



## Legal-Writing Ethics — Part I

**E**thics permeate every part of a lawyer's professional life, including legal writing.<sup>1</sup> Few law schools teach ethics in the context of legal writing for more than a few moments here and there, but all should.<sup>2</sup> 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,<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> The Ethical Considerations provide aspirations to which lawyers are encouraged to strive but that are not

mandatory.<sup>6</sup> 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,<sup>7</sup> 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.<sup>8</sup> But because the federal district courts in New York have

who assert meritless claims. Courts also sanction to make whole the victims of harassing or malicious litigation.<sup>12</sup>

### 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.<sup>13</sup>

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

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incorporated by reference the Disciplinary Rules into their local rules,<sup>9</sup> federal courts will discipline lawyers who violate them.

Courts, too, can sanction lawyers for misconduct.<sup>10</sup> 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.<sup>11</sup> 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

that an action was meritless. One New York court sanctioned for making frivolous arguments two defense lawyers who had held themselves out as specialists.<sup>14</sup> 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.<sup>15</sup> The Appellate Division, Third Department, eventually disbarred one of the defense attorneys for making the same frivolous arguments in eight cases.<sup>16</sup>

Lawyers whose potential client litigates for a legitimate purpose must

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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.<sup>17</sup> 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

contrary fact and law to insure that the court commits no injustice.<sup>25</sup>

Failing to find controlling cases reflects poorly on the lawyer's skill as an advocate and jeopardizes the client's claims.<sup>26</sup> 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.<sup>27</sup>

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

sanctions from a New York federal district court.<sup>32</sup> The court scheduled a hearing to determine whether the lawyer's misstatement occurred intentionally or due to her "extremely sloppy . . . reading" of the case.<sup>33</sup> 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."<sup>34</sup>

Lawyers must cite cases honestly.<sup>35</sup> They must cite what they use and use what they cite.<sup>36</sup> They mustn't pass off a dissent for a holding.<sup>37</sup> The cases

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another's writing and research, local counsel,<sup>18</sup> co-counsel,<sup>19</sup> and supervising attorneys<sup>20</sup> risk court sanction and discipline.

A lawyer who accepts employment must represent the client zealously.<sup>21</sup> Lawyers also owe a duty to the court to be candid about the law and the facts of a case.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> Lawyers who move *ex parte* or seek an order or judgment on a default must further inform the court fully about

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.<sup>28</sup> 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."<sup>29</sup>

### Argument

Ethical writing is more persuasive than deceptive writing.<sup>30</sup> 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.<sup>31</sup>

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

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.<sup>38</sup> The lawyer's mistake was to cite four cases not resolved on the merits.<sup>39</sup>

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."<sup>40</sup>

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.<sup>41</sup> Rejecting the idea that it should do the lawyers' research for them, the court dismissed the appeal.<sup>42</sup>

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.<sup>43</sup>

## Civility

Lawyers should be courteous to opposing counsel and the court.<sup>44</sup> Appellate lawyers may attack the lower court's reasoning but not the trial judge personally.<sup>45</sup> Never may a lawyer make false accusations about a judge's honesty or integrity.<sup>46</sup> 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.<sup>47</sup> The court found that the lawyer's behavior "pose[d] an immediate threat to the public interest."<sup>48</sup>

## 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."<sup>49</sup> 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."<sup>50</sup> At least two federal district judges in New York have disapproved of ghostwriting.<sup>51</sup>

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?<sup>52</sup>

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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/](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. Quantex 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., *Schults 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); *Savoca 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 Clío 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).

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