



Common Ethical Issues in Legal Writing

The Ethics of Brief Writing and Brief Strategies

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Presented by: Edmund S. Sauer

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Overview

- **We have a duty to “zealously” advocate for our clients in legal writing, as in other aspects of legal practice. RPC Preamble and RPC 1.3 cmt. [1].**
- **But this is not an unqualified duty.**
 - Ethical restrictions: As officers of the court, we must follow the Rules of Professional Conduct and governing case law to protect integrity of judicial process.
 - Practical considerations: Attorney credibility is critical.
- **Selecting & Structuring Written Arguments**

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Common Ethical Issues in Legal Writing

▪ Duty of Candor With Court

- Duty to Disclose Adverse Authority
 - ❖ Tenn. Sup. Ct. R. 8, RPC 3.3(a)(2):

“A lawyer shall not knowingly . . . fail 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.”
 - ❖ Practice Pointer: Disclose what you would want to know if you were the judge or law clerk.

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Common Ethical Issues in Legal Writing (cont'd)

- ❖ They will find it! And when they do, it reflects poorly on you and your client.
- ❖ People, including judges and law clerks, tend to ascribe greater importance to what is hidden.

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Common Ethical Issues in Legal Writing (cont'd)

- Misrepresentation of Facts or Law
 - ❖ Tenn. Sup. Ct. R. 8, RPC 3.3(a)(1):
“A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal.”
 - ❖ RPC 1.1 requires lawyers to “provide competent representation to a client,” including “legal knowledge, skill, thoroughness, and preparation.”
 - ❖ Practice Pointer: No Blissful Ignorance or Hyperbole

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Common Ethical Issues in Legal Writing (cont'd)

- ❖ To write persuasively, you must be competent. Know your record and the applicable law. If needed, go beyond the governing law.
- ❖ Practice Pointer: Cite check everything, ideally with assistance from third party.
- ❖ Be careful in selectively quoting cases and record materials.

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Common Ethical Issues in Legal Writing (cont'd)

- Supplemental Authority
 - ❖ An attorney's duty of candor doesn't end when he or she files the brief.
 - ❖ Federal Rule of Appellate Procedure 28(j)
 - ❖ Tennessee Rule Appellate Procedure 27(d)
 - ❖ Supplemental letters in trial courts

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Common Ethical Issues in Legal Writing (cont'd)

- Attorneys Are Gatekeepers: Cannot Delegate Ethical Duties To Clients
 - ❖ Tennessee Sup. Ct. 8, RPC 1.2:
"[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by RPC 1.4, shall consult with the client about the means by which the client's objectives are to be accomplished."

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Common Ethical Issues in Legal Writing (cont'd)

- ❖ *In re Howard Neil Shipley*, U.S. Sup. Ct. No. 14D2827. The U.S. Supreme Court ordered an attorney to show cause why he should not be disciplined for submitting a jargon-filled petition in a patent case. As it turned out, the petition was largely written by the attorney's client, a German business executive, who is not a lawyer. The client insisted on retaining primary control over the content of the petition.

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Common Ethical Issues in Legal Writing (cont'd)

The Supreme Court ultimately dismissed the disciplinary proceeding with the following admonition: "A response having been filed, the Order of Show Cause . . . is discharged. All Members of the Bar are reminded, however, that they are responsible – as Officers of the Court – for compliance with the requirement of Supreme Court Rule 14.3 that petitions for certiorari be stated in 'plain terms' and may not delegate that responsibility to the client."

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Common Ethical Issues in Legal Writing (cont'd)

- Ghostwriting Briefs for *pro se* Litigant
 - ❖ RPC 8.4(c) prohibits lawyers from “engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation.”
 - ❖ “[A]n attorney in Tennessee may not engage in extensive undisclosed participation in litigation on behalf of *pro se* litigant as doing so permits and enables the false appearance of being without substantial professional assistance.” BPR Formal Ethics Opinion 2007-F-153.

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Common Ethical Issues in Legal Writing (cont'd)

- **Limits on Lawyer’s Ability to Criticize Courts and Judges**
 - RPC Preamble: “A lawyer should demonstrate respect for the legal system and for those who serve it, including judges”
 - RPC 8.2(a): “A lawyer shall not make a statement that the lawyer knows to be false or that is made with reckless disregard concerning the qualifications or integrity of . . . a judge.”
 - Tennessee Court Appeals Rule 9: “Any brief or written argument containing language showing disrespect or contempt for any court of Tennessee will be stricken from the files, and this Court will take such further action relative thereto as it may deem proper.”

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Common Ethical Issues in Legal Writing (cont'd)

▪ Civility

- Use respectful tone in discussing adversary.
- Courts have little tolerance for disrespectful or derogatory statements.
- A brief that uses such language is no more effective than one that does not.
- Practice Pointer: Avoid telling the court how “clear” the law is. Let the court come to that conclusion itself.

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Common Ethical Issues in Legal Writing (cont'd)

▪ No Frivolous Arguments

- Rules of Professional Conduct 3.1
“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless after reasonable inquiry the lawyer has a basis in law or fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.”

“A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.”

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Common Ethical Issues in Legal Writing (cont'd)

- Practice Pointer: Set the bar a bit higher. Be selective in the arguments you present.
- Approach Different Depending on Court.
 - ❖ Trial court: issue preservation & de novo review
 - ❖ Appeal: reversal & different standard of review
- Asserting three arguments does not triple your chances of winning.

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Common Ethical Issues in Legal Writing (cont'd)

- **Filing Your Briefs On Time**
 - RCP 1.3: “A lawyer shall act with reasonable diligence and promptness in representing a client.”
 - RPC 3.2: “A lawyer shall make reasonable efforts to expedite litigation.”
 - If you need a briefing extension, ask for it. But don’t abuse the process, even if in your client’s interest.

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Common Ethical Issues in Legal Writing (cont'd)

- **Communications With Client And Client Input On Written Product**
 - RPC 1.4 requires a lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished” and “keep the client reasonably informed about the status of the matter.”
 - Practice Pointer: Give client opportunity to provide input on briefs.
 - Caveat: *Shipley* case discussed earlier.

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Common Ethical Issues in Legal Writing (cont'd)

- **Do Not Include Confidential Information In Briefs**
 - RCP 1.6 generally prohibits attorneys from “reveal[ing] information related to the representation of a client.”
 - File under seal or redact confidential information.
 - Examples include trade secrets, health information, contact information (address/phone), financial/social security information, minor’s name, etc.

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Selecting & Structuring Written Arguments

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Selecting & Structuring Written Arguments

- **What Arguments to Raise?**
 - What is your legal theory? What is your theme?
 - Trial: Issue preservation; good faith basis for argument.
 - Appellate: Be more discriminatory.
 - Attorneys and litigants can be sanctioned for raising frivolous arguments.
 - Practice Pointer: focus only on those arguments that have a legitimate shot of helping your client. **Bad arguments detract from good ones.**

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Selecting & Structuring Written Arguments (cont'd)

- **How to Order Them:**

- Lead with Your Strongest Argument.
 - ❖ Limited exceptions (e.g., jurisdictional arguments, standard of review disputes, logical sequence).
 - ❖ In choosing strongest argument, consider
 - The importance of that issue to your client.
 - Likelihood of success on that issue.
 - Does that issue set the tone for the rest of your brief?

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Selecting & Structuring Written Arguments (cont'd)

- **Complex Cases**

- "I have yet to put down a brief and say, 'I wish that had been longer.'" Justice John Roberts
- Cut extraneous facts and law that are not relevant to issues before the court.
 - Legally significant facts
 - Emotionally important facts
- Consider using a narrative statement of the issue up front to frame the issue(s) and put the case in context.
 - ❖ Particularly helpful in fact-intensive cases.

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Selecting & Structuring Written Arguments (cont'd)

❖ Consider something like:

- Joe Smith was hired as Nashville University's basketball coach in 2014. His employment agreement authorizes severance pay under certain limited conditions, but only if he "perform[ed] the requirements of his position." In his three years as coach at Nashville U, Smith lost at least twenty games each season. Smith was given five written warnings that the team's performance was unsatisfactory. Unfortunately, the team's performance did not improve and Smith's employment was terminated in 2017.

The question presented is whether substantial evidence supports the district court's decision denying Smith's claim for severance pay.

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Selecting & Structuring Written Arguments (cont'd)

- Use consistently formatted and short headings/subheadings.
- Use helpful topic sentences and varied/comparative transitions.
- Be direct and use short, easily digested sentences.
- Do not use legal digest writing or Latin/legalese.
- In heavily regulated areas, use a background section upfront explaining the regulatory/legal framework.

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Selecting & Structuring Written Arguments (cont'd)

- Quote and cite treatises addressing your issue favorably. Many judges and law clerks love treatises, which are often very effective at bringing the reader up to speed quickly in complicated areas of the law.
- Have a third party unfamiliar with your case read your brief before filing.

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Selecting & Structuring Written Arguments (cont'd)

- **How Much Ink to Spend on Arguments?**
 - Remember eye strain: Most briefs are too long.
 - Attorneys generally do not spend the time necessary to narrow the issues and tighten the analysis. I spend about 25% of my time on a brief revising/cutting it.
 - Sleep on it and read again with fresh eyes.
 - Be direct and concise and eliminate unnecessary words.
 - Much more likely to get a judge or law clerk to carefully read and understand a shorter brief.
 - But do take the sting out of bad facts and bad law

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Questions

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