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WALK THE LINE: ARISTOTLE AND THE ETHICS OF NARRATIVE

Lori D. Johnson & Melissa Love Koenig*

Lawyers are storytellers who face tremendous pressure to persuade judges and juries of the rightness of their stories. Zealous advocacy has long been a touchstone in lawyering, but lawyers need to balance zealousness with candor to the tribunal. As narrative and storytelling have evolved in scholarship and practice as powerful tools for persuasion, lawyers can find themselves walking a delicate ethical line. The applicable Model Rules of Professional Conduct do not provide a sufficient framework for ensuring sufficient candor in the use of narrative, particularly when considering the cultural and psychological power inherent in stories. Thus, lawyers can find themselves sliding on a slippery slope into ethically actionable misrepresentation.

*These are not new problems, and the classics have something to teach modern lawyers using narrative to persuade. Aristotle addressed the same types of concerns in his *Nicomachean Ethics* and *On Rhetoric*. Aristotle discussed the importance of keeping one's conduct within the "mean"—to maintain a balanced approach to one's life and practice. He also stressed the value of using good habits to develop a person's character. Aristotle's wisdom can guide a lawyer who seeks to be a candid, ethical, and still zealous advocate.*

Thus, this Article posits that incorporating Aristotle's concepts of virtue ethics into the Preamble of the Model Rules will provide guidance to lawyers seeking to use legal storytelling in an ethical, balanced way. Providing lawyers with intrinsic motivation to behave ethically provides a more workable framework than adding additional proscriptive requirements to the Model Rules, particularly for lawyers walking the line between truth and falsity when retelling client facts through storytelling.

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*"I Walk The Line"**You've got a way to keep me on your side**You give me cause for love that I can't hide**For you I know I'd even try to turn the tide**Because you're mine, I walk the line**I keep a close watch on this heart of mine**I keep my eyes wide open all the time**I keep the ends out for the tie that binds**Because you're mine, I walk the line**Johnny Cash*¹

INTRODUCTION

In the past nearly thirty years, the Applied Legal Storytelling movement has blossomed in the legal academy and led to a proliferation of scholarship and study concerning the use of narrative or storytelling in legal persuasion.² At

¹ *Johnny Cash Lyrics: "I Walk the Line"*, AZLYRICS.COM, <https://www.azlyrics.com/lyrics/johnnycash/iwalktheline.html> [https://perma.cc/UDF9-Z3SP] (last visited Mar. 26, 2020) (verses four and five). Written and recorded by Johnny Cash in 1956, "I Walk the Line" was released in 1956 on the album *Johnny Cash with His Hot and Blue Guitar!*. The song, serving as Cash's promise to remain faithful to his first wife while on the road, was his first number one hit. Gayle Thompson, *63 Years Ago: Johnny Cash Records 'I Walk the Line'*, BOOT (Apr. 2, 2019), <https://theboot.com/johnny-cash-i-walk-the-line/> [https://perma.cc/V5VN-TDHC]. Cash must have recognized the importance of seeking the "mean" in his life, as reflected in a to-do list Cash wrote that seems part tongue-in-cheek and part serious reflection. Erika Berlin & Matthew Kitchen, *10 Deservedly Famous Lists by Famous People*, WALL ST. J. (Oct. 25, 2019), <https://www.wsj.com/articles/10-deservedly-famous-lists-by-famous-people-11572004871> [https://perma.cc/VJL4-KZ4G]. In the to-do list Cash penned, which sold in 2010 for \$6,250, he listed ten aspirational goals. Gretchen Rubin, *What did Johnny Cash Write in His To-Do List?*, HUFFPOST (Sept. 10, 2012), https://www.huffpost.com/entry/to-do-lists_b_1858700 [https://perma.cc/DM95-88FM]. Among the goals included are to kiss June (his second wife), and not kiss anyone else; eat, and not eat too much. *Id.* His list exemplifies Cash's desire to form habits that stay within the mean. Whether he succeeded in his aspirations, we don't know, but we give him credit for trying.

² See Ruth Anne Robbins, *An Introduction to Applied Storytelling and to this Symposium*, 14 J. LEGAL WRITING INST. 3, 8–9 (2008). Note that various terms have been used to describe the use of story in legal documents, and there has been debate and discussion as to the appropriate nomenclature. *Id.* at 14; see also Derek H. Kiernan-Johnson, *A Shift to Narrativity*, 9 LEGAL COMM. & RHETORIC 81, 81–83 (2012). The term "storytelling" will be used throughout this Article, as the focus is primarily on the retelling of client facts, which "refer to specific people and events," and therefore, according to Robbins, constitute stories. Robbins, *supra*, at 14. For a deeper discussion of the shift in the Applied Storytelling movement toward exploration of narrative and narrativity, see Linda H. Edwards, *Speaking of Stories*

its core, the movement has identified a main thesis that “lawyers persuade by telling stories.”³ Perhaps nowhere in the world of lawyering is the skill of storytelling more easily and naturally applied to advocacy than in the retelling of client facts by lawyers in argumentative briefing.⁴

However, ethics scholars have begun to recognize and warn of the potential risks inherent in the use of this psychologically potent form of persuasion.⁵ Complicating the issue further, existing ethical guidelines, provided in the Model Rules of Professional Conduct (Model Rules), do not provide a sufficient framework for ensuring sufficient candor in the use of narrative, particularly when considering the cultural and psychological power inherent in stories. Specifically, the proscriptive structure of Model Rule 3.3 does not address the nuanced issues of potential factual misrepresentations that may fall below its black and white guidelines. Further, the aspirational Preamble does not reach far enough in encouraging lawyers to be cautious when using powerful, newly emphasized tools of persuasion.

This Article argues that this struggle—of lawyers in “walking the line” between persuasion and misrepresentation—is not a new problem.⁶ Specifically, our research has shown that the classics have something to teach modern lawyers using narrative to persuade. Aristotle addressed the same types of concerns in his *Nicomachean Ethics* and *On Rhetoric*.⁷ Aristotle discussed the importance of keeping one’s conduct within the “mean”—to maintain a balanced approach to one’s life and practice.⁸ He stressed the value of using good habits

and Law, 13 LEGAL COMM. & RHETORIC 157, 157–60 (2016); Stephen Paskey, *The Law is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules*, 11 LEGAL COMM. & RHETORIC 51, 55 (2014).

³ J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 53, 53–54 (2008).

⁴ See, e.g., Brian Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 RUTGERS L.J. 459, 465 (2001).

⁵ See, e.g., Steven J. Johansen, *This Is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 ARIZ. L.J. 961, 961–62 (2006).

⁶ See, e.g., SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 166–73 (1999) (discussing moral choices lawyers and politicians must make about lying and truth telling). Indeed, the line between truth and falsehood can be easily blurred in an audience’s mind. In a study published in 1977, Lynn Hasher, a Temple University psychologist, and her colleagues, showed that repeating a lie can make it appear to be the truth. Gary Marcus & Annie Duke, *The Problem With Believing What We’re Told*, WALL ST. J. (Aug. 31, 2019), <https://www.wsj.com/articles/the-problem-with-believing-what-were-told-11567224060> [<https://perma.cc/YD8J-35X4>] (“Test subjects became more likely to believe things [statements] as they were repeated, regardless of whether they were true or false. The third time they heard a false statement, they were just as likely to believe it as a true statement that they heard once.”).

⁷ See ARISTOTLE, NICOMACHEAN ETHICS 79:1129a, 80:1129b, 81:1130a (Joe Sachs trans., Focus Publishing 2002) [hereinafter ARISTOTLE, NICOMACHEAN ETHICS]; ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 36:1355b (George A. Kennedy trans., Oxford Univ. Press 2d. ed. 2007) [hereinafter ARISTOTLE, ON RHETORIC].

⁸ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 7, at 28–29:1106b.

to develop a person's character.⁹ Character is perfected or completed through work and practice—learning by doing.¹⁰ The pursuit of morality through character, as described by Aristotle, is a philosophy now called virtue ethics.¹¹ A virtuous person is “a person who possesses an integrated set of virtues enabling her ‘to live and act morally well.’”¹²

George Kennedy states that “[t]he concept of a mean between extremes is a characteristic doctrine of Aristotelian ethics that finds application to rhetoric as well.”¹³ This important connection between virtue ethics and rhetoric is central to our thesis. Aristotle's wisdom can guide a lawyer who seeks to be a candid, ethical, and still-zealous advocate. A lawyer, in building character through good habits, can more easily and confidently walk on the mean, or the line, in handling difficult ethical choices.

This Article will describe the problems inherent in attempting to regulate the use of legal storytelling under the Model Rules' current proscriptive model, where lawyers are primarily prohibited from providing false facts. In the context of legal storytelling, ethical issues are much more nuanced, and not easily reduced to deontological, rule-based regulation. Thus, this Article posits that incorporating Aristotle's concepts of virtue ethics into the Preamble of the Model Rules will provide guidance to lawyers seeking to use legal storytelling in an ethical, balanced way. Providing lawyers with intrinsic motivation to behave ethically can assist lawyers walking the line between truth and falsity when retelling client facts through storytelling. This motivation, we posit, could also extend to lawyers grappling with rapidly evolving legal technology, where ethical guidelines may also fall short or lag behind.

This Article will proceed in four parts. The first will discuss the cognitive power of storytelling as a persuasive modality and describe its broadening influence on legal practice. This Part will illustrate the problem by reviewing suggestions from legal storytelling scholars, as well as analyzing examples of briefing where the technique has been used. In the second Part we will review recent malpractice and disciplinary opinions penalizing lawyers for misstating or mischaracterizing facts.

⁹ See *id.* at 22:1103a.

¹⁰ See *id.* at 22–23:1103b.

¹¹ R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to “Seek Justice”*, 82 NOTRE DAME L. REV. 635, 642–43 (2006) (noting that deontological reasoning does not “provide meaningful guidance”); see also Linda H. Edwards, *Advocacy as an Exercise in Virtue: Lawyering, Bad Facts, and Furman's High Stakes Dilemma*, 66 MERCER L. REV. 425, 425 (2014) [hereinafter Edwards, *Advocacy*] (noting that “[v]irtue ethics approaches moral reflection by asking what sort of person a particular moral choice encourages the actor to become.”).

¹² Edwards, *Advocacy*, *supra* note 11, at 426 (quoting James F. Keenan, *Proposing Cardinal Virtues*, 56 THEOLOGICAL STUD. 709, 714 (1995)).

¹³ GEORGE A. KENNEDY, *CLASSICAL RHETORIC & ITS CHRISTIAN & SECULAR TRADITION FROM ANCIENT TO MODERN TIMES* 91 (2d ed. 1999) [hereinafter KENNEDY, *CLASSICAL RHETORIC*].

The third Part will identify the tension inherent in the call for the lawyer to zealously advocate for a client's position, while also recognizing existing ethical boundaries circumscribing misrepresentation and falsity. This Part will also highlight the use of aspirational motivations in current and previous movements within the field of legal ethics. The fourth Part will identify Aristotle's contribution to helping lawyers achieve a balance between persuasion and the ethical retelling of a client's facts. The final Part will offer recommendations and a conclusion about how an addition to the Preamble of the Model Rules can better equip lawyers with the motivation to appropriately walk the line between zeal and candor, particularly when using new and evolving modes of advocacy.

I. THE RISE OF APPLIED LEGAL STORYTELLING

Understanding the underpinnings of the theory behind legal storytelling is essential to knowing how and why storytelling serves as such a powerful and enticing tool for advocates.¹⁴ Additionally, a nuanced understanding of the power of storytelling in persuasive legal argument, particularly fact-telling, is necessary to understand how and when an advocate might cross the line from using story as a persuasive tool, into using it as a method of obscuring or misstating facts. A well-recognized concept in legal persuasion is that "story is essential to a good facts section,"¹⁵ but understanding why this is so, and how story can and should be wielded in fact-telling, is critical to understanding how and when a lawyer may cross ethical boundaries.

What story means in the law, and how it can be wielded, has generated significant scholarship over the past thirty-plus years.¹⁶ In a foundational 1989 book discussing the applicability of narrative to human communication, Walter Fisher highlighted the application of story to the law, stating that "[n]o matter how strictly a case is argued . . . it will always be a story, an interpretation of

¹⁴ Relatedly, scholars have noted that Aristotle's philosophy is central to a modern examination of the narrative of human beings, the stories we tell ourselves about our own lives. ALASDAIR MACINTYRE, *ETHICS IN THE CONFLICTS OF MODERNITY: AN ESSAY ON DESIRE, PRACTICAL REASONING, AND NARRATIVE* 240 (2016). The intersection of Aristotle's teachings on rhetoric, ethics, and poetics has also influenced narrative ethics in literature. While legal storytelling addresses the storytelling of non-fiction factual narratives, a parallel exists between the two. *See, e.g.*, RICHARD KEARNEY, *ON PAUL RICOEUR: THE OWL OF MINERVA* 113 (2004) (narrative and persuasion); RICHARD KEARNEY, *POETICS OF MODERNITY: TOWARD A HERMENEUTIC IMAGINATION* xii (1999) (describing Aristotle's philosophy); ADAM ZACHARY NEWTON, *NARRATIVE ETHICS* 57 (1995) (narrative ethics).

¹⁵ Foley & Robbins, *supra* note 4, at 461.

¹⁶ *See* Robbins, *supra* note 2, at 8–12 (tracing the history of the Applied Legal Storytelling movement); *see also* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983). Cover's article has been identified by scholars as influential in the emergence of the theory of "legal storytelling." Samuel J. Levine, *Halacha & Aggada: Translating Robert Cover's Nomos and Narrative*, 1998 UTAH L. REV. 465, 466–67.

some aspect of the world that is historically and culturally grounded [within the] human personality.”¹⁷

Later, in the early to mid-1990s, the movement gained momentum through suggestions that the persuasive value of story could be wielded more practically to frame and craft various trial and appellate documents, oral arguments, trial theories, and the like.¹⁸ Specifically, scholars active in the current Applied Legal Storytelling movement have “encourage[d] scholars to use storytelling to enhance their understanding of what skills lawyers practice and how to improve those skills.”¹⁹ Thus, storytelling techniques have become recognized as beneficial, applicable skills for use in the “actual practice of lawyering.”²⁰

The popularity of the movement, and the burgeoning recognition of the inherent power of story, began to encourage an expansion from the use of “legal storytelling” in the more colloquial sense (i.e., its use to assist in telling a client’s story at trial), to exploring how narrative theory practically impacts the skills and ethos of lawyering.²¹ Scholars have explained that the use of narrative theory enhances persuasion in litigation documents and oral presentations,²² such as briefs,²³ fact sections,²⁴ personal statements,²⁵ opening²⁶ and closing arguments,²⁷ judicial opinions,²⁸ and even transactional documents.²⁹

¹⁷ WALTER R. FISHER, *HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE, AND ACTION* 49 (1989).

¹⁸ See Paskey, *supra* note 2, at 55–56 (summarizing the vast body of scholarship applying narrative and storytelling techniques to trial practice, particularly).

¹⁹ Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 J. ASS’N LEGAL WRITING DIRECTORS 37, 38 (2010).

²⁰ Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 485–86 (1994); see also Melissa Love Koenig et al., *OK, Google, Will Artificial Intelligence Replace Human Lawyering?*, 102 MARQ. L. REV. 1269, 1274–75 (2019) (discussing how empathy and storytelling, as a reflection of human feeling, is an important part of human lawyering that differentiates us from artificial intelligence).

²¹ See Paskey, *supra* note 2, at 54–58.

²² See Grose, *supra* note 19, at 38.

²³ See, e.g., Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. LEGAL WRITING INST. 127, 130–31 (2008).

²⁴ See, e.g., MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 203–09 (4th ed. 2014); Foley & Robbins, *supra* note 4, at 462.

²⁵ See, e.g., Stacy Caplow, *Putting the “I” in Wr*t*ng: Drafting an A/Effective Personal Statement to Tell a Winning Refuge Story*, 14 J. LEGAL WRITING INST. 249, 249, 260–61 (2008).

²⁶ See Jim M. Perdue, *The Principles of Storytelling*, in 3 LITIGATING TORT CASES § 37:11 (2019).

²⁷ See, e.g., Philip N. Meyer, *Making the Narrative Move: Observations Based Upon Reading Gerry Spence’s Closing Argument in The Estate of Karen Silkwood v. Kerr-McGee, Inc.*, 9 CLINICAL L. REV. 229, 234 (2002).

²⁸ See, e.g., Jeffrey L. Harrison & Sarah E. Wilson, *Advocacy in Literature: Storytelling, Judicial Opinions, and The Rainmaker*, 26 U. MEMPHIS L. REV. 1285, 1286–89 (1996).

²⁹ See, e.g., Susan M. Chesler & Karen J. Sneddon, *Once Upon a Transaction: Narrative Techniques and Drafting*, 68 OKLA. L. REV. 263, 265–68 (2016); Lori. D. Johnson, *Redefin-*

However, nowhere is the concept of storytelling more commonly or successfully used than in retelling client facts.³⁰ Specifically, lawyers have been encouraged to familiarize themselves with “the pool of stories that the facts of their client’s case may evoke,” and to consider how invoking such stories might “affect the judgment of their audience,”³¹ particularly judges and juries.

Scholars active in Applied Legal Storytelling scholarship have also begun to examine the distinct cultural, and even psychological power that stories hold. Specifically, narrative scholar Linda Berger has noted that “stories and images we acquire from our culture and experience provide mental blueprints that, for better or for worse, help us sort through and understand new things.”³² Berger, along with Kathryn Stanchi and other prominent scholars on the topic, have recognized that storytelling implicates issues of neuroscience and cognitive psychology, amplifying its recognition, credibility, and importance as a persuasive tool.³³

The “mental blueprints” recognized by Berger³⁴ can assist lawyers in understanding and explaining complex legal concepts, but more specific to the problem presented in this Article, they can also be wielded to persuade judges and juries of preferred ways of viewing a client’s set of facts.³⁵ Employing a well-known, persuasive story format when retelling client facts, therefore, can “trigger empathy and emotion, helping us persuade others about the paths that events should follow and the frameworks into which things should fit.”³⁶ Invoking a story framework (such as an “underdog” story, for example) can also

ing Roles and Duties of the Transactional Lawyer: A Narrative Approach, 91 ST. JOHN’S L. REV. 845, 846–47 (2017).

³⁰ See Foley & Robbins, *supra* note 4, at 461–62.

³¹ Jennifer Sheppard, *Once Upon A Time, Happily Ever After, and in A Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 258 (2009) [hereinafter Sheppard, *Once Upon a Time*].

³² Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 276 (2011) [hereinafter, Berger, *The Lady or the Tiger?*].

³³ See, e.g., LINDA L. BERGER & KATHRYN M. STANCHI, *LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE* CH. 6 (2018); MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 32–34 (2d ed. 2008); Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEGAL COMM. & RHETORIC 39, 44–45 (2016); Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305, 306–07 (2010) [hereinafter Stanchi, *Priming*]; Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 412. This list is by no means exhaustive, as many in the field of legal persuasion have begun to explore the cognitive aspects of storytelling. This Article’s focus on fact-telling lends itself toward a more limited body of the scholarship, focused primarily on the use of stock story, but these (and other) foundational works on the topic undergird our analysis.

³⁴ Berger, *The Lady or the Tiger?*, *supra* note 32, at 276.

³⁵ See Foley & Robbins, *supra* note 4, at 462; Stanchi, *Priming*, *supra* note 33, at 312 (noting that the Statement of Facts is a particularly effective place for an advocate to “prime” a reader’s emotions through the use story and theme).

³⁶ Berger, *The Lady or the Tiger?*, *supra* note 32, at 276.

help “prime” the reader to have a preferred emotional response to client’s facts.³⁷

These well-known story frameworks are referred to as “stock stories.”³⁸ A stock story is defined as a “generic stor[y] conveyed in broad brushstrokes that [is] readily understood by audiences.”³⁹ By triggering a stock story in a listener’s mind, scholars argue, a writer can depend upon a predictable response from their reader, in line with the traditional arc of the well-known story.⁴⁰ An example of a well-known stock story is the biblical tale of David and Goliath, which triggers sympathy for an “underdog who needs to overcome . . . obstacles to secure a victory . . . against all odds.”⁴¹ The narrative technique of using stock stories adds value by creating “patterns and models” for preparing legal documents and arguments.⁴² This technique has been recognized as helpful across various types of legal documents to enhance persuasion and outcomes.⁴³

According to cognitive research, stock stories provide the listener with “a cognitive shortcut that supplements facts in a given situation.”⁴⁴ Thus, scholars of legal storytelling have suggested, particularly because layperson jurors are not well-versed in legal argumentation, that lawyers should utilize stock stories to enhance persuasion.⁴⁵ In harnessing (or in some cases avoiding) a stock story when telling client facts, therefore, an advocate can activate a powerful shortcut in a listener’s mind, causing her to fill in blanks and predict results.⁴⁶ Further, the use of a stock story can activate a deep desire for the “narrative correspondence” that would come from predicting or providing an outcome for the client consistent with the triggered story.⁴⁷ A lawyer need not go so far as to provide

³⁷ Stanchi, *Priming*, *supra* note 33, at 314–17. Stanchi defines “priming” as “a process in which a person’s response to later information is influenced by exposure to prior information.” *Id.* at 306. She notes that emotions can be “primed, particularly by stories,” leading the decision maker to “infer and interpret details” in ways that are “consistent with the overarching theme” or story put forth by the advocate. *Id.* at 310, 313.

³⁸ See, e.g., Susan M. Chesler & Karen J. Sneddon, *Tales from a Form Book: Stock Stories and Transactional Documents*, 78 MONT. L. REV. 237, 238 (2017) [hereinafter, Chesler & Sneddon, *Stock Stories*]; Jennifer Sheppard, *What if the Big Bad Wolf in All Those Fairy Tales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories that are Harmful to Your Client’s Case*, 34 HASTINGS COMM. & ENT. L.J. 187, 188 (2012) [hereinafter Sheppard, *Big Bad Wolf*].

³⁹ Chesler & Sneddon, *Stock Stories*, *supra* note 38, at 238.

⁴⁰ *Id.* at 238–39.

⁴¹ *Id.* at 252.

⁴² See *id.* at 239.

⁴³ *Id.* at 238; see also Sheppard, *Big Bad Wolf*, *supra* note 38, at 188.

⁴⁴ Sheppard, *Big Bad Wolf*, *supra* note 38, at 188.

⁴⁵ *Id.* at 189.

⁴⁶ *Id.*; Stanchi, *Priming*, *supra* note 33, at 313.

⁴⁷ See Rideout, *supra* note 3, at 66–67. The theory of narrative correspondence suggests that when a provided narrative corresponds with a listener’s existing knowledge, it enhances the structural plausibility and inherent persuasive value of that story, and helps a listener predict and align outcomes in keeping with the proposed narrative. *Id.*; see also FISHER, *supra* note

false facts to trigger this response. Simply using existing, truthful facts and arranging them in a manner consistent with a stock story would be sufficient to generate the desired response in a listener.

For example, one brief-writer, in arranging a brief arguing on behalf of payday loan borrowers, successfully used the stock story format of “The Quest”⁴⁸ to frame issues surrounding the legislative intent behind Alabama’s Small Loan Act.⁴⁹ In his fact statement, the lawyer set the scene by describing the various types of loans provided by these lenders,⁵⁰ and then in his argument, traced the history of legislators fighting for meaningful protections for payday loan borrowers, like his client, rather than focusing on a “boring” recitation of the legislative history.⁵¹ The lawyer highlighted individual legislators, almost as characters, as he wove the tale of the evolution of the law protecting borrowers, setting courageous lawmakers against the obstacles thrown in their way by slick “loan sharks.”⁵² This brief serves as just one example of the use of narrative, beginning in the fact section and flowing through the argument, that resulted in successful outcomes for the client.⁵³

However, in contrast to such successful uses of storytelling in facts and argument, in some cases attorneys are beginning to recognize that facts stated in a narrative fashion may be viewed as having been “spun” for the court. Attorneys may disagree about the chronology of events, for instance. One example is the briefing to the Seventh Circuit in the Brendan Dassey case.⁵⁴ The underlying

17, at 5. Also supporting the theory that narrative correspondence enhances the persuasive power of fact statements, Foley and Robbins note that:

[t]he goal of the lawyer, then, is much like the fiction writer’s, but with a twist—to portray the characters and conflict in such a way that the resolution the lawyer seeks ‘fits,’ and so the judge will naturally *choose* that resolution over the competing resolution offered by the opposing party.

Foley & Robbins, *supra* note 4, at 467.

⁴⁸ CHRISTOPHER BOOKER, *THE SEVEN BASIC PLOTS: WHY WE TELL STORIES* 69 (2004). “The Quest” as a story form is structured with a protagonist and companions on a journey to acquire an important object or reach a destination, while facing and overcoming obstacles along the way. Some examples include the *Odyssey*, *Pilgrim’s Progress*, and *Lord of the Rings*. *Id.* at 69–79, 82–83, 85–86.

⁴⁹ Mike Skotnicki, *An Example of Storytelling in a Winning Appellate Brief*, BRIEFLY WRITING (June 11, 2012), <https://brieflywriting.com/2012/06/11/an-example-of-storytelling-in-a-winning-appeal-brief/> [<https://perma.cc/S465-HKB8>] (discussing briefing in *Austin v. Ala. Check Cashers Ass’n*, 936 So. 2d 1014 (Ala. 2005)). *See generally* Brief of Appellants, *Austin v. Ala. Check Cashers Ass’n*, 936 So. 2d 1014 (Ala. 2005) (No. 1011907 & No. 1011930).

⁵⁰ Brief of Appellants, *supra* note 49, at 8–12.

⁵¹ *See id.* at 20–41; Skotnicki, *supra* note 49.

⁵² Brief of Appellants, *supra* note 49, at 20.

⁵³ *See, e.g.*, Stanchi, *Priming*, *supra* note 33, at 326–32 (providing several examples of successful thematic storytelling in appellate brief fact statements).

⁵⁴ Brief of Petitioner-Appellee Brendan Dassey, *Dassey v. Dittmann*, 877 F.3d 297 (7th Cir. 2017) (No. 16-3397).

case was the horrific rape and murder of Teresa Halbach,⁵⁵ which was well-publicized as the subject of the popular 2015 Netflix documentary series *Making a Murderer*.⁵⁶ In connection with the case, Dassey's attorneys filed a petition for writ of habeas corpus, which the magistrate judge granted, and which the Seventh Circuit affirmed, but then reversed in an en banc decision.⁵⁷

Dassey's defense in the habeas case centered around his videotaped confession, and the briefs before the Seventh Circuit and Seventh Circuit's en banc decision highlight the complexity of the facts.⁵⁸ In Dassey's response brief, his counsel constructed a factual narrative around the potential that investigators had made Dassey a false promise during the investigation.⁵⁹ The response brief also claimed that the Wisconsin DOJ made certain mischaracterizations about investigation tactics used on Dassey.⁶⁰

However, certain quotes from the Wisconsin DOJ's reply brief to the Seventh Circuit pointed to its own concerns around how Dassey's brief retold the facts related to the investigation. The Wisconsin DOJ's reply brief described Dassey's counsel's recitation of the facts relating to investigators statements as "cobl[ing] together his own patchwork of quotes . . . taken out of context and out of order."⁶¹ The Wisconsin DOJ's brief then went on to restate its own position on the chronology of the facts.⁶² This exchange raises a possibility that weaving even factually true statements into a narrative form has the potential to cause disputes between the parties.

Another example of potential concerns with storytelling in facts relates to the advice provided by legal storytelling scholars to use point of view in crafting fact sections. Specifically, in their article instructing lawyers how to better wield narrative in fact-telling, Brian Foley and Ruth-Anne Robbins suggest that one of the most effective ways to use story in fact-telling is to retell the facts from the point of view of the party that the lawyer hopes will prevail.⁶³ Of course, this is most commonly the lawyer's client. Robbins and Foley suggest this approach because listeners often "root for [a] character they identify with[,] or like[,] or know."⁶⁴

⁵⁵ *Dassey v. Dittmann*, 877 F.3d 297, 300 (7th Cir. 2017).

⁵⁶ See Mariel Padilla, *Brendan Dassey of 'Making a Murderer' Is Denied Clemency*, N.Y. TIMES (Dec. 21, 2019), <https://www.nytimes.com/2019/12/21/us/brendan-dassey-pardon-making-a-murderer.html> [<https://perma.cc/QM9U-URKS>].

⁵⁷ *Dassey*, 877 F.3d at 318.

⁵⁸ *Id.* at 301.

⁵⁹ Brief of Petitioner-Appellee Brendan Dassey, *supra* note 54, at 4–5.

⁶⁰ *Id.* at 28–29.

⁶¹ Reply Brief of Respondent-Appellant, Michael A. Dittmann at 9–10, *Dassey*, 877 F.3d 297 (No. 16-3397), ECF No. 30.

⁶² *Id.* at 10.

⁶³ Foley & Robbins, *supra* note 4, at 479. Other scholars and teachers of legal writing provide similar advice and approaches to teaching the writing of persuasive fact sections. See, e.g., BEAZLEY, *supra* note 24, at 203–09.

⁶⁴ Foley & Robbins, *supra* note 4, at 479.

Nonetheless, this advice is seemingly difficult to square with recent opinions that have challenged the practice of lawyers putting the judge or juror “in the [client’s] shoes.”⁶⁵ Relatedly, in the context of opening statements and closing arguments, every circuit has warned lawyers against using verbiage that seeks to place the jury in the client’s shoes.⁶⁶ Triggering stock stories, priming emotions, and using altered point-of-view in narrative fact-telling appears to skirt close to this disfavored practice, in that it activates a cognitive response that causes listeners to seek the culturally-embedded outcome provided by the story.

This inconsistency between the federal circuit courts’ guidance and the approaches suggested in employing factual storytelling amplifies the concerns raised with regard to the briefing discussed above. These potential ethical questions create a gray area for the advocate seeking to use story to powerfully and persuasively retell client facts. Unfortunately, the Model Rules fail to provide a workable framework to address these concerns. The ideal use of factual storytelling ethically hones facts into a narrative capable of influencing decision-making and providing for favorable client outcomes. However, as the cases we will discuss in Part II will show, lawyers are not always ethically balanced and capable of discerning the limits of appropriate behavior when caught up in the heat of adversarial battle.

As yet, reported cases disciplining lawyers for the misuse of narrative in fact-telling are sparse. The paucity of case law directly on point has two potential causes. First, legal ethicists have noted that Model Rule 3.3 (the rule requiring candor toward the tribunal when presenting facts and law), is “not generally the basis for disciplinary proceedings by bar associations.”⁶⁷ Second, in most instances, the misuse of narrative in fact-telling is done more subtly than blatantly stating false facts. Thus, potential violations of the duty of candor based

⁶⁵ See, e.g., *United States v. Taylor*, 514 F.3d 1092, 1094–95 (10th Cir. 2008) (then Circuit Judge Neil Gorsuch noting that a comment made by a prosecutor in opening argument, asking the jurors to put themselves “in the shoes” of citizens living in the location where a violent crime occurred, “was inappropriate.”).

⁶⁶ See, e.g., *Gov’t of the Virgin Islands v. Mills*, 821 F.3d 448, 458 (3d Cir. 2016); *United States v. Al-Maliki*, 787 F.3d 784, 795 (6th Cir. 2015); *United States v. Hope*, 608 F. App’x 831, 840–41 (11th Cir. 2015); *Sechrest v. Baker*, 603 F. App’x 548, 551 (9th Cir. 2015); *United States v. Tucker*, 714 F.3d 1006, 1015 (7th Cir. 2013); *United States v. Matias*, 707 F.3d 1, 6 (1st Cir. 2013); *United States v. Susi*, 378 F. App’x 277, 283–84 (4th Cir. 2010); *Taylor*, 514 F.3d at 1095; *United States v. Palma*, 473 F.3d 899, 902 (8th Cir. 2007); *United States v. Gaspard*, 744 F.2d 438, 441 (5th Cir. 1984); *United States v. D’Anna*, 450 F.2d 1201, 1205–06 (2d Cir. 1971).

⁶⁷ Frances C. DeLaurentis, *When Ethical Worlds Collide: Teaching Novice Legal Writers to Balance the Duties of Zealous Advocacy and Candor to the Tribunal*, 7 DREXEL L. REV. 1, 13–14 (2014) (discussing the lack of discipline under Model Rule 3.3 when dealing with the requirement that attorneys disclose adverse authority). Our research into case law disciplining lawyers for lack of candor in presenting facts reaches a similar conclusion on the limited use of Model Rule 3.3. See *supra* Sections II.A–B.

on the use of narrative falls into a gray area, or ethical “morass” between the competing duties of zeal for the client and candor toward the tribunal.⁶⁸

Nonetheless, judges are becoming more attuned to problems associated with a lack of candor in advocacy, and are beginning to issue sanctions and express “impatience” with attorneys who operate with even a “perceived lack of candor.”⁶⁹ Unfortunately for attorneys hoping to navigate this ethical morass, the Model Rules as currently drafted address only the black and white line between truth and falsity in fact presentation. This proscriptive approach fails to take into account the large swath of gray area created by the cognitive impact of story on how readers view facts. To better understand the boundaries of that gray area, and how Aristotle’s aspirational concepts of virtue ethics can assist lawyers in navigating it, examining some instances where fact-telling clearly crossed the black and white line is instructive.

II. LAWYERS BEHAVING BADLY

Lawyers sometimes fail to walk the line between truth and falsity in representing the facts of a case to a tribunal. The cases we use to illustrate these failings are at the outer bounds of bad behavior. Other situations present more subtle ethical dilemmas for lawyers. Those situations do not end up in written orders for sanctions, so they are not reflected here in the discussion of case law, but they are much more common. Nonetheless, the characteristics of sanctionable conduct in the cases cited below are instructive in demonstrating the outer boundaries of ethical behavior in advocacy.

Several themes run through decisions commenting on lawyers who misrepresent the facts of a case. One theme reflects the time judges and their law clerks are compelled to allocate in ferreting out the truth of the facts, both because the facts are inaccurate and because the record cites are minimal. Another is that the courts are obliged to illustrate the factual inaccuracies in the briefs, which takes space in a decision and is probably time-consuming to write. And, even as the courts are unhappy with the behavior of the sanctioned counsel, they show genuine concern for the treatment of the litigants, the cost to the opposing counsel in time and effort, and even the reputation of the sanctioned attorneys.

As we described in Part I, the problems associated with the use of storytelling in relating client facts are more subtle, and often fall just below the bright-line issues elucidated in these cases. As R. Michael Cassidy explains, “there is

⁶⁸ See DeLaurentis, *supra* note 67, at 18–19. However, the 9th Circuit recently chastised attorneys for “misrepresenting in their brief” the holdings of two cases relevant to the proceedings by using “selective quotations” arranged in a misleading way. *Swinomish Indian Tribal Cmty. V. BNSF Railway Company*, No. 18-35704, 2020 U.S. App. LEXIS 6787, at *3 (9th Cir. Mar. 4, 2020). This behavior is analogical to the misleading arrangement of facts at issue in this Article, and potentially shows a trend toward increased judicial scrutiny of misleading, though not facially false, arrangements of information in persuasive briefing.

⁶⁹ DeLaurentis, *supra* note 67, 7–8, 18–19.

an important difference between ‘being truthful,’ which is a good character trait, and ‘not telling lies,’ which is a rule.”⁷⁰ But the Model Rules identify the point at which conduct becomes sanctionable, and therefore a discussion of the types of behavior subject to discipline and sanction sets a framework for discussing the more nuanced issues in the Model Rules associated with the potentially misleading nature of storytelling in facts.

A. *At the District Court*

District courts rightly complain of being forced to engage in detective work to ascertain whether and how attorneys misrepresent the record. The district courts are in an especially frustrating position as the first line of defense when an attorney submits a brief that contains factual misrepresentations. A trial court must waste precious time and expend added effort to ferret out what is accurate and what misrepresents the facts. For instance, in *Nguyen v. IBP, Inc.*, the court called out counsel on both sides for sloppy briefing, which it described as being drafted “with total disregard for clarity and candor.”⁷¹ The defendant’s brief contained “so many inaccuracies in basic underlying facts” that it bore “little resemblance to the actual dispute presented to the court.”⁷² The court, experiencing “great difficulty in sorting out” both the facts and issues, reminded the parties that they should use the same level of care in drafting their briefs as they expect from the court in preparing a response.⁷³

A district court is put into an especially awkward position in having to call out attorneys’ poor work in what could be characterized, at best, as a parental tone. A court must transition from assessing the merits of the case to more personally reflecting on the attorneys themselves. In *American National Bank & Trust Co. of Chicago v. Harcros Chemicals, Inc.*, for example, the district court, in an unpublished decision, was compelled to chastise the attorneys and “strongly caution counsel to state the record accurately and meticulously in the future.”⁷⁴ The court issued a rule to show cause why the attorneys should not be

⁷⁰ Cassidy, *supra* note 11, at 642 (citing Thomas L. Shaffer, *On Living One Way in Town and Another Way at Home*, 31 VAL. U. L. REV. 879, 890 (1997)). Cassidy recognizes the usefulness of using character to “bridge the gap” between truth and falsity. *Id.* (citing Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 70 (1980)).

⁷¹ *Nguyen v. IBP, Inc.*, 162 F.R.D. 675, 678 (D. Kan. 1995), *cited in* JUDITH D. FISCHER, *PLEASE THE COURT: WRITING ETHICAL AND EFFECTIVE BRIEFS* 15 (2d ed. 2011) (referring to this case as an example of a scolding). Throughout this section, we refer to cases that were previously collected by Fischer in *PLEASE THE COURT*. We gratefully acknowledge her contributions to this discourse.

⁷² *Nguyen*, 162 F.R.D. at 678.

⁷³ *Id.* (“To suggest that the briefing is less than precise would be a gross understatement.”).

⁷⁴ *Am. Nat’l Bank & Tr. Co. v. Harcros Chems., Inc.*, No. 95 C 3750, 1997 WL 413856, at *3 (N.D. Ill. July 21, 1997) (order vacated), *cited in* FISCHER, *supra* note 71, at 17; 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, 92 n.93 (2003–04).

sanctioned for their summary judgment briefing.⁷⁵ In addition to complaining about the voluminous “tangle” of briefing, the court found that the use by the plaintiffs’ lawyers of an ellipsis to describe a lease provision was “an attempt to mislead.”⁷⁶ Specifically, the court described how the plaintiffs’ lawyers “quoted the lease provision, omitted the language in dispute, and stated their redacted version of the lease was entitled to a broad reading.”⁷⁷ Selective quoting of the record is a form of misrepresentation, and the court described some misstatements as being “clerical in nature,” while others were “generalizations and overstatements that bordered on deception.”⁷⁸

Such failures waste both judicial resources and the opposing counsel’s time.⁷⁹ In *Hanoverian, Inc. v. Pennsylvania Department of Environmental Protection*, the district court described how an untimely filed brief contained “a string of incredible factual contentions” that contained no record cites.⁸⁰ The brief was a “377-page jumble of filings, letters, and instruments” that included multiple copies of the same documents.⁸¹ The court gave examples of the plaintiffs’ failure to support assertions with evidence from the record.⁸² For instance, the court noted how the plaintiffs, with no evidence in the record, improperly asserted that the other side “refused to comply with discovery.”⁸³ In direct contrast, the court said, “the record unambiguously show[ed]” the plaintiffs were the ones failing to comply.⁸⁴

Of course, counsel can point out the offending side’s errors, capitalizing on the opposing side’s failings to score advocacy points. In *Hanoverian*, the court quoted the opposing party’s brief, which “marvel[ed] at the ‘sheer volume of falsehoods and scandalous matter squeezed’” into the plaintiffs’ brief.⁸⁵ The opposing party described the plaintiffs’ “frequency, nonchalance, and sheer au-

⁷⁵ *Am. Nat’l Bank & Tr. Co.*, 1997 WL 413856, at *1 (employing Rule 11 and 28 U.S.C. § 1927, imposition of sanctions).

⁷⁶ *Id.* at *1–2.

⁷⁷ *Id.* at *2.

⁷⁸ *Id.* at *3.

⁷⁹ *Hanoverian, Inc. v. Pa. Dep’t of Env’tl. Prot.*, No. 1:07-CV-00658, 2008 WL 906545, at *6, *13 (M.D. Pa. Mar. 31, 2008); *see also* *Doebler’s Pa. Hybrids, Inc. v. Doebler*, 442 F.3d 812, 820 n.8 (3d Cir. 2006) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)) (“Judges are not like pigs, hunting for truffles buried in the record.”). Though *Doebler’s* and *Dunkel* are appellate, rather than trial cases, unnecessarily wasting judicial resources seems to irk judges on all levels.

⁸⁰ *Hanoverian, Inc.*, 2008 WL 906545, at *6–7.

⁸¹ *Id.* at *7. The court additionally took issue with the plaintiff’s egregious misuse of grammar. Relenting that while “[m]inor grammatical errors are inevitable,” the court described the plaintiff’s brief as having a “troubling disregard for both the basic rules of grammar and the needs of the average reader.” *Id.* at *13.

⁸² *Id.* at *8.

⁸³ *Id.* (using the phrase “not a shred of support in the record”).

⁸⁴ *Id.*

⁸⁵ *Id.* at *13.

dacity” of misrepresentation as a “litigation tool.”⁸⁶ The court “wholeheartedly” agreed with this assessment.⁸⁷ The cases leave the question open as to whether attorneys engaging in factual misrepresentations purposefully engage in misbehavior, or if the misrepresentation is the result of sloppy or negligent lawyering. Regardless of the cause, these examples demonstrate the potential for lawyers to slide into unethical behavior when retelling client facts.

B. *At the Federal Court of Appeals*

Rule 11, Federal Rule of Appellate Procedure 28(a)(6) and 28(e), and local rules govern appellate practice on the use of facts in an appellate brief.⁸⁸ Under Rule 28(e), cites to the record require scrupulous accuracy.⁸⁹ In addition to requiring record cites, the Seventh Circuit’s Practitioner’s Handbook for Appeals guides practitioners in the Seventh Circuit on how to state the facts properly in the Statement of the Case.⁹⁰ The recitation of the facts should be narrative and chronological and “must be a fair summary without argument or comment.”⁹¹ *The Practitioner’s Handbook* urges attorneys to take “[g]reat care” to marshal the facts well, which will then “often develop the relevant and governing points of law.”⁹² A properly marshaled statement of facts is both accurate and ultimately persuasive because facts evoke in the reader a sense “that justice and the precedents both require a decision for the advocate’s client.”⁹³

Even with specific instructions from the circuit courts, attorneys sometimes misrepresent the facts at the appellate level, even reasserting factual inaccuracies made at the trial level. In *Borowski v. DePuy, Inc.*, for instance, the Seventh Circuit described how the plaintiff’s brief was “patently false” in characterizing witness testimony.⁹⁴ Plaintiff’s counsel continued to misrepresent the same testimony in its appellate briefs and oral argument that it had misrepresented at the district court.⁹⁵ In *In re Boucher*, the Ninth Circuit described misrepresenting the facts as a “poor strategy” because the facts’ accuracy is scruti-

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ FED. R. APP. P. 28(a)(6), 28(e); FED. R. CIV. P. 11.

⁸⁹ *In re Disciplinary Action Boucher*, 837 F.2d 869, 871 (9th Cir. 1988) (quoting *Markowitz & Co. v. Toledo Metro. Hous. Auth.*, 608 F.2d 699, 704 (6th Cir. 1979)); *see also* *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146 (9th Cir. 1997) (criticizing counsel for filing an opening brief “replete” with facts from the record but containing only a “handful of generalized record citations”; the court in its own review of the record did not find the facts asserted).

⁹⁰ U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, PRACTITIONER’S HANDBOOK FOR APPEALS 137 (2019) [hereinafter PRACTITIONER’S HANDBOOK].

⁹¹ *Id.* at 137–38.

⁹² *Id.* at 137.

⁹³ *Id.*

⁹⁴ *Borowski v. DePuy, Inc.*, 850 F.2d 297, 302 (7th Cir. 1988).

⁹⁵ *Id.* at 301–02 (laying out language from the briefing side by side with original testimony).

nized by counsel's opponents, the judges, or the law clerks.⁹⁶ Furthermore, reciting the facts is "not a vehicle for argument" and should therefore not include persuasive phrasing such as adverbs that comment on the facts.⁹⁷

A year after the Seventh Circuit decided *Borowski*, it upheld sanctions against counsel under Rule 11 in *Teamsters Local No. 579 v. B&M Transit, Inc.* for both misrepresenting the facts and misstating the law in a collective bargaining agreement case.⁹⁸ The court stated that counsel cannot rewrite "the factual record to reflect what it thinks should have occurred," and to do so is sanctionable under Rule 11.⁹⁹ The Seventh Circuit exhorted counsel to "read the document whose terms it is contesting"—in that case, the collective bargaining agreement.¹⁰⁰ The court provided some examples of sanctionable conduct that show how misstatements of the law and misrepresentation of the facts go hand in hand.¹⁰¹

For example, counsel argued a point directly contrary to precedent—that arbitration is not barred by a representation dispute—and further, the agreement at issue signaled that the matter was not a representation dispute.¹⁰² It is impossible to tell whether counsel in this case purposefully, knowingly, or negligently misread the law and facts, but it can be inferred that a failure to read the documents precisely can lead to a misreading of the law. However, a clear takeaway from these cases is the strong caution that attorneys need to be careful not to let wishful thinking, or the desire to spin a more persuasive story, get in the way of sound advocacy.

C. At State Appellate Courts

The state courts have considered whether the counsel's desire to deceive is relevant to sanctions when a brief misrepresents the facts. The state courts have been similarly stringent in reviewing attorney misconduct under state rules of professional conduct. In *Davis v. State Bar of California*, for instance, the California Supreme Court suspended an attorney for three years for willful failure

⁹⁶ *In re Disciplinary Action Boucher*, 837 F.2d 869, 871 (9th Cir. 1988) (suspending counsel for six months in the Ninth Circuit for misrepresentations that "went to the heart of the appeal").

⁹⁷ *Markowitz & Co. v. Toledo Metro. Hous. Auth.*, 608 F.2d 699, 704 (6th Cir. 1979).

⁹⁸ *Teamsters Local No. 579 v. B&M Transit, Inc.*, 882 F.2d 274, 279–80 (7th Cir. 1989).

⁹⁹ *Id.* at 280.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*; see also *Qualls v. Apfel*, 206 F.3d 1368, 1371 (10th Cir. 2000) (stating that the Tenth Circuit "does not look favorably upon arguments founded on misrepresentations of the record"). In *Qualls*, the court noted several facts in the plaintiff's brief that directly opposed the record. *Id.* at 1372.

¹⁰² *Teamsters*, 882 F.2d at 280. Courts have noted the detriment a court reprimand can have on a counsel's reputation. *E.g.*, *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1353 (Fed. Cir. 2003) (discussing reprimand of a DOJ lawyer who misquoted case authority). Even an unpublished decision is public because decisions are available electronically. See *id.*

to perform legal services and willful deception of the court.¹⁰³ The court stated that to prove willful deception of a court, actual deception is not required: an attorney must simply “knowingly present[] a false statement which tends to mislead the court.”¹⁰⁴ The attorney’s factual misrepresentation about his actions in handling a client’s case, made to avoid liability for his prior negligent handling of the case, “exceed[ed] the bounds of zealous advocacy.”¹⁰⁵ Similarly, the Iowa Supreme Court stated that neither reckless disregard nor deliberate deceit in misrepresentation of the facts is to be tolerated, and the lines between them are “blurred” when a lawyer repeatedly engages in factual misrepresentation.¹⁰⁶

The Indiana Supreme Court compared the duty of zealous advocacy with a criminal defense attorney’s briefing of the facts.¹⁰⁷ The court questioned counsel’s use of “uncontroverted” in describing the evidence that the defendant fired a gun in self-defense.¹⁰⁸ When the brief’s facts are unreliable, the court observed, an attorney loses effectiveness, and thus, injures a client.¹⁰⁹ Appellate courts are concerned about the standard of briefing; for instance, the Nevada Supreme Court has reminded its bar that briefing is to meet “‘high standards of diligence, professionalism, and competence.’”¹¹⁰

These cases reflect that when under pressure, attorneys do not always have the tools to combat the temptation to act in haste while compiling the facts (thereby failing to take care to accurately reflect the record or cite to the record). Lawyers under pressure sometimes also cave to the temptation of actively misrepresenting the record, perhaps thinking that they will not be caught. Or

¹⁰³ *Davis v. State Bar of Cal.*, 655 P.2d 1276, 1281 (Cal. 1983).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1280.

¹⁰⁶ *Iowa Sup. Ct. Bd. of Prof. Ethics & Conduct v. Ackerman*, 611 N.W.2d 473, 474 (Iowa 2000); *see also Hutchins v. Hutchins*, 501 So. 2d 722, 722–23 (Fla. Dist. Ct. App. 1987) (striking language from a brief containing factual misrepresentations and sanctioning counsel).

¹⁰⁷ *Cooper v. State*, 309 N.E.2d 807, 808 (Ind. 1974).

¹⁰⁸ *Id.* (citing DR7—102(A)(5) of the Code of Professional Responsibility); *see also Matter of Chakeres*, 687 P.2d 741, 741–42 (N.M. 1984) (ordering censure of an attorney who knowingly and intentionally misstated testimony in a court of appeals brief); *Suchorski v. Sloboda*, 530 N.W.2d 69, at *2 n.1 (Wis. Ct. App. 1995) (unpublished per curiam) (admonishing counsel for a factual misrepresentation and calling attention to Wisconsin’s Supreme Court Rule 20:3.3(a)(1), which prohibits counsel from knowingly making a false statement of fact or law to a tribunal).

¹⁰⁹ *Cooper*, 309 N.E.2d at 808 (“The Court is entitled to a fair statement of the facts from attorneys on both sides, not an exaggerated, self-serving version of the facts or an omission of crucial facts.”); *see also In re Greenberg*, 104 A.2d 46, 47 (N.J. 1954) (stating that counsel “may assert any inferences from the facts of the case that seem to him arguable, but he cannot present his inferences from the facts as if they were the very facts themselves.”).

¹¹⁰ *Sobol v. Capital Mgmt. Consultants, Inc.*, 726 P.2d 335, 337 (Nev. 1986) (quoting *State, Emp. Sec. Dep’t v. Weber*, 676 P.2d 1318, 1319 (Nev. 1984)); *see also Hurlbert v. Gordon*, 824 P.2d 1238, 1245–46 (Wash. Ct. App. 1992) (calling briefing by respondent’s counsel “laissez-faire” and highlighting counsel’s failure to cite to the record in asserting facts).

perhaps they lack the ability to discern, in their desire to win, how their factual assertions will be viewed by the court and opposing counsel.

Lawyers need to sharpen their minds to be able to discern these matters and take appropriate action, especially when using a powerful tool like storytelling, as we describe below. Aristotle commented on these very sorts of problems, which have not changed in the last 2,000 years. More importantly, he offers solutions for lawyers to train their minds using internal motivation to avoid making misrepresentations when under pressure.

III. THE ETHICAL LANDSCAPE OF FACT-TELLING

Ethics scholars have noted that one of the most “vexing ethical dilemma[s]” facing the modern lawyer is the tension between the obligations to both zealously advocate for clients, and yet maintain candor toward the tribunal.¹¹¹ Add in the power of legal storytelling as a persuasive tool, and the unworkable framework created by the Model Rules in grappling with candor to the tribunal, and lawyers attempting to ethically persuade through fact-telling are left to navigate a complicated ethical morass.

This Part of the Article seeks to illustrate this tension and will proceed in three Sections. In the first Section III.A, we will identify problems with balancing zeal and candor in the legal profession. This Section will continue by discussing ethical concerns raised by scholars of narrative fact-telling. Section III.B will examine the applicable Model Rules and their limitations in providing guidance to the modern legal storyteller. Finally, the Section III.C will examine aspirational models for providing ethical guidance to attorneys in this context.

A. *The Tension Between Zeal and Candor*

An examination of the role of the lawyer in modern advocacy and the limitations inherent in the Model Rules as applied to truthfulness in presentation of facts is necessary to understand how classical rhetoric can provide guidance to the modern practitioner walking the line between candor and zeal in the use of story.¹¹² The concerns presented in this Article regarding the ethical use of storytelling exist in the shadow of a longstanding debate in the scholarship of legal ethics.¹¹³ This debate centers on whether an advocate’s primary goal should be

¹¹¹ DeLaurentis, *supra* note 67, at 12.

¹¹² *E.g.*, BOK, *supra* note 6, at 10 (quoting Epictetus, EPICETUS, THE ENCHEIRIDION 536 (W.A. Oldfather trans., Harvard Univ. Press 1928), as an example of the proposition that philosophers hesitate to grapple with concrete moral choices); DeLaurentis, *supra* note 67, at 8–14 (addressing the tension between zeal and candor and providing a history of the Model Rules).

¹¹³ The full depth of the debate among scholars of legal ethics concerning whether the ultimate role of the advocate should be focused on victory for the client at all costs, or the pursuit of truth in connection with the lawyer’s role as an officer of justice, is outside the scope of this Article, but for more depth on this subject, see, e.g., Anita Bernstein, *The Zeal Short-*

“victory for the client or the pursuit of truth.”¹¹⁴ This debate has been ongoing for decades and was even recognized by the drafters of the Model Rules, one of whom noted that “to say that a lawyer owes a duty of candor to the court and one of loyalty to the client leaves unresolved the problem of conflict between those duties.”¹¹⁵

Perhaps as a reflection of this tension between zeal and candor, the concept of zeal has appeared to “wither”¹¹⁶ as the rules governing lawyering evolved from the aspirational ABA Canons of Professional Ethics (the Canons)¹¹⁷ into the ABA Code of Professional Responsibility (the Code),¹¹⁸ and most recently into the extant Model Rules. As will be more specifically discussed in Section III.B, the current iteration of the Model Rules, in fact, only refers to zeal in the aspirational Preamble, rather than in any of the black-letter rules.¹¹⁹ However, ethics scholar Anita Bernstein has noted that the concept of zeal, despite ongoing scholarly debate about the lawyer’s role and the reimagining of the ethical rules over time, remains a “great ideal” of lawyering, nearly as important as loyalty and competence.¹²⁰ Under this model, employing story as a highly effective method of client fact-telling would therefore be encouraged, if not necessary.

Bernstein also strives to combat those who would suggest that a focus on zeal for the client’s case necessarily tends toward unethical behavior by pointing out that zealous advocacy *itself* is not the sole source of affirmative wrongdoing.¹²¹ As Bernstein notes, “[w]rongful conduct is wrong by itself, and has no necessary connection to zeal.”¹²² Thus, lawyers can and, in fact should, strive for zealous representation of clients. Scholars who call for a balance between candor and zeal, however, have noted that even with regard to client

age, 34 HOFSTRA L. REV. 1165, 1166 (2006); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 651 (1985); Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 552; William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083 (1988).

¹¹⁴ Jill M. Dennis, Note, *The Model Rules and the Search for Truth: The Origins and Applications of Model Rule 3.3(d)*, 8 GEO. J. LEGAL ETHICS 157, 158 (1994).

¹¹⁵ MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N COMM’N ON EVALUATION OF PROF’L STANDARDS, Proposed Final Draft 1981).

¹¹⁶ Bernstein, *supra* note 113, at 1176–77. Bernstein argues that where lawyers err, zeal is not necessarily to blame, rather either “overzealousness” or “zealotry.” A measure of zeal is necessary to abide by Rule 1.3, while rules like Rule 3.3 and Rule 3.4 make such “overzealousness” a basis for professional discipline. *Id.*

¹¹⁷ CANONS OF PROF’L ETHICS (COMM. ON CODE OF PROF’L ETHICS 1908).

¹¹⁸ MODEL CODE OF PROF’L RESPONSIBILITY (AM. BAR ASS’N 1969).

¹¹⁹ MODEL RULES OF PROF’L CONDUCT Preamble (AM. BAR ASS’N 2018). Paragraph 2 states as follows: “As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.” *Id.* Note, however, that the Preamble continues by pointing out that “a lawyer is also guided by personal conscience and the approbation of professional peers.” *Id.*

¹²⁰ Bernstein, *supra* note 113, at 1169.

¹²¹ *Id.*

¹²² *Id.*

fact-telling, one of the “necessary objectives” of the adversarial process is “to ascertain truth: to reconstruct the past event as accurately as possible.”¹²³

The ability to balance the requisite zeal with persuasive narrative fact-telling should therefore be the goal of the ethical advocate.¹²⁴ However, scholars of legal storytelling have begun to recognize a distinct difficulty in maintaining this balance, based on the unique cognitive power of story.¹²⁵ Scholars of legal storytelling have noted that because stories provide “ways of seeing or highlighting some aspects of a concept,” they can inherently cause other aspects¹²⁶ (such as opposing facts, or even prevailing legal argument) to become obscured. Other scholars of storytelling in advocacy have pointed out that “[s]tories, because they necessarily are told from a particular point of view, are necessarily biased”¹²⁷

Therefore, a real risk exists that by using storytelling, advocates may transition from an appropriate level of zeal for their clients’ causes into ethically dubious inaccuracies in retelling client facts. Specifically, Foley and Robbins’ suggestion to retell client facts from the point of view of a proposed protagonist, discussed in Part I¹²⁸ powerfully initiates in the mind of a reader a desire for an outcome beneficial to that protagonist, based on the concept of narrative correspondence.¹²⁹ These practices, based on their inherent nature as a one-sided means of presenting a set of facts, in some circumstances may make storytelling “an inappropriate tool of persuasion in [the] legal context.”¹³⁰

As will be more deeply discussed in the examination of the Model Rules in Section III.B, the rules and related frameworks of advocacy are not appropriately robust with regard to these specific problems associated with the cognitive power of story in persuasion. The ethical rules seeking to regulate truthful fact-telling fail to provide any ethical floor below which storytelling must not fall, or else risk crossing the line into proscribed misrepresentation and deception.¹³¹ Rather, the relevant Model Rules provide only a black and white prohibition on factual falsity, which fails to capture the nuanced issues associated with persuasion through narrative. The inability of the black-letter Model Rules

¹²³ Schwartz, *supra* note 113, at 551.

¹²⁴ Relatedly, ethics scholars have noted that law professors need to begin teaching law students how to “advocate for one’s client while treating the tribunal with full candor, and to determine . . . the line between zealous advocacy and ethical candor,” to better prepare students to avoid potential discipline or sanction. DeLaurentis, *supra* note 67, at 18, 38.

¹²⁵ See *supra* Part I for a discussion of the cognitive power of story.

¹²⁶ Berger, *The Lady or the Tiger?*, *supra* note 32, at 278.

¹²⁷ Johansen, *supra* note 5, at 979.

¹²⁸ See *supra* notes 63–65 and accompanying text.

¹²⁹ See *supra* note 47 and accompanying text.

¹³⁰ Johansen, *supra* note 5, at 961. Another potential ethical problem in the use of story in fact-telling is that the party who has the option to submit their Statement of Facts first benefits from the ability to set a powerful “first impression” upon the reader. Stanchi, *Priming*, *supra* note 33, at 346.

¹³¹ Johansen, *supra* note 5, at 988–89.

to appropriately address these issues likely arises because the cognitive power of story is simply too difficult and nuanced to distill into a workable, proscriptive rule.

Further, the Model Rules were crafted and adopted before the rise of legal storytelling as an encouraged argumentative modality¹³² and therefore did not consider the need to provide lawyers with tools to avoid the use of storytelling in ways that cross the line from zeal into zealotry—from fact statement into fact misstatement. A deeper understanding of the applicable Model Rules is therefore necessary to understand the storyteller's dilemma, and why the aspirational guidance of Aristotle can help to resolve it.

B. The Limitations of Applicable Model Rules

The current Model Rules governing lawyers were originally drafted in 1983 and have now been adopted in forty-nine states and the District of Columbia.¹³³ In examining the Model Rules in more depth, in connection with the ethical problems surrounding the retelling of client facts, there are three potentially applicable sections: (i) the Preamble,¹³⁴ (ii) Model Rule 3.3,¹³⁵ and (iii) Model Rule 8.4.¹³⁶ These provisions, when considered in tandem, highlight the dual responsibilities of a lawyer to be a zealous advocate and to use candor when communicating about the law and facts of a case. These rules provide relatively clear frameworks for discipline in the types of straightforward factual disputes discussed in Part II above. Nonetheless, even when considering these provisions in combination, they offer an insufficient model for addressing the slippery slope toward unethical behavior inherent in the nuanced context of narrative fact-telling at issue in this Article.

The Preamble of the Model Rules is hortatory or aspirational,¹³⁷ while Rules 3.3 and 8.4 are proscriptive, black-letter disciplinary requirements. This Part will examine the applicable black-letter rules and discuss their limitations in connection with policing an issue as nuanced as the potentially misleading nature of story in retelling client facts. This examination will reveal that the aspirational Preamble to the Model Rules (in line with its predecessors and also current trends in ethical enforcement) provides a more appropriate and effective locus for providing practitioners of legal storytelling with effective ethical guidance than the Rules themselves.

¹³² The current Model Rules were promulgated by the ABA in 1983. MODEL RULES OF PROF'L CONDUCT Preamble (AM. BAR ASS'N 2018). In tracing the history of the legal storytelling movement, the earliest conference on the topic in the U.S. dates to 1989, but the "sustained" dialogue around the topic did not reemerge until 2005. Robbins, *supra* note 2, at 5–6.

¹³³ STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (2018).

¹³⁴ MODEL RULES OF PROF'L CONDUCT, Preamble (AM. BAR ASS'N 2019).

¹³⁵ *Id.* at r. 3.3.

¹³⁶ *Id.* at r. 8.4.

¹³⁷ Bernstein, *supra* note 113, at 1166.

The Model Rule directed at the lawyer's duty to candidly and accurately present the client's facts is Model Rule 3.3, which includes a prohibition in subsection 3.3(a)(1) requiring that "[a] lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer"¹³⁸ In contrast, subsection 3.3(a)(2) of the Rule includes an affirmative duty to "disclose to the tribunal legal 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"¹³⁹ Further, subsection 3.3(d) requires that in *ex parte* proceedings, the attorney "shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."¹⁴⁰

Importantly, subsection 3.3(a)(1) of the Rule is the specific provision that governs an attorney's recitation of facts in briefs and other pleadings.¹⁴¹ This subsection does not require an attorney to proffer unhelpful facts (even when legally relevant or determinative).¹⁴² Nor does it impose on attorneys an obligation to assure that the arrangement of facts in a narrative is not misleading.¹⁴³ The proscriptive construction against falsity stands in stark contrast to the affirmative duties created in subsections 3.3(a)(2) and 3.3(d). Seasoned advocates and some legal ethicists would argue that the implied permission to obfuscate harmful facts inherent in the structure of 3.3(a)(1) is fundamental to our system of legal advocacy, where opposing sides are required to muster persuasive facts on their client's behalf.¹⁴⁴

However, discussions surrounding the adoption of Model Rule 3.3 show that thought was given to including more affirmative requirements on attorneys in connection with fact presentation.¹⁴⁵ The Commission on the Evaluation of Professional Standards (the Kutak Commission) convened in 1977 to draft a new set of ethical standards to replace the aging Code, which was originally promulgated in 1969.¹⁴⁶ In discussions leading to the publication of the Model Rules in 1983, the Kutak Commission considered, *and rejected*, a rule that would have required an attorney to disclose "facts known to a lawyer which

¹³⁸ MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1).

¹³⁹ *Id.* at r. 3.3(a)(2).

¹⁴⁰ *Id.* at r. 3.3(d).

¹⁴¹ *See id.* at r. 3.3(a)(1).

¹⁴² *See id.*

¹⁴³ *See id.*

¹⁴⁴ *See* Rhode, *supra* note 113, at 595 (suggesting that correct legal results are achieved through lawyers proffering competing presentations of relevant fact and law).

¹⁴⁵ Dennis, *supra* note 114, at 163–65.

¹⁴⁶ *See Kutak Commission Drafts*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/kutakcommissiondrafts/ [<https://perma.cc/6NZU-Q6KG>] (last visited Mar. 26, 2020).

‘would probably have a substantial effect on the determination of a material issue.’¹⁴⁷

The rejection of this proposed provision suggests a decision on the part of the Kutak Commission to emphasize the lawyer’s duty to the court more heavily than the duty to play fair with opposing counsel. By restricting a lawyer’s ability to present false facts to the tribunal, the Commission did not go so far as to suggest that lawyers consider fairness or forthright behavior toward opposing counsel when deciding which facts to reveal or how to reveal them. The resulting formulation of Model Rule 3.3 leaves open the scenario where “opposing counsel may not always discover the truth” of the facts, “either through lack of diligence or because the truth has been effectively concealed.”¹⁴⁸

Thus, the formulation of Model Rule 3.3, while effective at dealing with straightforward issues of factual dishonesty to the tribunal discussed in Part II above, does not take into account the power that factual storytelling may have to conceal veracity, not only to opposing counsel, but also to the court. Similar to the struggles opposing counsel face in deciphering statements of fact, judges and juries are equally susceptible to the cognitive power of a carefully, even potentially misleading, narrative statements of fact. As such, the black letter of Model Rule 3.3, when taking into account the rise of the legal storytelling movement, may no longer be having its intended effect of maintaining candor to the court.

Often, when faced with a Model Rule that does not clearly prohibit ethically questionable behavior, an attorney can turn to the comments to the Rule for guidance. However, the comments to Model Rule 3.3, while coming close to addressing the issue of the misleading use of narrative, re-emphasize the prohibition on false facts, rather than prohibiting an overall misleading statement of fact.¹⁴⁹ Therefore, the Rule fails to provide sufficient guidance to lawyers with regard to persuasive fact-telling. Comment 2, the relevant comment to Model Rule 3.3 dealing with presentation of fact and law, again favors a lawyer’s duty of candor to a court, over the lawyer’s overall obligation to the adjudicative process.¹⁵⁰

The Comment notes in an aspirational manner that a lawyer is to “avoid conduct that undermines the integrity of the adjudicative process,” but counters this suggestion with the requirement that lawyers must present a client’s case “with persuasive force” and a note that the lawyer has no requirement to “present an impartial exposition” of the case.¹⁵¹ The Comment then directly restricts

¹⁴⁷ MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N, Discussion Draft 1980); see also Dennis, *supra* note 114, at 163.

¹⁴⁸ 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 3.3:101 (2d ed. 1998); see also Dennis, *supra* note 114, at 163.

¹⁴⁹ MODEL RULES OF PROF’L CONDUCT r. 3.3 cmt. 2 (AM. BAR ASS’N 2019).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

a lawyer from permitting a court to be “misled by *false* statements of law or fact.”¹⁵² Considering the problems with factual storytelling detailed in Part I above, these competing instructions within the Comment provide little guidance with regard to the “spinning” of otherwise truthful facts. Nor does the Comment encourage lawyers to consider their overall obligations to the pursuit of truth in the adjudicative process.

As such, the problem of a lawyer presenting facially truthful, yet misleadingly told, facts bubbles just beneath the requirements of Model Rule 3.3 and its related comments. While edits to Model Rule 3.3 or an additional comment might address this problem, it would be difficult to formulate a comment that would take into account the wide-ranging cultural influence of storytelling. It would be equally difficult for a comment to address the technical cognitive-scientific factors that could cause a factual narrative to cross the line into prohibited behavior. Further, the Commission’s rejection of language suggesting fairness in the presentation of facts implies that any specific amendments to Model Rule 3.3 or its comments seeking more objectivity in fact presentation would likely be met with resistance.

Another rule applicable to the issue of story in fact-telling might be found in Model Rule 8.4(c), which prohibits lawyers from “engag[ing] in conduct involving dishonestly, fraud, deceit, or misrepresentation”¹⁵³ This language, if effectively enforced, could help fill the gaps left in Model Rule 3.3(a)(1) with regard to the concerns around narrative fact-telling. However, a solution based on Model Rule 8.4 would likely fall short for two reasons. First, Model Rule 8.4 is not used as frequently as Model Rule 3.3 a basis for disciplining lawyers in the context of fact-telling.¹⁵⁴ Further, the debates surrounding the language of Model Rule 3.3 during its adoption show that a prevailing attitude likely exists among advocates that anything short of the direct presentation of false facts would not rise to the level of requiring discipline under the current Model Rules.¹⁵⁵

Thus, the black-letter language and comments of the applicable Model Rules simply lack the nuance and flexibility necessary to provide lawyers with the motivation necessary to avoid crossing the line when using stories to tell facts. In short, the proscriptive nature of Model Rule 3.3, which prohibits bad behavior rather than encouraging affirmatively ethical behavior, is one way in which the Model Rules fall short of the ideal that “the rules that govern the

¹⁵² *Id.* (emphasis added).

¹⁵³ *Id.* at r. 8.4.

¹⁵⁴ See *infra* cases cited in footnotes 69–106 and accompanying text. Of the cases cited, only two rely on Model Rule 8.4 (or an equivalent rule). See *Iowa Sup. Ct. Bd. of Prof. Ethics & Conduct v. Ackerman*, 611 N.W.2d 473, 474 (Iowa 2000); *Matter of Chakeres*, 687 P.2d 741, 742 (N.M. 1984).

¹⁵⁵ See *infra* notes 146–48 and accompanying text. Further, ethics scholars have noted that the practicing bar remains “firmly wedded” to existing “adversarial norms” and resists efforts to “undermine” or “abrogate” the current model. Rhode, *supra* note 113, at 600.

conduct of lawyers should be designed to aid in the search for truth.”¹⁵⁶ As such, this Article suggests exploring the potential for aspirational language, based on Aristotle’s guidance, to provide a more effective means of encouraging lawyers to use the powerful, persuasive tool of story in a balanced and ethical way.

C. Opportunities for Aspirational Guidance

Conveniently, the concepts of aspirational encouragement for ethical behavior are not new to the realm of ethical rule making. In considering options for taking an aspirational approach to governing the use of storytelling in facts, the Preamble to the Model Rules must be examined. However, it is important to note that the Model Rules evolved out of two main predecessors, the Canons and the Code, each of which placed a much higher emphasis on the aspirational encouragement of ethical lawyer behavior than the current Model Rules.¹⁵⁷ While this Article does not suggest we go back in time (other than to examine the astute teachings of Aristotle!), revisiting the basis of our current Model Rules will assist in understanding the importance of the Preamble, and why it serves as an opportune place for including the ethical guidance proposed here.

The Canons were promulgated by the ABA in 1908 and were a “broadly worded set of guidelines,” which consisted “primarily of general aspirational goals” for the profession.¹⁵⁸ The Preamble of the Canons exhorted lawyers that their “conduct and . . . motives” in the practice of law should stand as a “merit” to their fellow practitioners.¹⁵⁹ Further, the Canons dealt with the issue of candor to the tribunal in a less proscriptive, and more fairness-focused manner, than the current Model Rules. Specifically, the Canons exhorted that “[i]t is unprofessional and dishonorable to deal other than candidly with the facts” in preparing “documents, and in the presentation of causes.”¹⁶⁰ These constructions, while aspirational, come closer to addressing the issues presented by the misleading use of narrative than the current, proscriptive formulation of the Model Rules.

The Code, which replaced the Canons after its approval by the ABA in 1969, moved in a more proscriptive direction than the Canons, but still helpfully contained a set of aspirational “Ethical Considerations” in addition to set of enforceable rules and other principles.¹⁶¹ The Ethical Considerations were meant to “suggest . . . proper ethical behavior” and served as “a guide to the lit-

¹⁵⁶ Dennis, *supra* note 114, at 158.

¹⁵⁷ See MODEL CODE OF PROF’L CONDUCT Preamble (AM. BAR ASS’N 1969); CANONS OF PROF’L ETHICS Preamble (AM. BAR ASS’N 1908).

¹⁵⁸ GILLERS, *supra* note 133, at 4.

¹⁵⁹ CANONS OF PROF’L ETHICS Preamble.

¹⁶⁰ *Id.* at Canon 22.

¹⁶¹ GILLERS, *supra* note 133, at 4.

igating attorney” working in the adversarial context.¹⁶² Specifically, the Code noted in its opening paragraph that “[e]ach lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards.”¹⁶³ This language also struck directly at the problem associated with misleading fact-telling. If plainly truthful facts, retold in a potentially misleading way, would satisfy the minimum standard of Model Rule 3.3, any deceitful action taken by the lawyer in crafting them would be difficult to defend when faced with this language.

The idea of using aspirational language in lieu of proscriptive rules for handling lawyer behavior, however, is not merely a quaint antique. Modern legal ethicists have proposed aspirational models for encouraging lawyer behavior as alternatives or supplements to the existing Model Rules.¹⁶⁴ Even more recently, many states, including California, Florida, and Virginia, have approved aspirational professionalism guidelines or principles of professionalism for lawyers.¹⁶⁵ These guidelines highlight and encourage positive behavior and maintenance of integrity.¹⁶⁶ Additionally, local and county bar associations, including Clark County, Nevada, have adopted similar guidelines.¹⁶⁷ Thus, the ideal of aspirational guidance to encourage ethical behavior has both historical roots and modern applicability.

¹⁶² Louis M. Brown & Harold A. Brown, *What Counsels the Counselor? The Code of Professional Responsibility's Ethical Considerations—A Preventive Law Analysis*, 10 VAL. U. L. REV. 453, 453 (1976). Scholars of legal ethics have also argued that the broad formulation of ethics rules included in the Code permitted courts to identify “unenumerated legal principles” as flowing from the “expressly enumerated” broad text. Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TULANE L. REV. 527, 550 (2003) [hereinafter Levine, *Taking Ethics Codes Seriously*]. Therefore, these broader, less specifically proscriptive formulations have been recognized as having the potential to reach previously unidentified conduct in a way that more specific rules might not. *See id.* at 550–52.

¹⁶³ MODEL CODE OF PROF'L CONDUCT Preamble (AM. BAR ASS'N 1969).

¹⁶⁴ *See, e.g.*, Rhode, *supra* note 113, at 648 (suggesting that the ABA provide a “document[] expressing core notions of honest and equitable conduct” which would serve as “a collective affirmation of professional values” and would “have some effect simply by supplying, or removing, one source of rationalization for dubious conduct.” [i.e. the Model Rules]); *see also* Simon, *supra* note 113, at 1083–84, 1145 (suggesting a discretionary model of ethics based on concepts of justice and legal values to guide lawyers in exercising their autonomy within the advocacy system).

¹⁶⁵ *See* STATE BAR OF CAL., CALIFORNIA ATTORNEY GUIDELINES OF CIVILITY AND PROFESSIONALISM (July 20, 2007); FLA. BAR, GUIDELINES FOR PROFESSIONAL CONDUCT (2008); VA. STATE BAR, PRINCIPLES OF PROFESSIONALISM (2009) (which reminds lawyers to “[a]ct at all times with professional integrity”); *Professionalism Codes*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes/ (last updated Mar. 12, 2019).

¹⁶⁶ *See* sources cited *supra* note 165.

¹⁶⁷ CLARK CTY. BAR ASS'N, PLEDGE OF PROFESSIONALISM, <https://www.clarkcountybar.org/about-us/professionalism/> [<https://perma.cc/CAT7-MC52>] (last visited Mar. 26, 2020).

Turning to the current Model Rules, aspirational behavioral guidelines are limited to the two-page Preamble.¹⁶⁸ The drafters of the Preamble included some provisions addressing the delicate balance of zeal and candor, but, of course, did not directly address the problems associated with storytelling in persuasion. By way of contrast, when addressing candor in dealings with others (in connection with Model Rule 4.1), the Preamble helpfully encourages advocates to look beyond the black-letter Rules and be “honest [in] dealings with others.”¹⁶⁹ Yet, in connection with behavior in the advocacy setting, the Preamble simply suggests that lawyers behave “zealously . . . under the rules of the adversary system.”¹⁷⁰ This suggestion points advocates back toward the Rules as a floor below which behavior must not fall, thereby failing to encourage lawyers who may be walking an ethical line to look toward any aspirational, normative considerations in assessing their own behavior.

While the Preamble provides in other paragraphs, separate from those dealing with advocacy, that a lawyer must be “guided by . . . conscience” and exercise “moral judgment,” these suggestions are not emphasized in either their placement within the Preamble, nor in connection with advocacy in particular.¹⁷¹ Further, as will be discussed in Parts IV and V, neither do they provide any particular encouragement for the lawyer to maintain good moral character, or to make decisions that may not be flatly prohibited by the Model Rules, but are otherwise dishonest, misleading, or damaging to the profession.

Therefore, we must consider ways in which the Model Rules can provide a more adequate framework to address the slippery issue of ethics in legal storytelling, and potentially other yet-to-be-imagined ethical dilemmas. The concept of virtue ethics, as elucidated by Aristotle, and discussed in Part IV, holds a promising solution. Aristotle would lead us to consider motivating the lawyer toward virtuous and ethical behavior intrinsically, in an aspirational way, rather than utilizing a list of requirements a lawyer must obey—a list that may, in time, fail to adapt to changing modalities of legal argument.

Ethical rule making, both in the past and the present, has recognized the power of aspirational thinking to motivate ethical behavior. When facing a nuanced problem, such as addressing the cognitive power of story, black-letter rules are not the most effective approach. We suggest that a similar approach be undertaken. We suggest bringing the wisdom of Aristotle directly into the aspirational Preamble to the Model Rules, as a first step toward providing lawyers with the tools necessary to walk the line between permissible and impermissible zeal in storytelling. Before undertaking to provide specific language for the Model Rules’ Preamble, we explore Aristotle’s teachings and how they can motivate ethical behavior in advocacy.

¹⁶⁸ ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 1–2 (9th ed. 2018).

¹⁶⁹ *Id.* at 1.

¹⁷⁰ *Id.*

¹⁷¹ *See id.* at 2.

IV. ARISTOTLE'S GUIDANCE FOR ADVOCATES

Aristotle's approach to rhetoric and ethics is as fresh and relevant to modern legal advocacy as it was to the art of speech and persuasion when he lived in 384–322 BC.¹⁷² Aristotle's guidance in the *Rhetoric* on how an advocate should use ethics to persuade has even deeper roots in his discussion of character, habit, and virtue in his *Nicomachean Ethics*.¹⁷³ The *Nicomachean Ethics* provides a rich loam for his treatment of virtue in advocacy in the *Rhetoric*. In the *Rhetoric*, Aristotle describes how a virtuous advocate persuades by developing credibility with an audience.¹⁷⁴ In his *Nicomachean Ethics*, he expands on how a person should develop a virtuous character through the formation of good habits.¹⁷⁵ We advocate reading these two works in tandem because the virtuous character and habits that Aristotle sets out in the *Nicomachean Ethics* can apply to lawyers in their role as counselor and advocate.

By walking the line of the midpoint between excess and deficiency—in other words, by staying in the golden mean of behavior through conscious formation of good habits—a person can develop a virtuous character.¹⁷⁶ And this daily conscious formation of good habits is what we propose a lawyer exercise to create a virtuous character as an advocate. By developing good character, a virtuous lawyer can intuitively walk the line between zeal and candor in pursuit of truthful, credible advocacy.

A. Aristotle: A Teacher for the Ages

Aristotle was a Greek intellectual, scholar, and teacher of many diverse subjects, including science, the arts, economics and linguistics, politics and government, and, of course, rhetoric.¹⁷⁷ His methods of inquiry and methods of evaluation form the basis for the study of these subjects today.¹⁷⁸ He was born in Northern Greece and joined Plato's Academy as a student when he was approximately seventeen, remaining there until he was thirty-seven.¹⁷⁹ He left

¹⁷² See CARLO NATALI, ARISTOTLE: HIS LIFE AND SCHOOL 8, 14 (D. S. Hutchinson ed., 2013); Michael H. Frost, *With Amici Like These: Cicero, Quintilian and the Importance of Stylistic Demeanor*, 3 J. ASS'N LEGAL WRITING DIRECTORS 5, 8 (2006) [hereinafter Frost, *With Amici Like These*]. For an excellent overview of classical rhetoric and its use in modern advocacy, see KRISTEN KONRAD ROBBINS-TISCIONE, RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION (2009).

¹⁷³ See KENNEDY, CLASSICAL RHETORIC, *supra* note 13, at 91.

¹⁷⁴ ARISTOTLE, ON RHETORIC, *supra* note 7, at 112–13:1378a.

¹⁷⁵ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 7, at 21–22:1103a.

¹⁷⁶ See *id.* at 23–24:1104a.

¹⁷⁷ KENNEDY, CLASSICAL RHETORIC, *supra* note 13, at 76; NATALI, *supra* note 172, at 26 (teaching rhetoric).

¹⁷⁸ ARISTOTLE, ON RHETORIC, *supra* note 7, at x–xi.

¹⁷⁹ NATALI, *supra* note 172, at 6, 17.

Athens for the Macedonian court, but by 335 BC had returned to Athens to start his own school.¹⁸⁰

On Rhetoric was written during two periods of Aristotle's life in Athens: first, when he was a student at the Academy, and second, when he taught at his Lyceum.¹⁸¹ It is the oldest "authoritative" guide to persuasion and the techniques of developing arguments, and it greatly influenced Roman rhetoricians such as Cicero and Quintilian.¹⁸² Aristotle begins in the first sentence of *On Rhetoric* by defining rhetoric as "the power to observe the persuasiveness of which any particular matter admits."¹⁸³ Classical rhetoric had been earlier invented by Corax of Syracuse in 450 BC and was taught in ancient Greece, and later Rome, as a "flexible technique for training advocates to present cases in Greek and Roman law courts."¹⁸⁴ Rhetoric continues to be taught in different levels of education, and it certainly is part of the training that lawyers receive.¹⁸⁵

The Greeks divided rhetoric into three categories, which Aristotle refers to in *On Rhetoric*. Epideictic rhetoric is ceremonial or laudatory speech.¹⁸⁶ "Judicial rhetoric is forensic speech," where a speaker uses the rhetoric to accuse or defend and an audience is urged to bring justice for past actions or criminal behavior.¹⁸⁷ Deliberative rhetoric advocates for the audience to adopt a particular point of view, such as in political speech or religious sermons.¹⁸⁸

The *Rhetoric* is divided into three sections: Book One provides a general overview of rhetoric and discusses the major contexts and types of rhetoric; Book Two describes ethos, pathos, and logos; and Book Three describes elements of style and composition.¹⁸⁹ Roman rhetoricians carried forward Aristotle's categories of ethos, pathos, and logos described in the *Rhetoric*.¹⁹⁰ Both Greek and Roman rhetoricians believed in the value of a speaker's credibility

¹⁸⁰ NATALI, *supra* note 172, at 55.

¹⁸¹ KENNEDY, CLASSICAL RHETORIC, *supra* note 13, at 75–76.

¹⁸² ARISTOTLE, ON RHETORIC, *supra* note 7, at x; Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85, 86 (1994) [hereinafter Frost, *Ethos*].

¹⁸³ ARISTOTLE, ON RHETORIC, *supra* note 7, at 30:1354a (stating that "[r]hetoric is an *antistrophos* to dialectic; for both are concerned with such things as are, to a certain extent, within the knowledge of all people and belong to no separately defined science."); see also Krista C. McCormack, Note, *Ethos, Pathos, and Logos: The Benefits of Aristotelian Rhetoric in the Courtroom*, 7 WASH. U. JURIS. REV. 131, 131 (2014).

¹⁸⁴ Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613, 614 (1999) [hereinafter Frost, *Introduction to Classical Legal Rhetoric*].

¹⁸⁵ *Id.*

¹⁸⁶ Fred A. Simpson & Deborah J. Selden, *When to Welcome Greeks Bearing Gifts—Aristotle and the Rules of Evidence*, 34 TEX. TECH L. REV. 1009, 1010 (2003).

¹⁸⁷ *Id.* at 1010–11.

¹⁸⁸ *Id.* at 1010.

¹⁸⁹ ARISTOTLE, ON RHETORIC, *supra* note 7, at 27, 111, 193.

¹⁹⁰ Frost, *Ethos*, *supra* note 182, at 86.

and the emotional influences that play on an audience: the “nonrational factors which affect persuasive discourse.”¹⁹¹

In Aristotle’s *Nicomachean Ethics*, likely named after his son Nicomachus, who edited the work,¹⁹² he describes how to live well and flourish by living according to a system of ethical conduct.¹⁹³ A person who lives virtuously and builds his or her character will be ready to handle ethical challenges and make the right choices in life.¹⁹⁴ Aristotle identifies eleven virtues that can be developed through habit, building on a person’s natural character, until the virtue is internalized.¹⁹⁵ A person can walk the line in each virtue, which is a golden mean between excess and deficiency.¹⁹⁶

B. Responding to Plato and Other Detractors

Sadly, rhetoric as a technique for training advocates as a method for persuasion has often been undervalued and misunderstood in modern legal discourse.¹⁹⁷ Michael Frost well describes how the term rhetoric should be “regarded as the most coherent and experience-based analysis of legal reasoning, legal methodology, and argumentative strategy ever devised”¹⁹⁸ Instead, now it is often debased as “meaningless political exaggeration or mere stylistic embellishment.”¹⁹⁹

But the seeds of discontent with rhetoric were sown long ago. James Boyd White rightly suggests that the attack on rhetoric began in the Platonic dialogues’ reference to the “false art” of rhetoric.²⁰⁰ Plato was justly concerned

¹⁹¹ *Id.* at 87 (which Frost notes are just as important today; we agree).

¹⁹² *Aristotle’s Ethics*, STANFORD ENCYC. PHIL., <https://plato.stanford.edu/entries/aristotle-ethics/> [https://perma.cc/K9DJ-SRE3] (last visited Mar. 26, 2020).

¹⁹³ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 7, at 16–17:1100b.

¹⁹⁴ *Id.*

¹⁹⁵ Aristotle identifies the following eleven virtues: courage, temperance, liberality, magnificence, magnanimity, patience, truthfulness, wittiness, friendliness, shame, and justice. *See id.*

¹⁹⁶ *Id.* at 1106a–09b.

¹⁹⁷ Frost, *Introduction to Classical Legal Rhetoric*, *supra* note 184, at 614; Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1554 (1990).

¹⁹⁸ Frost, *Introduction to Classical Legal Rhetoric*, *supra* note 184, at 614; *see also* Gabriel H. Teninbaum, *Who Cares?*, 3 DREXEL L. REV. 485, 488 (2011) (advocating for those in the legal field to study persuasion in other disciplines).

¹⁹⁹ Frost, *Introduction to Classical Legal Rhetoric*, *supra* note 184, at 614; *see also* James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 687 (1985) (rhetoric is commonly used as a “pejorative” to describe “the ignoble art of persuasion”); McCormack, *supra* note 183, at 151. *But see* Michael Frost, *Justice Scalia’s Rhetoric of Dissent: A Greco-Roman Analysis of Scalia’s Advocacy in the VMI Case*, 91 KY. L.J. 167, 168–69 (2002) (describing Chaim Perleman’s use of classical rhetoric to modern judicial discourse, as well as others such as Judge Ruggero Aldisert and Judge Richard Posner in their treatises); Mary P. Nichols, *Aristotle’s Defense of Rhetoric*, 49 J. POL. 657, 657 (1987). Our research, combined with these sources, suggest that rhetoric is a powerful tool, and used without sound judgment and ethos, it can even be dangerous.

²⁰⁰ White, *supra* note 199, at 687.

about the potential for manipulation that comes with being a skilled rhetorician.²⁰¹

Mary Nichols argues that Aristotle used the *Rhetoric* to respond to Aristophanes' criticism of rhetoric "in the name of justice and the political community" and Plato's criticisms "in the name of philosophy."²⁰² Nichols describes Socrates, in Plato's *Phaedrus*, as stating that "[i]n its inability to comprehend the needs and ends of a variety of individuals, public speech both falls short of the truth and also is fundamentally unjust."²⁰³ Nichols responds that Aristotle's rhetorician is "restrained by the individuals whom he addresses at the same time that he is able to educate them."²⁰⁴

Aristotle's rhetorician, she says, considers the diversity of contradictory elements in common opinion, which may "in varying degrees reflect some element of the truth."²⁰⁵ A rhetorician must find a "comprehensive position that is both rooted in common opinion and able to go beyond common opinion."²⁰⁶ A lawyer is that type of rhetorician, arguing positions that serve a client's best interests and are consistent with law and the societal interests that underlie the law. A lawyer must sift through seemingly contradictory facts in a case, as well, to arrive at a coherent narrative, theme, and theory. It is in assessing the contradictions and ambiguities in the facts of a case that a lawyer must practice the most care to remain a virtuous lawyer, walking the line.

C. *The Rhetoric's Teachings for Lawyers*

In Book Two of the *Rhetoric*, Aristotle states that a speaker has a great ability to prove a point in court cases if the advocate establishes his (or her) credibility.²⁰⁷ In addition to analyzing topics for the three types of rhetoric, Book One of the *Rhetoric* describes rhetoric and the proper use of logical syllogisms, paradigms, and enthymemes.²⁰⁸ In Book Two, Aristotle says that in addition to proof by demonstration or logic, speakers can make themselves persuasive by using practical wisdom, virtue, and good will.²⁰⁹ In the next sen-

²⁰¹ See Nichols, *supra* note 199, at 657–58.

²⁰² *Id.* at 658.

²⁰³ *Id.* at 660.

²⁰⁴ *Id.* at 661.

²⁰⁵ *Id.* at 660–61.

²⁰⁶ *Id.* at 661.

²⁰⁷ ARISTOTLE, ON RHETORIC, *supra* note 7, at 112:1377b.

²⁰⁸ See, e.g., *id.*, at 36:1355b, 39–44:1356a–58a. Chapter I of Book I, which introduces the concept of rhetoric to the reader, emphasizes the importance of enthymemes in argument. *Id.* at 33–34:1355a; see also Robert F. Hanley, *Brush Up Your Aristotle*, 12 LITIG. 39, 40 (1986) (describing enthymemes as a "powerful form of argument."). Regarding Aristotle's conception of logic, see VESA TALVITIE, FREUDIAN UNCONSCIOUS AND COGNITIVE NEUROSCIENCE: FROM UNCONSCIOUS FANTASIES TO NEURAL ALGORITHMS 47 (2009) ("Aristotle created a language of symbols for logic, which enabled him to present presuppositions and conclusions in abstract form. We could say that he re-symbolized the thought process.").

²⁰⁹ ARISTOTLE, ON RHETORIC, *supra* note 7, at 112:1378a.

tence, Aristotle compares these three positive attributes of a persuasive advocate with people who make mistakes in what they say, and he says that these attributes make both a speaker and the person being spoken of appear to have common sense and integrity.²¹⁰

In this section, he observes the persuasive expression of paradigm to supplement enthymeme.²¹¹ Here he notes the importance of placing a paradigm—an inductive argument from example—after an enthymemes as a “witness[.]” in support of the enthymeme.²¹² Every modern lawyer knows that at the trial level, the facts are central to winning a case. He also says that events in the future are similar to those in the past.²¹³ These points call to mind the importance of using analogies to support enthymemes in presenting a legal argument.²¹⁴

Aristotle found character to be perhaps the most important part of an argumentative proof.²¹⁵ Aristotle was a strong proponent of the use of enthymemes, the use of which he describes at length in Books One and Two.²¹⁶ But logos cannot stand on its own.²¹⁷ Like a three-legged stool, in addition to logic, good advocacy requires the appropriate use of character and emotion, as he describes in Book Two.²¹⁸ Character in Book Two is first connected to a speaker’s ethics and developing credibility through common sense, virtue, and good will.²¹⁹

²¹⁰ *Id.* at 112–13:1378a. Compare H. C. Lawson-Tancred’s translation, which uses the word “lie,” with the phrase “make mistakes,” in the Kennedy translation. ARISTOTLE, THE ART OF RHETORIC 141:1378a (H. C. Lawson-Tancred trans., Penguin Books 1991) [hereinafter ARISTOTLE, THE ART OF RHETORIC].

²¹¹ ARISTOTLE, ON RHETORIC, *supra* note 7, at 164:1394a. Aristotle makes this comment in regard to deliberative oratory but, as Kennedy notes, the point also applies to courtroom advocacy. *Id.* (Kennedy chapter notes).

²¹² *Id.* Aristotle defines a paradigm as an “induction” whose “reasoning [is] neither from part to whole nor from whole to part but from part to part, like to like, when two things fall under the same genus but one is better known than the other.” *Id.* at 43:1357b.

²¹³ *Id.* at 163:1394a (“Although it is easier to provide illustrations through fables, examples from history are more useful in deliberation; for future events will generally be like those of the past.”); see also Michael Frost, *Greco-Roman Legal Analysis: The Topics of Invention*, 66 ST. JOHN’S L. REV. 107, 112 (1992) (discussing the importance Aristotle placed on the facts of a case to developing an argument).

²¹⁴ ARISTOTLE, ON RHETORIC, *supra* note 7, at 163:1394a (on drawing comparisons).

²¹⁵ *Id.* at 39:1356a (stating that “character is almost, so to speak, the most authoritative form of persuasion.”).

²¹⁶ See, e.g., *id.* at 44:1358a.

²¹⁷ See Frost, *Ethos*, *supra* note 182, at 89.

²¹⁸ See, e.g., ARISTOTLE, ON RHETORIC, *supra* note 7, at 113–47, bk. II, ch. 2–11 (the role of emotion in rhetoric); 112–13:1378a (the trustworthy character of a speaker); 148–56, bk. II, ch. 12–17 (“[a]dapt[ing] the [c]haracter of the [s]peech to the [c]haracter of the [a]udience”). Michael Frost notes that Aristotle recommended that speakers should “exploit the connections” between emotional appeals and appeals based on character. Frost, *Ethos*, *supra* note 182, at 100.

²¹⁹ ARISTOTLE, ON RHETORIC, *supra* note 7, at 112:1378a; see also *id.* at 38:1356a (“There is persuasion through character whenever the speech is spoken in such a way as to make the speaker worthy of credence; for we believe fair-minded people to a greater extent and more

Later in Book Two he describes appealing to the character of the audience: the young and the old, for instance.²²⁰ So, character can mean different things in the *Rhetoric*.²²¹ Aristotle realizes the significance of the relationship between the speaker and the audience to the persuasive appeal of the argument.²²² Arguments are not created and delivered in a vacuum, and positioning one's character as a speaker is critical to connecting with an audience.²²³

Book Three of the *Rhetoric* provides a more technical discussion of how to approach the parts of a speech.²²⁴ While the whole book provides guidance on advocacy that is consistent with modern legal advocacy, the sections of a speech in Greece follow a pattern strikingly similar to the sections and form used today in brief writing.²²⁵ His advice is remarkably consistent with modern advice on persuasive advocacy,²²⁶ and indeed, the *Rhetoric* could easily be used as a textbook in a law school advocacy course.

Regarding narration, Aristotle first says that a speaker must provide a non-technical discussion (because the speaker is not responsible for the deeds spoken of) and a technical one (which refers to the believability of the facts).²²⁷ He notes that sometimes the action should be provided in sequence, and at other times, not in sequence, especially if the facts can show certain things such as that a person is courageous, wise, or just.²²⁸ One should speak simply of the

quickly than we do others, on all subjects in general and completely so in cases where there is not exact knowledge but room for doubt.”).

²²⁰ *Id.* at 148.

²²¹ *Id.*

²²² *See id.* at 152–53:1390a–b (discussing the character of the old and young). In addition to stressing the need to relate to the young and the old, he also writes on the character on those in “the prime of life.” He believed that the body was in its prime from age thirty to thirty-five, and the mind was in its prime at about age forty-nine. *Id.* at 153:1390b.

²²³ *Id.* at 112:1377b (“3. [F]or it makes much difference in regard to persuasion (especially in deliberations but also in trials) that the speaker seem to be a certain kind of person and that his hearers suppose him to be disposed toward them in a certain way and in addition if they, too, happen to be disposed in a certain way favorably or unfavorably to him.”); *see also* Paul Mark Sandler et al., *Classical Rhetoric and the Modern Trial Lawyer*, 36 LITIG. 16, 16 (2010).

²²⁴ ARISTOTLE, ON RHETORIC, *supra* note 7, at 192, 194:1403b.

²²⁵ *Compare* ARISTOTLE, ON RHETORIC, *supra* note 7, at 230–31:1414a–b, with modern briefs as in BEAZLEY, *supra* note 24, at 171, 175–76 (a brief contains an introduction, a statement of the facts or factual narrative, an argument, and a conclusion, just as outlined in *The Rhetoric*).

²²⁶ *See* Frost, *Ethos*, *supra* note 182, at 108–12; Frost, *With Amici Like These*, *supra* note 177, at 8–9.

²²⁷ *Compare* ARISTOTLE, ON RHETORIC, *supra* note 7, at 239:1416b, which uses the phrase “non-artistic”, with ARISTOTLE, THE ART OF RHETORIC, *supra* note 210, at 252:1417a, which uses “non-technical.” We use the term technical here because it evokes certain types of facts that lawyers use.

²²⁸ ARISTOTLE, THE ART OF RHETORIC, *supra* note 210, at 252:1416b. He also notes that in describing well-known historical or legendary stories, like those of Achilles, a person should only mention famous actions, or only briefly refer to them because most people know those stories and do not need them to be elaborated. *Id.* at 252–53:1416b. This point is reminiscent

facts, but in a way that “is varied and not plain.”²²⁹ If something is less well-known, then more information needs to be provided.²³⁰ Significantly, here he refers to the mean when he says “[f]or no more in this case is the good effect swiftness or concision but the striking of the mean—that is to say, things which illuminate the matter”²³¹

Aristotle recommends narrating everything that highlights a person’s virtues or the opposition’s vices, or whatever is “pleasant to the jury.”²³² A defendant’s narration should be shorter because a defendant is contending that something did not happen or does not want the audience to dwell on it.²³³ Less time should be spent on narrating things that the parties agree on.²³⁴ He advises that a speaker should narrate facts in the past tense, except when the actions create “pity or indignation” in being narrated.²³⁵

In this section, Aristotle again refers to character.²³⁶ Aristotle says that “the narrative must have character; and this will be the case if we know what produces character.”²³⁷ In this sentence, the word in Greek for character is “ethike,” which refers to moral character.²³⁸ In the next sentence he says, “[o]ne thing, then, is to indicate moral purpose, the character being determined by that, and that being determined by the end.”²³⁹ Here he uses the word “ethos.”²⁴⁰ He asserts that a speaker can indicate moral purpose by making the “deliberate choice [proairesis] clear: what the character is on the basis of what sort of [deliberate] choice [has been made].”²⁴¹ Aristotle notes that for this reason, mathematical arguments do not have a moral purpose, but the Socratic dia-

of Mary Beth Beazley’s advice to spend time on facts that are important. BEAZLEY, *supra* note 24, at 203.

²²⁹ ARISTOTLE, THE ART OF RHETORIC, *supra* note 210, at 252:1416b; *see also* ARISTOTLE, ON RHETORIC, *supra* note 7, at 239:1416b.

²³⁰ ARISTOTLE, ON RHETORIC, *supra* note 7, at 239:1416b; ARISTOTLE, THE ART OF RHETORIC, *supra* note 210, at 253:1416b.

²³¹ *Compare* ARISTOTLE, ON RHETORIC, *supra* note 7, at 239:1416b (“for speaking well is not a matter of rapidity or conciseness but of moderation”), *with* ARISTOTLE, THE ART OF RHETORIC, *supra* note 210, at 253:1416b–17a.

²³² ARISTOTLE, THE ART OF RHETORIC, *supra* note 210, at 253:1417a; *see also* ARISTOTLE, ON RHETORIC, *supra* note 7, at 240:1417a.

²³³ ARISTOTLE, ON RHETORIC, *supra* note 7, at 240:1417a; ARISTOTLE, THE ART OF RHETORIC, *supra* note 210, at 253:1417a.

²³⁴ ARISTOTLE, ON RHETORIC, *supra* note 7, at 240:1417a; ARISTOTLE, THE ART OF RHETORIC, *supra* note 210, at 253:1417a.

²³⁵ ARISTOTLE, ON RHETORIC, *supra* note 7, at 240:1417a.

²³⁶ *Id.*

²³⁷ ARISTOTLE, THE ART OF RHETORIC, *supra* note 210, at 253:1417a; *see also* ARISTOTLE, ON RHETORIC, *supra* note 7, at 240:1417a.

²³⁸ ARISTOTLE, ON RHETORIC, *supra* note 7, at 240:1417a.

²³⁹ ARISTOTLE, THE ART OF RHETORIC, *supra* note 210, at 253:1417a.

²⁴⁰ ARISTOTLE, ON RHETORIC, *supra* note 7, at 240:1417a (“This will be so if we know what makes for character [ēthos]”); ARISTOTLE, THE ART OF RHETORIC, *supra* note 210, at 253:1417a.

²⁴¹ ARISTOTLE, ON RHETORIC, *supra* note 7, at 240:1417a.

logues do.²⁴² In the next few sentences of this passage he describes how character can be shown through “ethical indications” exemplifying, for instance, a prudent person (pursuing his own advantage) versus a good person (pursuing what is honorable).²⁴³

Commentators such as Michael Frost note that this passage refers to how a speaker can demonstrate the ethical character of the person whose story is being narrated.²⁴⁴ We agree. The examples of the prudent person and the honorable person later in the passage especially make that clear.²⁴⁵ But the sentences do not use the active voice: the actor is removed from these sentences entirely.²⁴⁶ Considering that in ancient Greece, advocates were essentially pro se litigants arguing their own cases, the speaker and the person being spoken of were the same.²⁴⁷ As a result, developing credibility was doubly important for the speaker in ancient Greece: this is not simply an advocate arguing someone else’s case, this is an advocate arguing his own matter. The credibility of the speaker relates both to the speech and the portrayal of the person in the story, as the same person.

In modern advocacy, we generally think of an advocate arguing on behalf of someone else. In this sense, we view the credibility of the advocate as removed from the credibility of a witness or the litigant whose story is being told. But they are still interwoven. Each affects the other’s ability to persuade because if a lawyer loses credibility with the court or jury, the audience is less likely to see the litigant’s narrative clearly. If a jury does not like or trust a litigant, the jury will be less likely to side with that party.

D. *Nicomachean Ethics*

In this work, Aristotle describes his view of an ethical person who has internalized human virtues.²⁴⁸ As we noted earlier, this concept has been termed in modern scholarship as virtue ethics.²⁴⁹ Here, he discusses in much greater

²⁴² *Id.*

²⁴³ *Id.* at 240–41:1417a; ARISTOTLE, THE ART OF RHETORIC, *supra* note 210, at 253–54:1417a.

²⁴⁴ Frost, *Ethos*, *supra* note 182, at 95.

²⁴⁵ ARISTOTLE, ON RHETORIC, *supra* note 7, at 241:1417a (good person doing honorable things); ARISTOTLE, THE ART OF RHETORIC, *supra* note 210, at 254:1417a.

²⁴⁶ ARISTOTLE, ON RHETORIC, *supra* note 7, at 241:1417a; ARISTOTLE, THE ART OF RHETORIC, *supra* note 210, at 254:1417a.

²⁴⁷ See Dan Levitt, *Rhetoric—From Socrates to Court TV*, 26 LITIG. 42, 43 (1999) (describing Athenian trials; even though sometimes litigants hired lexographers to write their speeches, the litigants presented their own arguments in court).

²⁴⁸ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 7, at 21–22:1103a; see also Bernard E. Jacob, *Aristotle and the Graces* 8 (Hofstra Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 04-14, 2004), <http://ssrn.com/abstract=611105> [<https://perma.cc/UWU7-KWQB>] (discussing justice and “Being Just,” concepts in Book V of *Nicomachean Ethics*, as an “outward-turning” of virtue, especially difficult and demanding in public life).

²⁴⁹ Edwards, *supra* note 11, at 425.

detail concepts found in *On Rhetoric* such as character and mean.²⁵⁰ By mean, he refers to staying in a balanced path, where daily habit elevates a person's judgment and inherent character.²⁵¹ *Nicomachean Ethics* and *On Rhetoric* should be read together because the habits of a virtuous person translate to the habits of a virtuous advocate.²⁵² Lawyers can use simple techniques to develop their virtue as persons, which sharpen and elevate their critical thinking when facing the regular ethical dilemmas encountered by advocates. Central to this point is that by regularly practicing good, virtuous habits, a lawyer can more naturally and easily face ethical dilemmas with a strong moral purpose.

In Book One of *Nicomachean Ethics*, Aristotle says that human life is a "state of being-at-work" and that a person of serious stature must "do these things well and beautifully . . ."²⁵³ A worthy and good person accomplishes work "as a result of the virtue appropriate to it—if this is so, the human good comes to be disclosed as a being-at-work of the soul in accordance with virtue, and if the virtues are more than one, in accordance with the best and most complete virtue."²⁵⁴ This way of being must be a way of life.²⁵⁵

Aristotle says that the concepts of virtue, happiness, practical judgment, wisdom, and pleasure are overlapping concepts and definitions in different people's minds.²⁵⁶ He says that people may have virtue as an "actively maintained condition," but still not accomplish good things because they are not doing anything with their virtue.²⁵⁷ Among those who have a virtuous state of being, using that virtue in a way of being at work is important to creating complete virtue, because among "well favored and well mannered it is the ones who act rightly who become accomplished people."²⁵⁸

Virtue is divided into thinking and character.²⁵⁹ "[W]isdom, astuteness, and practical judgment [are] intellectual virtues . . ."²⁶⁰ "[G]enerosity and temper-

²⁵⁰ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 7, at 21:1103a (character), 28–29:1106a (mean).

²⁵¹ *Id.* at 29:1106b.

²⁵² See Lorie M. Graham, *Aristotle's Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinic Legal Education*, 20 J. LEGAL PROF. 5, 13 (1995–96) (stating that according to Aristotle, habit is not "a mindless process.").

²⁵³ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 7, at 11:1098a.

²⁵⁴ *Id.* at 12:1098a.

²⁵⁵ *Id.* at 13:1098b–99a.

²⁵⁶ *Id.* at 13:1098b.

²⁵⁷ *Id.* at 13:1099a; see also Graham, *supra* note 252, at 15 (stating that "Aristotle clearly believes that action and habituation are prerequisites to understanding ethics, for only someone who has had experience in the actions of life is 'a proper hearer' of lectures on ethics, 'for each man judges well the things he knows, and of these he is a good judge.'").

²⁵⁸ ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 7, at 13:1099a. The soul of a self-restrained person obeys reasons "and presumably in a temperate and brave person it is still more amenable to reason, since in such a person all parts of the soul are in harmony with reason." *Id.* at 21:1102b.

²⁵⁹ *Id.* at 21:1103a.

²⁶⁰ *Id.*

ance [are] virtues of character.”²⁶¹ Aristotle again emphasizes the importance of a virtue as being “an active condition of the soul,” whether deriving from intellect or character.²⁶² Narrative is related to character, not intellect.²⁶³

Excellence of thinking is a result of teaching that needs experience and time, and excellence of character is a consequence of habit.²⁶⁴ Character is not present in nature; a person must “take them on [] and [] be brought to completion in them by means of habit.”²⁶⁵ We develop virtues by “first being at work in them” and learning by doing.²⁶⁶ “[A]ctive states come into being from being at work,” and we need to conduct our work in a way that emphasizes an active state of virtue.²⁶⁷

Therefore, lawyers need to actively train their minds to discern their moral purpose as advocates. Developing virtue is an active endeavor. In other words, lawyers can train themselves to be virtuous. Simply being a lawyer and studying ethics is not enough. A lawyer must use good habits daily to be ready for the difficult moments when presented with an ethical choice. These teachings are particularly helpful when facing a nuanced ethical decision on an issue like the use of storytelling in facts. In light of the lack of workable ethical guidance on the issue, lawyers must keep Aristotle’s teachings front of mind.

RECOMMENDATIONS AND CONCLUSION

This Article recommends that the ABA consider including guidance provided by Aristotle at the outset of the Preamble to the Model Rules, to provide a clear, aspirational nudge to lawyers using storytelling in presenting persuasive facts or other emerging tools of advocacy. As demonstrated, the potential problems associated with lawyers who harness the cognitive power of story in misleading and unethical ways can bubble just below the surface of the prohibi-

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *See id.*

²⁶⁴ *Id.* at 22:1103a.

Therefore, virtue is an active condition that makes one apt at choosing, consisting in a mean condition in relation to us, which is determined by a proportion and by the means by which a person with practical judgment would determine it. And it is a mean condition between two vices, one resulting from excess and the other from deficiency, and is also a mean in the sense that the vices of the one sort fall short and those of the other sort go beyond what is appropriate both in feelings and in actions, while virtue both discovers and chooses the mean.

Id. at 29:1106b–07a.

²⁶⁵ *Id.* at 22:1103a.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 23:1103b. Specifically, Aristotle noted:

Now in this way everyone who has knowledge avoids excess and deficiency, but seeks the mean and chooses this, but not the mean that belongs to the thing but the mean in relation to us. So if every kind of knowledge accomplishes its work well in this way, by looking to the mean and guiding its works toward this (which is why people are accustomed to remark about works that . . .) then virtue would be something apt to hit the mean.

Id. at 28–29:1106b.

tions against false factual presentations as provided in the current Model Rules. This misleading, yet not facially unethical, use of persuasion inflicts unknown costs in time and frustration by courts and opposing counsel who must seek to truthfully counteract powerfully told misleading narratives. This behavior falls below the ethical guidelines the classicists—and modern scholars of advocacy and rhetoric—have considered applicable to advocacy for 2,500 years.

As such, this Article proposes an aspirational comment for inclusion at the outset of the Preamble of the Model Rules. This comment would serve to encourage attorneys to avoid behavior on the edges of ethical acceptability and provide a potential lens for judges and disciplinary panels to examine choices made by an advocate in light of overall patterns of behavior and character. This guidance can assist lawyers in navigating the use of storytelling in fact statements, as well as other yet-undefined ethical issues.

The language we suggest for an additional comment, based on Aristotle's teachings, is as follows:

A lawyer should strive to be a person of good character and maintain good habits in the practice of law. In light of such virtuous character, and employing personal conscience, a lawyer should make good choices when faced with difficult moral decisions in the course of advocating for a client, including avoiding behavior that is misleading or undermines the integrity of the profession.

This language is consistent with Sections 7 through 9 in the Preamble:

Section 7 refers to personal conscience. It provides:

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.²⁶⁸

Our proposed language further defines how personal conscience is informed by good habits and a virtuous character. The proposed language recognizes that while rules define conduct that violates ethics, a lawyer, to be successful and morally upright, must additionally *strive to do good*. In other words, a lawyer must aim to do the right thing, not seek merely to avoid doing the wrong thing or avoid censure.²⁶⁹

Section 8 of the Preamble highlights the very notion of a good character informing a lawyer's public life as an advocate for others, in keeping with Aristotle's teachings. It states:

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing

²⁶⁸ MODEL RULES OF PROF'L CONDUCT Preamble (AM. BAR ASS'N 2019).

²⁶⁹ Scholars of ethics have recognized that where rules are silent as to the specific behavior proscribed, the lawyer is "free to formulate a completely subjective approach to the issue." Levine, *Taking Ethics Codes Seriously*, *supra* note 162, at 552 n.103 (quoting Susan G. Kupper, *Authentic Legal Practices*, 10 GEO. J. LEGAL ETHICS 33, 51 (1996)).

party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.²⁷⁰

Our proposed comment adds depth to Section 8's discussion of zeal by stating that a lawyer must cultivate a virtuous character to avoid misleading others in the practice of law. This aspirational language fills in the previously identified gaps in the Model Rules by exhorting lawyers to strive for the highest ideals.

Section 9 addresses ethical problems in conflicts between professional and personal responsibilities. It states:

In the nature of law practice . . . conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.²⁷¹

Our proposed comment provides more specificity than Section 9 by making specific reference to misleading behavior. Further, in practicing good habits—in actively working to use good habits every day—a lawyer can more readily exercise the sound professional discretion demanded by this Section. In consistently using good habits, a lawyer will be more flexible and able to pivot properly, avoiding compounding ethical problems. A lawyer will be able to see ethical problems more clearly, enabling the lawyer to solve ethical problems or avoid them all together. As discussed, this type of aspirational guidance has been recognized as helpful under previous iterations of the Model Rules and by modern scholars of legal ethics. Additionally, it helps address issues such as the potential for misleading narrative facts, where the Model Rules fail to provide a workable standard.

So, by following Aristotle's guidance and walking the line of the midpoint between excess and deficiency—staying in the golden mean of conduct through conscious formation of good habit—a lawyer's virtuous character will make him or her a better lawyer. A more successful lawyer. A lawyer who can problem solve and reduce risk. An honest lawyer who can better relate to the public. A lawyer who can be truthful not only to a client and the court, but to himself or herself.

²⁷⁰ MODEL RULES OF PROF'L CONDUCT Preamble (AM. BAR ASS'N 2019).

²⁷¹ *Id.*

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After all, “Excellence is an art won by training and habituation: we do not act rightly because have virtue or excellence, but we rather have these because we have acted rightly . . . we are what we repeatedly do. Excellence, then, is not an act but a habit”²⁷²

²⁷² WILL DURANT, *THE STORY OF PHILOSOPHY* 87 (1926) (describing Aristotle’s philosophy).

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