscopic type. It was a vain effort, however, because the judges had neither the time nor the inclination (nor the eyesight) to wade through those swamps of verbiage. Such footnotes remind one of the rule of legal housekeeping—when you have too much junk to fit in the house, the cellar becomes the place to put it.

There is a further reason to avoid footnotes. Their usage has been called, with good reason, the Ping-Pong Ocular Syndrome. A footnote jerks the smooth flow of argument to an abrupt stop by the command that you immediately transfer your attention from the text to the footnote. The interruption is hardly worth it. What ordinarily appears in a footnote is a reference that, without injury, could have been incorporated into the main text or, in most cases, omitted entirely. Occasionally, but only occasionally, a literary footnote or a humorous footnote may have its place. Those occasions fall within what I call the Zuckerman Exception, named after a polymath friend, who is an accomplished appellate advocate and skilled footnote practitioner. But otherwise, I suggest that you avoid using them. They are bothersome and do not abet argument, they disrupt it.[11]

I hope these few admonitions and suggestions will be of some value in achieving the prize that every advocate seeks: to have, as in ancient Rome, the victor's garland hung upon your door.

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1. Reprinted in the *Journal of Appellate Practice and Process*, Vol. 1, No. 1, 3 (Winter 1999).
2. *Id.* at 4.
3. *Siegfried v. Kansas City Star Co.*, 193 F. Supp. 427, 432 (W.D. Mo. 1961), *aff'd*, 298 F.2d 1 (8th Cir. 1962).
4. 98 A.D.2d 38, 40, 469 N.Y.S.2d 467 (2d Dep't 1983).
5. *Id.* at 40.
6. *Glebe Sugar Refining Ltd. v. Trustees of Port and Harbours of Greenoch*, 2 App. Cas. 66 (House of Lords 1921); *see La Cucina Mary Ann, Inc. v. State Liquor Auth.*, 150 A.D.2d 450, 451, 541 N.Y.S.2d 220 (2d Dep't 1989); The Lawyer's Code of Professional Responsibility, Disciplinary Rule 7-106(B)(1).
7. 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).
8. 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).
9. 78 N.Y.2d 509, 577 N.Y.S.2d 219 (1991).
10. 81 N.Y.2d 494, 601 N.Y.S.2d 49 (1993).
11. For a good discussion of the subject, see Abner J. Mikva, *Goodbye to Footnotes*, 56 U. Colo. L. Rev. 647 (1985).

ETHICAL CONSIDERATIONS FOR

APPELLATE COUNSEL

by

Hon. David O. Boehm

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ETHICAL CONSIDERATIONS FOR APPELLATE COUNSEL

By: David O. Boehm[1]

A. Generally - Loyalty to Client and Obligations to Court

"A lawyer is bound by the applicable ethics rules to observe the sometimes conflicting duties of loyalty to the client, candor to the tribunal, and fairness in dealing with third parties. Resolution of these conflicting duties is not always simple or easy, and the lawyer's obligation in this regard presupposes autonomy on his part, in order to be able to make his decisions in accord with ethical responsibilities and not in lock step with the directives of a client/principal. The frequency of sanctions under Fed. R. Civ. P. 11 and comparable state provisions signals a shift toward regarding lawyers as independent decision makers, not the mere hired agents of their clients. See generally, *Patterson, Legal Ethics and the Lawyer's Duty of Loyalty*, 29 Emory L. J. 909(1980)." (ABA/BNA "Lawyers' Manual On Professional Conduct", 31: 302-303).

However, although the lawyer is in charge of procedural decisions, the client has the final say over matters that would directly affect the ultimate resolution of the case, such as whether to settle, and whether to proceed with or discontinue an appeal (*Hawkeye - Security Insurance Co. v. Indemnity Insurance Co.*, 260 F2d 361 [CA10 1958]; *State v Pence*, 53 Hawaii 157, 488 P2d 1177 [1971]; *In re Grubbs*, 403 P2d 260 [Okla Crim App 1965]). Lawyers have been disciplined for making decisions beyond their authority (see, e.g. *Silver v. Califomia State Bar*, 13 Cal 3d 134, 58 P2d 1157 [1974] [lawyer dismissed

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[1] Senior Counsel Harris Beach & Wilcox, LLP, Rochester, New York; Associate Justice, Appellate Division, Supreme Court, Fourth Department, Retired

client's appeal without client's consent]; *In re Paauwe*, 294 Or 171, 654 P2d 1117 [1982] [lawyer appealed without consent of client]).

Nevertheless, counsel does not have the constitutional duty to raise on appeal every non-frivolous issue requested by defendant (*Jones v. Barnes*, 463 U.S. 745 [1983]).

B. Obligations Prescribed by Court Rules

Probably the two most important rules dealing with lawyer's conduct in state courts are *DR 7-102 (A)(2) (22 NYCRR §1200.33) and DR 7-106 (B)(1) (22 NYCRR §1200.37).* The *Uniform Rules for Trial Courts (*see especially *130-1.1 [a], [c] [i] [ii])* are not directly applicable to appellate practice, but may be useful in their application to counsel's conduct generally.

DR 7-102 provides: "In the representation of a client, a lawyer shall not: [k]nowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law."

DR 7-106 provides: "In presenting a matter to a tribunal, a lawyer shall disclose: [c]ontrolling legal authority known to the lawyer to be directly adverse to the position of the client and which is not disclosed by opposing counsel."

Similar provisions are contained in the Federal Rules of Civil Procedure, such as *Rule 11, Rule 38, and 28 USC §1912.* Their application will be discussed under frivolous appeals.

C. Candor: Duty to Notify Court of Settlement/Termination and to Disclose Unfavorable Law.

In preparing your brief a not very pleasant but necessary requirement is that you include all evidence that is material, even though it may be unfavorable. It is not an easy thing to do, but do it. An admirable quality in an appellate lawyer is candor and the Court appreciates being advised of all of the relevant proof that is material to the case without discovering it for the first time in the respondent's brief. When that happens the reaction takes the form of a question: Why didn't the appellant disclose this evidence?

The further advantage of such disclosure is that it gives you the opportunity to deal with the unfavorable evidence first. But don't be unhappy if you are unable to distinguish or minimize the impact of such unfavorable evidence. You have at least demonstrated the admirable quality of disclosing something that should have been disclosed and would have been disclosed in any event. In the process you have added to your own credibility. As noted by a Federal Court in Missouri, "Facts do not cease to exist because they are ignored" (*Siegfried v. Kansas City Star Company*, 193 F Supp 427, 432, affd 298 F 2d 1).

Such candor governs references to case law as well. Appellant counsel have an affirmative obligation to advise the Court of adverse authorities. The Second Department has been especially critical of failure to do so. In the case of *Matter of LaCucina Mary Ann, Inc. v. State Liquor Authority* (150 AD 2d 450, 451) the Court stated: "[W]e remind counsel for the appellants of his affirmative obligation to advise the Court of authorities adverse to his position." Because counsel had also represented the State Liquor Authority in a prior appeal involving the same issue and nevertheless failed to inform the Court of the previously decided case, the Court chastised counsel, saying "there can be no excuse for the failure to bring the holding to the court's attention [citation omitted]".

In an earlier case, the Second Department was even more direct. That case involved a motion by plaintiff to serve a late notice of claim that was only one day late. This application was granted by Supreme Court and the City of New York appealed. The Appellate Division affirmed, citing numerous prior cases holding that the amendments to sections 50-e of the General Municipal Law were to be liberally construed and that all the requisites for late filing had been met in this case. The court scolded the city's counsel, stating:

> None of these cases are cited in the city's brief submitted to this court. This is most disturbing and clearly inexcusable because the city was a party [to prior cases permitting late notice]. Had even a modicum of thought and research been given to this case, it would have been self-evident to the city that its position was untenable and this court and the taxpayers would have been spared the cost of a frivolous appeal.
>
> The function of an appellate brief is to assist, not mislead, the court. Counsel have an affirmative obligation to advise the court of adverse authorities, though they are free to urge their reconsideration (see, *Code of Professional Responsibility, DR 7-106[B][1]; EC 7-23;* see also *Thode, The Ethical Standard for the Advocate, 39 Texas L Rev 575, 585-586; Uviller, Zeal and Frivolity: The Ethical Duty of the Appellate Advocate to Tell the Truth About the Law*, 600 Hofstra L Rev 729). . . .

> We trust that this case will serve as a warning that counsel are expected to live up to the full measure of their professional obligation [some citations omitted]
>
> *Cicio v City of New York*, 98 AD 2d 38, 40.

Lord Birkenhead termed the necessity for candor as the "obligation of confidence" (*Glebe Sugar Refining Ltd. v Trustees of Port and Harbours of Greenoch*, 2 AC 66 [House of Lords, 1921]).

In *Petti v Pollifrone*, (170 AD 2d 494, 495) the court criticized the appellate counsel, even though he was successful in his appeal, because his brief "showed the same lack of thought and effort as was evidenced at the trial level." It reminded counsel, quoting *Matter of Cicio v City of New York* (supra) that the "function of an appellate brief is to assist, not mislead."

Candor is not only an obligation. It also has honesty's special engaging quality of encouraging open and unencumbered communication. It encourages the court to give sympathetic attention to your arguments. By your candor the court knows that you can be trusted. Such attention is precisely what you want from the court. Thus, candor is probably foremost among the essential elements of appellate success.

D. Matters Dehors the Record

Needless to say one should not include in the appendix or record on appeal documents, transcripts of depositions in whole or in part, material ruled inadmissible by the trial court, unless marked for identification or incorporated in an offer of proof, or any other material not part of the record below. This practice has been repeatedly condemned.

In *City of New York v Grosfeld Realty Co.* (173 AD 2d 436, 437), the court stated: "We note with disfavor the attempt on the part of the appellant's attorneys to submit on this appeal an affidavit specifically rejected by the Supreme Court and, therefore, not properly part of the record on this matter."

In *Broida v Bancroft* (103 AD 2d 88, 93), the court noted: "It is axiomatic that appellate review is limited to the record made at nisi prius and, absent matters which may be judicially noticed, new facts may not be injected at the appellate level" (see also, *Buley v Beacon Tex - Print, Ltd.*, 118 AD 2d 630).

And in *Merl v Merl* (128 AD 2d 685, 686), the court rebuked counsel for injecting matters into the brief dehors the record, mischaracterizing events and fabricating facts and issues. The court stated: "We admonish counsel that such attempts to mislead the court are in direct derogation of their professional obligations and will not be tolerated" (citing matter of *Peterson v New York State Department of Correctional Services* 100 AD 2d 73, 78, n 5.) Appellant was therefore denied costs.

Sanctions were awarded when an attorney improperly supplemented papers before the appellate court and persisted in continuing this practice, thereby "flouting . . .well-understood norms of . . . practice" (*Rosenman Colin Freund Lewis & Cohen v. Edelman*, 165 AD 2d 533, 536-537 [1st Dept 1991]).

E. Sanctions for Frivolous Appeals (Subjective and Objective Tests)

Lawyers are ethically prohibited from bringing claims, asserting defenses or pursuing appeals that are frivolous or that would serve only to harass or maliciously injure another person or entity.

Under both the Model Rules of Professional Conduct, our Rule 3.1, and the Model Code of Professional Responsibility, our Disciplinary Rule 7-102[A][2], a claim, defense, or appeal is not considered to be frivolous, even if unwarranted under existing law, if it can be supported by a good faith argument for the extension, modification or reversal of existing law. Infractions of the rules on meritorious claims can result in professional discipline, ranging from a reprimand to disbarment. Counsel may also be sanctioned under various statutes, court rules and the inherent judicial power of the courts. These include: Fed. R. App. P. 38 and 28 USC §1912, which address frivolous appeals.

The question arises whether, in determining frivolous conduct, to apply what has been designated as an objective or subjective test. It is doubtful that the decision as to what test to apply has been settled in New York.

There is a good discussion of this issue in a New York County Supreme Court case, *Principe v Assay Partners* (154 M 2d 702). Although the case did not arise out of an appeal, the criteria used by Supreme Court would be equally applicable to appeals. There, in a deposition, one attorney called another attorney "little lady", "little mouse" "young girl"and "little girl". The Court awarded sanctions for such conduct, $500.00 to the Client's Security Fund and $500.00 to the other party's attorney.

In doing so, the Court raised the issue of whether to apply an objective test or a subjective test. It noted: "Under a subjective test, the actor's intention becomes critical and a finding of 'a clean heart and an empty head' forecloses inquiry" (154 Misc 2d at 708). The Court adopted the objective test by considering the attorney's conduct against that of a reasonable attorney, pointing out that "[a]n 'objectively reasonable' test has been adopted for the application of rule 11 of the Federal Rules of Civil Procedure by the United States

Supreme Court in *Business Guides v Chromatic Enters.*, (498 US 533, 550-551 [1991]). Part 130 contains the same or similar operative words as are present in rule 11, which imply a certification that a paper is not 'interposed for any improper purpose, such as to harass'" (154 M 2d at 708).

The court then went on to define "frivolous conduct," as follows: "It is not ignored that part 130 requires a determination that the behavior at issue was 'undertaken primarily . . . to harass' and was not in good faith. Because a good-faith test implies a standard uncertain in application and slippery in nature, this court adopts the following language as a bright line standard for testing the bad-faith aspect of frivolity: '[F]rivolous . . . means that the [behavior or] legal claim can be supported by no colorable argument, is unsupported by precedent, logic, or other rational argument, and lacks any significant support in the legal community . . . . The court, upon examination of circumstantial evidence [in the record], is adequately equipped to characterize misconduct . . . as constituting bad-faith.' (Committee on Federal Courts, *Comments on Federal Rule of Civil Procedure 11 and Related Rules,* 46 Record of Assn of B of City of NY, 267, 293 [1991])." (154 M 2d at 708-709).

However, in *Matter of Levin v Axelrod* (168 AD 2d 178, 182 [3d Dept 1991]), the Third Department declined to impose sanctions on the petitioner, applying as to him a subjective standard, i.e. that there was nothing in the record "to suggest that petitioner actually was aware of the frivolous nature of his appeal and elected to pursue it anyway." The court also applied a subjective standard to petitioner's attorney, i.e. that he "knew or should have known that the appeal was frivolous" (Id.).

22 NYCRR sub part 130-1 empowers an appellate court to award costs and/or impose sanctions against the party and/or his attorney for engaging in frivolous conduct at the appellate level (see, *Matter of Minister, Elders & Deacons of Refm. Prot. Dutch Church v 198 Broadway*, 76 NY 2d 411). In that case the Court of Appeals defined frivolous conduct with respect to a motion, but the same definition would seem to be applicable to appeals, as well. "The motion is 'frivolous' within the meaning of rule 130-1.1(a) of the Uniform Rules for Trial Courts, since it is 'completely without merit in law or fact' and 'cannot be supported by a[ny] reasonable argument for an extension, modification or reversal of existing law, '(22 NYCRR 130-1.1[c][1]) . . . .

"The . . . motion is also 'frivolous' in that it was evidently 'undertaken primarily to delay or prolong the resolution of the litigation' (McKinney's 1990 New York Rules of Court [22 NY CRR] §130-1.1[c][ii]). In reaching this conclusion, we have considered, as part of 'the circumstances under which the conduct took place' (22 NYCRR 130-1.1[c]), the extended history of this litigation and the numerous post-judgment efforts respondent has made to overturn the judgment" (76 NY 2d at 414).

Sanctions of $2500 were awarded against the party, but the court left "for another day" the question as to when attorneys should be sanctioned for frivolous conduct.

There is no uniform definition of "frivolous" but Courts usually regard something as frivolous when it lacks factual or legal merit (see e.g. *Florida Bar v Thomas* 582 So. 2d 1177 [Florida 1991]). *The Restatement of the Law Governing Lawyers* describes a "frivolous" position as one "so lacking in merit that there is no substantial possibility that the tribunal would accept it" (Comment d to § 170 [Tent. Draft No. 8, 1997]). Although lawyers may contend that claims may never be considered truly "frivolous" because of the

changeable character of the law, the courts have approved sanctions against lawyers for what were regarded as frivolous claims (see generally, *Bone, Modeling Frivolous Suits* 145 U.Pa.L. Rev. 519 [1997]; Cann, *Frivolous Law Suits-The Lawyer's Duty to Say "No,"* 52 U.Col.L. Rev. 367 [1981]).

A key issue is whether the lawyer's conduct should be judged under a subjective test (did the lawyer actually believe the litigation was without merit), (see *Principe v. Assay Partners*, supra) or whether the conduct should be judged by an objective test (would a reasonable lawyer know this action had no basis in fact and law) (see, *Matter of Levin v Axelrod*, supra). The move has been toward an objective standard especially in the federal court system where many decisions have established that under the Federal Rule of Civil Procedure 11 good faith is not a criterion upon which a lawyer's conduct will be judged. Federal Rule of Civil Procedure 11 requires that pleadings cannot be "presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The *Restatement of the Law Governing Lawyers* establishes an objective test by which a frivolous position is one that "a lawyer of ordinary competence" would recognize as lacking in merit (Comment d to § 170 [Tent. Draft No. 8, 1997]). Under the objective approach the Court will assess the frivolousness by examining the merits of the position in light of governing legal authority (see, e.g., *Florida Bar v. Richardson* 591 So. 2d 908, 910 [Florida 1992]).

The older subjective standard focuses on the lawyer's intent and the presence or absence of good faith. Sanctions are not imposed under this standard if the lawyer believes in good faith that the claim has merit (see, *Matter of Levin v Axelrod, supra*;

Robertson's Case, 626 A. 2d 397 [New Hampshire 1993]; *Barnes v. Texas State Bar* 888 S.W. 2d 102 [Texas App. 1994]).

Although the fact that an appeal is lost may not be viewed as frivolous, there are cases holding that an appeal may be frivolous even though the underlying action may not be (*Clark v. Maurer*, 824 F. 2d 565 [7th Cir. 1987]; *AIG Hawaii Insurance Co. Inc. v. Batman* 923 P. 2d 395 [Haw. 1996]).

A lawyer has an affirmative obligation to research the law and analyze the record to determine if an appeal would be frivolous (*Hilmon Co. v. Hyatt International* 899 F. 2d 250, 254 [3d Cir. 1990]). It has been held that an appeal is frivolous if it is totally without merit, based on an objective standard (*Hilmon Co. v. Hyatt International*, supra; *Quiroga v. Hasbro, Inc.* 943 F. 2d 346 [7th Cir. 1991]; *Arizona Tax Research Association v. Department of Revenue*, 787 P. 2d 1051 [Ariz. 1989]; *Wittekind v. Rusk*, 625 N.E. 2d 427 [Illinois App. 1993]).

An appeal may also be regarded as frivolous where the brief fails to identify any arguable error or fails to challenge the finding below (*Clark v. Maurer* 824 F. 2d 565 [7th Cir. 1987]). A lawyer's good faith in pursuing an appeal does not make it nonfrivolous where the argument is devoid of "any possible foundation in reason or history or precedent" (*In re Reese*, 91 F. 3d 37 [7th Cir. 1996]). Recently the Court of Appeals, Second Circuit, dismissed the complaint of a plaintiff attorney, appearing pro se, for lack of a federal question or jurisdiction. The District Court had adopted the report of the magistrate who held that plaintiff's complaint presented "no non-frivolous claims," but declined to impose sanctions, in part because plaintiff was "not sophisticated." Both plaintiff and defendant appealed. The Second Circuit modified by granting defendant's motion for sanctions

awarding $1,000 in attorney's fees and double costs, and otherwise affirmed. It noted that this was not plaintiff's first frivolous appeal and, despite the District Court's "clear warning," he pursued his appeal with a brief that, among other things, failed to cite any case law to support his argument (*Moore v Time, Inc.*, _____ *F 3d* _____, New York Law Journal, July 13, 1999).

See, also Hunt and Magnuson, *Ethical Issues On Appeal*, 19 William Mitchell L. Rev. 659, 664-670 (1993); Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 S.W. L.J. 677, 680-84 (1989).

Discipline under Model Rule 3.1 may not only result from pursuing a meritless appeal but also from or asserting issues on appeal that do not have a nonfrivolous basis (see *People v. Fitzgibbons*, 909 P. 2d 1098 [Colo. 1996]; *In re Becker* 620 N.E. 2d 691 [Ind. 1993]).

Rule 11. Under Federal Rule 11 a lawyer who signs and files a pleading, motion or other paper certifies that the paper is well grounded in fact or likely to have evidentiary support after discovery or further investigation; is supported by existing law or by a nonfrivolous argument for a change in the law or establishment of new law; and is not presented for an improper purpose such as harassment or delay. Every state has some rule or statute patterned on Rule 11 which is designed to serve the similar purpose of deterring frivolous litigation. Amendments to Rule 11 were made in 1933 to add a "safe harbor" mechanism requiring that a lawyer first be given the opportunity to retreat from a position that is without merit.

It should be noted that Rule 11 does not apply to appellate proceedings (see *Cooter & Gell v Hartmarx Corp.* 496 US 384 [1990]).

28 USC §1927 provides that "[a]ny attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct."

Frivolous litigation is one type of misconduct that frequently triggers sanctions under section 1927. The Second Circuit has held that a lawyer violates section 1927 only if he acts with intentional bad faith (*Oliveri v. Thompson*, 803 F. 2d 1265 [2d Cir. 1986]). But bad faith can be inferred "when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay" (*People v. Operation Rescue* 80 F. 3d 64, 72 [2d Cir. 1996]). Section 1927 differs from Rule 11 in a number of important ways. It is more sweeping in scope, embracing a wide range of misconduct at pre-trial, trial and appellate stages. Furthermore, it does not contain a "safe harbor" provision.

28 USC §1912 provides that when a Court of Appeals or the Supreme Court affirms a judgment, "the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."

Federal Rule of Appellate Practice 38 provides that "[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

Section 1912 does not restrict its application to frivolous appeals as does Rule 38. However, they have consistently been construed together to authorize awards for frivolous appeals, even without a specific finding of delay, and are cited together as justification for

assessing fees or an award of damages and costs on appeal. Under both, "[a]n appeal is frivolous when the result is obvious or when the appellant's argument is wholly without merit "(*Indianapolis Colts v Mayor & City Council of Baltimore*, 775 F. 2d 177, 184 [7th Cir. 1985]). Further, sanctions may be awarded for frivolous arguments even where the entire appeal is not frivolous (*Tomczyk v. Blue Cross & Blue Shield of Wisconsin*, 951 F. 2d 771 [7th Cir. 1991]).

Sanctions may be imposed under the Statute, Rule 11 and Rule 38 against the lawyer, the client, or both (see *Hilmon Co. v. Hyatt International* 899 F. 2d 250 [3rd Cir. 1990]).

It should be noted that a frivolous motion for sanctions is itself sanctionable (see, *General Electric v. Speicher*, 877 F. 2d 531 [7th Cir. 1989]; *Shelley v Shelley*, 180 M2d 275).

A lawyer who is sanctioned during litigation may also face disciplinary proceedings for misconduct (see *In re Marin* 250 AD 2d 997, 673 NY Supp. 2d 247 [1998]).

Criminal Cases

A criminal defendant's right to counsel does not include the right to pursue a groundless appeal. When representing a client on appeal, an attorney should seek to withdraw if there are no nonfrivolous grounds supporting the appeal (see, *People v. Crawford* 71 AD 2d 38). The U. S. Supreme Court has held that an appointed lawyer may not seek to withdraw on the ground that the appeal would be frivolous without also submitting a brief that refers to "anything in the record that might arguably support the appeal" (*Anders v. California*, 386 US 738, 743 [1967]).

LEGAL WRITING ETHICS

by

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Legal-Writing Ethics — Part I

Ethics permeate every part of a lawyer's professional life, including legal writing.[1] Few law schools teach ethics in the context of legal writing for more than a few moments here and there, but all should.[2] A lawyer's writing should embody the profession's ethical ideals. Courts and disciplinary or grievance committees can punish lawyers who write unethically. This article notes some of the ethical pitfalls in legal writing.

Rules Lawyers Must Know

Most lawyers know the American Bar Association's Model Rules. Law students in ABA-approved law schools learn them,[3] and New York State Bar applicants study them to pass the Multistate Professional Responsibility Examination (MPRE). But New York, together with California, Iowa, Maine, Nebraska, Ohio, and Oregon, has not adopted the Model Rules. New York lawyers must be familiar with the New York State Bar Association's Lawyer's Code of Professional Responsibility, first adopted in 1970 and last amended in 2002, which differs from the Model Rules.[4]

The State Bar's Code is divided into three parts: the Disciplinary Rules as adopted by the four departments of the New York State Supreme Court's Appellate Division, the Canons, and the Ethical Considerations. The Disciplinary Rules set the minimum level of conduct to which lawyers must comport, or face discipline. The Canons contain generally accepted ethical principles.[5] The Ethical Considerations provide aspirations to which lawyers are encouraged to strive but that are not mandatory.[6] The Disciplinary Rules, the Canons, and the Ethical Considerations, together with court rules, guide lawyers through ethical issues that affect their writing as advocates and advisors.

New York's Disciplinary Rules are promulgated as joint rules of the Appellate Division,[7] which is charged with disciplining lawyers who violate the Disciplinary Rules. A lawyer whose writing falls below the standards set in the Disciplinary Rules might face public or private reprimand, censure, or suspension or disbarment. The Disciplinary Rules are not binding on federal courts in New York State.[8] But because the federal district courts in New York have incorporated by reference the Disciplinary Rules into their local rules,[9] federal courts will discipline lawyers who violate them.

Courts, too, can sanction lawyers for misconduct.[10] To avoid being sanctioned for deficient legal writing, lawyers must know the pertinent law and facts of their case, the court's rules about the form of papers, and the Disciplinary Rules.[11] Court-ordered sanctions differ from disciplinary action. They can range from costs and fines on lawyers or their clients, or both, to publicly rebuking lawyers. Courts sanction lawyers to discourage wasting judicial resources on litigation that lacks merit and to punish lawyers who assert meritless claims. Courts also sanction to make whole the victims of harassing or malicious litigation.[12]

Lawyer's Role as Advocate

The first question lawyers must ask themselves is whether they should handle a particular case or client. New York lawyers have a gatekeeping role to prevent frivolous litigation. Lawyers must decline employment when it is "obvious" that the client seeks to bring an action or argue a position to harass or injure or when the client seeks to argue a position without legal support.[13]

When is it "obvious" that a claim lacks merit? One factor is whether the lawyer claims to specialize in a practice area and therefore should have known that an action was meritless. One New York court sanctioned for making frivolous arguments two defense lawyers who had held themselves out as specialists.[14] The court stated that sanctions were appropriate because the lawyers knew that their arguments were frivolous but still wasted the court's time and their client's and the plaintiff's time and money.[15] The Appellate Division, Third Department, eventually disbarred one of the defense attorneys for making the same frivolous arguments in eight cases.[16]

Lawyers whose potential client litigates for a legitimate purpose must

> The duties to client and court might create a conflict lawyers must resolve before putting pen to paper — or finger to keyboard.

CONTINUED ON PAGE 52

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then decide whether they can represent the client effectively. Lawyers have an ethical responsibility to be prepared and competent to represent a client.[17] A lawyer incompetent to represent a client may decline employment, associate with a lawyer competent to represent the client, refer the matter to a competent lawyer, or tell the client that the lawyer needs to spend time studying a legal issue or practice area. This rule has teeth. For not verifying another's writing and research, local counsel,[18] co-counsel,[19] and supervising attorneys[20] risk court sanction and discipline.

A lawyer who accepts employment must represent the client zealously.[21] Lawyers also owe a duty to the court to be candid about the law and the facts of a case.[22] The duties to client and court might create a conflict lawyers must resolve before putting pen to paper — or finger to keyboard.

Research

Lawyers must avoid the pitfalls of under-preparation. Poor research wastes the court's time and the taxpayer's money. It also wastes the client's time and resources.[23] Lawyers must know the facts of the case and the applicable law. Knowing fact and law adverse to their clients' interests helps lawyers advise their clients and argue their cases. Lawyers must know adverse facts and law for ethical reasons, too. A lawyer must cite controlling authority directly adverse to the client's position if the lawyer's adversary has failed to cite that controlling authority.[24] Lawyers who move ex parte or seek an order or judgment on a default must further inform the court fully about contrary fact and law to insure that the court commits no injustice.[25]

Failing to find controlling cases reflects poorly on the lawyer's skill as an advocate and jeopardizes the client's claims.[26] Courts are unsympathetic to lawyers who bring claims that, in light of controlling authority, should not be brought. The case law on this point is legion.[27]

Lawyers must cite cases that continue to be good law. They may not conceal from the court that a case they cite has been reversed or overruled, even if it was on other grounds. Citing reversed cases or overruled principles is a sure way to lose the court's respect. In one example, a federal district court in Illinois chastised the lawyers for failing to make sure that the cases they cited still controlled.[28] In response to the lawyers' statement that the court's public disapproval would damage their reputation, the court stated that the reprimand's effect on their reputations "is perhaps unfortunate, but not, I think, undeserved."[29]

Argument

Ethical writing is more persuasive than deceptive writing.[30] Disclosing adverse authority, even when the lawyers' opponents haven't raised it, can diffuse its effects and increase confidence in the lawyers' other arguments. Lawyers who don't address adverse authority risk the court's attaching more significance to that authority than it might otherwise deserve. The more unhappy a lawyer is after finding adverse authority, the wiser it is to address it.[31]

It's not enough to find controlling authority. To argue competently, a lawyer must also know what the case or statute stands for. One defense lawyer who misinterpreted an important case in her brief faced possible sanctions from a New York federal district court.[32] The court scheduled a hearing to determine whether the lawyer's misstatement occurred intentionally or due to her "extremely sloppy . . . reading" of the case.[33] To make a point, and possibly to humiliate, the court ordered the lawyer to bring her supervisor to court "to discuss the overall poor quality of the defendants' brief."[34]

Lawyers must cite cases honestly.[35] They must cite what they use and use what they cite.[36] They mustn't pass off a dissent for a holding.[37] The cases must also conform to what the lawyers argue they stand for. Thus, a federal district court in New York ordered a plaintiff's lawyer to show cause why it shouldn't sanction him for, among other briefing mistakes, citing four cases that didn't support his argument.[38] The lawyer's mistake was to cite four cases not resolved on the merits.[39]

To make a point, and possibly to humiliate, one court ordered the lawyer to bring her supervisor to court "to discuss the overall poor quality of the defendant's brief."

A lawyer may argue a position unsupported by the law to advocate that the law be extended, limited, reversed, or changed. It chills advocacy to sanction for what, in hindsight, is frivolous litigation. But as one New York court explained, frivolous litigation is "precisely the type of advocacy that should be chilled."[40]

Lawyers must also argue clearly. Unclear arguments increase the possibility that courts might err. One Missouri appellate court explained that briefs that don't competently explain a lawyer's arguments force the court either to decide the case and establish precedent with inadequate briefs or to fill in through research the gaps left by deficient lawyering.[41] Rejecting the idea that it should do the lawyers' research for them, the court dismissed the appeal.[42]

To embody the profession's ethical ideals, lawyers' writing must be accurate and honest. Citing authority is common sense; authority bolsters argument. But citing can be a must: some lawyers have incurred sanctions and reprimands for arguing positions without citing legal authority at all.[43]

Civility

Lawyers should be courteous to opposing counsel and the court.[44] Appellate lawyers may attack the lower court's reasoning but not the trial judge personally.[45] Never may a lawyer make false accusations about a judge's honesty or integrity.[46] Many courts have sanctioned lawyers for insulting their adversaries or a lower court. In one case, the Appellate Division, First Department, sanctioned a lawyer for attacking the judiciary and opposing counsel.[47] The court found that the lawyer's behavior "pose[d] an immediate threat to the public interest."[48]

Ghostwriting

The American Bar Association, while condemning "extensive" ghostwriting for pro se litigants, has found that disclosing ghostwriting is not required if the lawyer only "prepare[s] or assist[s] in the preparation of a pleading for a litigant who is otherwise acting pro se."[49] But the Association of the Bar of the City of New York's Committee on Professional and Judicial Ethics has concluded that lawyers may not prepare papers for a pro se client's use in litigation "unless the client commits . . . beforehand to disclose such assistance to both adverse counsel and the court."[50] At least two federal district judges in New York have disapproved of ghostwriting.[51]

So many judicial opinions trash lawyers for their writing that until *The Legal Writer* resumes next month with Part II of this column, it's apt for lawyers and judges to consider this:

> Reading these cases, we might experience a bit of schadenfreude — being happy at the misfortune of some other lawyer (especially a prominent or rich one). We might feel a bit superior, if we are confident that we would not have made that particular mistake. Then again, we might be humbled if we realize that we could, very easily, have made that very same mistake. And then we wonder: did the judge have to be so very clever in pointing out the lawyer's incompetence? Was the shaming necessary?[52] ■

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1. For an excellent review of ethical legal writing for New York practitioners and judges, see Gary D. Spivey & Maureen L. Clements, The Ethics of Legal Writing, an unpublished two-part manuscript for CLEs the authors gave at the New York Court of Appeals in April 2002 and June 2003. Several citations in this two-part column are taken from that manuscript. For a text on ethics and legal writing, see Drake University Law School Professor Melissa H. Weresh's *Legal Writing: Ethical and Professional Considerations*, which Lexis/Nexis will publish in late 2005.

2. *See* Donna C. Chin et al., *One Response to the Decline of Civility in the Legal Profession: Teaching Professionalism in Legal Research and Writing*, 51 Rutgers L. Rev. 889, 895 (1999) (recommending that law schools teach professionalism in legal writing); Beth D. Cohen, *Instilling an Appreciation of Legal Ethics and Professional Responsibility in First Year Legal Writing Courses*, 4 Perspectives 5 (1995) (same); Margaret Z. Johns, *Teaching Professional Responsibility and Professionalism in Legal Writing*, 40 J. Legal Educ. 501 (1990) (same); Melissa H. Weresh, *Legal Writing Symposium, Fostering a Respect for Our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum*, 27 Touro L. Rev. 427 (2005) (same).

3. ABA Standards of Approval of Law Schools 302(b) (2001).

4. The New York Code differs from the ABA's Model Rules in substance and style. The Model Rules, for example, allows lawyers to reveal a client's confidential information to prevent "death or substantial bodily harm"; New York's Code doesn't. Another difference is that the New York Code includes the Canons and the Ethical Considerations but the Model Rules don't.

5. *See, e.g.*, Code of Professional Responsibility Canon 1 (Jan. 1, 2002) ("A lawyer should assist in maintaining the integrity and competence of the legal profession."), *available at* http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Lawyers_Code_of_Professional_Responsibility/LawyersCodeOfProfessionalResponsibility.pdf (last visited June, 1 2005).

6. *See, e.g., id.* EC 2-2 ("[L]awyers should encourage and participate in educational and public relations programs . . . .").

7. *See* 22 NYCRR 1200.1 *et seq.*

8. *E.g., The Cadle Co. v. Demadeo*, 256 F. Supp. 2d 155, 156 (E.D.N.Y. 2003).

9. E.D.N.Y. L.R. 1.5(b)(5); N.D.N.Y. L.R. 83.4(j); S.D.N.Y. L.R. 1.5(b)(6); W.D.N.Y. L.R. 83.1(b)(6).

10. New York: 22 NYCRR 130-1.1(a). Federal: Fed. R. Civ. Pro. 11(c); Fed R. App P. 38.

11. *See* Judith D. Fischer, *The Role of Ethics in Legal Writing: The Forensic Embroiderer, The Minimalist Wizard, and Other Stories*, 9 Scribes J. of Legal Writ. 77, 78-79 (providing many examples of courts sanctioning lawyers for failing to abide by court and disciplinary rules).

12. *Kernisan v. Taylor*, 171 A.D.2d 869, 870, 567 N.Y.S.2d 794, 795 (2d Dep't 1991) (mem).

13. DR 2-109(a)(1), (2) (22 NYCRR 1200.14(a)(1), (2)).

14. *See Providian Nat'l Bank v. McGowan*, 179 Misc. 2d 988, 1000, 687 N.Y.S.2d 858, 866 (Civ. Ct. Kings County 1999), *modified mem.*, 186 Misc. 2d 553, 554, 720 N.Y.S.2d 709, 709–10 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2000).

15. *See id.*, 687 N.Y.S.2d at 866.

16. *In re Capoccia*, 275 A.D.2d 804, 809, 712 N.Y.S.2d 699, 703 (3d Dep't 2000) (per curiam). Advancing false claims is improper. *Kushner v. DBG Prop. Inv., Inc.*, 793 F. Supp. 1161, 1181 (S.D.N.Y. 1992); *In re Babigian*, 247 A.D.2d 817, 817–18, 669 N.Y.S.2d 686, 686–87 (1998) (per curiam).

17. DR 6-101(a)(2) (22 NYCRR 1200.30(a)(2)).

18. *Long v. Quentex Resources, Inc.*, 108 F.R.D. 416 (S.D.N.Y. 1985).

19. *Pravic v. U.S. Indust.-Clearing*, 109 F.R.D. 620 (E.D. Mich. 1986).

20. DR 1-102(a)(2) (22 NYCRR 1200.3(a)(2)).

21. DR 7-101 (22 NYCRR 1200.32).

22. For a history of lawyers' conflicting roles as advocates and court officers, see Christopher W. Deering, *Candor Toward the Tribunal: Should an Attorney Sacrifice Truth and Integrity for the Sake of the Client?*, 31 Suffolk U.L. Rev. 59, 66–74 (1997).

23. *See Roeder v. Islamic Rep. of Iran*, 195 F. Supp. 2d 140, 184–85 (D.D.C. 2002), *aff'd*, 333 F.3d 228 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2836 (2004).

24. DR 7-106(b)(1) (22 NYCRR 1200.37(b)(1)).

25. *Id.*; DR 1-102(a)(5) (22 NYCRR 1200.3(a)(5)).

26. *See, e.g.*, Wayne Schiess, *Ethical Legal Writing*, 21 Rev. Litig. 527, 534 (2002) (giving examples of consequences for poor research).

27. *See, e.g., Schutts v. Bentley Nev. Corp.*, 966 F. Supp. 1549, 1563 (D. Nev. 1997); *Peterson v. Foote*, 1995 WL 118173, at *8 n. 25, 1995 U.S. Dist. LEXIS 3391, at *30 n. 25 (N.D.N.Y. 1995); *Pierotti v. Torian*, 81 Cal. App. 4th 17, 20, 96 Cal. Rptr. 2d 553, 566 (2000); *McCoy v. Tepper*, 261 A.D.2d 592, 593, 690 N.Y.S.2d 678, 679 (2d Dep't 1999) (mem); *Saveca v. Reilly*, 111 A.D.2d 493, 494, 488 N.Y.S.2d 876, 877 (3d Dep't 1985); *Estate of A.B.*, 1 Tuck 247 (N.Y. Sur. Ct. 1866); Marguerite L. Butler, *Rule 11 Sanctions and a*

Lawyer's Failure to Conduct Competent Legal Research, 29 Cap. U.L. Rev. 681 (2002).

28. *See Gould v. Kemper Nat'l Ins. Co.*, 1995 WL 573426, at *1, 1995 U.S. Dist. LEXIS 14102, at *2 (N.D. Ill. 1995).

29. *Id.* at *4, 1995 U.S. Dist. LEXIS 14102, at *13.

30. Nancy Lawler Dickhute, *Playing By the Rules: Dealing Effectively With Adverse Authority in Writing a Brief*, Neb. Lawyer 34 (Sept. 2003).

31. Geoffrey Hazard & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 3.3:206 (3d. ed. 2001).

32. *See Hernandez v. N.Y.C. Law Dep't Corp. Counsel*, 1997 WL 27047, at *14, 1997 U.S. Dist. LEXIS 620, at *43 (S.D.N.Y. 1997).

33. *Id.*

34. *Id.* at *14 n.11, 1997 U.S. Dist. LEXIS 620, at *43 n.11.

35. *United States v. Jolly*, 102 F.3d 46, 50 (2d Cir. 1996); *People v. Whelan*, 165 A.D.2d 313, 324 n.3, 567 N.Y.S.2d 817, 824 n.3 (2d Dep't); *In re Cicio v. City of N.Y.*, 98 A.D.2d 38, 40, 469 N.Y.S.2d 467, 468–69 (2d Dep't 1983) (per curiam); Ronald V. Sinesio, *Imposition of Sanctions Upon Attorneys or Parties for Miscitation or Misrepresentation of Authorities*, 63 A.L.R.4th 1199 (1998); H. Richard Uviller, *Zeal and Frivolity: The Ethical Duty of the Appellate Advocate to Tell the Truth About the Law*, 6 Hofstra L. Rev. 729 (1978).

36. Paul Axel-Lute, *Legal Citation Form: Theory and Practice*, 75 Law Lib. J. 148, 149 (1982).

37. *Sobol v. Capital Mgmt. Consultants, Inc.*, 102 Nev. 444, 446, 726 P.2d 335, 337 (Nev. 1986) (per curiam).

38. *See USA Clio Biz, Inc. v. N.Y.S. Dep't of Labor*, 1998 WL 57176, at *2, 1998 U.S. Dist. LEXIS 783, at *6–7 (E.D.N.Y. 1998).

39. *Id.*, 1998 U.S. Dist. LEXIS 783, at *7.

40. *Gordon v. Marrone*, 155 Misc. 2d 726, 732, 590 N.Y.S.2d 649, 653 (Sup. Ct. Westchester County 1992), *aff'd*, 202 A.D.2d 104, 111, 616 N.Y.S.2d 98, 102 (2d Dep't 1994), *appeal denied*, 84 N.Y.2d 813, 647 N.E.2d 453, 623 N.Y.S.2d 181 (1995).

41. *See Richmond v. Springfield Rehab. & Healthcare*, 138 S.W.3d 151, 154 (Mo. App. 2004).

42. *In re Knight*, 264 App. Div. 106, 34 N.Y.S.2d 810 (1st Dep't 1942) (per curiam); *In re Schwartz*, 202 App. Div. 88, 195 N.Y.S. 513 (1st Dep't 1922); *Goldreyer v. Shalita*, 152 N.Y.S. 1002 (App. Term 1st Dep't 1915) (per curiam).

43. *E.g.*, *DeWilde v. Guy Gannett Publ'g Co.*, 797 F. Supp. 55, 56 n.1 (D. Me. 1992) (reprimanding lawyer who made unsupported arguments in reply brief); *Chapman v. Hootman*, 999 S.W.2d 118, 124 (Tex. App. 1999) (same).

44. Donald H. Green, *Ethics in Legal Writing*, 35 Fed. Bar News & J. 402, 405 (1988) (discussing incivility in legal profession).

45. Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 Rev. Litig. 301, 327 (2004).

46. DR 8-102(b) (22 NYCRR 1200.43(b)).

47. *See In re Truong*, 2 A.D.3d 27, 30, 768 N.Y.S.2d 450, 453 (1st Dep't 2003) (per curiam).

48. *Id.*; *cf. In re Justices of the App. Div., First Dep't v. Erdmann*, 33 N.Y.2d 559, 559–60, 301 N.E.2d 426, 427, 347 N.Y.S.2d 441, 441 (1973) (per curiam) (finding that isolated instances of lawyer's disrespect outside court not subject to discipline).

49. Am. Bar Ass'n. Comm. on Eth. & Prof. Resp., Informal Op. 1414, *Conduct of Lawyer Who Assists Litigant Appearing Pro Se* (1978).

50. Ass'n Bar City N.Y., Comm. on Prof. & Jud. Eth., Op. 1987-2 (1987), *available at* http://www.abcny.org/Ethics/eth1987-2.htm (last visited July 6, 2005); *see also* N.Y. St. Bar Ass'n Op 613 (1990).

51. *See Klein v. H.N. Whitney, Goadby & Co.*, 341 F. Supp. 699, 702 (S.D.N.Y. 1971) (noting that court ought not countenance pro se litigant's undisclosed legal assistance); *Klein v. Spear, Leeds & Kellogg*, 309 F. Supp. 341, 342–43 (S.D.N.Y. 1970) (noting that undisclosed representation of pro se litigant "smacks of the gross unfairness that characterizes hit-and-run tactics").

52. Mary Whisner, *When Judges Scold Lawyers*, 96 Law Lib. J. 557, 558 (2004) (endnote omitted).

BY GERALD LEBOVITS

Legal-Writing Ethics — Part II

The Legal Writer continues from last month, discussing ethical legal writing.

The Facts

Lawyers must set out their facts accurately. They may never knowingly give a court a false fact,[1] especially a false material fact. Giving a court a false material fact can subject the lawyer to court-ordered and disciplinary sanctions.[2] In an illustrative case, the Appellate Division, Second Department, suspended a lawyer for five years for repeatedly providing courts with false facts.[3]

To write ethically and competently, lawyers must communicate the factual basis of their clients' claims and defenses. One federal district court in New York noted that two types of substandard fact pleadings can lead to dismissal or denial: (1) a pleading written so poorly it is "functionally illegible" and (2) a pleading so "baldly conclusory" it fails to articulate the facts underlying the claim.[4] As the Ninth Circuit explained, "[a] skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. Especially not when the brief presents a passel of other arguments . . . . Judges are not like pigs, hunting for truffles buried in briefs."[5]

Lawyers must choose which facts to include in their pleadings. Omitting important adverse facts is not necessarily dishonest.[6] Lawyers may omit facts adverse to the client's position and focus on the facts that support their arguments. It might be poor lawyering or even malpractice to inform the court of all the cases' pertinent facts. A criminal-defense lawyer, for example, can be disbarred for telling the court the client is guilty without the client's consent.

But lawyers who omit facts lose an opportunity to mitigate adverse facts. Being candid with the court about facts adverse to the client's position, moreover, gives credibility to the lawyer's arguments. And the court is more likely to consider the lawyer's other arguments credible.

To prove they are using facts honestly, lawyers must cite the record.[7] They may not add to their record on appeal new facts not part of the record before the trial court. Thus, the Appellate Division, Second Department, sanctioned two lawyers for including new information in their record on appeal and then certifying that their record was "a true and complete copy of the record before the motion court."[8]

Writing Style

A lawyer's writing must project ethos, or credibility and good moral character: candor, honesty, professionalism, respect, truthfulness, and zeal.[9] To evince good character, lawyers should write clearly and concisely.[10] They should avoid using excessively formal, foreign, and legalistic language. They should also avoid bureaucratic writing. Bureaucratic writers confound their readers with the passive voice and nominalizations.

The active voice: "The plaintiff signed the contract." The passive voice: "The contract was signed by the plaintiff." The double-passive voice: "The contract was signed." Think: "Mistakes were made." A lawyer who uses that phrase is hiding the name of the person who made the mistake. The passive voice is wordy. The double-passive voice omits an important part of a sentence — the "who" in "who did what to whom" — a necessary feature unless the object of a sentence is more important than the subject.

Nominalizations are verbs turned into nouns. Nominalization: "The police conducted an investigation of the crime." No nominalization: "The police investigated the crime." Nominalizations are wordy and make sentences difficult to understand. They can also make writing abstract and conclusory.

Lawyers who combine the passive voice with nominalizations are poor communicators. Worse, they might be trying to disguise, confuse, or warp.[11] The following illustrates how vague writing damages a lawyer's effectiveness and credibility: "The court clerk has a preference for the submission of documents." To correct the sentence, the lawyer writer must do three things. First, remove the two nominalizations. The sentence becomes: "The court clerk *prefers* that documents be *submitted*." Second, remove the double-passive. Who submits? The judge? The police? Without the double passive, the sentence becomes: "The court clerk prefers that litigants submit documents." Third, explain. What documents? Submit them where? With the explanation, the sentence might read: "The court clerk prefers that litigants file motions in the clerk's office."

Subject complements also deceive readers. They appear after the verb "to be" and after linking verbs like "to appear" and "to become." "Angry" is the subject complement of "The judge became angry." This construction hides because it does not explain how the judge became angry. Compare "Petitioner's claim is procedurally barred" with "Petitioner is procedurally defaulted because he did not preserve his claim."

Lawyers shouldn't use role reversal to disguise what happened. A lawyer who reverses roles moves the object of the sentence to the first agent or subject in the sentence. Compare: "Police Shoot and Kill New Yorkers During Riot" with "Rioting New Yorkers Shot Dead."[12]

Skeptical courts can easily spot obfuscation. In one such case, the Tenth

CONTINUED ON PAGE 58

CONTINUED FROM PAGE 64

Circuit noted that the appellees' "creative phraseology border[ed] on misrepresentation."[13] The court also noted that incoherent writing is "not only improper but ultimately ineffective."[14]

Lawyers shouldn't use adverbial excessives like "obviously" or "certainly." Overstatement is unethical while understatement persuades. In that regard, shouting at readers with bold, italics, underlining, capitals, and quotation marks for emphasis raises ethical concerns of overstatement.[15] Nor should lawyers use cowardly qualifiers like "generally" or "usually" to avoid precision.

Courts must dispose of motions and cases quickly. Courts might sanction lawyers for wasting the court's time with poor writing. As one court sarcastically put it when faced with incoherent pleadings, "the court's responsibilities do not include cryptography."[16]

Plagiarism

Lawyers must not present another's words or ideas as their own. Doing so deceives the reader and steals credit from the original writer. Plagiarism, prohibited in academia, can affect a lawyer's ability to practice. In one case, the Appellate Division, Second Department, censured a lawyer dismissed from law school for plagiarizing half his LL.M. paper who failed to disclose his dismissal in his bar application.[17] In another, the Appellate Division, First Department, censured a lawyer who plagiarized the writing sample he submitted as part of his application for the Supreme Court (18-B) criminal panel for indigent defendants.[18]

Lawyers reuse form motions and letters, law clerks write opinions for their judges, and some judges incorporate parts of a litigant's brief into their opinions.[19] But plenty remains of the obligation to attribute to others their contributions, thoughts, and words.

To avoid plagiarizing, lawyers should cite the sources:

- On which they relied to support an argument;
- From which they paraphrased language, facts, or ideas;
- That might be unfamiliar to the reader;
- To add relevant information to the lawyer's argument;
- For specialized or unique materials.[20]

Courts don't forgive lawyers who plagiarize.[21] A federal district court in Puerto Rico, for example, reprimanded a lawyer who copied verbatim a majority of his brief from another court's opinion without citing that opinion.[22]

Lawyers must quote accurately.[23] A reader who checks a quotation and finds a misquotation will distrust everything the lawyer writes.[24] To quote accurately, lawyers must use quotation marks, even if the lawyer omits or changes some words. Lawyers must use ellipses to note omissions and put changes in brackets.[25] The key to honest writing is to use quotation marks when quoting even a few key words and then to cite. That's the difference between scholarship and plagiarism.

Lawyers must not substitute practice forms for their professional judgment. While not plagiarism, it's bad lawyering to rely on forms or boilerplate. One federal district court in New Jersey sanctioned a lawyer for reproducing without analysis a complaint from a Matthew Bender practice form.[26] As part of the sanction, the court ordered the lawyer to attend either a reputable continuing-legal-education class or a law-school class on federal practice and procedure and civil-rights law.[27] The court concluded that despite the availability of practice forms and treatises, lawyers are "expected to exercise independent judgment."[28]

Court Rules

Most courts have rules that govern the length and format of papers. Under the Second Circuit's Local Rule 32, a brief must have one-inch margins on all sides and not exceed 30 pages.[29] New York State courts have their own rules.[30] State and federal courts in New York and elsewhere may reject papers that violate the courts' rules regarding font, paper size, and margins.

Lawyers shouldn't cheat on font sizes or margins. And they must put their substantive arguments in the text, not in the footnotes. In one illustrative case, the Second Circuit declined to award costs to a successful appellant whose attorney "blatantly evaded" the court's page limit for briefs by including 75 percent of the substantive arguments in footnotes.[31] Lawyers must edit and re-edit their work to set forth their strongest arguments in the space allowed. A court may, in its discretion, grant a lawyer leave to exceed page limits. Conversely, lawyers shouldn't try to meet the page limit with irrelevancies or unnecessary words for bulk.[32]

Lawyers who ignore court rules risk the court's disdain.[33] Worse, the court can dismiss the case.[34] The Ninth Circuit did just that when an appellant disregarded its briefing rules.[35] The appellant's lawyers submitted a brief that didn't cite the record or provide the standard of appellate review. Instead, the brief exceeded the court's word-count limit and cited cases without precedential value.[36] The lawyers also submitted a reply brief that had no table of contents or table of authorities.[37] The court stated that despite the appellant's poorly written briefs, it examined the papers and decided that appellants were not entitled to relief on the merits.[38] Other than to comment on the lawyers' ethics and briefing errors, the court didn't explain its reasoning for dismissing the appeal.[39]

Even if a court doesn't have rules about a brief's format and length, lawyers shouldn't burden the court with prolix writing. In a 1975 New York Court of Appeals case decided before the court instituted rules to regulate brief length, the court sanctioned a lawyer who submitted a 284-page brief about issues "neither novel nor complex."[40] To illustrate the brief's absurdity, the court broke down the number of pages it devoted to each issue, including 50 pages for the facts,

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126 for one argument, and 4 to justify the brief's length.[41]

Lawyer's Role as Advisor

Lawyers must mind the Disciplinary Rules when advising a supervising attorney or a client. Lawyers are often asked to prepare memorandums for a supervising attorney or a client directly. A memorandum is intended to predict objectively how the law will be applied to the facts of the client's case, not to persuade the reader what the law should be. A memorandum must take a position, but it must also provide the strongest arguments for and against the client's position. A skewed memorandum is no strategic or planning tool.

Lawyers mustn't give unsolicited advice to non-clients. Publicly discussing the law, however, is essential to understanding how the law works and applies. The Disciplinary Rules allow lawyers to write about legal topics, but they forbid lawyers to give unsolicited advice to non-clients.[42] A lawyer who participates in an on-line chat, for example, should notify the other participants that the discussion doesn't create a lawyer-client relationship, that none of the communications are confidential, and that the advice is general in nature and not intended to provide specific guidance. The notice should contain unequivocal language that non-lawyers will understand.

Clients pay the bills. They can use their economic influence to pressure lawyers to break the law or violate a Disciplinary Rule. A lawyer is prohibited from assisting a client to engage in unlawful or fraudulent conduct.[43] A lawyer can choose to refuse to aid or participate in conduct the lawyer believes is unlawful, even if there's some support for the argument that the conduct is legal.[44] The Disciplinary Rules recognize that when clients place their lawyers in an ethical quandary, and when it is unclear whether the lawyer will be advising a client to commit legal or illegal conduct, the lawyer should err on the side of not advising rather than face possible disciplinary action.

Conclusion

Ethics permeates all aspects of the legal profession. The way a lawyer writes can establish the lawyer's reputation as ethical and competent. Reputation is a lawyer's most precious asset. By embodying the profession's ethical ideals in their writing, lawyers will insure that their reputation remains positive and increase the possibility that their clients will prevail in litigation. ■

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1. DR 7-102(a)(5) (22 NYCRR 1200.33(a)(5)).
2. 22 NYCRR 130-1.1(c)(3).
3. *See In re Abrahams*, 5 A.D.3d 21, 22–27, 770 N.Y.S.2d 369, 371–75 (2d Dep't 2003) (per curiam), *appeal dismissed*, 1 N.Y.3d 619, 808 N.E.2d 1273, 777 N.Y.S.2d 13 (2004).
4. *See Duncan v. AT&T Communications, Inc.*, 668 F. Supp. 232, 234 (S.D.N.Y. 1987).
5. *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (citation omitted).
6. Except when the other side is absent. See Part I of this column.
7. Margaret R. Milsky, *Ethics and Legal Writing*, 85 Ill. B.J. 33, 34 (1997) (noting that citing record enhances lawyer's credibility).
8. *DeRosa v. Chase Manhattan Mtge. Corp.*, 15 A.D.3d 249, 249, 793 N.Y.S.2d 1, 2 (1st Dep't 2005) (mem.).
9. Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Writing 122 (2002).
10. Wendy B. Davis, Writing Clinic, *An Attorney's Ethical Obligations Include Clear Writing*, 72 N.Y. St. B.J. 50, 50 (Jan. 2000) (calling clear legal writing an ethical obligation).
11. George Orwell, *The Politics of Language*, *in* 4 The Collected Essays: Journalism and Letters of George Orwell 165–69 (1968).
12. Laura E. Little, *Hiding With Words: Obfuscation, Avoidance, and Federal Jurisdictional Opinions*, 46 UCLA L. Rev. 75, 101 (1998).
13. *Wilson v. Meeks*, 52 F.3d 1547, 1558 (10th Cir. 1995).
14. *Id.*
15. *See United States v. Snider*, 976 F.2d 1249, 1251 n.1 (9th Cir. 1992) (Kozinski, J.) (referring to brief's bold-faced font, capital letters, and quotation marks for emphasis, the court wrote that "[w]hile we realize counsel had only our welfare in mind in engaging in these creative practices, we assure them that we would have paid no less attention to their briefs had they been more conventionally written").
16. *Duncan*, 668 F. Supp. at 234.
17. *See In re Harper*, 223 A.D.2d 200, 201–02, 645 N.Y.S.2d 846, 847 (2d Dep't 1996) (per curiam).
18. *In re Steinberg*, 206 A.D.2d 232, 233, 620 N.Y.S.2d 345, 346 (1st Dep't 1994) (per curiam) (citing DR 1-102(a)(4) (22 NYCRR 1200.3 (a)(4)); *see also Kingvision Pay Per View, Ltd. v. Wilson*, 83 F. Supp. 2d 914, 916 n.4 (W.D. Tenn. 2000) (noting that lawyer failed to give credit to source).
19. Linda H. Edwards, Legal Writing Process, Analysis, and Organization 10 (2002).
20. Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. Legal Educ. 236, 245 (1999).
21. *See, e.g.*, Wayne Scheiss, *Ethical Legal Writing*, 21 Rev. Litig. 527, 538-39 (2002) (documenting courts reprimanding lawyers for plagiarism).
22. *See Pagan Velez v. Laboy Alvarado*, 145 F. Supp. 2d 146, 160–61 (D.P.R. 2001).
23. *See generally* Gerald Lebovits, Legal Writer, *You Can Quote Me: Quoting in Legal Writing — Part I*, 76 N.Y. St. B.J. 64 (May 2004); Gerald Lebovits, Legal Writer, *You Can Quote Me: Quoting in Legal Writing — Part II*, 76 N.Y. St. B.J. 64 (June 2004).
24. *See* Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 Suffolk U. L. Rev. 1, 30-31 (1997) (providing example of courts sanctioning lawyers for misquoting).
25. Louis J. Sirico, Jr., *A Primer on Plagiarism*, Second Draft 11 (May 1988).
26. *See Clement v. Pub. Serv. Elec. & Gas Co.*, 198 F.R.D. 634, 635–36 (D.N.J. 2001); *see also DeWilde v. Guy Gannett Publ'g Co.*, 797 F. Supp. 55, 56 n.1 (D. Me. 1992) (reprimanding attorney for copying opposing counsel's memorandum of law).
27. *See Clement*, 198 F.R.D. at 636.
28. *Id.*
29. Local Rule 32(a), *available at* http://www.ca2.uscourts.gov/Docs/Rules/LR32.pdf (last visited June 20, 2005).
30. *See, e.g.*, 22 NYCRR 500.1(k) (Ct. App.); 600.10(a)(1) (1st Dep't); 670.10.1(f) (2d Dep't); 800.8(a) (3d Dep't); 1000.4(h) (4th Dep't).
31. *See Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 640 (2d Cir.1995).
32. Thomas R. Haggard, *Good Writing as Professional Responsibility*, 11 S.C. Law. 11, 11 (May/June 2000).
33. *See, e.g., La Reunion Francaise, S.A. v. Halbart*, No. 96-CV-1445, 1998 WL 1750128, at *1 n.1 (E.D.N.Y. Sept. 28, 1998) (expressing court's disfavor with plaintiff's using "microscopic font and half-inch margins" to circumvent page limit); *LaGrange Mem'l Hosp. v. St. Paul Ins. Co.*, 317 Ill. App. 3d 863, 876, 740 N.E.2d 21, 32 (2000) (reprimanding lawyers for exceeding page limits).
34. *See, e.g., Richmond v. Springfield Rehab. & Healthcare*, 138 S.W.3d 151, 154 (Mo. App. S.D. 2004) (dismissing case because lawyer's briefs did not conform to court's rules); *Frazier v. Columbus Bd. of Educ.*, 70 Ohio St. 3d 1431, 1431, 638 N.E.2d 581, 582 (Ohio 1994) (same).
35. *See N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146–47 (9th Cir. 1997).
36. *Id.* at 1146.
37. *Id.*
38. *See id.* at 1147.
39. *Id.*
40. *Slater v. Gallman*, 38 N.Y.2d 1, 4–5, 339 N.E.2d 863, 864–65, 377 N.Y.S.2d 448, 450–51 (1975).
41. *See id.* at 5 n.1, 339 N.E.2d at 865 n.1, 377 N.Y.S.2d at 450 n.1; *accord Stevens v. O'Neill*, 169 N.Y. 375, 376, 62 N.E. 424, 424 (1902) (per curiam) (commenting on how typewriters rather than pens allow verbosity).
42. DR 2-104(e) (22 NYCRR 1200.9(e)).
43. DR 7-102(a)(7) (22 NYCRR 1200.33(a)(7)).
44. DR 7-101(b)(2) (22 NYCRR 1200.32(b)(2)).