

# You Are What You Write!

## The Ethical Implications of Everyday Legal Writing

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- I. Writing to a Court (motions, memoranda, briefs, etc.)
  - A. Mind the rules: Know and meticulously comply with all local and other applicable court rules in your jurisdiction. **Rule 1.1 Competence.**
    1. Take seriously the technical requirements of motions and briefs. *See Alejandro-Gallegos v. Holder*, 598 Fed. Appx. 604 (10th Cir. 2015) (dismissing petition and directing clerk to initiate disciplinary proceedings against immigrant-petitioner’s counsel, who chronically failed to cite legal authority or include required record citations in his briefs, and “hasn’t even bothered to alphabetically arrange his table of authorities”); *State v. Godfrey*, No. 109,086, \_\_\_ Kan. \_\_\_ (Kan. May 29, 2015) (“Rule 6.02(a)(5) [governing contents of briefs] means what it says and is ignored at a litigant’s own peril”).
    2. Federal courts may sanction lawyers who fail to comply with briefing rules. *See, e.g., BondPro Corp. v. Siemens Power Generation, Inc.*, 466 F.3d 562 (7th Cir. 2006) (ordering counsel to pay \$1,000 as penalty for filing incomplete jurisdictional statement); *In re Witt*, 481 B.R. 468 (N.D. Ind. 2012) (sanctioning lawyer \$4,000 for failing to acknowledge and address governing legal standard and mischaracterizing legal precedent).
    3. The Federal District Court of Colorado has a local rule warning that “[m]otions, responses, and replies shall be concise. A verbose, redundant, ungrammatical, or unintelligible motion, response, or reply may be stricken or returned for revision, and its filing may be grounds for sanctions.” D.C. Colo. L.R. 7.1(i).
    4. Keep up with rule changes. The federal Committee on Rules of Practice and Procedure is considering reducing the length of appellate briefs. Watch for this new rule to take effect in late 2016.

- B. Mind your manners: Refrain from making disrespectful accusations against co-counsel or a lower court. **Rule 8.2 Maintaining the Integrity of the Profession.**

There are good reasons not to call an opponent's argument 'ridiculous,' which is what [Appellee] calls [Appellant's] principal argument here. The reasons include civility; the near-certainty that overstatement will only push the reader away (especially when, as here, the hyperbole begins on page one of the brief); and that, even where the record supports an extreme modifier, 'the better practice is usually to lay out the facts and let the court reach its own conclusions.' *Big Dipper Entm't, L.L.C. v. City of Warren*, 641 F.3d 715, 719 (6th Cir. 2011). But here the biggest reason is more simple: the argument that [Appellee] derides as ridiculous is instead correct.

*Bennett v. State Farm Mut. Auto. Ins. Co.*, 731 F.3d 584, 584-85 (6th Cir. 2013). See also *Christopher v. Liberty Mut. Ins. Co.*, No. 308568, 2013 WL 3198134 (Mich. App. June 25, 2013) (sanctioning appellant \$2,000 for vexatious reply brief); *Boczar v. Meridian Street Foundation*, 749 N.E.2d 87 (Ind. App. 2001) (noting Court's plenary power to strike briefs containing "impertinent, intemperate, scandalous, or vituperative language . . . impugning or disparaging this court, the trial court, or opposing counsel"); Steven Wisotsky, *Incivility and Unprofessionalism on Appeal: Impugning the Integrity of Judges*, 7 J. APP. PRAC. & PROCESS 303 (2005) (summarizing cases in which lawyers were disciplined or scolded for badmouthing judges in motions and briefs); Douglas R. Richmond, *The Ethics of Zealous Advocacy: Civility, Candor and Parlor Tricks*, 34 TEX. TECH. L. REV. 3 (2002) (discussing ethical implications of uncivil lawyering).

- C. Use humor with caution. See *The Florida Bar v. Solomon*, 711 So.2d 1141, 1143 n.1 (Fla. 1998) (noting that "[i]n his initial brief in that case, Solomon inappropriately noted, apparently in an attempt at humor, that the appellee's attorney had the same last name as person in a cited case who was convicted of burglary and assault with intent to commit rape with a deadly weapon"); but see *Beta Steel v. Rust*, 830 N.E.2d 62, 69 (Ind. App. 2005) (rejecting appellant's request to strike footnote in appellee's brief analogizing appellant's arguments to the Wizard of Oz: "This is a unique characterization of an opposing party's position, but not one that we can label 'scandalous,' 'impertinent,' or 'immaterial.' We do not automatically condemn an attempt to place some light humor into a brief, albeit at the expense of opposing counsel, and decline to strike the footnote."). See also *In re: Rome*, 218 Kan. 198 (1975) (censuring district court judge for writing lengthy sentencing opinion in humorous verse form). **Rule 3.5 Advocate: Impartiality and Decorum of the Tribunal.**

- D. Properly and prudently cite all controlling authority. In *Massey v. Prince George's County*, 918 F. Supp. 905 (D. Md. 1996), the District Court explained at length the practical and ethical dangers of crossing this thin line:

Even if one assumes for the sake of argument that *Knopf* could be factually distinguished from the case at bar, there is always the possibility that a judge might disagree, that despite Respondents' view he might ultimately find the omitted case on point and directly adverse to their position. Respondents thus undertake a bold and risky gambit. They rely on their mere *ipse dixit* that the case is distinguishable and therefore unnecessary to call to the Court's attention. But careful lawyering demands greater sensitivity. In this district, whenever a case from the Fourth Circuit comes anywhere close to being relevant to a disputed issue, the better part of wisdom is to cite it and attempt to distinguish it. The matter will then be left for the judge to decide. While Respondents may still in time be judged unsuccessful in their attempt to distinguish the case, they will never be judged ethically omissive for failing to cite it.FN3

FN3. See Charles W. Wolfram, *Modern Legal Ethics*, § 12.8 (1986):

The mandatory reach of [Rule 3.3(a)(3)] is effectively neutralized in many real-life settings because it merely parallels what prudence dictates independently. Effective advocacy of a client's legal position will most often involve full revelation of adverse authorities, together with arguments distinguishing or criticizing them. Candor here both takes the wind from an opponent's sails and instills judicial trust in the quality and completeness of presentation.

*See also Sobol v. Capital Management Consultants, Inc.*, 726 P.2d 335 (Nev. 1986) (sanctioning respondents for quoting language "as though it were the holding of the case, when in fact the language comes from the dissent"; noting that "[w]hile vigorous advocacy of a client's cause is expected and encouraged, these representations transcend the outer limits of zeal and become statements of guile and delusion"); *Chapman v. Hootman*, 999 S.W.2d 118 (Tex. App. 1999) (listing party's failure "to give appropriate citations to authorities" among "earmarks of a bad faith filing" justifying sanctions). **Rule 3.3 Advocate: Candor Toward the Tribunal.**

- E. Include all material facts. *See Montgomery v. Chicago*, 763 F. Supp. 301, 307 (N.D. Ill. 1991) (counsel's selective omission of a "plainly relevant fact . . . exceeds the bounds of zealous advocacy and is wholly inappropriate"). **Rule 3.3 Advocate: Candor Toward the Tribunal.**
- F. Identify and avoid plagiarism. *See Pick v. City of Remsen*, 298 F.R.D. 408 n.1 (N.D. Iowa 2014) ("counsel's attempt to pass off a significant portion of a prior

ruling as his own work is lazy, obnoxious and unprofessional. Moreover, plagiarizing a judge's analysis in a brief directed to that very judge is, to put it nicely, not very smart"). There is an ongoing debate within the legal and academic community about how much language a practitioner can ethically borrow in legal drafting, and how it should be done. In one particularly egregious case, a practitioner was suspended for six months for submitting as his own work in a brief eighteen pages from an uncredited treatise. *Iowa Supreme Ct. Bd. of Prof. Ethics and Conduct v. Lane*, 642 N.W.2d 296 (Iowa 2002). While this practitioner obviously intended deceit (and, worse, sought to profit from his deceit by charging for eighty hours of legal research!), the court's conclusion that submitting others' work as one's own to the court constitutes a fraud on the court might conceivably be applied to more innocent everyday borrowings. Balancing these concerns, one professor has argued that borrowing language is unethical if it is done for financial gain or to deceive a reader, but that it is acceptable in small doses "to the extent it forwards the goals of the court and saves clients money." K.K. DuVivier, *Nothing New Under the Sun—Plagiarism in Practice*, 32-May COLO. L. 53 (2003). **Rule 3.3 Advocate: Candor Toward the Tribunal.**

- G. Update and individualize boilerplate documents. See attached document checklist. See also *Caldwell v. Com.*, 157 S.W.3d 215 (Ky. App. 2004) (holding attorney in contempt and referring him for disciplinary investigation for pattern of dishonest practice in appellate cases; noting that "[t]his panel also has serious concerns about Mr. Stutsman's candor in the filing of what we perceive to be 'boilerplate' motions for extension or enlargement, which frequently do not contain current or pertinent information regarding his noncompliance with briefing deadlines and orders of this Court"). **Rule 1.1 Competence; Rule 3.3 Advocate: Candor Toward the Tribunal.**
- H. Know when it is appropriate to raise "frivolous" arguments to satisfy a client's wishes or to preserve an issue for appellate review. See *In re Becraft*, 885 F.2d 547 (9th Cir. 1989) (sanctioning criminal-defense lawyer for filing frivolous petition for rehearing); *In re Capoccia*, 712 N.Y.S.2d 699 (N.Y. Sup. 3 Dep't. 2000) (imposing 6-month suspension against civil lawyer for repeatedly raising frivolous defenses and counter-claims). But see Monroe Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167 (2003) (discussing necessity of raising frivolous issues in capital cases and noting that "[c]riminal defense lawyers are rarely disciplined or otherwise sanctioned for asserting frivolous positions in advocacy," because "courts are loath to impose sanctions against lawyers in any case in which the defendant's liberty is at stake"). **Rule 3.1 Advocate: Meritorious Claims and Contentions.**
- I. Query whether the rule requiring lawyers to report other lawyers' misconduct is triggered upon filing motions for sanctions against opposing counsel, or briefing

claims of prosecutorial misconduct, judicial misconduct, or ineffective assistance of counsel. *See State v. Zvolanek*, 34 Kan. App. 2d 570 (2005) (observing that “[a] finding of prosecutorial misconduct implies a violation of the Kansas Rules of Professional Conduct”); *Massey v. Brown*, 9 Vet. App. 134, 137 (Vet. App. 1996) (Nebeker, C.J., concurring) (noting that accusing opposing counsel of a conflict of interest might trigger reporting requirements, and cautioning: “Counsel are reminded that a panel of this Court . . . is not the appropriate authority [to receive the report] contemplated by the Rule”); *In re Condit*, No. SB-94-0021-D (Ariz. Mar. 14, 1995) (approving public censure for lawyer who sued another lawyer for malpractice and other offenses against former client, but did not report lawyer to disciplinary board), *described in* Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 183 (1999); *In re Himmel*, 533 N.E.2d 790 (Ill. 1988) (imposing one-year suspension of attorney who drafted settlement agreement so that client could recover converted funds from former lawyer; attorney never reported former lawyer’s misconduct); *see also* Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765 (Winter 2004); Lonnie T. Brown, Jr, *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209 (Spring 2003) (arguing that ethical rules should clarify “that a *Batson*-type violation is a disciplinable offense and, therefore, one that lawyers and judges have a clear obligation to report to the appropriate disciplinary authorities”). **Rule 8.3 Maintaining the Integrity fo the Profession: Reporting Professional Misconduct.**

- J. Be cautious about ghostwriting for pro se litigants. Some jurisdictions—including the Tenth Circuit—have found that offering ghostwritten pleadings to pro se litigants gives them an unfair advantage and violates the requirement of candor with the court. *See Duran v. Carris*, 238 F.3d 1268 (10th Cir. 2001) (admonishing ghostwriting counsel and ordering that “any ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved”). *See also* Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145 (2002) (listing and critiquing objections to ghostwriting); *see also* Brenda Star Adams, “*Unbundled Legal Services*”: *A Solution to the Problems Caused by Pro Se Litigation in Massachusetts’s Civil Courts*, 40 NEW. ENG. L. REV. 303, 337-39 (2005) (discussing efforts of some states to encourage lawyers to ghostwrite). **Rule 3.3 Advocate: Candor Toward the Tribunal.**
- K. Understand lawyers’ heightened research obligations in an electronic world. *See Hagopian v. Justice Admin. Com’n*, 18 So.3d 625, 642 (Fla. App. 2 Dist. 2009) (noting that “[l]awyers have also become expected to use computer-assisted legal research to ensure that their research is complete and up-to-date”);

*Massey v. Prince George's County*, 918 F. Supp. 905 (D. Md. 1996) (suggesting that inability to find controlling authority might violate duty of competence; noting the ease with which Natural Language search on Westlaw turned up case that counsel should have cited). *See also* Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence under the Rules of Professional Conduct*, 11 ALB. L.J. SCI. & TECH. 89 (2000) (positing that Computer Assisted Legal Research and the Internet have "placed an additional burden on attorneys to stay current with the new ways of conducting research" and that "[f]ailure to use these tools for legal research might be deemed a violation of an attorney's duty of competence and open him up to ethical sanctions or a malpractice suit"); Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607 (2000). **Rule 1.1 Competence.**

- L. Remember that sometimes *not writing at all* may violate an ethical duty. *See In re DeMarco*, 733 F.3d 457 (2d Cir. 2013) (publicly reprimanding lawyer for appellate deficiencies, including declining to brief issue Court had ordered counsel to brief); *In re Vanderbilt*, 279 Kan. 491 (2005) (suspending for one year county attorney who failed to file briefs in criminal appeals; attorney's failure to file briefs violated duties of competence and diligence). **Rule 1.1 Competence; Rule 1.3 Client-Lawyer Relationship: Diligence.**

II. Writing to Opposing Counsel. **Rule 3.4 Advocate: Fairness to Opposing Party and Counsel; Rule 8.3 Maintaining the Integrity fo the Profession: Reporting Professional Misconduct.**

- A. Anything you write may someday be an exhibit in a disciplinary action against you. *See In re Pyle*, 278 Kan. 230 (2004) (publicly censuring attorney for letters written to opposing counsel in effort to force settlement; attorney accused opposing counsel of committing ethical violations, yet never reported violations).

III. Writing to a Client. **Rule 1.4 Communication.**

- A. Use plain nonlegalese language consistent with the duty to communicate. *See* Roger J. Miner, *Confronting the Communication Crisis in the Legal Profession*, 34 N.Y.L. SCH. L. REV. 1 (1989) (arguing that "communication failure is a serious and growing problem throughout the legal profession" and suggesting that "there is a need to clarify, simplify, and edify in all forms of legal expression").
  - 1. In letters to the client.
  - 2. In affidavits for the client's signature.

3. In plea agreements.
- B. Update and personalize boilerplate letters.
  - C. Again, anything you write may someday be an exhibit in a disciplinary action against you.

IV. Writing Press Releases. **Rule 3.6 Advocate: Trial Publicity.**

- A. Review the rules about media contacts.
- B. Exercise caution in providing court documents to the press. *See Alpha Medical Clinic v. Anderson*, 280 Kan. 903, 928 (2006) (finding “troubling” Attorney General’s admission that he attached sealed documents to unsealed brief, and allowed staff to provide copies to press).

V. Writing in Cyberspace. **Rule 1.6 Client-Lawyer Relationship: Confidentiality of Information; Rule 3.6 Advocate: Trial Publicity.**

- A. Use email with appropriate formality and caution.
  1. The ABA’s Committee on Ethics & Professional Responsibility has concluded that, generally, attorneys may communicate with clients via unencrypted email without violating the Model Rules of Professional Conduct. However, lawyers should use encryption and/or consult with the client about emailing when it comes to particularly sensitive communications, and should warn clients about the risk of email when there is a significant risk that a third party such as an employer may gain access to the email. *See* ABA Formal Opinion 99-413 (1999); ABA Formal Opinion 11-459 (2011).
  2. Make sure filtering systems comply with confidentiality rules and are designed to avoid rejecting client emails as spam.
  3. Consider including confidentiality/work-product warnings in emails.
  4. Double-check addresses and attachments to be sure the correct information is sent to the correct recipient.
  5. Use email receipts to confirm that your emails are received.
  6. Print and keep copies of important emails and receipts.
- B. Get to know your metadata.

1. The Kansas Rules of Professional Conduct now prohibit secretly looking at metadata that another person inadvertently sends in an electronic document. K.R.P.C. 4.4(b).
  2. The duty of confidentiality obligates lawyers to take reasonable precautions to prevent the disclosure of metadata to unintended recipients. REVIEW AND USE OF METADATA, 2009 NC Eth. Op 1, 2010 WL 610306 (N.C. State Bar Jan. 15, 2010).
- C. Consider the benefits and risks of putting information in The Cloud.
1. The Comments to the Kansas Rules of Professional Conduct now direct that “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” K.R.P.C. 1.1, cmt. 8.
  2. *See Sarah Jane Hughes, Did the National Security Agency Destroy the Prospects for Confidentiality and Privilege When Lawyers Store Clients' Files in the Cloud—and What, If Anything, Can Lawyers and Law Firms Realistically Do in Response?*, 41 N. KY. L. REV. 405 (2014) (arguing that the risks of government inception “strongly suggest that, for the most sensitive files and data, lawyers and law firms should revert to old-fashioned methods to protect client communications and safeguard clients’ property, including confidential and other files”).
- D. Maintain confidentiality and professionalism when posting on blogs, listserves, Facebook and all other forms of social media. *See Denison v. Larkin*, \_\_\_\_ F.Supp. 3d \_\_\_\_, 2014 Copr.L.Dec. P 30,653 (N.D. Ill. 2014) (tracing disciplinary proceedings against lawyer for accusing judges and other attorneys of improprieties on her blog); *John G. Browning, Keep Your “Friends” Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 204, 211 (2013).
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## Document Checklist

—Every time!—

### ***Check for accuracy:***

- Dates
- Client name
- Lawyer name(s)
- Case caption (names; court; case number)
- Addresses
- Pronouns (he/she/they; his/her/their; etc.)
- Spelling (read the document word-for-word *and* run Spell Checker)

### ***Check for consistency and professionalism:***

- Fonts
- Spacing
- Margins
- Capitalization
- Spelling

### ***Check the formatting:***

- Is it consistent with all applicable rules?
- Does anything *just look funny*?

