The Role of Ethics in Legal Writing: The Forensic Embroiderer, The Minimalist Wizard, and Other Stories

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Introduction

Any comprehensive discussion of legal ethics must address ethics in legal writing. Whether incisive or inept, courteous or crude, a lawyer's writing not only embodies his or her sense of professionalism and ethics, but also affects clients, opposing parties, the courts, and the legal system. This article examines the role of ethics in legal writing by discussing cases in which lawyers' writing fell short of professional standards.

Court after court has explained how poor legal writing harms the legal system. For instance, when a lawyer errs by failing to cite relevant adverse authority, a court must spend valuable time and effort to perform its own analysis and may miss the chance to evaluate another court's reasoning and thus formulate a consistent decision.[1] Another error — misrepresenting facts — "threatens the integrity of the judicial process" and also requires courts to spend time checking sources.[2] Similarly, when lawyers submit frivolous

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[1] Tyler v. State, 47 P.3d 1095, 1108 (Alaska Ct. App. 2001).

[2] Romala Corp. v. United States, 927 F.2d 1219, 1224 (Fed. Cir. 1991).

papers, "everyone suffers."[3] Legitimate claimants must wait longer[4] and may be met with impatience, defense counsel become cynical about legitimate claims, courts waste resources, the public loses respect for the judicial system,[5] and clients entertain false hopes.[6] Even poor writing style harms the legal system because judges must take time to decipher the prose, a chore that prompted one court to exhort counsel "not to clog the system" with unclear briefs.[7] And following court rules is also "not an inconsequential matter."[8] Rules promote orderly arguments that help courts make sound decisions.[9]

What happens to lawyers whose writing fails to live up to professional standards? As I showed in an earlier article, the consequences may range from embarrassing comments in print to suspension or even disbarment.[10] In this article, I present new examples of courts' reactions to attorneys' lapses. These recent cases address some interesting contemporary issues, including the effects of misreading a Westlaw case history or using the cut-and-paste computer function. And along with traditional court responses, the cases include some creative ones. For example, one court ordered an errant lawyer to write a cautionary article for a bar journal. Another lawyer was no doubt chagrined when a court sent him a

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[3] Schutts v. Bently Nev. Corp., 966 F. Supp. 1549, 1566 (D. Nev. 1997).

[4] *See* Pierotti v. Torian, 96 Cal. Rptr. 2d 553, 566 (Ct. App. 2000).

[5] *See Schutts*, 966 F. Supp. at 1566.

[6] *See* Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140, 185 (D.D.C. 2002).

[7] N/S Corp. v. Liberty Mut. Ins. Co., 127 F.3d 1145, 1146 (9th Cir. 1997).

[8] LaGrange Mem'l Hosp. v. St. Paul Ins. Co., 740 N.E.2d 21, 32 (Ill. App. Ct. 2000).

[9] *Id.*

[10] *See* Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 SUFFOLK U. L. REV. 1 (1997).

model pleading and recommended that he study Strunk and White's classic *Elements of Style.*

I have divided these cases into somewhat artificial categories: failing to state the law accurately, failing to state the facts accurately, poor writing, plagiarism, and lack of civility. Within each category or subcategory, I begin with graver consequences and progress to less grave ones such as verbal reproaches. I focus on lapses that occur mainly in the research-and-writing process, not those that pervade a lawyer's work and only incidentally manifest themselves in the written word, because those cases receive adequate treatment elsewhere.

First, though, it's worth mentioning that many lawyers are fine writers. One federal judge recently said of the lawyers in a case: "Their briefs have been well written, their arguments cogent and candid, and their commitment to professionalism and civility outstanding."[11] Other judges have commended counsel for "well written briefs, superior arguments, and . . . exemplary courtesy and professionalism"[12] and "well written, dispassionate, informative" briefs.[13] The writing of these and many other lawyers meets high professional standards, manifesting the writers' competence and devotion to serving clients, the legal system, and society.[14] This article, however, looks at judges' responses to lawyers' errors.

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[11] 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).

[12] Quirk v. Premium Homes, Inc., 999 S.W.2d 306, 310 n.5 (Mo. Ct. App. 1999).

[13] *In re* Estate of Kendall, 968 P.2d 364, 365 n.1 (Okla. Civ. App. 1998).

[14] *See Report of ABA Comm'n on Professionalism*, 112 F.R.D. 243, 261 (1986) (quoting Roscoe Pound's definition of a profession as a group that "pursu[es] a learned art . . . in the spirit of public service").

Failing to State the Law Accurately

A lawyer who fails to state the law accurately to the court has failed at the very essence of lawyering. Rules of ethics require a lawyer to be competent, and that includes not only knowing the law[15] but also representing it accurately to the court.[16] Lawyers have a related ethical duty not to bring claims without adequate legal grounding,[17] a duty that is reinforced by Federal Rule of Civil Procedure 11, 28 U.S.C. § 1927, and many state statutes permitting sanctions for frivolous claims.[18]

A. Failing to Disclose Relevant Caselaw

One way lawyers sometimes violate the duty to present the law accurately is by failing to inform the court about important caselaw. Courts have recently met such failures with consequences ranging from sanctions to judicial rebukes.

One group of lawyers and their client were sanctioned when their brief failed to disclose an important case. In *Pierotti v. Torian*, an appeal of an arbitration award, Torian's attorneys failed to cite a controlling case that established an "extremely limited scope of review of arbitration decisions."[19] Besides omitting this key case, the brief contained numerous other errors: it lacked required citations to the record, quoted documents not part of the record, and repeated

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[15] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.1 (1996).

[16] *See, e.g., id.* 3.3.

[17] *See, e.g., id.* 3.1.

[18] *E.g.*, CAL. CIV. PROC. CODE § 128.5 (West Supp. 2004); FLA. STAT. ANN. § 57.105 (West Supp. 2004); ILL. S. CT. R. 137; N.Y. CT. RULES § 130-1.1; OHIO REV. CODE ANN. § 2323.51 (West 2001).

[19] 96 Cal. Rptr. 2d 553, 563 (Ct. App. 2000).

unsupported assertions even after opposing counsel had pointed them out.[20] Under a California sanctions provision,[21] the court required Torian and his counsel to pay the plaintiff $26,000 in costs in addition to the attorney's fees allowed under the parties' contract.[22] But the court did not stop there. Explaining that the behavior of Torian and his lawyers had damaged not only the defendant but also the appellate system, waiting litigants, and the taxpayers, the court added $6,000 in sanctions payable to the court and ordered that its opinion be sent to the state bar.[23]

Faulty research led to sanctions against another lawyer who omitted two controlling cases from his brief.[24] He tried to exonerate himself by blaming opposing counsel for not citing the cases and by making the "truly bizarre argument" that the Ninth Circuit authority was not controlling in a Nevada federal court until the Supreme Court resolved a conflict among circuits on the point.[25] The court sanctioned the plaintiff and his lawyer a total of $7,593.69 for "abuses of this court's scant resources," explaining that while it had no wish to deter meritorious claims, "everyone suffers" when lawyers file frivolous papers.[26]

Sanctions were also visited on an attorney who tried to divert a court's attention from a relevant case.[27] While a motion was pend-

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[20] *Id.* at 562.

[21] *Id.* at 563 (citing CAL. R. CT. 26(a), which allows an award of costs on appeal).

[22] *Id.* at 564–66.

[23] *Id.* at 566–67.

[24] Schutts v. Bently Nev. Corp., 966 F. Supp. 1549, 1563 (D. Nev. 1997).

[25] *Id.*

[26] *Id.* at 1564–66 (citing 28 U.S.C. § 1927 (1994); 42 U.S.C. § 12205 (1994); FED. R. CIV. P. 11).

[27] Griffith v. Hess Oil V.I. Corp., 5 F. Supp. 2d 336, 340 (D.V.I. 1998).

ing, another judge in the same court issued an opinion on parallel facts. When the plaintiffs' counsel wrote to the court about the new opinion, the defendants' lawyer moved to strike the letter as an "unauthorized communication" because the plaintiffs' counsel had not received permission to file an additional pleading as required by a local rule.[28] The plaintiffs countered by requesting sanctions against the defendants for "vexatiously multiplying the proceedings."[29] The court concluded that the plaintiffs' short letter was not a "pleading" and pointed out that its rules require counsel to inform the court of "any relevant law."[30] The court found the motion to strike a "conscious and deliberate effort . . . to withhold highly relevant case authority from the [c]ourt" and "the antithesis of an attorney's ethical duty."[31] Because of this bad faith, the court under its inherent power required the defendants' attorney to personally pay the plaintiffs $500 in sanctions.[32]

Apparently it was not bad faith but extreme forgetfulness that caused another lawyer to omit a relevant case in which he himself had been the attorney.[33] He argued that he had thought the case did not apply because he remembered the facts of the pending case incorrectly. The court pointed out that the requirement of citations to the record should guard against such errors of memory and that the lawyer had obviously not reviewed parts of the record before writing his brief. The court then reminded him that ethical rules require citation of directly adverse authority that "would reasonably

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[28] *Id.* at 339.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 340.

[32] *Id.*

[33] Tyler v. State, 47 P.3d 1095, 1100 (Alaska Ct. App. 2001).

be considered important by the judge sitting on the case."[34] When lawyers violate this rule, judicial resources are wasted, and the court may even render a decision that overlooks precedent, "leading to confusion in the law and possibly unfair outcomes."[35] Moreover, not identifying contrary authority violates the lawyer's duty to advise the client correctly so the client can make an informed decision about whether to appeal.[36] The court fined the lawyer for violating court rules, but limited the fine to $250 because he might not have acted in bad faith.[37]

A lawyer's failure to update the law prompted the court to lay a humbling requirement on him in *Salahuddin v. Coughlin*.[38] The court could "not fathom" how an assistant attorney general had omitted references to controlling cases that he would have found by shepardizing cases he did cite.[39] The court ordered him to show cause why he should not be sanctioned under Federal Rule of Civil Procedure 11 or 28 U.S.C. § 1927. It also required him to submit all further papers with a senior attorney's affidavit of approval.[40]

Other failures to cite relevant authority have evoked strong judicial rebukes. In *Doering v. Pontarelli Builders, Inc.*, in which counsel relied on a case whose reasoning had been rejected in several newer cases, the brief initially led the court to an erroneous view of

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[34] *Id.* at 1101, 1105 (citing ALASKA R. PROF'L CONDUCT 3.3(a)(3); ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 280 (1949)).

[35] *Id.* at 1108.

[36] *Id.* at 1108–09.

[37] *Id.* at 1110 (citing ALASKA APP. R. 510(c)).

[38] 999 F. Supp. 526, 538–40 (S.D.N.Y. 1998).

[39] *Id.* at 540.

[40] *Id.*

the law.[41] Upon discovering the newer authority, the court reproached the lawyer in print: "A party not only fails to benefit but loses the court's trust when it fails to disclose contradictory precedent."[42] Another court bluntly stated that adopting a lawyer's arguments would have caused it to apply the law incorrectly.[43] While describing the lawyer's brief as "well written," the court in the same sentence said it was "quite troubled" by the lawyer's "loose interpretation of the law" and "failure to notify the [c]ourt of adverse controlling authority."[44] And in *Jordan v. Reis*, a judge chastised both counsel for a variety of errors.[45] Neither side cited a line of controlling cases. The lawyers also omitted important facts, and the plaintiff's papers were "incoherent at many junctures," partly because "haphazardly placed" correction fluid "render[ed] the 'doctored' sentences incomprehensible."[46] The judge reproached both lawyers for their "seriously inadequate briefing."[47]

B. Misstating the Law

1. Intentional Misstatements

Recently, lawyers' intentional misstatements of the law have led to some creative judicial responses as well as more traditional ones.

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[41] No. 01 C 2924, 2001 WL 1464897, at *2 n.1 (N.D. Ill. Nov. 16, 2001).

[42] *Id.*

[43] Prickett v. DeKalb County, 92 F. Supp. 2d 1357, 1360–61 (N.D. Ga. 2000).

[44] *Id.* at 1361 n.1.

[45] 169 F. Supp. 2d 664, 667 (S.D. Tex. 2001).

[46] *Id.*

[47] *Id.*

Doctoring quoted material can amount to a misstatement of the law, as happened in *Precision Specialty Metals, Inc. v. United States*.[48] That case turned on whether a government lawyer had filed certain papers "forthwith." She quoted a case's definition of "forthwith" that would have encompassed the 12-day period she took to file the brief, but she omitted the case's next sentence, which stated that "forthwith" usually means "within 24 hours."[49] The court formally reprimanded her for attempting to mislead it about the case.[50]

Another judge called a brief "dead wrong" and found it either "extremely sloppy" or "intentionally misleading."[51] The judge ordered the lawyer to show cause why she should not be sanctioned under Rule 11. And in an unusual step that must have mortified the lawyer, the judge ordered her to bring her superior to court "to discuss the overall poor quality of [her] brief."[52]

One group of attorneys escaped sanctions but received a stern warning for misrepresenting a case.[53] Their motion papers said the identity of a certain tire was not at issue in the cited case. The court was therefore "shocked" to read the opinion and learn that the tire's identity *was* at issue.[54] Finding the lawyers' analysis "imprecise, if not outright deceptive," the court decried their "sloppy lawyering"

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[48] 315 F.3d 1346, 1348 (Fed. Cir. 2003).

[49] *Id.* at 1349.

[50] *Id.* at 1358.

[51] Hernandez v. N.Y. Law Dep't Corp. Counsel, No. 94 Civ. 9042 (AJP) (SS), 1997 WL 27047, at *14 (S.D.N.Y. Jan. 23, 1997).

[52] *Id.* at *14 n.11.

[53] Bruther v. Gen. Elec. Co., 818 F. Supp. 1238, 1241 n.2 (S.D. Ind. 1993).

[54] *Id.*

and warned them to "tread lightly for you have exhausted the Court's patience."[55]

2. Careless Misstatements

Other lawyers misstate the law because they do not understand it well — often because of poor research.

For example, one attorney's error occurred because she did not know a basic requirement of the civil-rights claim she pleaded.[56] Part of her excuse was that the annotated code for the relevant statute was several hundred pages long. The judge found this explanation "simply mind-boggling" and questioned whether the lawyer was "competent to practice law at all."[57] She had also copied her complaint from a formbook without performing her own analysis. The combination of these errors led the judge to dismiss her complaint, propose Rule 11 sanctions, and order her to take courses in federal practice and procedure and civil-rights law. He also referred the matter to the state ethics office.[58]

In *Lieber v. ITT Hartford Insurance Center, Inc.*, Hartford's counsel presented an overruled case as controlling law and, because he misread a Westlaw entry, erroneously stated that another case had not been cited recently.[59] The court pointed out that a case can still be good law even if it has not been cited recently and remanded the case for a determination whether Hartford should be required to pay

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[55] *Id.*

[56] Clement v. Pub. Serv. Elec. & Gas Co., 198 F.R.D. 634, 635, 636 (D.N.J. 2001).

[57] *Id.* at 636, 637.

[58] *Id.* at 635.

[59] 15 P.3d 1030, 1038, 1039 n.14 (Utah 2000).

the plaintiff's attorney's fees because it had not fairly evaluated the case.[60]

Another lawyer apparently failed to delve behind an "overruled" notation in *Shepard's* or online.[61] He asserted that a case had been overruled, although it was overruled on grounds not relevant to the pending issue. The error drew a critical comment from the court.[62] The lawyer also analyzed the statute of limitations for contracts cases by citing tort cases, prompting the court's embarrassing reminder that different statutes of limitations require different analyses.[63]

Still another lawyer cited a depublished case in violation of a California rule[64] — just one of the errors that brought dismissal and a stern reprimand in *N/S Corp. v. Liberty Mutual Insurance Co.*[65] Among the other errors were omitting the appellate standard, omitting required citations to the record, violating the word-limit rule, omitting required tables of contents and authorities, and inaccurately referring to the facts. This combination of errors led the court to strike the brief and dismiss the appeal.[66]

Carelessness again resulted in a reprimand when other lawyers cited authority that did not support the propositions for which they cited it.[67] The citations themselves were also incorrect, and the briefs in general were "inaccurate, poorly drafted, and an embarrassing

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[60] *Id.* at 1037–38 (citing UTAH R. PROF'L CONDUCT 3.3(a)(3)).

[61] Lewis v. Paul Revere Life Ins. Co., 80 F. Supp. 2d 978 (E.D. Wis. 2000).

[62] *Id.* at 990 n.10.

[63] *Id.* at 1008 n.22.

[64] CAL. R. CT. 977(a).

[65] 127 F.3d 1145, 1146 (9th Cir. 1997).

[66] *Id.*

[67] Georgopoulos v. Int'l Bhd. of Teamsters, 942 F. Supp. 883, 904 (S.D.N.Y. 1996).

example of shoddy lawyering."[68] The court issued a stern warning against further "trespasses against the obligations of professional responsibilities."[69]

In *DeMyrick v. Guest Quarters Suite Hotels*, the court found it "particularly distressing" that a lawyer had cited outdated authority because of an apparent failure to update the case through *Shepard's* or computer sources.[70] The same judge chastised another lawyer for citing an off-point case and relying on an "expressly overruled" one: the judge remarked that it is "really inexcusable" to cite a case without shepardizing or updating it online.[71]

C. Failing to Provide Adequate Legal Authority

A lawyer must support arguments to a court with adequate legal authority. Recently, lawyers who failed to do so have incurred sanctions, case dismissal, and a sarcastic rebuke. One of these attorneys failed to provide required citations to authority and omitted a major issue.[72] The court required his client to pay the opposing party $5,000 for fees and expenses for the appeal, declaring that "[t]here is no room at the courthouse for frivolous litigation," which burdens the opposing party, the courts, and legitimate litigants.[73]

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[68] *Id.* at 904, 905.

[69] *Id.* at 905.

[70] No. 93 C 1520, 1997 WL 177838, at *1 (N.D. Ill. Apr. 6, 1997).

[71] Gosnell v. Rentokil, Inc., 175 F.R.D. 508, 510 & n.1 (N.D. Ill. 1997); *see also* United States v. Jolly, 102 F.3d 46, 50 n.2 (2d Cir. 1996); LaGrange Mem'l Hosp. v. St. Paul Ins. Co., 740 N.E.2d 21, 30 (Ill. App. Ct. 2000); Lieber v. ITT Hartford Ins. Ctr., Inc., 15 P.3d 1030, 1038 (Utah 2000) (each chastising counsel for citing overruled cases).

[72] Chapman v. Hootman, 999 S.W.2d 118, 124 (Tex. App. 1999).

[73] *Id.* at 125.

Another lawyer's failure to present relevant authority misled her emotionally vulnerable clients, former U.S. hostages in Iran. In their suit against the Republic of Iran, their lawyer failed to provide "any supporting authority" and omitted important opposing authority.[74] Holding her arguments meritless, the court declared that "[a]n attorney cannot carry out the practice of law like an ostrich with her head in the sand, ignoring her duty to research and acknowledge adverse precedent."[75] The poor briefing was especially troubling to the court because of the emotional toll on the former hostages. When the judge dismissed the case, he regretted disappointing the plaintiffs' hopes, but rhetorically asked "how high those hopes were raised in the first place and on whose shoulders that responsibility should fall."[76]

When other lawyers failed to provide adequate support for their arguments, Judge Samuel B. Kent called their work "minimalist analytical wizardry."[77] He described the defendant's motion as "bumbling" because it was supported by only one irrelevant authority. The plaintiff's memorandum fared no better: its "equally gossamer wisp of an argument" cited an irrelevant case with an erroneous volume number and no pinpoint cite.[78] Explaining that he had received "no useful guidance whatever from either party" because of counsel's "heroic efforts to obscure" the issue, the judge sarcastically urged the lawyers to use pencil instead of crayon when writing their next briefs.[79] Judge Kent is noted for his impatience

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[74] Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140, 185 (D.D.C. 2002).

[75] *Id.* at 184.

[76] *Id.* at 185.

[77] Bradshaw v. Unity Marine Corp., 147 F. Supp. 2d 668, 670 (S.D. Tex. 2001).

[78] *Id.*

[79] *Id.* at 671, 672.

with lawyers,[80] and some have found his tone and comments too harsh,[81] but fair or not, the *Bradshaw* opinion is another illustration of what can befall the careless legal writer.

Failing to State the Facts Accurately

A lawyer also has a duty to investigate the facts of a case and present them accurately.[82] A lawyer who presents inaccurate facts causes the court to spend extra time checking errors or, worse, may cause it to reach an unjust result.

A lawyer may intentionally misrepresent facts because of pervasive ethical problems that manifest themselves in writing, as when a lawyer was disbarred after he manufactured a bank-sale prospectus to "cure" a problem with a witness's testimony,[83] or when another lawyer fabricated a will.[84] Another attorney wrote a false affidavit that rose to the level of "recklessly negligent conduct" and led to his suspension from practice for 18 months.[85] When another lawyer

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[80] *See* Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 11, 12–13 (2001) (arguing that Judge Kent's criticisms of lawyers in print are unnecessarily insulting and demeaning); *see also supra* notes 45–47 and accompanying text (discussing another of Judge Kent's cases).

[81] *E.g.*, Lubet, *supra* note 80, at 13.

[82] *See* FED. R. CIV. P. 11(b)(3) (providing that one who signs a court document represents that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the document is well grounded in fact).

[83] *In re* Richards, 755 N.E.2d 601, 603 (Ind. 2001).

[84] *In re* Nolan, 706 N.Y.S.2d 704 (App. Div. 2000).

[85] Nebraska *ex rel.* Neb. State Bar. Ass'n v. Zakrzewski, 560 N.W.2d 150, 156, 157 (Neb. 1997); *see also* Iowa Supreme Court Bd. of Prof'l Conduct v. Wanek, 589 N.W.2d 265, 267 (Iowa 1999) (false representation that a deponent had been properly served may have been due to ignorance of basic rules of service).

"grossly misstated" a case record, the court assessed $5,000 in sanctions against him and ordered him to take a course in advanced civil procedure.[86] Then there was the lawyer who drafted a deed that he knew to be inconsistent with the parties' contract. He buried the inconsistency in "an almost incomprehensible, three-page single-spaced description containing only four sentences."[87] Because of this chicanery, the court enforced the sale as stated in the contract and awarded damages to the aggrieved party.[88]

Another lawyer made up facts, submitting "creative renditions of what actually occurred at the district court."[89] This forced the court to look through the record for the alleged information, much of which was "not there at all."[90] Noting that courts have a high volume of work and limited resources, the Ninth Circuit declared, "[W]e must insist that parties not clog the system by presenting us with a slubby mass of words rather than a true brief."[91] Stating that the appellant had "approached our rules with such insouciance that we cannot overlook its heedlessness," the court struck the offending brief and dismissed the appeal.[92]

In yet another case, although some of counsel's misstatements were due to clerical errors, the court pointed out others that were

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[86] *In re* Guevara, 41 S.W.3d 169, 173, 174 (Tex. App. 2001); *see also* Weiland v. Paulin, 655 N.W.2d 204, 209–12 (Wis. Ct. App. 2002) (assessing fees and costs against a lawyer who misrepresented facts, including the trial court's rulings in the case).

[87] Cont'l Land Co. v. Inv. Props. Co., No. M1998-00431-COA-R3-CV, 1999 WL 1129025, at *5 (Tenn. Ct. App. Dec. 10, 1999).

[88] *Id.* at *8.

[89] N/S Corp. v. Liberty Mut. Ins. Co., 127 F.3d 1145, 1146 (9th Cir. 1997).

[90] *Id.*

[91] *Id.*

[92] *Id.* at 1146, 1147.

"generalizations and overstatements that bordered on deception."[93] One such offense was an "attempt to mislead the court" by using ellipses in the description of a lease. The court chastised the erring lawyers, warning them that "attention to detail is critical" because "sloppy argument greatly multiplies the proceedings."[94]

Other misstatements of fact result not from intent or recklessness but from carelessness. An inadequate investigation can lead to factual errors.[95] One lawyer who sued a funeral home was sanctioned for falsely representing that his client was the decedent's son, although events should have alerted him to investigate that point.[96] Elsewhere, a lawyer's faulty memory and failure to review the record closely were the apparent causes of his fine for misstating facts.[97] Another lawyer was referred to a disciplinary panel after misstating the record on an appeal, an error he had made in the past.[98]

Poor Writing

In the writing process itself, a lawyer can apply professional expertise to sift through a morass of law and facts and develop a

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[93] Am. Nat'l Bank & Trust Co. of Chi. v. Harcros Chems., Inc., No. 95 C 3750, 1997 WL 413856, at *3 (N.D. Ill. July 18, 1997).

[94] *Id.*; *see also* Copelco Capital, Inc. v. Gen. Consul of Bol., 940 F. Supp. 93, 95–96 (S.D.N.Y. 1996) (ordering an attorney to show cause why sanctions should not be imposed for his "selective and misleading" quotation of a lease in an affidavit).

[95] *See* FED. R. CIV. P. 11 (requiring a "reasonable inquiry" before filing pleadings).

[96] Stone v. House of Day Funeral Serv., Inc., 748 N.E.2d 1200, 1210–11, 1214 (Ohio Ct. App. 2000).

[97] Tyler v. State, 47 P.3d 1095, 1100, 1110 (Alaska Ct. App. 2001).

[98] Qualls v. Apfel, 206 F.3d 1368, 1371 (10th Cir. 2000).

clear analysis. Lawyers who instead obfuscated the issues were recently taken to task.

A. Faulty Analysis

Because analysis is integral to writing, faulty analysis can lead to substandard documents, as several lawyers were reminded.

Counsel's "crimped and skewed view of the controlling cases" was part of the basis for sanctions in one federal case.[99] There, the plaintiff's lawyer filed new complaints after a court had dismissed related ones on the same facts. The court found the lawyer's persistent pursuit of "copycat" claims "shocking." Moreover, the lawyer's brief in the pending case "present[ed] utterly preposterous arguments" and was a "consummate study [in] how to avoid the real issue."[100] The court assessed sanctions in the amount of attorney's fees and expenses and also ordered the lawyer to reveal the sanction order to any other court where he filed a complaint.[101] Fees and costs were also assessed against another lawyer who submitted only "vague and directionless sentences" and long block quotations of caselaw.[102] Because the brief lacked any application of law to the facts, the court said the lawyer did not even "set forth an 'argument'" as required by court rule.[103]

It "pained" a court to read another lawyer's analysis that was so "replete with unnecessary, baseless, irrelevant, and frivolous claims"

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[99] United States *ex rel.* Sampson v. Crescent City E.M.S., Inc., No. Civ. A. 96-3505, 1997 WL 570688, at *7 (E.D. La. Sept. 12, 1997).

[100] *Id.* at *2.

[101] *Id.* at *7.

[102] Morters v. Barr, No. 01-2011, 2003 WL 115359, at *3 (Wis. Ct. App. Jan. 14, 2003).

[103] *Id.*

that a layperson could be expected to do better.[104] Then, on a Rule 11 motion against him, the lawyer repeated his baseless arguments and added personal accusations against the opposing party and its lawyer.[105] This conduct, the court said, showed a "callous disregard for the operation and efficient functioning of the [c]ourt."[106] Noting that the lawyer's previous offensive conduct had caused other judges to bar him from their courts, the court formally reprimanded the lawyer and ordered him to apologize for the personal attacks and pay the opposing party's costs and fees.[107]

One lawyer's entire appeal was found frivolous because of "tactical decisions" he made in writing his brief.[108] His "irrelevant" arguments and faulty logic avoided the "real issue" and included false premises and non sequiturs.[109] This "exceed[ed] all permissible bounds of zealous advocacy" and led to sanctions against the lawyer and his client for twice the amount of the defendant's costs.[110] The court pointed out that such briefing harms the opposing party as well as the public, whose taxes are wasted on a frivolous appeal.[111] Stressing that courts are taking stronger stands against frivolous appeals, the court quoted Judge Richard A. Posner's admonition that "'some members of the bar still do not realize that the judicial

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[104] Lockheed Martin Energy Sys., Inc. v. Slavin, 190 F.R.D. 449, 453, 458 (E.D. Tenn. 1999).

[105] *Id.* at 455 & n.3.

[106] *Id.* at 458.

[107] *Id.* at 461.

[108] Romala Corp. v. United States, 927 F.2d 1219, 1225 (Fed. Cir. 1991).

[109] *Id.* at 1222, 1223–24.

[110] *Id.* at 1224, 1227.

[111] *Id.* at 1224.

attitude toward attorney misconduct has stiffened. They had better realize it.'"[112]

In another case, an attorney misunderstood the weight of authority and cited a dissenting opinion as controlling.[113] She also flouted settled summary-judgment principles by "improperly present[ing her] own version of the facts in a manner resembling jury argument."[114] Combined with her failure to adequately brief certain issues, this merited $10,000 in sanctions against her clients.[115]

Two other lawyers were recently sanctioned for poor logic. For one, "irrelevant, illogical" arguments that were "utterly without any good-faith factual basis" warranted sanctions of $3,675 against both him and his client.[116] Illogic was also a problem for a second lawyer, who wrote arguments that "fl[ew] in the teeth of the plain meaning of the statute" and had "utterly no foundation in law or logic."[117] He also made a "flatly false" statement of law and cited irrelevant cases in response to an allegation of frivolity.[118] The court required him to pay appellate costs and issued a stern warning.[119]

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[112] *Id.* at 1225 (quoting Hill v. Norfolk & W. Ry., 814 F.2d 1192, 1203 (7th Cir. 1987)).

[113] Bridges v. Robinson, 20 S.W.3d 104, 116 (Tex. App. 2000), *disapproved on other grounds by* Telthorster v. Tennell, 92 S.W.3d 457, 464 (Tex. 2002).

[114] *Id.* at 118–19.

[115] *Id.* at 116, 119 (citing TEX. R. APP. P. 45, which allows an award of damages for frivolous appeals); *see also* Tate v. E.I. Du Pont de Nemours & Co., 954 S.W.2d 872, 875 (Tex. App. 1997) (sanctioning a lawyer who improperly raised issues for the first time on appeal and omitted citations to the record).

[116] Prop. Movers, L.L.C. v. Goodwin, 31 Fed. Appx. 81, 89–90 (4th Cir. 2002).

[117] Abbs v. Principi, 237 F.3d 1342, 1351 (Fed. Cir. 2001).

[118] *Id.* at 1347, 1350.

[119] *Id.* at 1351–52.

B. Unclear Writing

"The power of a clear statement is the great power at the bar," said Daniel Webster.[120] Clear writing is also a professional obligation because both clients and courts rely on the lawyer's writing to elucidate the issues.

Instead of fulfilling this obligation, one Kentucky lawyer filed a "virtually incomprehensible" brief that led to dismissal of his appeal and a disciplinary proceeding.[121] The offending brief was only a page and a half long and "grossly inadequate."[122] In dismissing the appeal, the court characterized the brief as "little more than fifteen unclear and ungrammatical sentences, slapped together as two pages of unedited text with an unintelligible message."[123] When the bar association charged the lawyer with incompetence, his argument that he should not be suspended because he was trustworthy "highlight[ed] his continued inability to grasp the concept of relevance."[124] The Kentucky Supreme Court suspended him from practice for 60 days and ordered him to pay the costs of the bar action.[125]

Sometimes unclear writing brings direct financial consequences. One lawyer's brief was so unclear that the court could discern its arguments "only through the exertion of great effort."[126] The brief also included personal attacks, violated court rules on such matters

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[120] QUOTE IT COMPLETELY! 27 (Eugene C. Gerhart ed., 1998).

[121] Ky. Bar Ass'n v. Brown, 14 S.W.3d 916, 917 (Ky. 2000).

[122] *Id.* at 918.

[123] *Id.* at 918–19.

[124] *Id.* at 919.

[125] *Id.*

[126] Catellier v. Depco, Inc., 696 N.E.2d 75, 79 (Ind. Ct. App. 1998).

as the content of the statement of the case, page length, and typeface, and failed to include pinpoint citations.[127] The court therefore assessed attorney's fees against the lawyer personally.[128]

Confusing writing again led to sanctions when an insurance company's lawyer used a case's complex facts to "obfuscate, rather than clarify, the issues."[129] His brief contained numerous errors: it misled the court about the law, relied on overruled cases, omitted required sections, and exceeded the page limit.[130] In requiring the defendant to pay the plaintiff's costs and fees, the court stressed the importance of an orderly argument in helping it reach a just result.[131]

A court recently imposed some creative sanctions on a repeat offender. In one courtroom, the lawyer submitted a 160-page complaint containing "largely meritless allegations" that were "legally and factually nonsensical."[132] Partly because he had ignored previous admonitions, the judge publicly admonished him, fined him $1,000, and ordered him to write a 20-page summary of his obligations under Rule 11 and send the court's opinion to his clients.[133] Meanwhile, the lawyer angered a second judge in the same courthouse, who ordered him to take continuing-education classes in professionalism and federal practice and procedure.[134] The lawyer then filed a new 392-page complaint before the second judge that was "incomprehensible in its immensity" and, despite its length, was

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[127] *Id.*

[128] *Id.* at 80.

[129] LaGrange Mem'l Hosp. v. St. Paul Ins. Co., 740 N.E.2d 21, 32 (Ill. App. Ct. 2000).

[130] *Id.* at 31–32.

[131] *Id.* at 30, 32 (citing ILL. SUP. CT. R. 375(b)).

[132] Leuallen v. Borough of Paulsboro, 180 F. Supp. 2d 615, 616, 618 n.5 (D.N.J. 2002).

[133] *Id.* at 622, 623.

[134] Mendez v. Draham, 182 F. Supp. 2d 430, 431 (D.N.J. 2002).

"plainly frivolous."[135] That judge admonished the lawyer for substituting "'mouse clicks' for legal judgment," stating that it is unprofessional for a lawyer to substitute the cut-and-paste word-processing function for the research and draftsmanship he should have done.[136] The judge dismissed the complaint and cautioned the lawyer that further unprofessional conduct would result in a referral for disciplinary action, including suspension or disbarment.[137]

One attorney filed an "undecipherable" complaint that included more than 12 factual allegations in one paragraph, subdivided material in an "incomprehensible" manner, and was "redundant, jumbled, and cryptic."[138] Explaining that "[c]oncise and clear pleadings are vital to the administration of justice," the court required the lawyer to personally pay the defendants' attorney's fees and costs.[139]

Other lawyers' unclear writing has prompted similarly strong criticism. The Eighth Circuit denounced a plea agreement that "drown[ed] in clauses" as a "monument to legalese," partly because of the drafter's use of the "clumsy" expression *and/or*.[140] A state court described a lawyer's 88-page complaint as a "pastiche of prolix invective" and a "blunderbuss."[141] Another court chastised a lawyer for his wordy complaints filled with "incoherent" claims and "illogical" statements.[142] And when a lawyer advanced undeveloped and incoherent arguments, a court soundly condemned "litigat[ing]

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[135] *Id.*

[136] *Id.*

[137] *Id.* at 431–32.

[138] Rubino v. Circuit City Stores, Inc., 758 N.E.2d 1, 7–8, 15 (Ill. App. Ct. 2001).

[139] *Id.* at 15.

[140] United States v. Taylor, 258 F.3d 815, 818–19 (8th Cir. 2001).

[141] Brehm v. Eisner, 746 A.2d 244, 249, 267 (Del. 2000).

[142] Bliss v. Rochester City Sch. Dist., 196 F. Supp. 2d 314, 317, 343 (W.D.N.Y. 2002).

through obfuscation," adding, "This method of litigating is unbecoming for a member of the bar of this court."[143]

C. Verbosity

Verbosity is out of vogue in the legal profession. The evidence is clear that concise prose communicates and persuades better than wordy, cluttered legalese.[144] Legal-writing professionals have stressed this point for years, and courts have become increasingly impatient with lawyers who do not curb their verbosity.[145]

"[U]nnecessarily prolix and repetitive briefs" brought financial consequences in *Yankee Candle Co. v. Bridgewater Candle Co.*[146] There, in response to the defendant's motion for summary judgment, the plaintiffs attempted to support weak claims with "enormous (and often unenlightening) documents," including a 100-page memorandum of law and a 114-page response to the defendant's 10-

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[143] Joseph P. Caulfield & Assocs., Inc. v. Litho Prods., Inc., 155 F.3d 883, 892 (7th Cir. 1998); *see also* M&P Enters., Inc. v. Transamerica Fin. Servs., 944 S.W.2d 154, 158 n.2 (Mo. 1997) (calling a brief a "model of obfuscation").

[144] *See* Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 LOY. L.A. L. REV. 301 (1987) (reporting that judges and their research attorneys found briefs laden with legalese less persuasive than those written in plain English); Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1 (1996–1997) (reporting considerable evidence of the benefits of plain language in legal and official writing).

[145] *See Plain Language Resolution Adopted*, 8 SECOND DRAFT 1 (1992) (reporting the adoption of a plain-language resolution by the Legal Writing Institute, a professional organization for legal-writing teachers); State v. Eason, 629 N.W.2d 625, 656 (Wis. 2001) (Abrahamson, C.J., dissenting) (stating that nonlawyers often use terms like "'to wit'" and "'whereas'" in an effort to sound like lawyers, but that "law stu-dents have been taught for at least the last 50 years to avoid this kind of legalese").

[146] 140 F. Supp. 2d 111, 118 (D. Mass. 2001), *aff'd*, 259 F.3d 25 (1st Cir. 2001).

page statement of undisputed facts.[147] The court stated that the prolix documents "unduly burdened both defendant and this court" and were based on an improper attempt to harm the defendant financially through discourteous and "hardball conduct."[148] To deter such conduct in the future, the court assessed close to $1 million in fees and costs against the plaintiff under the Copyright and Lanham Acts.[149]

A verbose complaint warranted dismissal and a reproof in *Morgens Waterfall Holdings, L.L.C. v. Donaldson, Lufkin & Jenrette Securities Corp.*[150] There, counsel filed a 103-page amended complaint that was "a rhetorical exercise in length and forensic embroidery," "hopelessly redundant," and "excessively long-winded."[151] The court dismissed the complaint, suggesting that counsel file one "in concise, direct, simple form and of reasonable length."[152]

Another judge was moved to send a sample formbook pleading to a lawyer who filed a prolix, repetitive complaint containing multiple allegations per paragraph, improperly pleaded evidence, and argumentative language like "cynical" and "much too little too late."[153] The judge also urged the lawyer to study Strunk and White's

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[147] *Id.*

[148] *Id.*

[149] *Id.* at 126–27 (citing 17 U.S.C. § 505 (2000); 15 U.S.C. § 1117 (2000)).

[150] 198 F.R.D. 608 (S.D.N.Y. 2001).

[151] *Id.* at 610.

[152] *Id.*; *see also* Mendez v. Draham, 182 F. Supp. 2d 430, 431 (D.N.J.) (reproaching counsel for a verbose complaint); Bliss v. Rochester City Sch. Dist., 196 F. Supp. 2d 314, 317 (W.D.N.Y. 2002) (reproaching counsel for a prolix complaint); Brehm v. Eisner, 746 A.2d 244, 249 (Del. 2000) (reproaching counsel for a complaint that was a "pastiche of prolix invective").

[153] Politico v. Promus Hotels, Inc., 184 F.R.D. 232, 234 (E.D.N.Y. 1999).

Elements of Style.[154] (He might also have mentioned some of the excellent books on legal writing.[155])

The importance of concise briefing was again emphasized in *United States v. Molina-Tarazon*, in which the government moved to file a "fat brief" exceeding the prescribed word limit.[156] The court denied the motion and sent the requesting lawyer back to edit the document, commenting dryly, "We have every confidence that when the United States Department of Justice applies its formidable resources to the problem, it will come up with a petition . . . that complies with our rules, yet presents the government's position elegantly and forcefully."[157]

Plagiarism

A recent case raised an issue not often discussed in the reported cases — plagiarism in a lawyer's brief. In *Iowa Supreme Court Board of Professional Ethics & Conduct v. Lane*, Lane copied 18 published pages into a brief.[158] He then proceeded to ask the court to award him $16,000 in fees for 80 hours of work in preparing it.[159] A magistrate suspected that the brief had been copied, and after Lane attempted to conceal his source, the magistrate found that Lane had

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[154] *Id.* (citing WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE (3d ed. 1979)).

[155] *E.g.*, BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE (2d ed. 2002); BRYAN A. GARNER, THE WINNING BRIEF (2d ed. 2004); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS (4th ed. 1998).

[156] 285 F.3d 807, 808 (9th Cir. 2002).

[157] *Id.*

[158] 642 N.W.2d 296, 300 (Iowa 2002).

[159] *Id.* at 298.

taken "the legal portion of his brief verbatim" from a treatise.[160] When the bar ethics board brought disciplinary proceedings against him, the state supreme court called his copying "plagiarism" and "unethical."[161] It added that Lane had intended to deceive and had "jeopardized the integrity of the Bar and the public's trust in the legal profession."[162] The court suspended Lane from practice for six months and ordered him to pay the costs of the disciplinary action.[163]

Lane may raise more questions than it resolves because it is not completely clear what constitutes unacceptable copying in law practice. Any uncredited use of language from an outside source is plagiarism in the law-school setting, where "the emphasis is on learning [and] evaluation" of students' work and it is important to protect "the integrity of the intellectual record."[164] But the considerations are different in practice. In drafting complaints and instruments, lawyers commonly consult formbooks, which are meant to be consulted and partially copied. Courts seem to accept this practice. For example, a state supreme-court justice tacitly approved lawyers' use of boilerplate from "widely used model form books."[165] Some courts have even suggested that a lawyer *should* consult

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[160] *Id.* at 298–99.

[161] *Id.* at 300.

[162] *Id.* at 302.

[163] *Id.*

[164] Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. LEGAL EDUC. 236, 250 (1999).

[165] Moore v. Regents of Univ. of Cal., 793 P.2d 479, 521 n.27 (Cal. 1990) (Mosk, J., dissenting); *see also* Hou v. N.Y. City Dep't of Envtl. Prot., No. 98CIV.1518 (LBS)(HBP), 2001 WL 434856, at *1 n.1 (S.D.N.Y. Apr. 26, 2001) (stating that "given the multitude of form books and other resources available," it would not be difficult to draft an amended complaint).

formbooks; one court found a lawyer's claim of 2.8 hours for preparing a motion notice "exaggerated" because the notice "could easily have been copied from a form book,"[166] while another court sent counsel a sample form from a book.[167]

Still, it is recognized good practice for an attorney who uses a form not to copy it uncritically but to exercise professional judgment and fit it to the particular need.[168] One attorney who copied her complaint from a formbook did not tailor it to her case and therefore failed to allege a requirement for her claim.[169] The court dismissed the complaint and sternly pronounced that "[l]awyers are not automatons. They are trained professionals who are expected to exercise independent judgment."[170]

In addition to using formbooks, lawyers sometimes prepare instruments by taking language from other lawyers' documents without any attribution.[171] At least one court approved of this practice: "Legal instruments are widely plagiarized, of course. We see no impropriety in one lawyer's adopting another's work, thus

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[166] Decibus v. Woodbridge Township Police Dep't, No. Civ. A. 88-2926, 1991 WL 59428, at *2 (D.N.J. Apr. 15, 1991); *see also* Fiorentino v. Rapoport, 693 A.2d 208, 218 (Pa. Super. Ct. 1997) (referring to an expert witness's testimony that it is "common practice" for lawyers to use "exemplary contract provisions" from formbooks); Seaman v. Neel, 480 S.W.2d 430, 449 (Tex. App. 1972) (suggesting that a task was routine because it could be done by using a formbook).

[167] Politico v. Promus Hotels, Inc., 184 F.R.D. 232, 234 (E.D.N.Y. 1999).

[168] *See* Eschwig v. State Bar, 459 P.2d 904, 906 (Cal. 1969) (criticizing a lawyer for using a formbook "without researching any of the applicable law").

[169] Clement v. Pub. Serv. Elec. & Gas Co., 198 F.R.D. 634, 635, 637 (D.N.J. 2001).

[170] *Id.* at 636.

[171] *See* LeClercq, *supra* note 164, at 250.

becoming the 'drafter' in the sense that he accepts responsibility for it."[172]

In briefs, on the other hand, courts have disapproved of using borrowed language. One lawyer was ordered to show cause why he should not be sanctioned for a brief that repeated large sections of a brief in another case almost verbatim, conduct that the court found "unacceptable."[173] Another lawyer incurred a court's condemnation for plagiarism "wholly intolerable in the practice of law" when he copied large parts of opposing counsel's memorandum.[174] The court disregarded the pleading and ordered the offending lawyer to pay the other side's attorney's fees "for the services unwittingly rendered."[175] Significant factors in both of these cases were the large quantity of material copied and the lawyer's failure to do his own research on the subject.[176] That suggests a key difference between acceptable use of forms and Lane's conduct: a brief is supposed to present analysis, but Lane simply pasted large blocks of text into his brief without exercising professional judgment.[177] This produced a brief that did little to address the issues in the specific case before the court.[178]

Another significant difference between Lane's conduct and acceptable borrowing is the type of source used. While copying from formbooks is expected, treatises are not meant to be copied without

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[172] Fed. Intermediate Credit Bank v. Ky. Bar Ass'n, 540 S.W.2d 14, 16 n.2 (Ky. 1976), *cited in* Lisa G. Lerman, *Misattribution in Legal Scholarship: Plagiarism, Ghostwriting, and Authorship*, 42 S. TEX. L. REV. 467, 468 n.5 (2001).

[173] USA Clio Biz, Inc. v. N.Y. State Dep't of Labor, No. 97 CV 250, 1998 WL 57176, at *2 (E.D.N.Y. Jan. 3, 1998).

[174] DeWilde v. Guy Gannett Publ'g Co., 797 F. Supp. 55, 56 n.1 (D. Me. 1992).

[175] *Id.* at 64.

[176] *USA Clio Biz*, 1998 WL 57176, at *2; *DeWilde*, 797 F. Supp. at 56 n.1.

[177] 642 N.W.2d at 300.

[178] *See id.*

attribution, and their uncredited use raises copyright issues.[179] At least two courts have said that lifting material from treatises was plagiarism,[180] and another court found "intolerable" a lawyer's use of large blocks of text from a reported opinion without attribution.[181] In Lane's case, of course, there were two more exacerbating factors: Lane compounded his wrongdoing by requesting substantial fees for writing the document he had copied, and he failed to be candid when the court confronted him about his conduct.

Exactly what constitutes plagiarism in law practice is not yet clearly defined, but *Lane* puts lawyers on notice that some kinds of copying may not be acceptable in filed documents.

Lack of Civility

Almost a century ago, Dean Roscoe Pound said, "The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses, and jurors in particular cases, but to give the whole community a false notion of the purpose and end of law."[182] Today,

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[179] *See* Kingvision Pay Per View, Ltd. v. Wilson, 83 F. Supp. 2d 914, 916 n.4 (W.D. Tenn. 2000) (suggesting that copying a pleading is "theft of intellectual property").

[180] *Id.* (stating that copying seven paragraphs and three footnotes "in whole or part" from treatises without citation was dishonest and might violate ethical rules); Frith v. Indiana, 325 N.E.2d 186, 188, 189 (Ind. 1975) (stating that a public defender who copied most of his brief from A.L.R.3d had committed plagiarism and that "[a] brief is not a document to be thrown together without either organized thought or intelligent editing").

[181] Pagan Velez v. Laboy Alvarado, 145 F. Supp. 2d 146, 160–61 (D.P.R. 2001).

[182] Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, *in* Proceedings in Commemoration of the Address Delivered Aug. 26, 1906 Before a Convention of the American Bar Association, 35 F.R.D. 273, 282 (1964).

when many are eager to criticize the legal profession, Pound's words apply with special force. They emphasize that lack of civility in lawyers' writing breaches professional standards by harming the profession and society — a point that several recent cases illustrate.

One lawyer, Gershater, was suspended indefinitely after she wrote her lawyer a letter that was "vicious, offensive, and extremely unprofessional."[183] The letter, the court said, "adversely reflects on Gershater's fitness to practice law. A lawyer should be able to write a letter . . . and intelligently communicate his or her position without the use of profane, offensive, or derogatory language."[184]

Some particularly offensive behavior occurred when a lawyer asserted in a motion that opposing counsel was the granddaughter of a controversial former dictator.[185] This statement violated a statute by revealing her adoption by another family.[186] The assertion included a misrepresentation of fact and was undertaken "in the most personal way possible, by making allegations about [the lawyer's] family and her ancestry."[187] The press immediately reported the story, perhaps because the offending lawyer told them about it.[188] The court assessed a fine of $4,000 against him, finding his conduct "worthy of sanction [partly] because it unnecessarily intruded into the private life of a colleague and an officer of the court."[189]

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[183] *In re* Gershater, 17 P.3d 929, 931 (Kan. 2001).

[184] *Id.* at 935.

[185] United States v. Kouri-Perez, 8 F. Supp. 2d 133, 135 (D.P.R. 1998).

[186] *Id.* at 138–39.

[187] *Id.* at 138.

[188] *Id.* at 138 n.5, 141 n.7.

[189] *Id.* at 139–40 (citing 28 U.S.C. § 1927 (1994)).

Several courts recently condemned personal attacks. One court upheld sanctions against a lawyer whose brief contained "classic *ad hominem* arguments," including a statement that he had graduated from a law school that ranked higher than opposing counsel's alma mater.[190] Another lawyer's personal attacks, including calling opposing counsel "'Nazis' and [']redneck pecker-wood[s],'" combined with other offenses to merit a formal reprimand and an order to write an apology.[191] And when a brief ascribed bias and favoritism to a court, the personal attack merited a public reprimand.[192] Yet another lawyer's papers stated that opposing counsel's motion rose "'to the utmost level of absurdity'" and was an "'unbelievable demonstration of . . . chutzpah.'"[193] The court found this language "not only unenlightening [but also] unnecessary and undignified" and exhorted attorneys to "conduct themselves professionally."[194]

Obstructionist tactics also fall short of professional civility. When a lawyer responded to discovery requests with objections that were "boilerplate, obstructionist, frivolous, overbroad," and

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[190] *In re* First City Bancorporation, Inc., 270 B.R. 807, 813, 814 (N.D. Tex. 2001).

[191] Lockheed Martin Energy Sys., Inc. v. Slavin, 190 F.R.D. 449, 460–61 (E.D. Tenn. 1999); *see also* Berrios v. Denny's, Inc., No. E028108, 2001 WL 1346716, at *12 & n.1 (Cal. Ct. App. Nov. 1, 2001) (calling counsel's ad hominem attacks against the court "unpleasant, unproductive, and entirely unprofessional"); Nebraska *ex rel.* Neb. State Bar Ass'n v. Zakrzewski, 560 N.W.2d 150, 156, 157 (Neb. 1997) (holding that "repeated derogatory and inflammatory statements," along with other offenses, merited an 18-month suspension from practice). *But see* Revson v. Cinque & Cinque, P.C., 221 F.3d 71, 80–83 (2d Cir. 2000) (reversing a Rule 11 sanctions award because the underlying claims were not wholly baseless, even though the offending lawyer referred to adversaries as "snakes" and "slimy" and threatened "the legal equivalent of a proctology exam").

[192] *In re* Wilkins, 782 N.E.2d 985, 987 (Ind. 2003).

[193] Griffith v. Hess Oil V.I. Corp., 5 F. Supp. 2d 336, 340 (D.V.I. 1998).

[194] *Id.*

contrary to the law,[195] the judge remarked that such "'Rambo' style obstructionist discovery tactics . . . have a virus-like potential to corrupt the fairness of our civil justice system."[196] The judge imposed an unusual sanction: he required the lawyer "to write an article explaining why it is improper to assert the objections that he asserted in this case" and submit it for publication to two bar journals.[197]

In another case, a court reproached a lawyer for bringing a motion instead of making a courteous telephone call. The plaintiff's attorney had mistakenly refiled his first complaint as an amended complaint, and the defendant's attorney moved to dismiss it on the ground that the two complaints were identical.[198] The court said the plaintiff's counsel should not have filed papers without reading them,[199] but it also rebuked the defendant's counsel for not using the simple expedient of a telephone call to find out whether the duplicate complaint had been filed in error.[200] Emphasizing that "the law is a profession in which civility must be an essential element," the court added that "civility is the trademark of a winner."[201] Lawyers would do well to live by those words.

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[195] St. Paul Reinsurance Co. v. Commercial Fin. Corp., 198 F.R.D. 508, 511 (N.D. Iowa 2000).

[196] *Id.* at 517.

[197] *Id.* at 518.

[198] Phila. Gear Corp. v. Swath Int'l, Ltd., 200 F. Supp. 2d 493, 495 (E.D. Pa. 2002).

[199] *Id.* at 496.

[200] *Id.* at 497.

[201] *Id.* (citing Robert C. Josefsberg, Civility, International Academy of Trial Lawyers Dean's Address 2 (Mar. 30, 1996)).

Conclusion

Deficiencies in legal writing arise from various causes. Some of the offending lawyers are outright dishonest or simply mean. Others are lazy or to some extent incompetent. But whatever their degree of personal culpability, these lawyers are guilty of unprofessional conduct that harms clients and the legal system.

That is why deficient legal writing continues to provoke a variety of measures from the courts, some of them creative and some — like reprimands, sanctions, and bar discipline — more traditional. All of these measures serve to reemphasize that lawyers have a duty to their clients, the legal system, and society to uphold the profession's high standards of competence, candor, and civility in their written work.