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ETHICAL ADVOCACY: A VIEW FROM CHAMBERS

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I. INTRODUCTION

Michael Stanard built an outdoor stage in rural Illinois.[1] After he began hosting events there, he alleged that the local sheriff demanded he hire off-duty deputies for security.[2] If he refused, the sheriff would close the road to his property.[3] Stanard hired an attorney to sue the sheriff, the deputies, and the county.[4] Unfortunately, his attorney "proved unable to file an intelligible complaint," and after three failed attempts to comply with the rules, the district court dismissed Stanard's case with prejudice.[5] Stanard appealed, arguing that the complaint satisfied the rules and that, in any event, the court should have given him another chance.[6]

The Seventh Circuit affirmed in a published opinion.[7] The court explained that "[e]ach iteration of the complaint was generally incomprehensible and riddled with errors, making it impossible for the defendants to know what wrongs they were accused of committing."[8] The lawyer's "persistent failure to comply with basic directions from the court and his open defiance of court orders amply justified the judge's decision to dismiss with prejudice."[9] Worse still, the court openly questioned the lawyer's competence: "Moreover, like his pleadings in the district court, [his] appellate briefing is woefully deficient, raising serious concerns about his competence to practice before this court."[10] As a result, the court ordered the lawyer "to show cause why he should not be suspended from the bar of this court or otherwise disciplined under Rule 46 of the Federal Rules of Appellate Procedure."[11] Finally, the court "direct[ed] the clerk to send a copy of this opinion to the Illinois Attorney Registration and Disciplinary Commission."[12] Although the Seventh Circuit ultimately took no action, the lawyer ceased practicing the next year.[13]

This nightmarish scenario resulted from legal writing that was much more than unpersuasive. The effort was so poor that it violated the lawyer's ethical duties, including the duty of competence.[14] As with many ethical breaches in legal writing, the resulting damage spread far and wide.[15]

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1. Stanard v. Nygren, 658 F.3d 792, 793 (7th Cir. 2011).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 793–94.
11. *Id.* at 794.
12. *Id.*
13. Order re: Response to Show Cause, *Stanard*, 658 F.3d 792 (No. 09-1487).
14. *Stanard*, 658 F.3d at 793–94.
15. *See id.* at 801–02.

Because the case was dismissed with prejudice, the attorney's failures adversely impacted the client.[16] The lawyer's reputation, of course, suffered a mighty blow, especially given that the court's published opinion included his name.[17] It also exposed the lawyer to possible suspension from the Seventh Circuit bar and other discipline from his state's disciplinary commission.[18] Finally, the failures wasted the district and circuit courts' time, energy, and resources, and the courts were delayed in resolving properly presented claims.[19]

Stanard v. Nygren may be a rare bird, but it is not alone. Many attorneys would be both surprised and sorely disappointed in the level of ethics demonstrated in legal writing. This is not to say that attorneys and their work on behalf of their clients are somehow in crisis. And we appreciate the difficulty of writing a concise, effective, and persuasive brief, particularly when the facts or law present a very narrow path to victory. We appreciate, too, the temptation to ignore the weakest parts of an argument.

But sympathies aside, three patterns have become clear. First, the sad reality is that a good number of practitioners are either unaware of or ignore the ethical obligations incumbent on legal writers.[20] Lawyers who are unable (or unwilling) to follow the rules, misrepresent the law or facts, persist in frivolous claims, and engage in unprofessional conduct with opposing counsel are concerningly common.[21] Law clerks miss nothing, and being the ones that often do the initial heavy lifting, they do not take kindly to lawyers who make an already challenging job that much more difficult.[22] They are also, in many cases, a lawyer's first audience.[23]

Second, and thankfully, the opposite is also true: many practitioners are credits to their profession and consistently produce helpful, honest briefing. Even when the stakes are high and the pressure is on, we regularly see outstanding lawyers strike hard blows and resist the temptation to strike any foul ones.[24] Judges and clerks alike cherish these lawyers because their candor helps the court understand the dispute and more efficiently process the docket.[25]

Finally, and most importantly, the view from the bench leaves no doubt that ethical briefing—even when it requires ownership of a terrible fact or

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16. *See id.*

17. *See id.*

18. *Id.* at 802.

19. *See id.* at 800 (noting that multiple opportunities were given to correct issues).

20. *See, e.g.*, *id.* (highlighting a failure to adhere to the required obligations).

21. *See, e.g.*, *id.* at 801 (emphasizing a failure to comply with the rules); Judith D. Fischer, *The Role of Ethics in Legal Writing: The Forensic Embroiderer, the Minimalist Wizard, and Other Stories*, 9 SCRIBES J. LEGAL WRITING 77, 79 (2004).

22. *See Duties of Federal Law Clerks*, ONLINE SYS. FOR CLERKSHIP APPLICATION & REV., https://oscar.uscourts.gov/duties_of_federal_law_clerks (last visited Mar. 2, 2023).

23. *See id.*

24. *See* Berger v. United States, 295 U.S. 78, 88 (1935).

25. *See infra* Part II (discussing the duty of candor).

case—is the most effective briefing.[26] The rules meant to keep lawyers from behaving badly can, when followed scrupulously, lead lawyers to be more effective and persuasive.[27] There is a reason a third of Aristotle's equation for persuasion focuses on ethos: the author's character and trustworthiness necessarily affect the persuasive force the author may bring to bear.[28]

With these observations in mind, this Article attempts to explain—through real-world examples—the core ethical duties encountered in legal writing. But explaining how to avoid unethical conduct is not the Article's primary goal. The rules governing professional conduct set a floor, not a ceiling.[29] So, while understanding and applying the ethical obligations of legal writing will avoid the dire results noted in the examples below, a broad swath of conduct can be described as ethical but unpalatable. Such conduct is akin to the thirteenth strike of a clock: concerning in its own right and discrediting all that came before. Explaining how to steer clear of that gray area—and why it is better advocacy to do so—is our primary aim. Because for every cautionary tale, there is a success story.[30]

Although harder to find, courts do go out of their way to emphasize ethical triumphs in legal writing:

- "Their briefs have been well written, their arguments cogent and candid, and their commitment to professionalism and civility outstanding."[31]
- "After we raised the issue during oral argument, the parties submitted supplemental briefs. In the finest tradition of the Department of Justice, the government's supplemental brief carefully analyzed the subsection and ultimately recommended that we remand for re-sentencing. We track much of that analysis in our discussion of the issue."[32]

Careful attention to the rules, then, not only protects against catastrophic errors but also improves one's cachet with the audience.[33] And in a profession predicated on persuasion, that is critical.[34]

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26. *See* PAULA BARON & LILLIAN CORBIN, LEGAL WRITING: ACADEMIC AND PROFESSIONAL COMMUNICATION (2016) (highlighting the importance of ethical legal writing).

27. *See id.* (discussing the importance of clarity and persuasiveness).

28. LANE COOPER, ARISTOTLE, THE RHETORIC OF ARISTOTLE 8–18 (Pearson, 1932).

29. *See* Rural Water Sys. No. 1 v. City of Sioux Ctr., 967 F. Supp. 1483, 1498 n.2 (N.D. Iowa 1997), *aff'd*, 202 F.3d 1035 (8th Cir. 2000).

30. For additional success stories, see Fischer, *supra* note 21, at 79.

31. Olmer v. City of Lincoln, 23 F. Supp. 2d 1091, 1094 n.4 (D. Neb. 1998), *aff'd*, 192 F.3d 1176 (8th Cir. 1999).

32. United States v. Burge, 683 F.3d 829, 833 (7th Cir. 2012).

33. *See* Fischer, *supra* note 21, at 78.

34. *Id.* at 92.

Drawing on our experiences as judge and law clerk, we proceed duty by duty and use Texas rules as a source of positive law. Texas's Rules are much like the ABA's Model Rules adopted and taught across the country, so practitioners elsewhere should recognize—and be able to draw from—the principles and lessons we discuss.[35] We try to bring these rules to life by including examples throughout—both of failures and of triumphs. And while we hope these lessons are instructive, this Article is no substitute for careful consultation with ethical experts.

II. KNOWING ONE'S WEAKNESSES—THE DUTY OF CANDOR

Rule 3.03, entitled "Candor Toward the Tribunal," provides:

> A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; . . . (4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (5) offer or use evidence that the lawyer knows to be false.[36]

This rule makes clear that although a lawyer must "present the client's case with persuasive force," performance of that duty "is qualified by the advocate's duty of candor to the tribunal."[37]

In legal writing, these duties are often the most critical, yet they are also the most often violated.[38] The following are five common mistakes lawyers make that, aside from weakening a brief's persuasive force, violate the duty of candor and may result in sanctions and discipline.

A. Failing to Disclose Relevant Authority

Rule 3.03's commentary clarifies the boundaries of permissible conduct when explaining and arguing the law. The rule leaves no doubt that a "[l]egal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal."[39] Additionally, although "a lawyer is not required to make a disinterested exposition of the law," the lawyer "should recognize the existence of pertinent legal authorities."[40] When authority is

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35. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G., app. A (TEX. STATE BAR R. art. X, § 9) (drawing from similar principles as the ABA Model Rules).

36. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(a); *see also* MODEL RULES OF PRO. CONDUCT R. 3.3 (AM. BAR ASS'N 2020).

37. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03 cmt. 1.

38. *See* discussion *infra* Sections II.A–E (explaining common violations of professional conduct in legal writing).

39. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03 cmt. 3.

40. *Id.*

directly adverse, stems from the controlling jurisdiction, and has not been previously disclosed, the lawyer has a duty to disclose it.[41]

Failure to comply with this obligation has exposed lawyers to sanctions and findings of misconduct. In *Thul v. OneWest Bank*, for example, defense counsel moved to dismiss the case, but their motion failed to cite a recent, binding Seventh Circuit opinion.[42] After denying the motion, the court ordered defense counsel to show cause as to why they should not be sanctioned in various ways.[43] In response, defense counsel asserted that they viewed the case at issue as distinguishable, but the court disagreed: "Counsel may have persuaded themselves that [the case] was distinguishable in some way, but the Seventh Circuit has made it clear that the tactic 'of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless.'"[44] The court concluded that sanctions were not necessary largely based on the facts that defense counsel took responsibility for their conduct and they had been named in a publicly available document: "That is of no small consequence to a professional whose reputation 'is his or her bread and butter.'"[45]

A more dramatic cautionary tale is found in *Pierotti v. Torian*.[46] There, the appellant challenged the trial court's judgment confirming an arbitration award.[47] In essence, he argued that "the arbitrator erred by finding Pierotti was the prevailing party under the Partnership Agreement's attorney fees clause."[48] The argument, however, failed to cite or discuss controlling case law that undermined the position.[49] The court explained that "[t]he extremely limited scope of review of arbitration decisions is now firmly established," and "Torian [did] not even cite—much less attempt to distinguish" any cases "out of this very district addressing the precise issue Torian raised here."[50] Thus, the court imposed monetary sanctions on the attorney and client because "any reasonable attorney would agree that the appeal [was] totally and completely without merit."[51] The amount of sanctions imposed totaled $32,000.[52]

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41. *Id.*

42. Thul v. OneWest Bank, FBS, No. 12-C-6380, 2013 WL 24599, at *1–2 (N.D. Ill. Jan. 2, 2013), *and order vacated in part*, No. 12-C-6380, 2013 WL 212926 (N.D. Ill. Jan. 18, 2013).

43. *Id.* at *2–3.

44. *Id.* at *1–2 (quoting Hill v. Norfolk & W. Ry., 814 F.2d 1192, 1198 (7th Cir. 1987)).

45. *Id.* at *3 (quoting Harlyn Sales Corp. Profit Sharing Plan v. Kemper Fin. Servs., Inc., 9 F.3d 1263, 1269 (7th Cir. 1993)).

46. *See* Pierotti v. Torian, 96 Cal. Rptr. 2d 553, 555 (Ct. App. 2000).

47. *Id.*

48. *Id.* at 557.

49. *See id.* at 563.

50. *Id.*

51. *Id.*

52. *Id.* at 555; *see also* Doering v. Pontarelli Builders, Inc., No. 01-C-2924, 2001 WL 1464897, at *2 n.1 (N.D. Ill. Nov. 16, 2001) ("A party not only fails to benefit but loses the court's trust when it fails to disclose contradictory precedent.").

It stings, of course, to discover precedent that is contrary to a preferred position. Ironically, however, raising it with the court is good advocacy. Like dealing with a bad fact on direct examination, confronting weaknesses builds trustworthiness and, importantly, offers an opportunity to frame the terms of the debate—to put the best possible view of the law before the court.[53]

And even when disclosure of contrary precedent forecloses an argument presented solely for appeal, courts appreciate the efficiency gained through full candor. In *United States v. Mays*, the district court explained that it "appreciate[d] defense counsel's candor toward the tribunal regarding controlling precedent that is contrary to his position, as well as his specific intention to preserve an argument that such precedent should be overturned."[54] The attorney's candor set him apart: "Although all counsel have a professional obligation to disclose such authority, . . . it is unfortunately a practice that the Court sees far too infrequently."[55]

B. Falsely Representing the Law

It should go without saying that courts take great offense when a lawyer misrepresents the law—whether intentionally or negligently.[56] Doing so may result in reprimands or worse.[57]

In *Georgopoulos v. International Brotherhood of Teamsters*, for example, union members sued the union, alleging that disciplinary suspension deprived them of rights under the Labor Management Reporting and Disclosure Act.[58] The lawyer's briefing, however, included "repeated misstatements, miscitations, and mistakes of law."[59] The lawyer relied on a Second Circuit case, but the case involved a different section of the relevant statute and was "thus inapplicable to [the] Court's resolution of the instant case."[60] Additionally, "and more importantly, the majority of the cases plaintiffs cite[d] in support of their . . . claims do not support propositions for which plaintiffs cited them."[61]

What were the consequences? The court openly considered imposing sanctions under Federal Rule of Civil Procedure 11, which "provides for the imposition of sanctions upon an attorney who submits signed papers containing 'claims, defenses, and other legal contentions' that are not

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53. *See* United States v. Mays, No. 1:13-cr-230-JMS-TAB-01, 2015 WL 1647625, at *9 n.7 (S.D. Ind. Apr. 14, 2015), *aff'd*, 819 F.3d 951 (7th Cir. 2016).

54. *Id.*

55. *Id.* (internal citation omitted).

56. *See* Georgopoulos v. Int'l Brotherhood of Teamsters, 942 F. Supp. 883, 905 (S.D.N.Y. 1996) (admonishing the attorney for misleading the court).

57. *See id.* at 904 (considering imposing sanctions upon an attorney that misleads the court).

58. *See id.* at 886.

59. *Id.* at 905.

60. *Id.* at 904.

61. *Id.*

'warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.'"[62] Although the court ultimately did not impose monetary sanctions, it did admonish the attorneys, finding that "plaintiffs' papers [were] inaccurate, poorly drafted, and an embarrassing example of shoddy lawyering"[63]—not the easiest order to pass along to a client.

To be sure, the takeaway is not simply to not make mistakes about the law.[64] Most lawyers who practice long enough will inevitably commit an unforced error.[65] But the best lawyers do not ignore their mistakes; instead, they immediately and apologetically correct the misrepresentation once discovered.[66] Being humans themselves, judges and law clerks are sympathetic to the *mea culpa*, forgive, and forget.[67]

And, perhaps counterintuitively, admitting an honest mistake can improve the court's view of the attorney—especially when the admission helps the court resolve the matter. In *Farrey's Wholesale Hardware Co. v. Zurich American Insurance Co.*, the defendant removed the case to federal court, and the plaintiff moved to remand.[68] In the plaintiff's view, removal was untimely because the motion was not filed within thirty days of a certain triggering event.[69] In response, the defendant argued that the operative clock-starting event was a later demand letter.[70] The plaintiff first persisted in its argument through its reply brief, but the plaintiff later filed an amended reply that disclosed contrary authority.[71] During the hearing, the plaintiff's counsel "candidly discussed the disclosure mentioned in the Amendment, [and] conceded that the remand motion should probably be denied (because of the decisions cited in its Amendment)."[72] The court went out of its way to thank counsel in the order denying remand:

> The Undersigned appreciates the candor of Farrey's counsel and further appreciates the professionalism of counsel for both sides in discussing this issue . . . at the . . . hearing. That Friday afternoon discovery hearing (which

62. *Id.* (citing FED. R. CIV. P. 11(b)(2)).

63. *Id.* at 905.

64. *See, e.g.*, *In re* Arends, 506 B.R. 516, 525 (Bankr. N.D. Iowa 2014) (providing a good example of what attorneys should do when they realize their mistake).

65. *See* Fischer, *supra* note 21, at 79.

66. *See, e.g.*, *Arends*, 506 B.R. at 525; Farrey's Wholesale Hardware Co. v. Zurich Am. Ins. Co., No. 16-23956-CIV, 2016 WL 7437939, at *1 (S.D. Fla. Dec. 27, 2016) (providing examples of attorneys who corrected their errors).

67. *See, e.g.*, *Arends*, 506 B.R. at 525 ("The Court greatly appreciates and applauds [the attorney's] candor, acceptance of responsibility for her error, and keeping a focus on her clients' interests even when it casts her in an unfavorable light.").

68. *Farrey's Wholesale Hardware Co.*, 2016 WL 7437939, at *1.

69. *Id.*

70. *Id.*

71. *Id.* at *2.

72. *Id.*

> also involved a frank discussion about the remand motion) was an excellent way to end the official work week.[73]

C. Partial Quotations

Another common ethical pitfall in legal writing is the partial quotation.[74] Most lawyers have either encountered or heard stories of opposing counsel including a portion of a quotation that is particularly helpful to their argument but conveniently excluding the remainder of the quotation that is inevitably harmful.[75] Courts do not look kindly on this all-too-common practice and have sanctioned lawyers for their lack of candor.[76]

Rice v. Hamilton Oil Corp. provides one extreme example.[77] There, the plaintiffs alleged that the defendant violated securities law by failing to make a material disclosure.[78] In an attempt to support the claim, the plaintiffs included a selective, misleading quotation, but the court was not fooled:

> Plaintiffs presented to the Court a portion of a quote by Mr. Hamilton in which he supposedly characterized the tax change as "material non-public information concerning developments in the corporation." Mr. Hamilton's entire statement, in fact, reveals that the alleged omissions were contained in the tender documents. Mr. Hamilton said, ". . . he was not aware of any material nonpublic information concerning developments in the corporation *except the 10 year forecasts which had been described in the tender document*."[79]

As a result, the district court imposed monetary sanctions under Rule 11, explaining that the attorney "knew or should have known that his partial quotes, taken out of context, would mislead the Court if left uncorrected."[80]

The Second Circuit, although not imposing sanctions, warned of future sanctions based on similar conduct. In *Matijevic v. Gonzales*, an attorney included only partial, misleading quotations from a transcript.[81] The court felt "obligated to note [its] serious concerns about the quality of representation provided by the petitioner's attorney before [the] Court and before the BIA."[82] Among other things, "[t]he brief filed by counsel cite[d] partial quotes of the transcripts that [gave] misleading impressions of the proceeding

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73. *Id.* at *2 n.6.
74. *See* Fischer, *supra* note 21, at 85.
75. *See id.*
76. *Id.*
77. *See* Rice v. Hamilton Oil Corp., 658 F. Supp. 446, 449–50 (D. Colo. 1987).
78. *Id.*
79. *Id.*
80. *Id.* at 450.
81. Matijevic v. Gonzales, 235 F. App'x 801, 803 (2d Cir. 2007).
82. *Id.*

below."[83] As a result, the court "remind[ed] counsel of his professional duty to provide quality representation to his clients. Continuing conduct of this nature could subject counsel to sanctions by [the] Court."[84]

One frequent—and particularly dangerous—flavor of misrepresentation is passing off another (usually lower) court's summation of a party's argument as the court's own finding or conclusion.[85] Saying the district court said XYZ when it was really the party who said XYZ is a surefire way to earn a reader's scorn and skepticism.[86] It is also almost certain to be uncovered.[87] On appeal, it is guaranteed that a reviewing court will read the lower court's opinion very carefully, and the reviewing judges are unlikely to take kindly to misrepresenting their colleague's words.[88]

D. Falsely Representing the Facts

The duty of candor, of course, requires an accurate representation of the facts.[89] Unfortunately, however, attorneys often fail to meet this most basic requirement.[90] Some examples are extreme, such as when a lawyer was disbarred for manufacturing a bank-sale prospectus to remedy a witness's problematic testimony.[91]

While disbarment is a rare sanction, there are many other examples of significant sanctions imposed for violating the duty of candor. The attorney in *In re Thomas* engaged in multiple acts of misconduct, and the Fifth Circuit affirmed a sanctions order imposed on him.[92] The attorney

> prepared, signed, and filed a false petition, an improper chapter 13 plan summary and chapter 13 plan, an objection to claim and related memoranda without factual or legal basis, and a proof of claim and has advocated all of those for improper purpose and knowing that they were factually incorrect.[93]

Because the attorney "refused to recognize a duty of candor," the district court imposed an ethics instruction, forwarded its memorandum opinion to

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83. *Id.*

84. *Id.*

85. *See, e.g.*, Anderson v. Raymond Corp., 61 F.4th 505, 509 (7th Cir. 2023) (chiding a party that "selectively omit[ted]" language when quoting the district court's opinion in an effort to pass its arguments below as the district court's conclusion).

86. *See id.*

87. *See id.*

88. *See id.*

89. Fischer, *supra* note 21, at 90.

90. *Id.* at 90–92 (listing cases in which attorneys misrepresented facts).

91. *In re* Richards, 755 N.E.2d 601, 603–04 (Ind. 2001); *see also* Fischer, *supra* note 21, at 90 (discussing *In re Richards* and collecting other examples of "pervasive ethical problems that manifest themselves in writing").

92. *In re* Thomas, 223 F. App'x 310, 314–15 (5th Cir. 2007).

93. *Id.* at 314.

the U.S. Attorney, and forwarded another copy to the State Bar of Texas.[94] The Fifth Circuit affirmed: "Barry signed documents containing intentional misrepresentations in an attempt to abuse the bankruptcy process by discharging debts his clients could not challenge in good faith. Strong sanctions are necessary to deter this type of behavior."[95]

When faced with this type of misconduct, appellate courts have even reversed district courts' failures to impose sanctions. In *Peer v. Lewis*, the Eleventh Circuit held that the district court clearly erred in concluding there was insufficient evidence that an attorney acted in bad faith.[96] The attorney brought a Fair Credit Reporting Act claim alleging that suspicious activity on the client's credit report was caused by the defendant.[97] After filing the baseless claim, the attorney withdrew before opposing counsel could discover that the attorney had a document undermining his factual claim.[98] The circuit court held that the attorney acted in bad faith and remanded the case to determine whether and to what extent sanctions were appropriate.[99]

Moreover, thanks to the Constitution, litigants in federal court have a particular obligation to disclose facts that affect jurisdiction.[100] Federal courts can reexamine jurisdiction at any time, and the parties cannot waive jurisdictional limits.[101] Failure to disclose relevant facts or law—through either inadvertence or collusion—represents a particularly pernicious failure because it hoodwinks the federal judiciary into an unconstitutional exercise of power.[102]

At the very least, attorneys can be certain that courts will discover a lack of candor and, as a result, likely view them and their arguments with skepticism. In *United States v. Conlan*, the appellant raised multiple challenges to his federal stalking conviction.[103] A few weeks before oral argument, the Fifth Circuit ordered appellant's counsel to file a corrected brief in compliance with the Federal Rule of Appellate Procedure requiring counsel to state all relevant facts:

> For example only (and without limitation), in claiming insufficiency of the evidence, you focus on the defendant's first few communications and make

94. *Id.* at 315.
95. *Id.*
96. Peer v. Lewis, 606 F.3d 1306, 1316 (11th Cir. 2010).
97. *Id.* at 1312, 1315.
98. *Id.* at 1315.
99. *Id.* at 1316.
100. *See* FED. R. CIV. P. 8(a)(1) (requiring a pleading with the grounds for the court's jurisdiction).
101. Gonzalez v. Thaler, 565 U.S. 134, 141 (2012).
102. *See* U.S. CONST. art. III, § 2 (limiting jurisdiction of the Judiciary to cases and controversies). If all relevant facts and applicable law are not disclosed, a court may not be able to properly determine whether a case or controversy exists. *See* DeFunis v. Odegaard, 416 U.S. 312, 315–20 (1974) (per curiam) (holding that a change in facts during the appeal deprived the court of jurisdiction after requiring both parties to brief the issue).
103. United States v. Conlan, 786 F.3d 380, 383 (5th Cir. 2015).

> no mention of the year-long, escalating campaign of harsh messages—despite multiple warnings to cease—culminating in an interstate drive to the target's house armed with a firearm and riot stick.[104]

The court likewise faulted counsel for omitting critical facts relevant to a Speedy Trial Act issue:

> Regarding your theory of a Speedy Trial Act violation, you entirely omit such things as delays occasioned by the defendant's pre-trial motions and his interlocutory appeal, and you do not mention the district court's "interest-of-justice" findings.[105]

Due to these deficiencies—and the court stressed that these were "only examples of deficiencies in [the attorney's] brief"—the court ordered counsel to file a corrected brief that included all relevant facts.[106] This requirement exists "even if that information is damaging to your client's case."[107] Failure to comply, the court warned, would subject the appeal to dismissal with prejudice.[108]

In contrast, admitting a bad fact and its consequences not only keeps an attorney out of treacherous waters but also garners the court's appreciation and strengthens the attorney's reputation.[109] When, for example, the United States admitted on appeal that the defendant failed to understand a material fact relevant to his guilty plea, which required vacating the plea and remanding the case, the panel applauded: "The court appreciates and applauds the candor of counsel for the government. Such a concession is in accord with the highest standards and traditions of our profession."[110]

E. Failing to Update the Court

The duty of candor is ongoing and "continue[s] until remedial legal measures are no longer reasonably possible."[111] Accordingly, attorneys subject themselves to discipline if they fail to correct a misrepresentation or knowingly fail to update the court about a change in the law or facts.[112]

Courts are particularly frustrated when an attorney not only fails to meet this obligation but does so as a matter of strategy. In *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, the attorney lost a Fair Labor Standards

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104. Letter to Counsel at 1, *Conlan*, 786 F.3d 380 (No. 13-50842).
105. *Id.*
106. *Id.*
107. *Id.* at 2.
108. *Id.*
109. *See supra* notes 36–38 and accompanying text (discussing the importance of candor toward the tribunal).
110. United States v. Hayes, 268 F. App'x 896, 898 n.1 (11th Cir. 2008).
111. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.03(c).
112. *See id.*

Act appeal.[113] The fallout from the loss was severe, requiring the defendants to pay significant damages and attorney's fees.[114] "It is not surprising in view of those unpleasantries that . . . the attorney for the defendants has filed a rehearing petition. What is surprising is the position that he has taken in that petition."[115] Rather than argue that the panel reached the wrong conclusion, he argued that "the appeal was mooted when his clients paid the full amount of the judgment and a satisfaction of it was filed in the district court."[116] Those events occurred two weeks after oral argument, yet the lawyer "waited to see how [the court] would decide the appeal," and "[o]nly after learning that he had lost the appeal, and lost it big, did he tell [the court] about what he characterize[d] as jurisdiction-stripping events that had occurred three-and-a-half months before" the court issued its decision.[117] The court expressed its displeasure with the attorney, noted an attorney's ongoing duty of candor, and said that "[w]hat sanctions, if any, should be imposed . . . for this behavior is a question for another day."[118]

The Federal Rules of Appellate Procedure offer one route. Rule 28(j) explains how and when parties should keep the court apprised of developments.[119] Courts are particularly grateful to be alerted to new authority, and it is not lost on the judges when notice comes from the party hurt the most.[120] In *United States v. Williams*, an assistant federal public defender disclosed contrary authority that arose after she filed her brief.[121] Counsel's diligence in staying apprised of relevant legal developments and notifying the court of them were noted in the opinion:

> [T]he Assistant Federal Defender who filed Williams's [b]rief submitted a letter pursuant to Rule 28(j) . . . advising that recent Eighth Circuit decisions filed after Williams's [b]rief rejected arguments presented in her [b]rief. We applaud counsel's candor in making sure our panel was aware of unfavorable precedent that may be controlling.[122]

Although no parallel provision exists in the Federal Rules of Civil Procedure, one would struggle to find a district judge who—as a categorical

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113. Alvarez Perez v. Sanford-Orlando Kennel Club, Inc., 518 F.3d 1302, 1304 (11th Cir. 2008).
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. FED. R. APP. P. 28(j).
120. *See* United States v. Williams, 18 F.4th 577, 579 (8th Cir. 2021).
121. *Id.*
122. *Id.*; *see also* Moore v. McDonald, No.15-4315, 2015 WL 9301812, at *1 (Vet. App. Dec. 22, 2015) (stating in response to an update that mooted the appeal that the "Court appreciate[d] the appellant's candor and his respect for the time and resources of both the Court and the Secretary [of Veterans Affairs]").

rule—disallows notices akin to a 28(j) letter.[123] The first of the Federal Rules of Civil Procedure says that all other rules should be employed to "secure the just, speedy, and inexpensive determination" of every case.[124] Anything that helps a court accomplish that goal—and avoid unnecessary work when the time could be spent on other cases—should be welcomed.[125] Apart from whatever ethical duties an attorney is under, then, an attorney who fails to keep a court informed jeopardizes both the client's case and the lawyer's credibility.

III. KNOWING ONE'S LIMITS—THE DUTY OF COMPETENCE

Texas Disciplinary Rule of Professional Conduct 1.01 outlines the duty of "Competent and Diligent Representation."[126] The rule provides that a "lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence."[127] There are only two exceptions to this rule: one requiring a competent lawyer to be associated in the matter and the other requiring an emergency.[128]

The rule's commentary makes clear that excuses such as workload, opposition, and personal inconvenience will not excuse incompetence.[129] "Having accepted employment, a lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf."[130] Additionally, a "lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer. A lawyer's workload should be controlled so that each matter can be handled with diligence and competence."[131] Finally, the rule leaves no doubt that "an incompetent lawyer is subject to discipline."[132]

We began this Article with a dramatic example of a court questioning a lawyer's competence and referring him to his state's disciplinary

123. *See* FED. R. APP. P. 28(j); FED. R. CIV. P. (lacking a parallel provision requiring citation to supplemental authorities).

124. FED. R. CIV. P. 1.

125. Indeed, the Model Rules of Professional Responsibility requires lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client." MODEL RULES OF PRO. CONDUCT r. 3.2 (AM. BAR ASS'N 2020). Saving the court time by presenting new developments—rather than forcing the court to discover them on its own—saves precious judicial resources and earns the court's gratitude.

126. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01; *see also* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

127. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(a).

128. *Id.* R. 1.01(a)(1)–(2).

129. *Id.* R. 1.01 cmt. 6.

130. *Id.*

131. *Id.*

132. *Id.*

commission.[133] In affirming the district court's dismissal with prejudice, the court said that the attorney's "entire approach to this case was alarmingly deficient."[134] As a result, the court felt compelled to do more than reject the lawyer's arguments.[135] It considered suspending him from the bar and subjecting him to discipline.[136]

Similarly, the First Circuit dismissed a civil appeal with prejudice because the appellant's brief repeatedly failed to give the court what the rules required.[137] The court explained that "busy appellate judges depend on counsel to help bring issues into sharp focus," yet the appellant's brief "offer[ed] no specific record cites to support her version of the facts, which, again, she allege[d] [were] in dispute."[138] Worse still, the "plaintiff's principal brief provide[d] neither the necessary caselaw nor reasoned analysis to support her theories."[139] Under these circumstances, the court concluded:

> What [the plaintiff] has done is not the type of serious effort that allows us to decide difficult questions . . . , and doing her work for her is not an option, since that would divert precious judge-time from other litigants who could have their cases resolved thoughtfully and expeditiously because they followed the rules.[140]

Finally, courts have sanctioned lawyers as a result of incompetent briefing. In *Romala Corp. v. United States*, the court found the lawyer's appeal frivolous as a result of irrelevant arguments, faulty logic, false premises, and non sequiturs.[141] The court sanctioned the lawyer and his client in an amount equaling twice the defendant's costs even though opposing counsel did not request them.[142]

Choosing which cases to take and what arguments to pursue is difficult; an attorney never knows what issues lurk within a client's file. But an ounce of prevention—in the form of due diligence and proper planning—is worth a pound of cure. Handing a file off to another attorney midstream or securing necessary co-counsel is costly, but as the above examples prove, those costs pale in comparison to the toll exacted upon advocates who incompetently represent their clients.

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133. Stanard v. Nygren, 658 F.3d 792, 793–94 (7th Cir. 2011).
134. *Id.* at 801.
135. *Id.* at 801–02.
136. *Id.* at 802.
137. Rodriguez-Machado v. Shinseki, 700 F.3d 48, 49–50 (1st Cir. 2012).
138. *Id.* at 49 (emphasis omitted).
139. *Id.*
140. *Id.* at 49–50 (internal citation omitted).
141. Romala Corp. v. United States, 927 F.2d 1219, 1222–27 (Fed. Cir. 1991).
142. *Id.* at 1220, 1225.

IV. REALLY?—ON MERITORIOUS CLAIMS AND CONTENTIONS

Rule 3.01 provides that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous."[143] The commentary explains that legal procedure should be used but not abused.[144] Frivolous or knowingly false pleadings, motions, and other papers are clearly prohibited.[145] Claims and defenses are also considered frivolous "if the lawyer is unable either to make a good faith argument that the action taken is consistent with existing law or that it may be supported by a good faith argument for an extension, modification or reversal of existing law."[146]

The rule also specifies that a "filing or contention is frivolous if it contains knowingly false statements of fact."[147] In contrast, a claim or contention is not frivolous "merely because the facts have not been first substantiated fully or because the lawyer expects to develop vital evidence only by discovery," nor "is it frivolous even though the lawyer believes that the client's position ultimately may not prevail."[148]

For example, the court in *Pierotti* imposed monetary sanctions on counsel and the client as a result of frivolous arguments.[149] A controlling case directly undercut the argument raised on appeal, yet the lawyer ignored it and persisted in the claim.[150] The court said that "the appeal is . . . sanctionable because it lacks substance and was taken for an improper purpose. We conclude that, based on all the facts before us, the appeal is frivolous and was taken solely for the purpose of delay or to harass the opposing party."[151]

Similarly, in *Dearborn Street Building Associates, LLC v. Huntington National Bank*, the district court sanctioned an attorney for persisting in a frivolous claim.[152] There, a judgment creditor sued its debtor, the debtor's affiliate, and a bank, alleging that the debtor fraudulently transferred a property to the affiliate to evade the creditor.[153] The sole allegation against the bank was that it financed the affiliate's purchase and received a mortgage in return.[154] Nowhere did the creditor accuse the bank of any sort of

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143. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.01; *see also* MODEL RULES OF PRO. CONDUCT R. 3.1 (AM. BAR ASS'N 2020) (stating a lawyer's burden when bringing or defending a claim).

144. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.01 cmt. 1.

145. *Id.* R. 3.01 cmt. 2.

146. *Id.*

147. *Id.* R. 3.01 cmt. 3.

148. *Id.*

149. Pierotti v. Torian, 96 Cal. Rptr. 2d 553, 569 (Ct. App. 2000).

150. *Id.*

151. *Id.*

152. Dearborn St. Bldg. Assocs., LLC v. Huntington Nat'l Bank, 411 F. App'x 847, 851 (6th Cir. 2011).

153. *Id.*

154. *Id.*

wrongdoing.[155] After months of asking to be voluntarily dismissed, the bank moved for summary judgment, which was granted in part because the creditor filed no opposition to the motion.[156] The bank then moved for Rule 11 sanctions, which were granted.[157] The Sixth Circuit affirmed: "Rule 11 sanctions are . . . proper where, as here, instead of withdrawing a complaint or agreeing to dismissal, a plaintiff 'continued to litigate after it became clear that his claim was frivolous, unreasonable, or without foundation.'"[158]

Courts have also found litigation frivolous and imposed sanctions when briefing fails to address critical issues and cite authority for the legal and factual claims. In *Chapman v. Hootman*, the court noted that, "[i]n making his argument on appeal, Chapman neither addressed the operative provision of the contract nor proffered any reason why it was not applicable."[159] Additionally, "[h]is brief fail[ed] to give appropriate citations to authorities and the record, a fact which [was] not altogether surprising given the lack of support for his factual contentions in the record and the lack of legal authority to support his arguments on appeal."[160] In conclusion, the court stressed that "[t]here is no room at the courthouse for frivolous litigation."[161] It explained that "[w]hen a party pursues an appeal that has no merit, it places an unnecessary burden on both the appellee and the courts."[162] Moreover, "it unfairly deprives those litigants who pursue legitimate appeals of valuable judicial resources."[163]

More recently, the Fifth Circuit affirmed—in one sentence—a jury verdict in a hostile-workplace suit because "[t]he evidence in support of the jury verdict [was] not insufficient and no reversible error of law appear[ed]."[164] The basis for the Fifth Circuit's decision was Circuit Rule 28.2.2, which requires that "[e]very assertion in briefs regarding matter in the record must be supported by a reference to the page number of the original record."[165] Understanding what went wrong for the appellant's counsel in *Tate* requires looking to—or rather, listening to—oral arguments in the case, which took place just two days before the opinion was issued.[166] After a few minutes of fairly vanilla arguments, a member of the panel confirmed that appellant's counsel was familiar with Rule 28.2.2 before proceeding to read unsupported assertions from his brief: "No record cite. No record cite. But

155. *Id.* at 849.
156. *Id.* at 851.
157. *Id.* at 849–50.
158. *Id.* at 851 (quoting Bailey v. Papa John's USA, Inc., 236 F. App'x 200, 203 (6th Cir. 2007)).
159. Chapman v. Hootman, 999 S.W.2d 118, 124 (Tex. App.—Houston [14th Dist.] 1999, no pet.).
160. *Id.* (internal footnote omitted).
161. *Id.* at 125.
162. *Id.*
163. *Id.*
164. Tate v. Total Foot Care, No. 22-60143, 2022 WL 17538824, at *1 (5th Cir. Dec. 8, 2022).
165. *Id.* (quoting 5TH CIR. R. 28.2.2).
166. Oral Argument, *Tate*, 2022 WL 17538824 (No. 22-60143), https://www.ca5.uscourts.gov/OralArgRecordings/22/22-60143_12-6-2022.mp3.

you're required to have a record cite. . . . Next page."[167] After expressing frustration that he searched in vain to find support for appellant's assertions, the panel member said to counsel, "this is your opportunity right now to give an exact record cite" for key assertions.[168] Counsel responded, "Well, until the rest of the transcript [is] presented—I believe it has not been resubmitted by the court reporter," which prompted the panel member to ask, "Well, why don't you lose the case right there?"[169] After further discussion, the panel member noted that he thought counsel's "brief [was] flagrantly in violation" of Rule 28.2.2.[170] We could go on, as the oral argument did, but you get the idea.

The obligation to avoid frivolous arguments and the expectation of zealous advocacy often conflict, but the stakes of that conflict are never higher than in criminal cases.[171] Representing criminal defendants on direct appeal, in particular, poses a unique set of ethical challenges.[172] After the Supreme Court's opinion in *Anders v. California*,[173] defense counsel who believes an appeal is frivolous may move to withdraw from the representation but only after explaining why there are no nonfrivolous grounds for appeal.[174] This presents a potential moral hazard for courts looking to separate cases that need attention from those that do not: it may be easier for an attorney to file a brief raising one exceedingly weak argument than it would be to prepare an *Anders* brief that explains why *every* argument is a surefire loser.[175] Indeed, the Third Circuit recently clarified its expectations for *Anders* briefs, recognizing that the procedure called for by *Anders* imposes unique burdens on those who "have heeded the Court's call to public service and devoted their time and effort to the representation of indigent defendants."[176] The Eighth Circuit, too, recently rejected an *Anders* brief because it drew inferences against the defendant: only after counsel resolved all doubts in his client's favor could the appeal be labelled frivolous.[177]

Finally, failure to think through the merits of an argument will distract during oral argument, even if your other arguments have merit. In *Sanches v.*

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167. *Id.* at 4:45–:53.

168. *Id.* at 5:23–:30.

169. *Id.* at 5:35–:50.

170. *Id.* at 8:23–:33.

171. *See* Anders v. California, 386 U.S. 738, 744 (1967).

172. *Id.*

173. *Id.* at 738.

174. *See* Penson v. Ohio, 488 U.S. 75, 80 (1988).

175. *Id.* at 81–82; *Anders*, 836 U.S. at 744–45; *United States v. Smartt*, 2023 WL 371870, *1 (7th Cir. 2023) (warning counsel who "submitted badly deficient briefs pressing frivolous claims, tossing in a few case citations along the way, none of which support an argument for reversal and some of which are inapplicable, inaccurate, and/or misleading" and noting that the lawyer twice cited a dissent without informing the court that counsel was citing a minority viewpoint).

176. United States v. Langley, 52 F.4th 564, 572 (3d Cir. 2022) (discussing *Anders* briefs); *see Anders*, 836 U.S. at 744–45.

177. United States v. Collins, 67 F.4th 919 (8th Cir. 2023).

Carrollton-Farmers Branch Independent School District, the plaintiff appealed the district court's summary judgment in favor of the defendants, but the argument immediately went sideways due to counsel's briefing and unmeritorious use of case law.[178] The case involved a high school student who did not make the cheerleading squad and then brought federal civil rights claims.[179] During oral argument, the court asked, "You take the position in your brief that the facts here are more egregious—those are your words—than the facts in the *Easthaven* case. Are you sticking by that position?"[180] After answering in the affirmative but not recalling *Easthaven*'s facts, the court reminded the lawyer: "Well, let me just tell you that my summary of the facts in *Easthaven* are that a girl who was raped off campus endured daily verbal harassment for five weeks following the rape, including being called a slut, a liar, a bitch, and a whore."[181] The court concluded, "And you're telling us that your case is more egregious than that?"[182] To ask the question, of course, is to answer it.

Consider the flip side. Imagine a plaintiff who files an amended complaint in response to a motion to dismiss. The amendment is untimely and could be stricken. But rather than move to strike, the defendant concedes that leave to amend would likely be granted and that the amended complaint would survive a motion to dismiss. To save everyone the hassle, the defendant then withdraws its pending motion to dismiss and asks the court to give effect to the amended complaint. Convincing a client to take that route may be difficult, but the credibility and gratitude that it garners is priceless.[183]

V. DO NOT LASH OUT—THE EXPECTATION OF PROFESSIONALISM

The preamble to the Texas Disciplinary Rules of Professional Conduct outlines "A Lawyer's Responsibilities."[184] One bedrock responsibility is to be respectful and professional: "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials."[185]

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178. Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 159 (5th Cir. 2011).

179. *Id.*

180. Oral Argument at 14:06–:17, *Sanches*, 647 F.3d at 156 (No. 10-10325), https://www.ca5.uscourts.gov/OralArgRecordings/10/10-10325_3-28-2011.wma.

181. *Id.* at 14:30–:46.

182. *Id.* at 14:52–:57.

183. *See* Morales-Martinez v. Morgan & Meyers Roofing & Exteriors, LLC, No. 5:21-CV-00139 (N.D. Tex. 2022), Dkt. Nos. 30, 31, 33; *see also* Wells Fargo Bank v. Kobernick, No. 4:08-CV-1458, 2010 WL 6297295, at *2 (S.D. Tex. Mar. 1, 2010), *aff'd sub nom.*, U.S. Bank, Nat'l Ass'n v. Kobernick, 454 F. App'x 307 (5th Cir. 2011) (applauding the plaintiff's candor in agreeing with the defendant that the requested attorney's fee award should be reduced by 20% for certain work).

184. TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 4.

185. *Id.*; *see also* MODEL RULES OF PRO. CONDUCT r. 3.4 (entitled "Fairness to Opposing Party and Counsel") and r. 3.5 (entitled "Impartiality and Decorum of the Tribunal").

An unprofessional tone in legal writing not only violates these obligations—it also weakens your case.[186] Over twenty years ago, a circuit court judge used satire to explain how poor legal writing can cause a lawyer to lose a case.[187] He explained, among other things, that to prevent a court from stumbling onto a valid argument, "salt your brief with plenty of distractions that will divert attention from the main issue."[188] He noted:

> One really good way of doing this is to pick a fight with opposing counsel. Go ahead, call him a slime. Accuse him of lying through his teeth. The key thing is to let the court know that what's going on here is not really a dispute between the clients.[189]

After giving an example, the judge revealed, "Pretty soon I found myself cheering for the lawyers and forgot all about the legal issues."[190]

A stark example of how an unprofessional tone can harm a case and distract from the merits is found in *Sanches*, the cheerleading case.[191] There, the court felt compelled to comment on the volume of mistakes in appellant's brief, as well as its unprofessional tone.[192] After quoting a portion of the appellant's brief that the court characterized as an unjustified attack on a magistrate judge, the court commented: "These sentences are so poorly written that it is difficult to decipher what the attorneys mean, but any plausible reading is troubling, and the quoted passage is an unjustified and most unprofessional and disrespectful attack on the judicial process in general and the magistrate judge assignment here in particular."[193] The court continued: "Usually we do not comment on technical and grammatical errors, because anyone can make such an occasional mistake, but here the miscues are so egregious and obvious that an average fourth grader would have avoided most of them."[194] The court noted that "Magistrate Judge Stickney [was] referred to as 'it' instead of 'he' and [was] called a 'magistrate' instead of a 'magistrate judge.'"[195] Imagine that opinion landing in your inbox and having to take it to your client.

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186. *See* Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 172 (5th Cir. 2011).

187. Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325, 325 (1992) (discussing the effects of poor legal writing).

188. *Id.* at 328.

189. *Id.*

190. *Id.*

191. *Sanches*, 647 F.3d at 156.

192. *Id.* at 172 n.13.

193. *Id.* at 172. At oral argument, appellant's counsel did not finish his introduction before being interrupted by the court to ask about the attacks on the magistrate judge. Oral Argument at 00:27–03:24, *Sanches*, 647 F.3d 156 (No. 10-10325), https://www.ca5.uscourts.gov/OralArgRecordings/10/10-10325_3-28-2011.wma.

194. *Sanches*, 647 F.3d at 172 n.13.

195. *Id.*

Additionally, the appellate court in *Pierotti* explained that an unprofessional tone is not just ineffective—it is also costly:

> Indeed, the tone of counsels' brief suggests it was more cathartic than tactical. However, an opening brief is not an appropriate vehicle for an attorney to "vent his spleen" after losing at an arbitration hearing. This is because, once the brief is filed, both the opponent and the state must expend resources in defending against and processing the appeal. Thus, an unsupported appellate tirade is more than just words on paper; it represents a real cost to the opposing party and to the state.[196]

Excelling on this front, however, will not go unnoticed, especially in hard-fought cases. In *United States v. Abu-Jihaad*, a jury convicted the defendant after a six-day trial of disclosing national-defense information and providing material support to terrorists.[197] The defense moved for a judgment of acquittal and a new trial.[198] Before resolving the motions, the court "pause[d] to note that throughout this case, it ha[d] been assisted by extremely able counsel on both sides," explaining that they have "worked tirelessly and with great professionalism in support of their respective positions and to present the Court and the jury with all the tools needed to decide this case properly."[199] The court expressed gratitude for "their skill, sensitivity, civility, and candor," and it opined that "[i]n the highest tradition, counsel for both the Government and Mr. Abu-Jihaad were scrupulously fair and candid with the Court and each other."[200] Courts do not forget this type of positive experience with counsel, and the ethos these lawyers brought to bear on the next case before this judge was likely formidable.[201]

VI. MISREPRESENTATION AND MISCONDUCT—PLAGIARISM

It may seem odd that in a common-law system built on precedent, plagiarism would be viewed as unethical.[202] But it is the failure to disclose one's sources that gives rise to an ethical problem, not the reliance upon them in the first instance.[203] Why? Because failing to disclose one's sources shields those sources from scrutiny.[204]

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196. Pierotti v. Torian, 96 Cal. Rptr. 2d 553, 564 (Ct. App. 2000) (internal footnote omitted).
197. United States v. Abu-Jihaad, 600 F. Supp. 2d 362, 364 (D. Conn. 2009).
198. *Id.*
199. *Id.* at 365.
200. *Id.*
201. *See id.* (noting the praise the court gave to counsel for their temperament).
202. *See infra* text accompanying notes 202–03 (detailing why plagiarism is unethical).
203. *See* United States v. Bowen, 194 F. App'x 393, 402 n.3 (6th Cir. 2006).
204. *See* Doering v. Pontarelli Builders, Inc., No. 01-C-2924, 2001 WL 1464897, at *2 n.1 (N.D. Ill. Nov. 16, 2001) (discussing the loss of trust that occurs when parties do not disclose contradictory precedent).

Texas Disciplinary Rule of Professional Conduct 8.04(a)(3) provides that a lawyer must not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[205] Applying various forms of this rule, courts have reprimanded attorneys for plagiarism: "While our legal system stands upon the building blocks of precedent, necessitating some amount of quotation or paraphrasing, citation to authority is absolutely required when language is borrowed."[206]

In *Bowen*, much of the appellant's brief—nearly twenty pages—"was copied almost verbatim from a published district court decision."[207] The lawyer did not cite the district court decision nor otherwise reflect that the brief borrowed heavily from it.[208] The court stressed that this conduct was unacceptable: "We made it very clear to [the lawyer] during oral argument [that] this behavior is completely unacceptable and reiterate it here as an admonishment to all attorneys tempted to 'cut and paste' helpful analysis into their briefs."[209] Aside from being unethical, copying a court without attribution is also counterproductive: a court is much more likely to accept arguments that have been vetted and accepted elsewhere, so why omit the imprimatur of acceptance?

Similarly, a district court in Pennsylvania openly rebuked an attorney for plagiarism, which it termed "professional misconduct."[210] The court explained that it was "both disappointed and disturbed to conclude that plaintiff's attorney . . . ha[d] plagiarized a significant portion of plaintiff's brief in opposition to the motion to dismiss."[211] Five of the eight pages of the brief's discussion were copied verbatim from circuit and district court opinions.[212] "Indeed, none of the legal research contained in [his] brief appear[ed] to be his own work product, yet he ha[d] not quoted or cited any of these cases for the content reproduced from them."[213] The court cited many examples of the federal bench denouncing "such mass appropriation as improper, [and] 'completely unacceptable.'"[214] The court reiterated the Sixth Circuit's exhortation: "Although reliance upon precedent forms the bedrock of legal argument, 'citation to authority is absolutely required when language is borrowed.'"[215] Critically, the court noted that "several courts have

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205. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04 (a)(3).
206. *Bowen*, 194 F. App'x at 402 n.3.
207. *Id.*
208. *Id.*
209. *Id.*
210. Venesevich v. Leonard, No. 1:07-CV-2118, 2008 WL 5340162, at *2 n.2 (M.D. Pa. Dec 19, 2008).
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* (collecting cases).
215. *Id.* (quoting *Bowen*, 194 F. App'x at 402 n.3 (emphasis omitted)).

recognized that plagiarism violates the prohibition that state ethics codes place on misrepresentation and deceit."[216]

To make matters worse for the attorney in *Venesevich*, the court had previously admonished him about plagiarism in a different case, but "[t]his prior admonition . . . clearly passed unheeded."[217] Thus, the court "issue[d] a more direct rebuke: [His] plagiarism is professional misconduct, and it is unacceptable behavior by a member of the bar of the Middle District of Pennsylvania."[218] Plagiarism, the court continued, "constitutes misrepresentation and is therefore a violation of Rule 8.4(c) of the Pennsylvania Rules of Professional Conduct and of the Local Rules of Court. The court expects that [his] future submissions will conform to all applicable standards of professional conduct."[219]

Violating this ethical duty can also hit an attorney in the pocketbook. In one case, an Illinois district court refused to award attorney's fees for the work done in preparing a petition for fees because the attorney plagiarized large portions of the analysis.[220] The court explained that "[c]ase law is meant to support an attorney's arguments, but borrowed analysis, and especially quoted material, must be cited."[221] The court withheld fees and issued a stern warning:

> This Court does not look lightly upon passing off as one's own the analysis and work of another. . . . Plaintiff's counsel is warned that future filings in this Court must follow commonsense and ethical standards, including citing work that is from another source. Plaintiff's counsel should take note of the cases cited above in which judges imposed more serious consequences for plagiarizing material, and realize the consequences may be far more severe if he ever attempts to plagiarize again.[222]

VII. CONCLUSION

Dire consequences flow from unethical legal writing. The duties of candor, competence, meritorious claims, professionalism, and honesty are critical to every lawyer's written product. But beyond merely avoiding discipline or adverse consequences for clients, advocates strengthen their own chances and reputation by aiming for more than the bare minimum. They also help promote the rule of law more broadly. Hamilton wrote that the

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216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. Consol. Paving, Inc. v. Cnty. of Peoria, No. 10-CV-1045, 2013 WL 916212, at *5–6 (C.D. Ill. Mar. 8, 2013).
221. *Id.* at *5.
222. *Id.* at *6 (collecting cases in which plagiarism led to censure, disgorging of fees, and referral to the state's disciplinary board).

judiciary possesses only judgment, not force or will.[223] It is incumbent upon judges and advocates, then, to promote public confidence in the judicial system—to persuade parties to resolve their disputes in court. Judges and practitioners shoulder not only heavy caseloads but also the burden of preserving and promoting confidence in the rule of law. Thus, upholding the duties we have described above is not only a professional obligation but a patriotic one, too.

223. THE FEDERALIST No. 78 (Alexander Hamilton) (1788).