

Nova Law Review

Volume 29, Issue 1

2004

Article 4

Ethical Obligations: Performing Adequate Legal Research and Legal Writing

Carol M. Bast*

Susan W. Harrell†

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ETHICAL OBLIGATIONS: PERFORMING ADEQUATE LEGAL RESEARCH AND LEGAL WRITING

CAROL M. BAST*
SUSAN W. HARRELL**

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I. INTRODUCTION

Legal research and legal writing are fundamental skills necessary to the practice of law. Thus, it should come as no surprise that an attorney's failure to perform adequate legal research and write well can violate the attorney's professional responsibility. A demonstrated lack of competent legal research and legal writing performance is injurious to an attorney's reputation. Failure to adequately research or write well, or both, is a violation of ethics rules and can result in a reprimand, suspension, or disbarment from the practice of law; a client may decide that it is the basis of a legal malpractice lawsuit.

Many states have adopted the *American Bar Association (ABA) Model Rules of Professional Conduct* and the ethics rules of other states may have provisions similar to those of the Model Rules. A number of the Model

* Associate Professor in the Department of Criminal Justice and Legal Studies of the University of Central Florida, Orlando; J.D., magna cum laude, New York Law School, 1982; M.A., University of Wisconsin, 1976; B.A., Kalamazoo College, 1974.

** Associate Professor in the Division of Criminal Justice and Legal Studies of the University of West Florida, Pensacola; J.D. Samford University, Cumberland School of Law, 1984; B.F.A., University of Georgia, 1978.

Rules are related to the duty of the attorney to perform adequate legal research and write well. Far from being a technicality, problems with the attorney's legal research and legal writing can violate the Model Rules.

Those professors who teach legal research and legal writing bemoan the students who do not apply themselves in class, perhaps believing that class material will not be relevant to them in the future. Exposing students to cases in which sloppy legal research or inattention to grammar or court rules resulted in severe sanctions can serve as a cautionary tale, impressing upon them the importance of developing sound legal research and legal writing skills.

This article will provide a discussion of specific parts of the *ABA Model Rules of Professional Conduct* that relate to the attorney's legal research and writing obligations. Each section will introduce the reader to a Model Rule, or a portion of a Model Rule, and supply case law examples of the sanctions meted out to attorneys found to be in violation of the rules. The importance of the attorney's duty to perform adequate legal research may possibly be reflected in the fact that it is the first rule in the Model Rules.

II. ADEQUATE LEGAL RESEARCH

Rule 1.1 of the *Model Rules of Professional Conduct* requires the attorney to provide the client with competent representation.¹ The rule provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."²

Performing any needed legal research is one of the elements to providing competent representation for the client. An attorney must perform legal research to have the legal knowledge necessary to competently represent a client.³ However, many attorneys apparently fail to perform even basic legal

1. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004).

2. *Id.* In *Howard v. Oakland Tribune*, 245 Cal. Rptr. 449, 451 n.6 (Cal. Ct. App. 1988), the annoyance of the court was palpable when it chastised the attorney for sloppy citations. "We were not aided in our resolution of this appeal by the appellants' opening brief, which was riddled with inaccurate and incomplete citations and which frequently referred to cases without reference to the pages on which the cited holdings appear." *Id.*

3. One of the fundamental tasks in legal research is to ascertain that authority found is still good law by using a citator. Omitting this step can cause grave problems. In *Fletcher v. State*, 858 F. Supp. 169, 172 (M.D. Fla. 1994), the court noted that the plaintiffs cited one case that had been overruled and another that was reversed.

research. Weinstein, the attorney in the following case, provided legal advice without performing any legal research.⁴

In *Baldayaque v. United States*,⁵ Baldayaque, an illegal immigrant from the Dominican Republic, pled guilty to a heroin charge and was sentenced to 168 months in prison.⁶ At sentencing, the court admitted that the sentence was harsh but required by the sentencing guidelines, and the court would not object if the government chose to deport Baldayaque rather than have him remain in prison.⁷ At Baldayaque's request, his wife, Christina Rivera, hired Weinstein to file a petition for writ of habeas corpus.⁸ Without completing any legal research, Weinstein informed Rivera that the time had passed for filing a petition for writ of habeas corpus; however, Baldayaque had nearly fourteen months within which to do so.⁹ Weinstein did file a motion requesting that Baldayaque's sentence be modified to permit the government to deport him; however, that motion failed to cite any legal authority supporting it.¹⁰ The district court denied the motion stating that the court did not have jurisdiction and the motion was untimely.¹¹ Weinstein informed Baldayaque in writing of the court decision, but the letter was returned to Weinstein.¹²

Eighteen months later, Baldayaque filed a motion on a pro se basis to have his sentence modified.¹³ The court denied the motion but gave Baldayaque information regarding the filing of a habeas petition.¹⁴ With that information, Baldayaque, again on a pro se basis, filed a petition for writ of habeas corpus.¹⁵

4. *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003). In *Smith v. Lewis*, 530 P.2d 589 (Cal. 1975), the court explained that an attorney is expected "to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." *Id.* at 595. The court gave an example of a minimum standard: "In evaluating the competence of an attorney's services, we may justifiably consider his failure to consult familiar encyclopedias of the law." *Id.* at 593 n.5 (citing *People v. Ibarra*, 386 P.2d 487, 491 (Cal. 1963)). In *Pineda v. Craven*, 424 F.2d 369, 372 (9th Cir. 1970), the Ninth Circuit brutally clarified that although an attorney may make a strategic or tactical decision on behalf of a client, "[t]here is nothing strategic or tactical about ignorance."

5. 338 F.3d 145 (2d Cir. 2003).

6. *Id.* at 147.

7. *Id.* at 148.

8. *Id.*

9. *Id.* at 148-49.

10. *Baldayaque*, 338 F.3d at 149.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Baldayaque*, 338 F.3d at 149.

The court found that Weinstein had violated the state ethics rule, which is identical in wording to rule 1.1 of the *Model Rules of Professional Conduct*.¹⁶ The court held that “an attorney’s conduct, if it is sufficiently egregious, may constitute . . . ‘extraordinary circumstances.’”¹⁷ Extraordinary circumstances combined with reasonable diligence on Baldayaque’s part could allow tolling of the one year period.¹⁸ The Court of Appeals for the Second Circuit remanded the case to the district court to determine whether Baldayaque had been reasonably diligent.¹⁹

The failure to perform adequate research is clearly unprofessional and unacceptable. However, the failure to comply with a court rule that specifies a format becomes unbelievable. Courts burdened under an overwhelming number of cases do not take kindly to attorneys who fail to comply with the format required by court rules.

III. COMPLIANCE WITH COURT RULES

If an attorney fulfills the obligation to perform adequate research and in doing so locates specific formats that the court rules require, logic would suggest that the format should be followed. Incompetence may be demonstrated by the attorney’s noncompliance with court rules.²⁰ In the following three cases, failure to comply with court rules resulted in severe sanctions.

16. *Id.* at 152.

17. *Id.* at 152.

18. *Id.* at 153.

19. *Id.*

20. In *Henning v. Kaye*, 415 S.E.2d 794, 794 (S.C. 1992), the Supreme Court of South Carolina barely refrained from dismissing an appeal because the appellant’s brief failed to conform to the court rule regulating brief format.

[T]he components of the brief are incorrectly organized and labeled, the issues are not distinctively headed, the table of authorities is not alphabetized or referenced to the body of the brief, the statement of the case contains contested matter and omits required information, and the arguments contain no citations to the record or to the cases listed in the table of authorities.

Id. The court reminded the attorney of the importance of court rules: “[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals” *Id.* In *TSC Express Co. v. G.H. Bass & Co. (In re Allen)*, 176 B.R. 91, 95 n.2 (D. Me. 1994), the court denied both parties’ motions for summary judgment because they failed to comply with the local rule requiring a motion for summary judgment to be supported with a memorandum containing a factual statement with references to the record. One of the parties failed to make references to the record and the other failed to provide a factual statement. *Id.* In addition, both parties’ memoranda were too long. *Id.* “The briefs of both sides are prolix, verbose, and full of inaccuracies, misstatements and contradictions. The lawyering on behalf of both parties falls woefully short of the standards to which attorneys practicing before this court have been traditionally held” *Id.* Many courts take page limit restrictions seriously. In the following

In *In re O'Brien*,²¹ the court dismissed the appeal because the appellant “has seen fit to ignore the *Federal Rules of Appellate Procedure* and Ninth Circuit rules, and essentially tossed this bankruptcy case in our laps, leaving it to us to figure out the relevant facts and law. We decline to do so.”²² The court commented that “[a]n enormous amount of time is wasted when attorneys fail to provide proper briefs and excerpts of record that should have supplied the court with the materials relevant to the appeal.”²³

cases, the courts sanctioned attorneys for failure to comply with page limit restrictions. In *Insulated Panel Co. v. Industrial Commission*, 743 N.E.2d 1038, 1040 (Ill. App. Ct. 2001), the appellate court approved the trial court’s decision of considering only the first ten pages of a fifty-page brief after the court had announced that it was limiting briefs to ten pages. Similarly, in *Van Winkle v. Owens-Corning Fiberglas Corp.*, 683 N.E.2d 985, 989 (Ill. App. Ct. 1997), Owens-Corning placed some of its argument in single-spaced footnotes to comply with the page limit on briefs. The court announced that in the future it would ignore material in footnotes when the footnotes are used to avoid the page limit rule. *Id.* at 990. In *State v. Hudson*, 473 S.E.2d 415, 417 (N.C. App. 1996), *rev’d on other ground*, 483 S.E.2d 436 (N.C. 1997), the court ordered Hudson’s attorney to pay \$500 because the brief was forty-two pages, thus above the thirty-five page limit under the appellate rules. In *Varda, Inc. v. Insurance Co. of North America*, 45 F.3d 634, 640 (2d Cir. 1995), the successful party was not awarded costs because of its violation of the court rule limiting briefs to fifty pages. “[A]pproximately 75% of Varda’s statement of facts and argument appear in footnotes. If Varda had presented its facts and argument in . . . the text, its briefs would have been roughly seventy pages.” *Id.* In *TK-7 Corp. v. Estate of Barbouti*, 966 F.2d 578, 579 (10th Cir. 1992), the court struck the defendants’ brief because it failed to conform to the fifty-page limit. The writer had moved text into footnotes and reduced the footnote font below the pica ten pitch spacing minimum. Otherwise the brief would have been almost twice the fifty-page limit. *Id.* In *White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 811 S.W.2d 541, 541 (Tex. 1991), the Supreme Court of Texas dismissed an Application for Writ of Error because, although the Application complied with the fifty-page limit, the writer had reduced the type size and narrowed the margins to achieve the limit. In *Buffalo v. Robbins*, 811 S.W.2d 541, 541–52 (Tex. 1991), the Supreme Court of Texas struck the Application for Writ of Error because it failed to comply with the court rule governing format of the Application. Some page limit restrictions apply even in a death penalty case. In *Pratt v. Armenakis*, 56 P.3d 920, 921 (Or. 2002), the attorney seeking post-conviction relief for the client asked to file a 260-page brief. The judge permitted a brief of one hundred pages instead of the usual fifty. *Id.* The attorney repeated the request to file a 260-page brief. *Id.* The judge permitted a brief of 150 pages. *Id.* The Supreme Court of Oregon affirmed the judge’s decision to allow a brief with a maximum of 150 pages. *Id.* at 923. One Illinois court takes pinpoint references seriously. In *Ikari v. Mason Properties*, 731 N.E.2d 975, 978 (Ill. App. Ct. 2000), the court admonished the parties for failing to include pinpoint references. “All of the cases cited by defendant, and most of the cases cited by plaintiffs, lack reference to the official reports’ page numbers upon which the pertinent matters appear.” *Id.*

21. 312 F.3d 1135 (9th Cir. 2002).

22. *Id.* at 1137.

23. *Id.* In *Morters v. Barr*, No. 01-2011, 2003 WL 115359, at *4 (Wis. App. Jan. 14, 2003), the court ordered the appellants to pay the respondents’ costs and attorney fees because the appellants’s brief failed to comply with the applicable court rule. The court stated: “We

In *Catellier v. Depco, Inc.*,²⁴ Ziobron, Catellier's attorney, was ordered to pay Depco's attorney fees for the appeal because of Ziobron's failure to comply with the appellate rules governing appellate briefs.²⁵ Ziobron's brief exceeded the maximum number of pages allowable and used smaller font than required in the text and the footnotes.²⁶ The statement of the case and the statement of the facts incorrectly included an argument.²⁷ Pinpoint citations were omitted.²⁸ The argument section was so poorly written that it was difficult to understand and contained accusations against the trial court.²⁹

recognize that it is unreasonable to expect every attorney in Wisconsin to construct arguments as if they were authored by Learned Hand, but a line must be drawn separating adequate from inadequate briefs in order to give some life to the requirements of Wis. Stat. Rule 809.19." *Id.* at *3-4. In evaluating the appellants' brief the court found that "[t]he appellants' brief falls short of the mark—the brief was apparently thrown together by making a number of general claims of error and then quoting two pages of law that may or may not be relevant to the case at hand." *Id.*

24. 696 N.E.2d 75 (Ind. Ct. App. 1998).

25. *Id.* at 80.

26. *Id.* at 79.

27. *Id.*

28. *Id.*

29. *Catellier*, 696 N.E.2d at 79. The statements about the judge could have violated another ethics rule prohibiting an attorney from impugning the reputation of the judge. Another ploy attempted by some attorneys to avoid the maximum page limit is to incorporate another document by reference. In *Guerrero v. Tarrant County Mortician Services Co.*, 977 S.W.2d 829, 832-33 (Tex. Ct. App. 1998), the court refused to consider the appellants' arguments regarding official immunity contained in their responses to the defendants' motion for summary judgment. In *Glover v. Columbia Fort Bend Hospital*, No. 06-01-00101-CV, 2002 WL 1430783, at *5 (Tex. Ct. App. July 3, 2002), Glover's pro se brief was ninety pages long, exceeding the maximum length by more than forty pages. When the court struck the brief and ordered him to submit a brief in compliance with the court rule, Glover requested leave to exceed the page limit, which the court denied. *Id.* Glover's new brief complied with the page limit but incorporated a number of arguments by reference from his original brief. *Id.* The court refused to consider argument contained in the original brief. *Id.* at *5-6. In *Westinghouse Electric Corp. v. N.L.R.B.*, 809 F.2d 419, 424-25 (7th Cir. 1987), the court sanctioned an attorney \$1000, to be paid by the attorney, for failing to conform the brief format to rule 28(g), which limits the opening brief to fifty pages. The court noted that:

Fed. R. App. P. 32(a) requires typed briefs to be double-spaced and to observe specified margins. Briefs also must have type 11 points or larger, ruling out elite type. Westinghouse disregarded all of these rules. It filed a brief with approximately 1 1/2 spacing, with type smaller than 11 points, and with margins smaller than those allowed. The effect was to stuff a 70-page brief into 50 pages. One has the sense that the lawyers wrote what they wanted and told the word processing department to jiggle the formatting controls until the brief had been reduced to 50 pages. Our clerk's office did not catch the maneuver. The judges did, and when we required Westinghouse to file a brief complying with the rules counsel responded by moving gobs of text into single-spaced footnotes, thereby leaving essentially the same number of words in the brief.

Id. at 425 n.1. In *Laitram Corp. v. Cambridge Wire Cloth Co.*, 919 F.2d 1579, 1584 (Fed. Cir. 1990), the attorneys were each ordered to pay \$1000 in sanctions due to their failure to conform the briefs to applicable court rules.

In *Ernst Haas Studio, Inc. v. Palm Press, Inc.*,³⁰ the court affirmed the dismissal of the appellant's complaint and sanctioned the attorney, ordering the attorney personally liable for the appellee's reasonable attorney's fees where the attorney failed to conform the appellate brief to the court rule governing briefs.³¹ "Appellant's Brief is at best an invitation to the court to scour the record, research any legal theory that comes to mind, and serve generally as an advocate for appellant. We decline the invitation."³²

Although most attorneys do not have difficulty following formats required by court rules, some attorneys graduate from law school and pass the bar, yet their writing skills fall below what courts tolerate. The following section discusses two cases in which attorneys were sanctioned because of their poor writing.

IV. ADEQUATE WRITING

The competence required under rule 1.1 includes adequate writing skills.³³ In *Kentucky Bar Ass'n v. Brown*,³⁴ attorney Brown filed an appellate

Counsel for neither side appears willing, even when cautioned, to understand and follow the rules governing the appellate process. Showing no mercy on this busy court, they first filed briefs so replete with cross-charges of misstatements and so lacking in record references as to frustrate the desire of this court to trust its officers in this case. The court was thus compelled to decline the burden of checking each statement and to reject those briefs . . . Continuing a kind of "Alice in Patentland" approach to the judicial process, the parties' conduct then grew "curiouser and curiouser," for their new briefs include: statements of fact with no record reference; statements of fact for which there is no record; reliance on attorney argument and counsel's unsworn fact statements as 'evidence'; citation of materials and raising of questions as though they were before the district court when the present record indicates they were not; assertions of and reliance on facts that occurred after entry of the judgment appealed from; irreconcilably conflicting positions of the same party; citation of inapplicable authorities; page upon page of argument about a product that was admittedly not before the district court and is not before this court; arguments directed to products never charged as infringements; disregard of the concerns expressed by this court at oral argument; and a refusal to come to grips with the questions propounded by this court. Far from aiding this court to decide, by presenting legal arguments on concrete fact patterns, counsel have in this case wasted this court's resources by playing in the rarified atmosphere of a debating society. In sum, the parties' briefs and arguments on this appeal serve not to seek but to obfuscate the truth.

Id. at 1583–84 (citations omitted).

30. 164 F.3d 110 (2d Cir. 1999).

31. *Id.* at 113.

32. *Id.* at 112. In similar fashion, the Court of Appeals for the Second Circuit dismissed the appeal in *Sioson v. Knights of Columbus*, 303 F.3d 458, 459 (2d Cir. 2002) for the appellant's attorney to submit "an adequate brief."

33. MODEL R. PROF'L CONDUCT R. 1.1. In *State v. Bridget*, No. 70053, 1997 WL 25518, at *3 n.3 (Ohio App. Dist. 1997), the court stated:

[W]e note that appellant counsel's brief is replete with over fifty examples of mistakes in punctuation, citation and spelling. We note that appellant's counsel is a former judicial clerk with service to this court and is urged to do credit to his former position by applying greater attention to detail in his brief writing and proofreading efforts before the Bench.

brief that was “a little more than fifteen unclear and ungrammatical sentences, slapped together as two pages of unedited text with an unintelligible message.”³⁵ The Supreme Court of Kentucky noted that Brown’s brief “would compare unfavorably with the majority of the handwritten pro se pleadings prepared by laypersons which this Court reviews on a daily basis.”³⁶ The Supreme Court of Kentucky suspended Brown from the practice of law for sixty days for violating the state ethics rule that was identical in wording to Model Rule 1.1.³⁷

In *In re Hogan*,³⁸ attorney Hogan “lack[ed] the fundamental skill of drafting pleadings and briefs,” with some of the passages understandable and other passages “incomprehensible.”³⁹ The Supreme Court of Illinois placed Hogan on inactive status while undergoing rehabilitation.⁴⁰ In 1998, Hogan filed a Petition for Restoration to Active Status with the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission.⁴¹ The Hearing Board recommended that Hogan’s petition be denied because Hogan had not undergone any treatment since 1987 and the petition Hogan submitted showed that his writing was “incomprehensible.”⁴²

In *In re Hawkins*,⁴³ Hawkins filed documents in bankruptcy court that were “rendered unintelligible by numerous spelling, grammatical, and typographical errors . . . sufficiently serious that they amounted to incompetent representation.”⁴⁴ The Supreme Court of Minnesota found that Hawkins had violated the state ethics rule version of rule 1.1 and publicly reprimanded

Id. In *Arena Land & Investment Co. v. Petty*, No. 94-4196, 1995 WL 645678, at *1 (10th Cir. Nov. 3, 1995), Arena’s third amended complaint was dismissed because it failed to give defendants notice of the claims against them. The complaint contained “confusing grammatical and structural problems that contained legal conclusions unsupported by relevant facts.” *Id.* at *2. Arena also failed to delete “scandalous, impertinent and redundant matter” as requested by the trial court. *Id.* The court added that “[v]ague and conclusory assertions, regardless of how long or how short, are inadequate to state such causes of action.” *Id.*

34. 14 S.W.3d 916 (Ky. 2000).

35. *Id.* at 918–19.

36. *Id.* at 919.

37. *Id.* at 918–919.

38. No. 98-RS-2552, 1999 WL 802922, at *1 (Ill. Att’y Registration & Disciplinary Comm’n Feb. 15, 1998).

39. *Id.* at *1.

40. *Id.* at *3.

41. *Id.* at *4.

42. *Id.* at *4–6.

43. 502 N.W.2d 770 (Minn. 1993).

44. *Id.* at 770–71.

him.⁴⁵ The court ordered Hawkins to attend ten hours of legal writing and other continuing legal education programs.⁴⁶

In *Henderson v. State*,⁴⁷ Henderson challenged the adequacy of his indictment because of its poor grammar.⁴⁸ The court stated: “Though grammatically unintelligible, we find that the indictment is legally sufficient and affirm, knowing full well that our decision will receive of literate persons everywhere opprobrium as intense and widespread as it will be deserved.”⁴⁹

The substantive and procedural content of legal writing must be communicated clearly, but it must also meet the requirement of timeliness. The attorney must perform legal research and legal writing tasks with reasonable promptness.

V. DILIGENCE

An attorney must comply with deadlines or be subject to sanctions.⁵⁰ Rule 1.3 of the *Model Rules of Professional Conduct* requires the attorney to act in a timely fashion: “A lawyer shall act with reasonable diligence and promptness in representing a client.”⁵¹ In the following case, the attorney failed to perform adequate legal research, which resulted in the attorney filing the lawsuit after the two-year statute of limitations had passed.

In *Idaho State Bar v. Tway*,⁵² a client hired Tway in August of 1989 to pursue a police brutality claim against the Boise Police Department.⁵³ Tway consulted the annotations to the Idaho Code, finding a 1981 case stating that a civil rights action under 42 U.S.C. § 1983 is subject to a three-year statute of limitations.⁵⁴ Tway failed to Shepardize the case to find that in a 1986 case the Supreme Court of Idaho held that a civil rights action was subject to a two-year statute of limitations.⁵⁵ The two-year statute of limitations had

45. *Id.* at 771.

46. *Id.* at 772.

47. 445 So. 2d 1364 (Miss. 1984).

48. *Id.* at 1366.

49. *Id.* at 1365.

50. In *Julien v. Zeringue*, 864 F.2d 1572 (Fed. Cir. 1989), the appeal was dismissed for failure to prosecute. *Id.* at 1573. Julien’s attorney, C. Emmet Pugh, was ordered to personally pay \$12,087 and \$1350 for a portion of the other parties’ costs, expenses, and attorneys’ fees. *Id.* at 1576. In the case, Pugh filed fourteen motions for extension of time and met one deadline. *Id.* at 1573.

51. MODEL RULES OF PROF’L CONDUCT R. 1.3.

52. 919 P.2d 323 (Idaho 1996).

53. *Id.* at 324.

54. *Id.* at 325, 327.

55. *Id.* at 325.

run by the time Tway filed the case in March of 1992.⁵⁶ Tway also committed some irregularities with the client's trust account and with regard to communicating with the client; at the time, Tway was suspended from practice because of other misconduct.⁵⁷ The Supreme Court of Idaho suspended Tway from practicing law for five years.⁵⁸

An attorney's failure to perform adequate and timely research not only harms clients, but also harms the judicial system. With their ever-increasing case loads, courts seem to deal more harshly with attorneys who file frivolous lawsuits. Cases in which attorneys were disciplined for failing to anchor the lawsuit to a basis in law and fact are discussed in the following section.

VI. BASIS IN LAW AND FACT

Rule 3.1 of the *Model Rules of Professional Conduct* requires that the attorney provide a legal and factual foundation for a lawsuit.⁵⁹ The rule provides in relevant part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."⁶⁰ *Federal Rule of Civil Procedure* 11(b)(2) contains language similar in substance to the first sentence of rule 3.1 of the *Model Rules of Professional Conduct*.⁶¹ Rule 11 allows the federal court to impose severe sanctions.⁶²

Courts have resorted to a variety of remedies when faced with attorneys who file complaints that are groundless, or lack a factual basis. Attorneys have been ordered to pay opposing counsel's reasonable attorney's fees and attend continuing legal education classes on professionalism, the rules of

56. *Id.* at 324–25.

57. *Tway*, 919 P.2d. at 325–26.

58. *Id.* at 328.

59. MODEL RULES OF PROF'L CONDUCT R. 3.1.

60. *Id.* In *Federated Mutual Insurance Co. v. Anderson*, 920 P.2d 97 (Mont. 1996), the court sanctioned John Deere by ordering it to pay another party's reasonable costs and attorney's fees on appeal. *Id.* at 104. The sanctions were "on the basis of the inconsistent and conflicting positions John Deere has taken . . . its baseless claims on appeal, and its inaccurate citations in its appellate brief." *Id.* In *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990), the court refused to consider Zannino's arguments that were referenced briefly, yet not developed. "[W]e see no reason to abandon the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Id.* The four co-defendants, who had been tried separately, had raised various arguments. *Id.* Zannino told the appellate court that he adopted their arguments as they applied to him. *Id.* The court refused to consider their arguments. *Id.*

61. Compare FED. R. CIV. P. 11 with MODEL RULES OF PROF'L CONDUCT R. 3.1.

62. FED. R. CIV. P. 11.

professional conduct, and substantive areas of law specific to the cases that were filed.

In *Balthazar v. Atlantic City Medical Center*,⁶³ attorney Branella filed a medical malpractice action in state court claiming that Balthazar's ureter was severed during a hysterectomy.⁶⁴ The state appellate court affirmed the dismissal of the case for the attorney's failure to file an affidavit of merit within the required 120-day period.⁶⁵ Branella subsequently filed a federal lawsuit based on the same facts of the state lawsuit in *Balthazar*.⁶⁶ The judge allowed Branella to amend his complaint but warned him that the judge might find Branella in violation of rule 11 if the amended complaint was based on the same facts as the prior state court lawsuit.⁶⁷ According to the court, Branella's amended complaint was "a rambling narrative, which is organized and drafted so poorly that it is often difficult to comprehend."⁶⁸

Federal Rule of Civil Procedure 11(b)(2) contains language similar in substance to the first sentence of rule 3.1 of the *Model Rules of Professional Conduct*.⁶⁹ In *Balthazar*, the federal judge found Branella in violation of rule 11(b)(2) for his failure to state a cognizable legal claim; the judge ordered Branella to complete a continuing legal education course on Federal Practice and Procedure and another on Attorney Professionalism and the Rules of Professional Conduct.⁷⁰

In *Carlino v. Gloucester City High School*,⁷¹ a number of high school students could not participate in graduation exercises because they became intoxicated on the senior class trip.⁷² Prior to the trip, the students had signed a statement saying that any student consuming alcoholic beverages on the trip would be excluded from graduation exercises and would possibly not graduate.⁷³ Malat, the students' attorney, filed a federal lawsuit claiming that the students' exclusion from graduation exercises violated the students' constitutional rights and caused them and their parents emotional distress.⁷⁴

63. 279 F. Supp. 2d 574 (D. N.J. 2003).

64. *Id.* at 578.

65. *Id.* at 579.

66. *Id.*

67. *Id.* at 594 n.18.

68. *Balthazar*, 279 F. Supp. 2d at 581.

69. Compare FED. R. CIV. P. 11(b)(2) with MODEL RULES OF PROF'L CONDUCT R. 3.1.

70. *Balthazar*, 279 F. Supp. 2d at 595.

71. No. 00-5262, 2002 WL 1877011, at *1 (3d Cir. 2002).

72. *Id.* at *1.

73. *Id.*

74. *Id.*

The district court found “a flagrant failure to conduct any legal research violates Mr. Malat’s obligations under rule 11(b).”⁷⁵ If Malat had performed “[e]ven a casual investigation, let alone [a] reasonable inquiry” he would have determined that a number of the claims were barred by statute.⁷⁶ The appellate court affirmed the trial court order that Malat complete two continuing legal education courses and pay a \$500 fine.⁷⁷

In *Brandt v. Schal Associates, Inc.*,⁷⁸ the appellate court affirmed an award of \$443,564.66 in attorneys’ fees and costs against plaintiff’s attorney.⁷⁹ The attorney filed a Racketeer Influenced and Corrupt Organizations Act (RICO) lawsuit and pursued the lawsuit for a number of years even though there were no facts to support it.⁸⁰

In addition to the requirement that the attorney provide a basis in law and fact, that basis must be true. Courts do not take kindly to finding that they have been presented with a false statement of law or fact.

VII. TRUE STATEMENT

Rule 3.3(a)(1) of the *Model Rules of Professional Conduct* prohibits an attorney from making a false statement to a court.⁸¹ The rule provides: “[a] lawyer shall not knowingly . . . 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.”⁸² In the following cases, attorneys were sanctioned or referred for disciplinary action when they misstated the facts.⁸³

In *Dube v. Eagle Global Logistics*,⁸⁴ the court sanctioned appellants’ law firm \$71,117.75, representing the attorney’s fees and costs Eagle incurred defending the appeal.⁸⁵ The court stated that the briefs prepared by

75. *Id.*

76. *Carlino*, 2002 WL 1877011, at *1.

77. *Id.* at *2. In *Vandeventer v. Wabash Nat’l Corp.*, 893 F. Supp. 827, 849-50 (N.D. Ind. 1995), the plaintiffs had claimed quid pro quo sexual harassment and repeated the claim numerous times even though the court found no factual or legal basis for the claim. “[T]he Attorneys were essentially ostriches who turned a blind eye to the law when they had no facts to support their claim—a blindness that persisted throughout.” *Id.* at 850. The court ordered the two plaintiffs’ attorneys sanctioned \$500 each or to attend a continuing legal education seminar “on the substantive provisions of sexual harassment.” *Id.* at 833.

78. 960 F.2d 640 (7th Cir. 1992).

79. *Id.* at 645, 652.

80. *Id.* at 642.

81. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1).

83. *Id.*

83. *Id.*

84. 314 F.3d 193, 195 (5th Cir. 2002), *vacated as moot* (5th Cir. Feb. 4, 2003).

85. *Id.*

the appellants' law firm were "noncompliant" as they "contained 'specious arguments' and had 'grossly distorted' the record through the use of ellipses to misrepresent the statements and orders of the district court."⁸⁶

In *Florida Breckenridge, Inc. v. Solvay Pharmaceuticals, Inc.*,⁸⁷ both parties were drug companies and in the lawsuit the attorneys "engaged in a pattern of practice designed to mislead and confuse the court regarding the regulatory status of their clients's [sic] drugs."⁸⁸ The court referred the matter to its disciplinary committee.⁸⁹

In *Hurlbert v. Gordon*,⁹⁰ the court sanctioned Hurlbert's attorneys \$750 for their "laissez-faire legal briefing."⁹¹ The numerous misstatements in the brief frustrated both the court and opposing counsel.⁹² "[N]umerous references to clerk's papers . . . were either non-existent, or difficult if not impossible to find, because of typographical errors in the references."⁹³ Also, "[o]n several occasions the pages cited were irrelevant to the factual statements for which the references were made."⁹⁴ In addition, "in several instances case citations contained typographical errors and in numerous other instances cases were cited which did not support the positions for which they were cited."⁹⁵

In *Sobol v. Capital Management Consultants, Inc.*,⁹⁶ the Supreme Court of Nevada sanctioned an attorney \$5000 because the attorney misrepresented a stipulated fact and quoted a portion of a case as if it were the case holding rather than language from the dissent.⁹⁷ The court termed these "statements of guile and delusion."⁹⁸

In *Precision Specialty Metals, Inc. v. United States*,⁹⁹ the United States Court of International Trade contemplated holding Department of Justice attorney Walser in contempt of court "for misquoting and failing to quote

86. *Id.* at 194–95.

87. *Fla. Breckenridge, Inc. v. Solvay Pharm., Inc.*, No. 98-4606, 1999 WL 292667, at *1 (11th Cir. May 11, 1999).

88. *Id.* at *9.

89. *Id.*

90. 824 P.2d 1238 (Wash. Ct. App. 1992).

91. *Id.* at 1245–46 (quotations omitted).

92. *Id.* at 1245.

93. *Id.*

94. *Id.*

95. *Hulbert*, 824 P.2d at 1245. The court found that the attorneys had violated a court rule that requires reference to the record. *Id.* "Virtually all of the factual statements made in the argument section of the brief were made without reference to the record . . ." *Id.*

96. 726 P.2d 335 (Nev. 1986).

97. *Id.* at 337.

98. *Id.*

99. 315 F.3d 1346 (Fed. Cir. 2003).

fully from two judicial opinions in a motion for reconsideration she signed and filed.”¹⁰⁰ In *Precision*, the government’s response to Precision’s motion for summary judgment was due by May 5, 2000.¹⁰¹ The day prior to the deadline, the government requested a thirty-day extension.¹⁰² The court denied the request on May 10 and ordered the government to file its response “forthwith.”¹⁰³ After the government filed its response on May 22, the court struck it as untimely.¹⁰⁴ Walser then filed a motion for reconsideration, which contained several quoted passages from cases in which the courts attempted to define the term “forthwith.”¹⁰⁵

The quoted passages in the motion for reconsideration omitted a citation to a 1900 United States Supreme Court case and a quotation from the case, “[i]n matters of practice and pleading [‘forthwith’] is usually construed, and sometimes defined by rule of court, as within twenty-four hours.”¹⁰⁶ The Court of Appeals for the Federal Circuit affirmed the lower court’s formal reprimand of Walser, stating: “She violated Rule 11 because, in quoting from and citing published opinions, she distorted what the opinions stated by leaving out significant portions of the citations or cropping one of them, and failed to show that she and not the court has supplied the emphasis in one of them.”¹⁰⁷

The obligation to perform adequate legal research carries with it the ethical requirement that the attorney must disclose adverse authority that the attorney knew or should have known. The following cases involve attorneys who knew or should have known of adverse authority because either the attorney or the attorney’s office previously had been involved in the case that was the basis of the adverse authority.

VIII. DISCLOSURE OF ADVERSE AUTHORITY

Rule 3.3(a)(2) of the *Model Rules of Professional Conduct* requires the attorney to disclose adverse authority to the court.¹⁰⁸ The rule provides: “A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority

100. *Id.* at 1347.

101. *Id.* at 1348.

102. *Id.*

103. *Id.*

104. *Precision Specialty Metals, Inc.*, 315 F.3d at 1348.

105. *Id.*

106. *Dickerman v. N. Trust Co.*, 176 U.S. 181, 193 (1900).

107. *Precision Specialty Metals, Inc.*, 315 F.3d at 1357.

108. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(2).

in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”¹⁰⁹

In *Massey v. Prince George's County*,¹¹⁰ the government attorney failed to disclose an adverse case in which the government had been a party.¹¹¹ The court ordered Prince George's County to show cause why it had not cited *Kopf v. Wing*,¹¹² an on-point case that was directly adverse to the county.¹¹³ The court found it “troublesome” that the county had also been a defendant in *Kopf*, but had failed to cite the case to the court.¹¹⁴ The court rejected the county's second answer to the order to show cause, that *Kopf* did not make new law and the *Kopf* facts are distinguishable from the *Massey* facts.¹¹⁵ The county also commented that the county attorney who handled *Kopf* was a different attorney than the attorney representing the county in *Massey*.¹¹⁶ The court responded that the attorney's failure to cite *Kopf* violated rules 1.1 and 1.3 in that the attorney had an obligation to “pursu[e] applicable legal authority in [a] timely fashion.”¹¹⁷

In a more disturbing case, the attorney failed to inform the court of a controlling, but adverse case.¹¹⁸ The court was understandably upset by this omission because the attorney had been counsel to one of the parties in the case.¹¹⁹ In *Nachbaur v. American Transit Insurance Co.*,¹²⁰ Nachbaur sued the driver's insurance company for injuries Nachbaur, while a pedestrian, allegedly received in an automobile accident.¹²¹ On appeal, the court stated that the pedestrian was not the intended beneficiary of the insurance policy and could not maintain an action alleging a bad faith breach of the insurance

109. *Id.* In *Northwestern Nat'l Ins. Co. v. Guthrie*, No. 90-C-04050, 1990 WL 205945, at *2 (N.D. Ill. Dec. 3, 1990), the court warned defense counsel of a near violation of the Illinois ethics rule equivalent of Model Rule 3.3. “This failure to disclose relevant legal authority borders perilously close to a violation of the legal profession's ethical canons.” *Id.* The attorney had cited to a line of cases discussing the rule of law but had failed to explain the exception to the rule, which was applicable to the case under consideration. *Id.* The attorney had quoted from a case but omitted the sentence following the quoted language, which discussed the exception to the rule of law. *Id.*

110. 918 F. Supp. 905 (D. Md. 1996).

111. *Id.* at 906.

112. 942 F.2d 265 (4th Cir. 1991).

113. *Massey*, 918 F. Supp. at 906.

114. *Id.*

115. *Id.* at 907–08.

116. *Id.* at 906–07.

117. *Id.* at 908.

118. *Nachbaur v. Am. Transit Ins. Co.*, 752 N.Y.S.2d 605, 607 (N.Y. App. Div. 2002), appeal dismissed 785 N.E.2d 730 (N.Y. 2003).

119. *Id.*

120. *Id.* at 605.

121. *Id.* at 606.

policy.¹²² The court chastised Moore, the plaintiff's attorney, for failure to cite to adverse authority.¹²³ "The failure is especially glaring in this case since plaintiff's attorney represented the losing appellant in *Bettan* . . . a Second Department case issued a matter of weeks before plaintiff's reply brief on the instant appeal was submitted, which precisely addresses five out of six of plaintiff's causes of action"¹²⁴

Courts have no difficulty punishing attorneys whose conduct is so blatantly unprofessional. In the heat of litigation, the attorney may be tempted to ridicule or impugn the integrity of opposing counsel. Such ad hominem attacks are unprofessional, if groundless, and also unethical, as discussed in the following section.

IX. STATEMENT CONCERNING OTHERS

Rule 4.4(a) of the *Model Rules of Professional Conduct* prohibits an attorney from making baseless accusations about others.¹²⁵ In the following case, the attorney was sanctioned for making groundless accusations against opposing counsel.¹²⁶ The rule provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."¹²⁷

122. *Id.*

123. *Nachbaur*, 752 N.Y.S.2d at 607.

124. *Id.* at 607. Failure to cite to adverse authority seems to have been the least of Moore's worries. Moore's conduct would be a violation of rules 1.1, 3.1, 3.3(a), 4.4(a), and 8.2(a). Moore failed to provide citations in his appellate brief and the court characterized the appeal as frivolous. *Id.* "The 4 1/2 and 3 1/2-page appellate briefs submitted by plaintiff's attorney, completely devoid of relevant discussion, are vividly reflective of the appeal's utter lack of even arguable merit." *Id.* In addition, Moore insulted opposing counsel, made unfounded allegations concerning the trial court, and made inaccurate statements concerning the record. *Id.* The court stated that:

[P]laintiff's attorney replicates the conduct sanctioned in the Supreme Court by repeating the insult directed at opposing counsel, adds to that insult with new invective, makes baseless, serious accusations against the motion court, makes unsupported accusations against defendant, seriously mischaracterizes the record and makes no reference to recent adverse authority.

Nachbaur, 752 N.Y.S.2d at 607. The appellate court affirmed sanctions of \$5000 against Moore and ordered Moore to pay defendant's reasonable attorneys' fees for defending against the appeal. *Id.* at 606.

125. MODEL RULES OF PROF'L CONDUCT R. 4.4(a).

126. *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1308 (11th Cir. 2002).

127. MODEL RULES OF PROF'L CONDUCT R. 4.4(a).

Attorney Munson filed a federal lawsuit, *Thomas v. Tenneco Packaging Co.*,¹²⁸ claiming that Tenneco had discriminated against Thomas on the basis of his race.¹²⁹ At the trial level, Munson filed documents containing “insulting remarks about defense counsel’s physical traits and demeanor; remarks that called into question defense counsel’s fitness as a member of the bar; thinly veiled physical threats directed at defense counsel; a racial slur; and unsubstantiated claims that defense counsel was a racist.”¹³⁰ The district court censured and reprimanded Munson.¹³¹ In addition, the court ordered any further similar documents filed by Munson were to be stricken, after notice and opportunity for hearing.¹³²

On appeal, the Court of Appeals for the Eleventh Circuit affirmed what the district court had done under its inherent power, noting that Munson had “exhibited a pattern of baseless accusations and invective.”¹³³ In addition, the court noted that in Munson’s appellate brief, she had “made insulting and demeaning remarks about the district judge, such as by calling him ‘a protectorate of white America.’”¹³⁴ One of the ethics rules referenced by the Eleventh Circuit was rule 4.4 of the *Georgia Rules of Professional Conduct*,¹³⁵ which is identical in wording to rule 4.4 of the *Model Rules of Professional Conduct*.¹³⁶

Almost unimaginable is the practice of some attorneys of making baseless accusations about a judge. This conduct is an ethics violation, as discussed in the following section.

X. STATEMENT REGARDING JUDGE

Rule 8.2(a) prohibits an attorney from impugning the integrity of the judge or other court personnel.¹³⁷ The rule provides: “A lawyer shall not

128. 293 F.3d 1306 (11th Cir. 2002).

129. *Id.* at 1308.

130. *Id.* at 1331.

131. *Id.* at 1308.

132. *Id.* at 1329.

133. *Thomas*, 293 F.3d at 1331.

134. *Id.* This conduct could have violated the ethics rule discussed in the following section.

135. *Id.* at 1323.

136. See MODEL RULES OF PROF’L CONDUCT R. 4.4(a); GA. RULES OF PROF’L CONDUCT R. 3.1(a).

137. MODEL RULES OF PROF’L CONDUCT R. 8.2(a). In *Henry v. Eberhard*, 832 S.W.2d 467, 474 (Ark. 1992), the court struck a number of pages from the appellants’ brief because the pages contained “inflammatory and disrespectful” statements concerning the lower courts. In *State v. Rossmannith*, 430 N.W.2d 93, 94 (Wis. 1988), the Supreme Court of Wisconsin did not sanction the appellant’s attorney, although it could have for disparaging the lower court.

make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer”¹³⁸

In *In re Wilkins*,¹³⁹ the Supreme Court of Indiana decided that attorney Wilkins should be suspended from the practice of law because of language in a brief.¹⁴⁰ In his brief, which supported a petition to transfer the case to the Supreme Court of Indiana, Wilkins criticized the lower court.¹⁴¹ A portion of the text of the brief stated:

The Court of Appeals’ published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point. Clearly, such a decision should be reviewed by this Court. Not only does it work an injustice on appellant Michigan Mutual Insurance Company, it establishes dangerous precedent in several areas of the law. This will undoubtedly create additional problems in future cases.¹⁴²

The last sentence of the above-quoted text was footnoted at note 2.¹⁴³ Note 2 stated: “Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).”¹⁴⁴

In *Notopoulos v. Statewide Grievance Committee*,¹⁴⁵ an attorney accused a judge of improprieties regarding the attorney’s mother’s estate.¹⁴⁶

When the attorney appealed the lower court’s decision to the Supreme Court of Wisconsin, the attorney fashioned the petition as a letter to the lower court:

You are probably quite smug about your decision in this case You *think* you managed to avoid deciding the case all together. Sorry I can’t congratulate you on this clever evasion of a precedential statutory interpretation. This may come as something of a shock, but you *didn’t* avoid an interpretation of the insanity law with a major impact in this state If all of this seems theoretical, think again I will, of course, ask the supreme court to grant review. But between you and me, that should not be necessary. You should withdraw your decision in this case You should do the job yourselves.

Id. at 93 n.2.

138. MODEL RULES OF PROF’L CONDUCT R. 8.2(a).

139. 777 N.E.2d 714 (Ind. 2002), *stay granted*, 778 N.E.2d 1290 (Ind. 2002).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at n.2.

144. *Wilkins*, 777 N.E.2d at 715–16.

145. No. CV010510911S, 2003 WL 22293599, at *1 (Conn. Super. Ct. Sept. 24, 2003).

146. *Id.*

The attorney was sanctioned by reprimand even though the attorney was not representing a party to the case.¹⁴⁷ Attorney Joseph Notopoulos formerly had some disagreements with Judge Berman regarding Notopoulos's mother's estate.¹⁴⁸ After the case was concluded, Notopoulos sent a letter to a member of the court staff criticizing Judge Berman.¹⁴⁹ The attorney claimed that Judge Berman "has clearly prostituted the integrity of his office and is presently running it as a financial spoils system for [his] cronies."¹⁵⁰ The attorney stated that:

[H]ardly all-inclusive of these abuses is his reprehensible extortion from the undersigned, without legal authority, of money for his crony[,] . . . resorting to threats to impose upon the undersigned a substantial conservator's cash bond or to dispatch a psychiatrist to our residence to examine my mother and bill the estate . . .¹⁵¹

The attorney claimed that the judge placed "the financial greed of his cronies above my mother's best interest and welfare with utter contempt for applicable requirements of the Connecticut General Statutes to act in her best interest."¹⁵² The attorney added that "[b]ecause Mr. Berman has become not merely an embarrassment to this community but a demonstrated financial predator of its incapacitated and often dying elderly whose interests he is charged with the protection," the attorney asked that the judge resign.¹⁵³

Notopoulos was charged with violating rules 8.2(a) and 8.4(4) of the *Connecticut Rules of Professional Conduct*.¹⁵⁴ On appeal, the court disagreed with Notopoulos's argument that he could not have violated rule 8.2(a) because he was acting in his individual capacity as a relative rather than in his representative capacity as an attorney.¹⁵⁵ The court found that the rule applies to an attorney, even when the attorney is not representing a client.¹⁵⁶ The court also found that Notopoulos had violated rules 8.2(a) and

147. *Id.* at *3.

148. *Id.* at *1.

149. *Id.*

150. *Notopoulos*, 2003 WL 22293599, at *1.

151. *Id.*

152. *Id.*

153. *Id.* The language of rule 8.4(4) of the state rules coincides with rule 8.4(d) of the Model Rules. Rule 8.4 of the Model Rules is discussed in the following section.

154. *See id.* Notopoulos had been charged under rule 3.5(3) with disrupting a tribunal. *Notopoulos*, 2003 WL 22293599, at *1. The court found that Notopoulos had not violated rule 3.5(3) because there was no clear and convincing evidence that he had intended to disrupt a tribunal. *Id.* at *5.

155. *Id.* at *3.

156. *Id.*

8.4(4) because there was no basis in fact for the allegations against the judge in Notopoulos's letter.¹⁵⁷

False statements, baseless allegations, and misrepresentations of fact are parallel to the theft of another person's work through plagiarism. Plagiarism committed by an attorney reflects poorly on the legal profession and is contrary to the ethics rules. The following section discusses a case in which an attorney was sanctioned for plagiarism.

XI. HONESTY

Rule 8.4 of the *Model Rules of Professional Conduct* requires the attorney to refrain from conduct reflecting adversely on the attorney's position as an officer of the court.¹⁵⁸ In the following case, the attorney violated the rule by plagiarizing a major portion of a brief filed with the court.¹⁵⁹ The rule provides in relevant part:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice.¹⁶⁰

In *Iowa Supreme Court Board of Professional Ethics & Conduct v. Lane*,¹⁶¹ attorney Lane submitted a post-trial brief to the court and requested \$16,000 in attorney's fees for writing the brief.¹⁶² Later it was discovered that Lane plagiarized a treatise in writing the brief.¹⁶³ "The legal argument of Lane's post-trial brief consisted of eighteen pages of plagiarized material, including both text and footnotes, from the treatise . . . Lane cherry-picked the relevant portions and renumbered the footnotes to reflect the altered

157. *Id.* at *4-5.

158. See MODEL RULES OF PROF'L CONDUCT R. 8.4.

159. See *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Lane*, 642 N.W.2d 296 (Iowa 2002).

160. MODEL RULES OF PROF'L CONDUCT R. 8.4.

161. 642 N.W.2d 296.

162. *Id.* at 298.

163. *Id.* at 298-99.

text.”¹⁶⁴ The similarity between the treatise and the brief was so great that the “brief does not reveal any independent labor or thought in the legal argument.”¹⁶⁵

The Ethics Board charged Lane with violating the state ethics rule that is similar in wording to subsections (b), (c), and (d) of rule 8.4 of the *Model Rules of Professional Conduct*.¹⁶⁶ The Ethics Board recommended a three month suspension for Lane from the practice of law; however, the Supreme Court of Iowa suspended Lane for six months because Lane had “jeopardized the integrity of the Bar and the public’s trust in the legal profession.”¹⁶⁷

XII. ANALYSIS OF A CASE WITH A COMBINATION OF ETHICAL ERRORS

*Bradshaw v. Unity Marine Corp.*¹⁶⁸ is a case that illustrates a number of deficiencies in the attorneys’ performance. In the case, seaman Bradshaw

164. *Id.* at 300.

165. *Id.* *Lane* was not an isolated incident, and other courts have dealt with attorneys who plagiarized. In *In re Harper*, 645 N.Y.S.2d 846, 847 (N.Y. App. Div. 1996), Harper enrolled in an L.L.M. program at Pace University School of Law. Harper plagiarized a research paper in one of his classes by submitting a published article as his own writing. *Id.* Because of Harper’s remorse, Harper’s otherwise good reputation, and the fact that the plagiarism was a single incident, the court censured Harper. *Id.* at 847–48. In *In re Hinden*, 654 A.2d 864, 865 (D.C. 1995), Hinden had already been censured by the Supreme Court of Illinois for plagiarizing, by incorporating twenty-three pages of an article word-for-word into Hinden’s chapter in a treatise. The District of Columbia Court decided to censure Hinden also. *Id.* In *In re Steinberg*, 620 N.Y.S.2d 345, 346 (N.Y. App. Div. 1994), Steinberg submitted two writing samples, a requirement of the New York Court of Appeals to be appointed to represent those charged with felonies. When it was discovered that the writing samples were not his, Steinberg was publicly censured. *Id.* In *In re Zbiegien*, 433 N.W.2d 871, 872 (Minn. 1988), Zbiegien plagiarized almost all of twelve pages of a research paper he wrote for his fourth year in law school by including passages of law review articles without crediting the sources. The court considered the plagiarism a “single incident” and decided that the incident would not keep Zbiegien from being admitted to the bar. *Id.* at 877. In *In re Lamberis*, 443 N.E.2d 549, 550 (Ill. 1982), attorney Lamberis enrolled in an LL.M. program at Northwestern University School of Law. Pages thirteen through fifty-nine of his ninety-three page master’s thesis incorporated portions of two books without crediting the authors. *Id.* Northwestern expelled Lamberis. *Id.* at 550–552. Before the Supreme Court of Illinois, Lamberis argued that he should not be disciplined because he was not practicing law when the incident occurred. *Id.* at 551. The court disagreed and decided that Lamberis should be censured. *Id.* at 551–553. In *Frith v. State*, 325 N.E.2d 186, 188 (Ind. 1975), Frith’s brief contained a collection of material plagiarized from other sources, including ten pages of an American Law Reports annotation. The court briefly mentioned the plagiarism and moved on to consider the rest of the case, noting that attorneys’ fees may take the plagiarism into account. *Id.* at 188–89.

166. *Lane*, 642 N.W.2d at 299.

167. *Id.* at 297, 302.

168. 147 F. Supp. 2d 668 (S.D. Tex. 2001).

alleged that he had been injured while working on a ship docked at Phillips Petroleum Company's dock.¹⁶⁹ Bradshaw sued his employer, Unity Marine, within two years of the injury and sued Phillips within three years of the injury.¹⁷⁰ The case came before the court on Phillips' motion for summary judgment in which Phillips claimed that the action against Phillips was barred by the state law two-year statute of limitations rather than the maritime law three-year statute of limitations.¹⁷¹

Bradshaw provided no details about the type of injury he incurred or how he was injured.¹⁷² Phillips failed to support its motion with relevant authority as to why the two-year statute of limitations applied and provided no legal analysis of its argument.¹⁷³ In response, Bradshaw failed to direct the court to relevant case law, gave an incorrect citation, lacked a pinpoint reference to a case that was not on-point, and failed to provide legal analysis of Bradshaw's claim against Phillips.¹⁷⁴

The court quickly resolved the motion for summary judgment by citing to two cases from the Court of Appeals for the Fifth Circuit.¹⁷⁵ Those cases stated that any duty of the dock owner to the seaman is under state law and not maritime law.¹⁷⁶ Based on those cases, the court concluded that the Texas two-year statute of limitations would apply and granted Phillips's motion for summary judgment.¹⁷⁷

The attorneys had the bad luck of being before Samuel B. Kent, a federal judge for the Southern District of Texas.¹⁷⁸ Judge Kent has been nicknamed "Judge Seinfeld" for his humorous legal opinions.¹⁷⁹ The word "criticism" is mild compared to what Judge Kent metes out to the attorneys.¹⁸⁰ "[T]his case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston"¹⁸¹ The judge explains that the:

169. *Id.* at 669.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Bradshaw*, 147 F. Supp. 2d at 671–72.

174. *Id.* at 670–71.

175. *Id.* at 671.

176. *Id.*

177. *Id.* at 671–72.

178. *Bradshaw*, 147 F. Supp. 2d at 669.

179. Jenny B. Davis, *The Limelight Rules: Some Celebrity Judges Just Can't Help Getting Big Heaps of Attention*, 88 A.B.A. J. 28, 28 (Apr. 2002).

180. See *Bradshaw*, 147 F. Supp. 2d at 668.

181. *Id.* at 670.

[A]ttorneys have obviously entered into a secret pact—complete with hats, handshakes and cryptic words—to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed.¹⁸²

The judge explained relevant case law regarding whether state law or maritime law applied in one paragraph.¹⁸³ This contrasts with the attorneys who were unable to provide relevant law and legal analysis.¹⁸⁴ “Take heed and be suitably awed, oh boys and girls—the Court was able to state the issue and its resolution in one paragraph . . . despite dozens of pages of gibberish from the parties to the contrary!”¹⁸⁵ In the following paragraph, Judge Kent concluded that the two-year statute of limitations applied and granted Phillips’s motion for summary judgment.¹⁸⁶ “[H]aving received no useful guidance whatever from either party, the Court has endeavored, primarily based upon its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented.”¹⁸⁷

Even though the propriety of Judge Kent’s opinion may be questioned,¹⁸⁸ *Bradshaw* received wide circulation on the Internet and was published in *Legal Times*.¹⁸⁹ From *Bradshaw*, one may glean that the performance of the attorneys was deficient in a number of respects.¹⁹⁰ They apparently failed to perform adequate research, and their writing was deficient.¹⁹¹ Neither attorney developed the analysis of the legal argument.¹⁹² *Bradshaw*’s attorney failed to provide basic facts concerning *Bradshaw*’s injury,

182. *Id.*

183. *Id.* at 671–72.

184. *Id.* at 670–71.

185. *Bradshaw*, 147 F. Supp. 2d at 672 n.3.

186. *Id.* at 672.

187. *Id.*

188. Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 2d 11, 11 (2001). Professor Lubet claimed that Judge Kent engaged in bullying. *Id.* at 12. “By belittling the lawyers who appear before him, Judge Kent used his authority to humiliate people who—in the courtroom environment—are comparatively powerless.” *Id.* at 12. “[L]aughter at the ill fate of others—even when they are bunglers—just enables further victimization. Judge Kent, and others like him, need to know that ridicule isn’t funny. It’s just mean. It isn’t judging, it’s just showing off.” *Id.* at 16.

189. *Id.* at 11 n.1.

190. *See Bradshaw*, 147 F. Supp. 2d at 670–72.

191. *Id.* at 670–71.

192. *Id.*

provided an incorrect case citation, and omitted a pinpoint reference to relevant material in a forty-page brief.¹⁹³

The *Bradshaw* attorneys faced humiliation, but they also could have faced discipline for violating some of the ethics rules discussed in this article.¹⁹⁴

XIII. CONCLUSION

Although seemingly minor, grammatical errors may indicate that there is a problem with the substance of the document, and more scrutiny is warranted. The attorney's stock in trade is a good reputation, and problems with legal research or errors in citation may contribute to the attorney's loss of credibility. The examples of ethics violations contained in this article show that even tiny problems with legal research and legal writing leave the attorney open for ethics violations.

Imagine the attorney's chagrin at reading a case in which the attorney was sanctioned and knowing that the case is a lasting legacy, to be read by generations of attorneys. One court gave the following career advice: "The Attorneys should give serious consideration to not practicing in the United States District Court until such time as they have demonstrably enhanced their practice skills."¹⁹⁵ Imagine the client reading one of these cases. The client would be bound to lose faith in the attorney and may feel that a legal malpractice lawsuit is warranted. As far as the public is concerned, the attorney's conduct reflects poorly on the legal system.

The majority of attorneys conduct themselves ethically. They faithfully perform any necessary legal research and try to write well. As shown by the cases discussed in this article, however, there are a number of attorneys whose legal research and writing falls below the standard expected by the client and the court.

To a diligent, ethically-minded attorney, the acts discussed in this article for which attorneys were disciplined are almost unimaginable. This conduct represents one end of the spectrum. Even so, the competent attorney should be mindful of these cases and take them as a reminder of the legal research and legal writing obligations owed the client and the court. Often, an attorney is pressured by a looming deadline or by the client to take shortcuts. Skimping on research or writing can lead to ethics violations. A momentary lapse of good judgment may place an attorney in the same predicament.

193. *Id.* at 670–71.

194. MODEL RULES OF PROF'L CONDUCT R. 8.4; *Bradshaw*, 147 F. Supp. 2d at 670–72.

195. *Vandevanter*, 893 F. Supp. at 859 n.43.

As an officer of the court, the attorney owes a duty to the judge. Courts attempt to make the right decisions and rely on attorneys to provide the court with information. This relationship is subverted by the attorney who does not fulfill his or her obligation to perform adequate legal research and write well. An officer of the court should help the judge, and not add to the judge's workload. When reading the cases cited in this article, one can feel the frustration of the court.

The duty to the client is to provide the best representation possible. Obviously, the attorneys in the cases cited in this article performed a disservice to their clients by providing substandard representation. In addition, poor attorney performance damages the public's respect for the legal system.