

Winning Fair and Square: Ethics in Advocacy Writing

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Neither the Code of Professional Responsibility nor the Model Rules of Professional Conduct specifically address legal writing in general or advocacy writing in particular.¹ This rather remarkable omission was noted by the moderator of a 1993 panel presentation, *Lost Words: The Economic, Ethical and Professional Effects of Bad Legal Writing*, co-sponsored by the ABA Legal Writing Committee of the Section on Legal Education and Admissions to the Bar and the ABA Standing Committee on Lawyer Competence.² The panel discussed the ways “inept” legal writing negatively reflects on lawyers and the legal profession.³

As professional legal writers themselves, trial and appellate judges alike rely on advocates to submit coherent, concise, and candid written arguments. Indeed, the integrity of the judicial system largely depends on the unspoken assumption that every advocate will responsibly exercise the overriding duty as an officer of the court. Critical components of that duty include accurately portraying relevant facts supported by the record and citing appropriate legal authority in support of legal arguments. Although the Kansas Rules of Professional Responsibility do not specifically address written advocacy, several rules codify ethical standards that encompass advocacy writing, including pretrial motions, trial briefs, and appellate briefs.⁴

Several jurisdictions and specialized legal organizations have adopted aspirational guidelines encouraging civility and professionalism in litigation.⁵ For example, the Code of Trial Conduct adopted by the American College of Trial Lawyers “is intended to identify and encourage the conduct to which the best in the profession aspire, not to create the lowest floor of acceptable behavior.”⁶ In 1999, the Conference of Chief Justices of the National Center for State Courts adopted *A National Action Plan on Lawyer Conduct and Professionalism*, outlining recommendations designed to enhance the ability of state supreme courts to exercise their inherent regulatory authority over the legal profession. “The National Action Plan calls

¹ However, the Kansas rules prohibit written communications with the court unless a copy is immediately served upon opposing counsel. See KRPC 3.5(c)(2).

² Jaime S. Dursht, Note, *Judicial Plagiarism: It May Be Fair Use But Is It Ethical?*, 18 Cardozo L. Rev. 1253, 1294 (1996) (citing American Bar Association Section of Legal Education and Admissions to the Bar, *Lost Words: The Economic, Ethical and Professional Effects of Bad Legal Writing*, Occasional Papers 7, Annual Meeting Panel Presentation of August 5, 1993).

³ Dursht, *supra* note 2, at 1294.

⁴ Relevant Kansas Rules of Professional Conduct include Rules 1.2(d) (Scope of Representation), 3.3 (Candor Toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel), 3.5 (Impartiality and Decorum of the Tribunal), 8.2 (Judicial and Legal Officials), and 8.4 (Misconduct).

⁵ See American Bar Association Center for Professional Responsibility, Professionalism Codes/Reports, <http://www.abanet.org/cpr/professionalism/profcodes.html> (last visited February 24, 2007).

⁶ American College of Trial Lawyers, Annotated Code of Trial Conduct 17.1 (2005).

upon the state supreme courts to ‘take a leadership role in evaluating the contemporary needs of the legal community with respect to lawyer professionalism and coordinating the activities of the bench, the bar, and the law schools in meeting those needs.’”⁷

Several states have responded. In 2003, the Utah Supreme Court adopted the Utah Standards of Professionalism and Civility,⁸ a succinct list of aspirational guidelines. “The . . . standards are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.”⁹ Several of the Utah standards specifically apply to written communication, motion and pleading practice, discovery practice, and drafting. They also exhort lawyers to “avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries.” Many of the Utah Standards of Professionalism and Civility directly apply to common ethical problems associated with written advocacy.

A. Misrepresenting the Work of Another as the Advocate’s Own Writing

(1) Plagiarism

(a) Definition

- (i) Although difficult to define for all purposes, the term generally means “stealing and passing off (the ideas or words of another) as one’s own.”¹⁰ “Plagiarism” comes from the Latin word “plagiarius,” meaning kidnapper. It is generally understood as a form of stealing or cheating.¹¹
- (ii) Plagiarism is not the same as copyright infringement, although courts sometimes use the terms interchangeably.¹²
- (iii) Plagiarism is plagiarism, whether intentional or not.¹³
- (iv) Plagiarism is unethical and in some circles immoral, but it is not illegal.¹⁴

(b) Lifting Large Amounts of Text from Other Sources Without Attribution

⁷ Conference of Chief Justices, *Implementation Plan for the Conference of Chief Justices’ National Action Plan on Lawyer Conduct and Professionalism 2* (adopted August 2, 2001).

⁸ See <http://www.utcourts.gov/courts/sup/civility.htm> (last visited February 24, 2007).

⁹ *Id.*

¹⁰ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 888 (10th ed. 1998).

¹¹ Dursht, *supra* note 2, at 1258.

¹² *Id.* at 1294.

¹³ Newman v. Burgin, 930 F.2d 955, 962 (1st Cir. 1991) (“[O]ne can plagiarize through negligence or recklessness without intent to deceive.”). “[T]o plagiarize is to give the impression that you have written or thought something that you have in fact borrowed from another.” *Id.* (quoting MODERN LANGUAGE ASS’N HANDBOOK FOR WRITERS OF RESEARCH PAPERS, THESES, AND DISSERTATIONS 4 (1977)).

¹⁴ Dursht, *supra* note 2, at 1280-81.

- (i) *Iowa Supreme Court Bd. of Prof. Ethics & Conduct v. Lane*, 642 N.W.2d 296 (Iowa 2002).

Facts: Iowa attorney, representing Plaintiff in ADA claim, prepared an appellate brief that plagiarized 18 pages of a published treatise on employment discrimination, including both text and footnotes. He later sought an award of attorney fees, including \$ 200 per hour for 80 hours he claimed he devoted to preparing the brief.

At a hearing on Respondent's fee application, the magistrate noted that the legal arguments in the brief appeared not to have been written by Respondent. He admitted he had "borrowed liberally from other sources" but failed to respond to a court order directing him to identify his sources. Soon after, a fire at Respondent's home destroyed many files and records in the matter. Eventually he supplied a four-page, single-spaced list of authorities, among them the treatise from which he had lifted 18 pages. The judge's research revealed that Respondent had copied his legal argument verbatim from the treatise.

Held: Addressing only the charge of plagiarism and Respondent's motion for fees, the court held that Respondent "knowingly plagiarized and intended to deceive the court." Plagiarism and submission of his brief as his own work amounted to misrepresentation in violation of DR 1-102(A)(4), analogous to ghostwriting. Respondent also violated DR 2-106(A), forbidding an illegal or clearly excessive fee. The court reasoned that the chances were remote that Respondent had in fact invested 80 hours to write the largely plagiarized brief.

Consequences: "[Respondent's] excessive billing for writing a largely plagiarized brief cannot go undisciplined. Honesty is fundamental to the functioning of the legal profession, and [Respondent's] conduct in this case has compromised that honesty. Moreover, [Respondent] has jeopardized the integrity of the Bar and the public's trust in the legal profession." The court suspended him from practicing law for six months and assessed costs of the disciplinary action.

- (ii) *Kingvision Pay Per View, Ltd. V. Wilson*, 83 F. Supp. 2d 914, 916 n.4 (W.D. Tenn. 2000).

Facts: In a written response to Defendant's motion for summary judgment, Plaintiff's counsel copied 7 of the pleading's 19 paragraphs and 3 of its 7 footnotes, without citation, from Wright & Miller, Federal Practice and Procedure.

Held: The plagiarism was "distasteful" and may have violated DR 1-102, prohibiting "conduct involving dishonesty, fraud, deceit, or misrepresentation."

Consequences: The court nevertheless declined to impose sanctions.

(iii) *Pagan Velez v. Laboy Alvarado*, 145 F. Supp. 2d 146, 160-61 (D.P.R. 2001).

Facts: The court noticed *sua sponte* that in responding to a summary judgment motion, counsel copied entire pages from an earlier decision by another judge of the same court, without attribution. In fact, about two-thirds of the responsive brief was copied verbatim from the court's earlier decision.

Held: The court found counsel's plagiarism "reprehensible," noting its inherent power to sanction attorneys appearing before it.

Consequences: The court admonished counsel:

We find counsel's behavior to be intolerable. In addition to the self-evident reasons for denouncing this practice, the impugnable brief was a disservice to Plaintiff, counsel's client, and this court, as it did not fully address all the arguments raised in Defendants' motion for summary judgement [sic].

In the future, we expect counsel to maintain the highest standards of integrity in all of his representations with this court. We will not treat so gingerly further lapses in his judgement [sic].

Id. at 161.

(iv) *Alamo v. Puerto Rico*, 2006 WL 1716422 (D. P.R. 2006).

Facts: Plaintiff's counsel filed a Rule 60(b) motion for relief from a judgment dismissing a claim under the Americans with Disabilities Act. Plaintiff's brief copied seven pages of text nearly word-for-word, without citation, from *Tennessee v. Lane*, 541 U.S. 509 (2004).

Held: Counsel's plagiarism was declared "unacceptable" by the court, which noted its inherent power to sanction attorneys appearing before it.

By plagiarizing, [Plaintiff's counsel] has bucked his duty to develop pointed arguments before this court on his client's behalf. *Tennessee v. Lane* may very well offer a great deal of information about state sovereign immunity in the context of the ADA, but pasting seven pages of it into a brief hardly tells us what . . . [counsel] wants us to reconsider, and his client suffers great injury for it.¹⁵

Consequences: The court chastised counsel but declined to exercise its inherent power to impose a monetary sanction.

¹⁵ *Alamo v. Puerto Rico*, 2006 WL 1716422, at *3 (D. P.R. 2006).

By plagiarizing, [Plaintiff's counsel] has bucked his duty to develop pointed arguments before this court on his client's behalf. *Tennessee v. Lane* may very well offer a great deal of information about state sovereign immunity in the context of the ADA, but pasting seven pages of it into a brief hardly tells us what . . . [counsel] wants us to reconsider, and his client suffers great injury for it.¹⁶

(v) *Dewilde v. Guy Gannett Pub. Co.*, 797 F. Supp. 55 (D. Me. 1992).

Facts: In a Title VII claim by a terminated employee alleging sex discrimination, Plaintiff's counsel filed an untimely response to Defendant employer's motion for summary judgment. Plaintiff's response also plagiarized Defendants' brief in support of his motion for summary judgment in significant part, copying its legal portions nearly verbatim.

Held: The court declared that counsel's plagiarism was "unacceptable" and "wholly intolerable," and noted its inherent power to sanction attorneys appearing before it.

An even more egregious example of bad practice on the part of Plaintiff's counsel is the late-filed memorandum of law in support of Plaintiff's response to the summary judgment motion. The memorandum plagiarizes Defendants' memorandum in significant part, copying its legal portions virtually verbatim Throughout the brief, Plaintiff's counsel . . . did no legal research and was content with defense counsel doing all the work. Defense counsel has . . . failed to call this major breach in professional conduct to the Court's attention. The Court, however, cannot let it pass without condemnation.

Plagiarism is unacceptable in any grammar school, college, or law school, and *even* in politics. It is wholly intolerable in the practice of law.¹⁷

Id. at 56 n.1.

Consequences: The court declined to exercise its inherent power to impose monetary sanctions.

¹⁶ *Alamo v. Puerto Rico*, 2006 WL 1716422, at *3 (D. P.R. 2006).

¹⁷ *Dewilde v. Guy Gannett Pub. Co.*, 797 F. Supp. 55, 56 n.1 (D. Me. 1992).

(vi) *Frith v. Indiana*, 263 Ind. 100, 325 N.E.2d 186 (1975).

Facts: Appellant’s attorney, a public defender, “filled his Brief with plagiarized material” without quoting or citing his sources. For example, more than 10 pages of 39 ALR 3d, amounting to some 14 pages of the appellate brief, were copied into the brief, without listing 39 ALR 3d in the Table of Authorities or citing it elsewhere. Further, some pages of the brief had apparently been copied from another brief.

Held:

To place all this conglomeration of uncited material in a Brief is an imposition on the Court. We do not mean to say that such material should not be used if properly identified. However, as we have said, “the great rule in drawing briefs consists in conciseness with perspicuity.” . . . A brief is not to be a document thrown together without either organized thought or intelligent editing on the part of the brief-writer. Inadequate briefing is not, as any thoughtful lawyer knows, helpful to either a lawyer's client or to the Court. We make this point so that when the compensation for Appellant Williams' attorney is fixed some consideration may be given to the way in which the Brief in this case was prepared.

Consequences: Nevertheless, the court considered Appellant's legal arguments.

(c) Harmful Effects of Plagiarism

- (1) Deception: If true author’s identity were known, reader may read more critically and may be less confident about relying on the work.
- (2) Plagiarism tends to hobble the writer’s professional development.
- (3) By eroding integrity and commitment to truth, plagiarism harms the legal profession.¹⁸

(2) Ghostwriting

(a) Definition

- (i) “Ghostwriting” refers to drafting pleadings and providing substantial legal assistance to *pro se* litigants without entering an appearance or otherwise identifying the author as an attorney.¹⁹

¹⁸ See Lisa G. Lerman, *Misattribution in Legal Scholarship: Plagiarism, Ghostwriting, and Authorship*, 42 S. TEX. L. REV. 467 (Spring 2001).

- (ii) Ghostwriting differs from plagiarism in that the ghostwriter *consents* to lack of attribution by the litigant.²⁰

(b) General rule

- (i) A 1978 ABA Informal Ethics Opinion concluded, “Extensive undisclosed participation by a lawyer . . . that permits the litigant falsely to appear as being without substantial professional assistance is improper.” However, disclosure is not required if the lawyer only “prepare[s] or assist[s] in the preparation of a pleading for a litigant who is otherwise acting pro se.”²¹
- (ii) The practice has been consistently condemned by the federal courts at least since 1970.²²

(c) The deceptive nature of the practice raises five distinct concerns.

- (i) Lenient interpretation of pro se pleadings yields unfair results. Courts generally assume that a *pro se* litigant has neither substantial legal training nor the assistance of an attorney; hence courts are generally lenient in construing pleadings by *pro se* litigants.²³ If an attorney has authored the pleadings without disclosing that fact, the *pro se* litigant secures the benefit of leniency, which may be unfair to the other party.
- (ii) Evasion of Rule 11 certification requirement. Ghostwriting implicates Fed. R. Civ. P. 11(a) because the attorney who drafts the pleadings evades responsibility for ensuring they are supported by the facts and law, as required by Rule 11. One court found this result “particularly disturbing” and considered this factor alone “a strong policy ground for prohibiting attorneys from ghost-writing pleadings and motions for pro se litigants.”²⁴
- (iii) Misrepresentation and lack of candor to the court. An attorney who drafts pleadings without signing them engages in misrepresentation and violates the duty

¹⁹ Wesley v. Don Stein Buick, Inc., 987 F. Supp. 884, 885 (D. Kan. 1997); see John C. Rothermich, *Ethical and Procedural Implications of “Ghostwriting” for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687 (1999).

A related concern is the practice of nonlawyers engaging in similar actions. See, e.g., *In re State ex rel. Stephen v. Williams*, 246 Kan. 681, 793 P.2d 234 (1990) (enjoining nonattorney from engaging in conduct amounting to the practice of law, including signing pleadings in various lawsuits in Kansas district courts, assisting others in preparing pleadings, appearing on behalf of others at court hearings, examining witnesses, and attempting to perform legal services).

²⁰ Lerman, *supra* note 10, at 476 (Spring 2001).

²¹ ABA Informal Opinion 1414 (1978). A copy is attached to this outline.

²² See, e.g., *Klein v. Spear, Leeds and Kellogg*, 309 F. Supp. 341 (D.C. N.Y. 1970) (condemning the practice of participating extensively in litigation in support of an irresponsibly prolific litigant without revealing one’s identity, which “smacks of the gross unfairness that characterizes hit-and-run tactics”).

²³ E.g. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

²⁴ *In re Mungo*, 305 B.R. 762, 768 (Bankr. D. S.C. 2003); see ABA Informal Ethics Opinion 1414 (1978) (implicating DR 1-102(A)(4)).

of candor to the court contrary to professional rules of conduct, specifically MRPC 3.3 and 8.4.²⁵

- (iv) Circumvention of local rules restricting attorney withdrawal. Ghost-writing pleadings or motions for otherwise *pro se* litigants allows attorneys to circumvent court rules restricting withdrawal once an attorney has entered an appearance. The purpose of these rules is to provide for communication between the litigants and the court, as well as allowing the court to fairly and efficiently oversee the litigation process.
 - (v) Practicing law “behind the scenes” while suspended or disbarred. An attorney who conceals involvement in drafting pleadings for non-attorneys evades ethical sanctions for practicing law while disbarred or suspended from law practice.²⁶
- (d) **Majority Rule.** Most jurisdictions that have considered the issue hold that an attorney violates rules of professional conduct by failing to disclose true authorship of pleadings.²⁷
- (e) **Minority Rule.** A minority of state jurisdictions do not condemn ghostwriting, at least if an attorney is permitted to provide limited scope representation or “unbundled” legal services.²⁸

For example, the Florida Supreme Court recently amended the comments to its version of MRPC 1.2 to permit lawyers to draft documents for *pro se* litigants without signing. However, the documents must reflect that they were prepared with a lawyer’s assistance.²⁹

(f) **Ghostwriting Briefs for *Pro Se* Litigants**

- (i) Federal courts strongly disapprove when attorneys prepare court filings for *pro se* litigants without signing them, citing Fed. R. Civ. P. 11.³⁰
- (ii) The Tenth Circuit in particular considers ghostwriting sanctionable.

²⁵ *Somerset Pharmaceuticals, Inc. v. Kimball*, 168 F.R.D. 69, 72 (M.D. Fla. 1996) (“[T]he practice of filing *pro se* pleadings which are actually prepared by a legal advocate [taints] the legal process and create[s] disparity between the parties . . .”).

²⁶ *See, e.g., In re Mays*, No. 1804014, Ill. Disp. Op. 01 SH 80 (2003).

²⁷ Lauren A. Weeman, *supra* note 21, at 1042 (referring to “undisputed judicial condemnation”).

²⁸ *See, e.g., State Bar of Arizona Ethics Opinion 05-06* (July 2005) (attorney providing limited scope representation need not disclose legal assistance to *pro se* client). *But see Weeman, supra* note 21, at 1048-51 (criticizing Ariz. Ethics Opinion 05-06 for failing to consider viable alternatives to blanket approval of undisclosed ghostwriting).

²⁹ Amendments to Rules Regulating the Florida Bar and Florida Family Law Rules of Procedure (Unbundled Legal Services), 860 So.2d 394 (Fla. 2003); *see Fla. R. 12.040(d); Fla. R. 4-1.2 cmt.*

³⁰ *See, e.g., Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971); *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078-79 (E.D. Va. 1997), *aff’d*, 172 F.3d 44 (4th Cir. 1999); *Johnson v. Board of County Comm’rs for County of Fremont*, 868 F. Supp. 1230, 1231-32 (D. Colo. 1994), *aff’d*, 85 F.3d 489 (1996).

Duran v. Carris, 238 F.3d 1268 (10th Cir. 2001).

Facts: Defendants sought sanctions, contending that Plaintiff's allegedly *pro se* brief was in fact ghostwritten by his former legal counsel. The court ordered both Plaintiff and former counsel to show cause why they should not be sanctioned.

Held: Citing Fed. R. Civ. P. 11, the court held that former counsel improperly assisted Plaintiff without entering an appearance, conferring the benefit of liberal construction of what otherwise appeared to be *pro se* pleadings and improperly shielding former counsel from accountability for his actions. An attorney must disclose to the court any "substantial" assistance provided. Participation in drafting an appellate brief is *per se* "substantial" and must be acknowledged by signature. "[A]ny ghostwriting of an otherwise *pro se* brief must be acknowledged by the signature of the attorney involved."

However, "the mere assistance of drafting, especially before a trial court, will not totally obviate some kind of lenient treatment due a substantially *pro se* litigant."³¹

Consequences: The court held that in this case, ghostwriting amounted to misrepresentation by both Plaintiff and former counsel.³²

- (a) "We do not allow anonymous testimony in court; nor does this circuit allow ghostwritten briefs. Therefore, we admonish [counsel] that this behavior will not be tolerated by this court, and future violations of this admonition will result in the possible imposition of sanctions."³³
- (b) As a corollary to the rule, federal courts in the Tenth Circuit bar attorneys from agreeing to provide *pro se* litigants representation absent clients' specific commitment to disclose attorney's assistance to the court upon filing.³⁴

³¹ The Tenth Circuit's holding in effect echoed ABA Informal Opinion 1414 (1978).

³² See John C. Rothermich, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 *FORDHAM L. REV.* 2687, 2697 (1999).

³³ *Duran v. Carris*, 238 F.3d 1268, 1273 (10th Cir. 2001).

³⁴ *Id.*; see *Barnett v. LeMaster*, 12 Fed. Appx. 774 (10th Cir. 2001) (admonishing federal public defender for failing to sign brief he prepared and filed on behalf of purportedly *pro se* habeas corpus petitioner); see also *In re Brown*, 354 B.R. 535, 542 (Bankr. N.D. Okla. 2006); *In re West*, 338 B.R. 906, 914 (Bankr. N.D. Okla. 2006) ("The practice of 'ghostwriting' pleadings by attorneys is one which has been met with universal disfavor in the federal courts."); Ass'n of the Bar of the City of New York Comm. on Prof. Ethics and Judicial Ethics, Formal Opinion Number 1987-2 (attorney cannot assist otherwise *pro se* litigant by drafting pleadings and other documents for use in litigation unless client commits beforehand to disclose attorney's assistance to adverse counsel and to the court; however, less substantial services would not require disclosure); cf. *In re Smith*, 76 F.3d 335, 336 (10th Cir. 1996) (disbarring attorney for violating court order suspending him from practice by filing briefs on behalf of four *pro se* litigants, even though he had personally signed two and included footnotes in the other two admitting his involvement).

(c) “[Attorneys have a duty], as officers of the court, to be candid and honest with the tribunal before which they appear. When an attorney has the client sign a pleading that the attorney prepared, the attorney creates the impression that the client drafted the pleading. This violates both Rule 11 and the duty of honesty and candor to the court. . . . According to these decisions, *ghostwriting is sanctionable under Rule 11 and as contempt of court.*”³⁵

(iii) *Ellis v. State of Maine*, 448 F.2d 1325 (1st Cir. 1971).

(a) Facts: *Pro se* litigant claimed ignorance of the law, but the brief appeared to have been written by someone with legal knowledge. The court acknowledged the possibility that the help could have been supplied by a “jailhouse lawyer.”

(b) Dicta: “[I]n some cases actual members of the bar represent petitioners, informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the bar, . . . in all cases, criminal as well as civil, of representing to the court that there is good ground to support the assertions made. We cannot approve of such a practice. If a brief is prepared in any substantial part by a member of the bar, it must be signed by him. We reserve the right, where a brief gives occasion to believe that the petitioner has had legal assistance, to require such signature, if such, indeed, is the fact.”³⁶

(g) Sanctions for ghostwriting

(a) Contempt of court. If an attorney knowingly and intentionally violates the procedural, ethical, and substantive rules of court by engaging in ghost-writing, contempt proceedings may be appropriate.³⁷

(b) Disciplinary proceedings. “[E]ven a single conviction for contempt of court may, in special circumstances, subject a lawyer to discipline.”³⁸

(c) Public admonition or monetary sanctions.³⁹

³⁵ *West*, 338 B.R. at 915 (emphasis added) (citing *In re Merriam*, 250 B.R. 724, 733 (Bankr. D. Colo. 2000)).

³⁶ *Ellis v. State of Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971) (dicta).

³⁷ *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1080 (E.D. Va. 1997).

³⁸ *Standing Comm. on Discipline of U.S. So. Dist. of Cal. v. Ross*, 735 F.2d 1168, 1171 (9th Cir. 1984) (citing *Greene v. Virginia State Bar Ass’n*, 411 F. Supp. 512, 517-18 (E.D. Va. 1976)).

³⁹ *See, e.g., In re Brown*, 354 B.R. 535, 545 (Bankr. N.D. Okla. 2006).

(3) Failing to Accurately State the Law

(a) Failure to Cite Adverse Authority in the Controlling Jurisdiction.

Three ABA Ethical Opinions have been issued to clarify the longstanding duty to cite adverse legal authority.⁴⁰

- (i) ABA Formal Ethics Opinion 149 (1935) (lawyer must disclose to the court legal authority adverse to the attorney’s position).
- (ii) ABA Formal Ethics Opinion 280 (1949) (lawyer’s duty to disclose adverse legal authority is not limited to controlling authorities; the lawyer should disclose any legal authority that the court would want to “clearly consider in deciding the case”).
- (iii) ABA Informal Ethics Opinion 84-1505 (1984) (lawyer must cite subsequent legal authority directly adverse to the attorney’s position even if the related issue is no longer directly before the court, but is likely to be revisited at a later stage of the proceeding).

(b) Cases

- (i) *Pierotti v. Torian*, 96 Cal. Rptr. 2d 553 (Ct. App. 2000).

Facts: On appeal from a judgment confirming an arbitration award, Appellant’s attorneys omitted clearly controlling authority and otherwise grossly violated California court rules governing appellate briefs. Specific misconduct included failing to cite to the record for facts included in the briefs; failing to confine the fact statement to documents in the record on appeal; and making unsupported ad hominem attacks on Appellees. Compounding the error, the reply brief included similar violations.

Held: Appellant’s opening brief made a “mockery” of the applicable court rules. Further, given the extremely narrow scope of appellate review of arbitration decisions, the appeal was frivolous. Finally, Appellant failed to cite or discuss a controlling decision from the same district of the California Court of Appeals addressing the precise issue raised in the brief.

[Appellant] prepared a completely inadequate record, failed to cite or discuss the most pertinent authority, and attempted to assassinate [Appellee’s] character based on facts that find no support in the record. Thus, it is this combination of substantive frivolousness *and* procedural misconduct that causes us to conclude [that Appellant] took this appeal

⁴⁰ Copies of the three ABA ethics opinions are attached to this outline.

solely for the purpose of delay or harassment, not because of any good faith belief in the validity of the appeal.⁴¹

[T]he tone of counsels' brief suggests it was more cathartic than tactical. However, an opening brief is not an appropriate vehicle for an attorney to "vent his spleen" after losing at an arbitration hearing. This is because, once the brief is filed, both the opponent and the state must expend resources in defending against and processing the appeal. Thus, an unsupported appellate tirade is more than just words on paper; it represents a real cost to the opposing party and to the state.⁴²

Consequences: The court assessed \$26,000 against Appellant and Appellant's counsel, divided equally, to reimburse the attorney fees Appellee incurred to defend the appeal, plus \$6,000 payable to the clerk of court to compensate the State for the cost of processing the appeal. Finally, Appellant's counsel was directed to file a copy of the court's decision with the State Bar.

(ii) *Tyler v. State*, 47 P.3d 1095 (Alaska Ct. App. 2001).

Facts: In the underlying DUI case, Defendant's counsel misstated the procedural facts in a way that concealed a fatal jurisdictional flaw. Counsel also failed to cite an Alaska Supreme Court decision directly adverse to his argument that the court had appellate jurisdiction, contending that he incorrectly remembered the facts of the current case.

Held: Facts supporting a claim of appellate jurisdiction are just as important as the substantive facts, and appellate counsel must make a reasonable effort to verify both before writing the brief. In this case, counsel violated that duty. Good faith is not enough; an attorney has an obligation to make objectively reasonable efforts to ascertain facts before making assertions in court documents.

Further, counsel failed to cite adverse authority in the controlling jurisdiction. Counsel claimed that the adverse authority was not controlling because it was factually distinguishable, that reasonable attorneys could conclude that the case was not controlling in the instant appeal, and therefore he had no obligation to cite the adverse authority. While the court conceded that the controlling nature of the case might have been debatable, it rejected counsel's argument that Rule 3.3(a)(3) required citation of only

⁴¹ *Pierotti v. Torian*, 96 Cal. Rptr. 2d 553, 563 n.9 (Ct. App. 2000).

⁴² *Id.* at 564.

“controlling” authority.

Rule 3.3(a)(3) does not speak of an attorney's failure to cite “controlling authority.” Instead, it speaks of an attorney's failure to cite authority in the “controlling jurisdiction” if that authority is “*directly adverse* to the [lawyer's] position.”

[The controlling case] was decided by our state supreme court, so it clearly constitutes “authority in the controlling jurisdiction.” The next question is whether [the case] was “directly adverse” to [counsel’s] position in [Defendant’s] appeal. The legislative history of Professional Conduct Rule 3.3(a)(3) and the commentaries on the rule show that “directly adverse” does not mean “controlling.” It refers to a broader range of cases and statutes.⁴³

Indeed, “the American Bar Association and various courts and commentators have adhered to a broader definition of ‘directly adverse’ for more than half a century.”⁴⁴ Specifically, counsel failed to cite the case in question even though the court would have reasonably considered it in deciding the underlying appeal, whether controlling or not; therefore, he had a duty to cite it when opposing counsel failed to do so.⁴⁵

Further, failing to cite adverse authority may implicate the lawyer’s duty to the client by “divest[ing] his client of the opportunity to assess intelligently the legal environment in which his case [will] be argued and [impeding his client's ability] to make informed decisions regarding whether to go forward with [the appeal].”⁴⁶

Consequences: The court assumed that counsel’s misstatement of jurisdictional facts was not intended to mislead and that he did not act in bad faith, even though he consciously decided not to cite the adverse authority in his brief. Considering all the circumstances, the court fined counsel \$250 for the two violations.

(c) Cited Authority Fails to Support Propositions; Inaccurate Citations.

- (i) *Georgopoulos v. Internat’l Broth. of Teamsters*, AFL-CIO, 942 F. Supp. 883 (S.D. N.Y. 1996).

Facts: Plaintiff’s attorney consistently cited inaccurately and cited cases that failed to support the propositions for which they were cited.

⁴³ *Tyler v. State*, 47 P.3d 1095, 1104 (Alaska Ct. App. 2001).

⁴⁴ *Id.* at 1109.

⁴⁵ *Id.* at 1107-08; *see* ABA Formal Opinion No. 280 (1949).

⁴⁶ *Tyler*, 47 P.3d at 1109.

Held: “[P]laintiffs' repeated misstatements, miscitations, and mistakes of law militate[d] against a finding that plaintiffs' counsel made ‘an inquiry reasonable under the circumstances,’ Fed. R. Civ. P. 11(b), into the [governing] law”⁴⁷

Consequences: The court chastised counsel for filing a brief that was “inaccurate, poorly drafted, and an embarrassing example of shoddy lawyering. [A]n attorney is an officer of the court . . . [H]e ‘plays his role badly, and trespasses against the obligations of professional responsibilities, when his desire to win leads him to muddy the headwaters of decision, [and] when, instead of lending a needed perspective to the controversy, he distorts and obscures its true nature.’”⁴⁸

(d) Frivolous Arguments; Lack of Adequate Legal Research

- (i) *Roeder v. Islamic Republic of Iran*, 195 F. Supp.2d 140, 184 (D.D.C. 2002), *aff'd*, 333 F.3d 228 (D.C. Cir. 2003), *cert. denied*, 542 U.S. 915 (2004).

Facts: An attorney representing a class of former Iran hostages failed to properly cite controlling statutes, advanced frivolous legal arguments, and omitted important adverse authority.

Held:

Plaintiffs' counsel in this case repeatedly presented meritless arguments to this Court, repeatedly failed to substantiate their arguments by reference to any supporting authority, and repeatedly failed to bring to the Court's attention the existence of controlling authority that conflicted with those arguments. [B]y way of example, this Court finds particularly problematic the following:

- Plaintiffs' total failure to bring to this Court's attention the Algiers Accords and implementing regulations despite the [statutory] requirement that plaintiffs “establish[ed] [their] claim or right to relief by evidence that is satisfactory to the Court.” 28 U.S.C. § 1608(e).
- Plaintiffs' failure to address any of the two hundred years of cases regarding conflicts between legislation and previously-enacted treaties and international agreements until ordered to do so by the Court.

⁴⁷ *Georgopoulos v. Internat'l Broth. of Teamsters, AFL-CIO*, 942 F. Supp. 883, 905 (S.D. N.Y. 1996).

⁴⁸ *Id.* at 905 (quoting 5A Charles A. Wright & Arthur R. Miller, *FEDERAL PRACTICE & PROCEDURE: CIVIL 2D* § 1334, at 56 n.14 (1990)).

- Plaintiffs request for a default judgment on liability prior to this Court hearing any evidence to support their claims, despite the clear statutory requirement in 28 U.S.C. § 1608(e).
- Plaintiff's motion to strike the government's motion to intervene that raised a completely frivolous argument and did not contain any discussion of the requirements of Federal Rule of Civil Procedure 24.
- Plaintiff's argument that the Algiers Accords are the legally invalid result of coercion [was] raised very late in these proceedings, and clearly contradicted Supreme Court precedent.

While such arguments in any case would raise concern, the Court is particularly concerned given the highly emotional nature of this case and the emotional toll it may have imposed on plaintiffs. Plaintiffs' counsel may argue that the United States government has unnecessarily dashed the hopes of recovery for these plaintiffs, but given the existing law on the abrogation of international agreements, the Court must ask how high those hopes were raised in the first place and on whose shoulders that responsibility should fall.⁴⁹

The court cautioned,

Unlike other professions, in the practice of law basic competence and ethical obligations are enforceable and intertwined. . . . What these requirements mean in practice is that ignorance is no excuse for an attorney. An attorney can not carry out the practice of law like an ostrich with her head in the sand, ignoring her duty to research and acknowledge adverse precedent and law. Attorneys are not free to assert any and all legal arguments they wish on behalf of their clients, without regard to existing precedent.⁵⁰

Consequences: The court criticized counsel but imposed no other sanctions.

(e) Selectively Doctoring Quoted Material

- (i) *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346 (Fed. Cir. 2003).

Facts: Department of Justice attorney unsuccessfully sought a motion for extension of time to file a response to opposing counsel's summary judgment

⁴⁹ Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d at 185.

⁵⁰ *Id.* at 184 (quoting Rule 3.3(a)(3) (prohibiting knowing failure to cite adverse authority)).

motion, and directed counsel to file the response “forthwith.” Counsel filed the response 12 days later. To support her position that she filed the response “forthwith,” counsel selectively cropped and edited quotations from precedents to conceal judicial interpretations that “forthwith” usually means just 24 hours.

Held: In a published opinion, the Third Circuit affirmed the unpublished reprimand originally imposed on counsel by the Court of International Trade. The lower court decided not to impose monetary sanctions, reasoning that an unpublished reprimand would be a sufficient deterrent. Counsel attempted to mislead the court by distorting quotations and citations, leaving out significant portions of the citations or cropping them, and failing to show that she (rather than the court) had supplied the emphasis in one passage. See below.

[Counsel’s] Motion

See *City of New York v. McAllister Brothers, Inc.*, 278 F.2d 708, 710 (1960) (“‘Forthwith’ means immediately, without delay, **or as soon as the object may be accomplished by reasonable exertion.**” Emphasis added.)

[Cited] Opinion

“Forthwith” means immediately, without delay, or as soon as the object may be accomplished by reasonable exertion. The Supreme Court has said of the word that “in matters of practice and pleading it is usually construed, and sometimes defined by rule of court, as within twenty-four hours.” *Dickerman v. Northern Trust Co.*, 1900 176 U.S. 181, 193, 20 S.Ct. 311, 315, 44 L.Ed. 423. *McAllister*, 278 F.2d at 710.

While we did not review the Supreme Court's decision in *Henderson v. United States*, 517 U.S. 654, 680, 116 S.Ct. 1638, 134 L.Ed.2d 880 (1996), in interpreting the meaning of “forthwith,” it is noteworthy that in his dissenting opinion, Justice Thomas, with whom The Chief Justice and Justice O'Connor joined, citing *Amella v. United States*, 732 F.2d 711, 713 (C.A.1984), stated that “[a]lthough we have never undertaken to define ‘forthwith’ ..., **it is clear that the term ‘connotes action which is immediate, without delay, prompt, and with reasonable dispatch.’**”

Although we have never undertaken to define “forthwith” as it is used in the SAA, it is clear that the term “connotes action which is immediate, without delay, prompt, and with reasonable dispatch.” *Amella v. United States*, 732 F.2d 711, 713 (C.A.9 1984) (citing Black's Law Dictionary 588 (5th ed.1979)). See also *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 192-193, 20 S.Ct. 311, 315, 44 L.Ed. 423 (1900). *Henderson*, 517 U.S. at 680, 116 S.Ct. 1638 (Thomas, J., dissenting).

Consequences: Court formally reprimanded the attorney and chastised the Department of Justice for filing an amicus brief supporting counsel's appeal of the sanction.

We find it troubling that the Department's Amicus Brief seeks to defend [counsel's] actions on the grounds that the Supreme Court decision . . . was not controlling authority; that the motion supposedly did not misrepresent the law; that "the issue of whether or not the Supreme Court had addressed the meaning of 'forthwith' is not important;" and that the court was not misled.⁵¹

The court cautioned the Department about its "own responsibility to establish high standards for its lawyers and to provide adequate training and supervision, so that episodes such as this are not repeated."⁵²

(f) Failing to Update Cited Authorities or Comply with the Law of the Case.

(i) *Salahuddin v. Coughlin*, 999 F. Supp. 526, 539 (S.D. N.Y. 1998).

Facts: New York Attorney General's office submitted a brief defending a pro se prisoner's civil rights claim. The brief failed to cite the law of the case and controlling authority, which could have been readily identified by Shepardizing other cited cases.

Held: Counsel's brief was misleading. The court "could not fathom" how defense counsel could submit such a brief.

Consequences: The court issued an order to show cause why the court should not sanction counsel personally, as well as the New York Attorney General's Office for inadequate supervision. Defense counsel was required to submit an affidavit as evidence that counsel's submissions were first reviewed and approved by a senior supervisor at the Attorney General's Office.

(4) Poor Writing

(a) Verbosity and Legalese

Judges find briefs written with legalese *less* persuasive than briefs written in ordinary language.⁵³

⁵¹ Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1358 (Fed. Cir. 2003) (citing Department of Justice amicus brief).

⁵² *Id.*

⁵³ Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 LOY. L.A. L. REV. 301 (1987).

(b) Incomprehensible arguments; failing to comply with appellate court rules.

- (i) *Catellier v. Depco, Inc.*, 696 N.E.2d 75, 79 (Ind. Ct. App. 1998).

Facts: Attorney’s brief was unclearly written. “Many of the arguments presented in the brief [were] so lacking in cogency that [the court could] discern the contentions only through the exertion of great effort. Such arguments are unacceptable on appeal.”⁵⁴ Also, the brief exceeded the court’s 30-page limit, used a font size smaller than the minimum 12-point typeface, and failed to include pinpoint citations. Finally, counsel substituted “accusatory statements” for “cogent argument,” including derogatory comments regarding the trial court’s decision.

Held: The brief was unacceptable, demonstrating “procedural bad faith through its flagrant disregard for the form and content requirements of our appellate rules”⁵⁵

Consequences: The court assessed attorney fees against appellate counsel, who alone was responsible for violating the court’s appellate rules to an extent warranting the attorney fee award.

(5) Failing to Accurately State Facts

(a) Gross Misstatements

- (i) *In re Guevara*, 41 S.W.3d 169, 173, 174 (Tex. App. 2001).

Facts: Attorney made gross misstatements to the court regarding the procedural posture of the case and otherwise grossly misstated important and material facts.

Held: Finding that counsel filed a petition that was clearly groundless and grossly misstated obviously important and material documents and facts, the court held that counsel failed to act in good faith.

Consequences: The court ordered counsel to pay \$5,000 toward the opposing counsel’s attorney fees. The court also ordered counsel to attend a continuing legal education course in advanced civil procedure. Finally, counsel was ordered to cease and desist from filing frivolous motions and pleadings in court, warning that failure to comply may be punishable as contempt.

⁵⁴ *Catellier v. Depco, Inc.*, 696 N.E.2d 75, 79 (Ind. Ct. App. 1998).

⁵⁵ *Id.* at 80.

(b) Misrepresenting Facts by Taking Deposition Testimony Out of Context

- (i) *In re Fletcher*, 424 F.3d 783 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1827 (2006).

Facts: In representing several clients in employment discrimination actions, Respondent, a Kansas City attorney who “has a history of using ethically questionable tactics in litigation,”⁵⁶ filed separate complaints against a single defendant employer. Each complaint made inaccurate and misleading written allegations based on selective use of quotations from previous deposition testimony in a manner that grossly mischaracterized the deponents’ statements.

Held: The Eighth Circuit concluded, “These and numerous other allegations paint a disturbing picture of an overzealous attorney who frequently resorts to unprofessional tactics in an attempt to harass, humiliate and intimidate deponents and their counsel.” The court concluded that Respondent “went beyond zealous representation into deceptive and misleading practices.”⁵⁷

Consequences: The Eighth Circuit affirmed the order of the United States District Court for the Western District of Missouri, sitting *en banc*, which suspended Respondent from practicing law for three years.

(c) Deception by Omission of Material Facts from Pleadings

- (i) *In re Lazzo*, ___ Kan. ___, 150 P.3d 887 (Feb. 2, 2007).

Facts: At the request of another attorney who owned the office building in which Respondent leased space, Respondent filed a petition in Sedgwick County, Kansas for a name change for a client who worked for the other attorney. Respondent knew the client had been charged in Colorado with child sexual abuse. He failed to investigate the status of the outstanding charges before filing the petition; had he done so, he would have learned of the outstanding Colorado warrant for the client’s arrest. The *ex parte* petition alleged that the proposed change of name would not hinder or defeat the client’s legal obligations.

Held: By submitting the petition for change of name without disclosing the client’s criminal status, Respondent violated KRPC 3.3(d) and 8.4(d) by failing to inform the court of all material facts known to Respondent to enable the court to make an informed decision.

Consequences: The court sanctioned Respondent by public censure, in part because his actions were the result of negligent rather than intentional conduct.

⁵⁶ *In re Fletcher*, 424 F.3d 783, 785 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1827 (2006).

⁵⁷ *Id.* at 795.

(6) Citing Unpublished Opinions in Violation of Court Rules

- (a) *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wash. App. 542, 13 P.3d 240 (2000).

Facts: In Defendant mortgage company’s appellate brief, counsel cited and discussed at length an unpublished decision of the Washington Court of Appeals, contrary to Washington Rule of Appellate Procedure 10.4(h). Plaintiffs sought sanctions.

Held: Washington statutes preclude a court of appeals panel from publishing nonprecedential cases, and Rule 10.4(h) prohibits their citation as authority. Therefore, defense counsel violated the appellate rules by citing the unpublished opinion as authoritative.

Consequences: The court assessed a monetary sanction of \$ 500 against defense counsel.

- (b) *Hart v. Massaneri*, 266 F.3d 1155 (9th Cir. 2001).

Facts: The Ninth Circuit panel, Judge Alex Kozinski presiding, ordered Appellant’s counsel to show cause why he should not be sanctioned for citing an unpublished opinion of the court in the opening brief, in violation of the Ninth Circuit’s local rules barring citation of unpublished opinions. Counsel cited the decision in a footnote (not in the Table of Authorities) for the purpose of demonstrating that the Ninth Circuit had never addressed the merits of the issue.

Counsel responded by suggesting that Ninth Circuit’s rule restricting citation of unpublished opinions might be unconstitutional, citing *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

Held: The court resoundingly rejected the holding in *Anastasoff*, holding that the Ninth Circuit’s rules barring citation of unpublished decisions were constitutional. Counsel violated the rule by citing to the court’s unpublished opinion.

Consequences: After 26 pages defending the rule barring citation of unpublished opinions, Judge Kozinski nevertheless concluded, “Our rules are obviously not meant to punish attorneys who, in good faith, seek to test a rule's constitutionality. We therefore conclude that the violation was not willful and exercise our discretion not to impose sanctions.”⁵⁸

⁵⁸ *Hart v. Massaneri*, 266 F.3d 1155, 1180 (9th Cir. 2001).

- (c) Recent Development: Fed. R. App. P. 32.1, effective December 1, 2006.
Federal circuit courts of appeal may no longer prohibit or sanction attorneys who cite “unpublished” federal judicial opinions, orders, judgments, or other written dispositions if (1) designated "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and (2) issued on or after January 1, 2007.⁵⁹
- (d) State courts are likely to continue the trend in favor of loosening appellate court rules restricting or prohibiting citation of unpublished opinions. About half the states currently have restrictive rules; the other half permit attorneys to cite unpublished opinions, at least for whatever persuasive value the court wishes to give them.

(7) **Violation of Court Rules**

- (a) *N/S Corp. v. Liberty Mutual Ins. Co.*, 127 F.3d 1145 (9th Cir. 1997).

Facts: Appellant violated court rules by (1) omitting a statement regarding appellate standard for review, (2) offering insufficient citations and statements of law, (3) exceeding the brief word limit, (4) citing a depublished opinion, (5) filing a reply brief that omitted the table of contents and table of authorities.

Held:

We are passing through a period in the history of this country when the pressures upon the courts are extremely high. They are so because of the volume of work as more and more people seek to have the courts resolve their disputes and vindicate their rights. But resources are limited. In order to give fair consideration to those who call upon us for justice, we must insist that parties not clog the system by presenting us with a slubby mass of words rather than a true brief. Hence we have briefing rules. *See Fed. R. App. P. 28.*⁶⁰

“[A]ppellant has approached our rules with such insouciance that we cannot overlook its heedlessness.”⁶¹

Consequences: The court struck Appellant's briefs and dismissed the appeal for failure to comply with briefing rules.

⁵⁹ Fed. R. App. P. 32.1. A copy of the newly adopted rule is attached to this outline.

⁶⁰ *N/S Corp. v. Liberty Mutual Ins. Co.*, 127 F.3d 1145, 1146 (9th Cir. 1997).

⁶¹ *Id.*

(8) Civility in Advocacy Writing; Obligations as Officers of the Court

(a) Refusing to file responsive briefs

- (i) *Lee v. Legacy Bank*, 2007 WL 259840 (Wis. Ct. App. Jan. 30, 2007).

Facts: Respondent notified the court by letter that for economic reasons, it would not file a responsive brief to a *pro se* appeal from an order dismissing a complaint small claims court. The letter suggested that the Court of Appeals simply review the record and affirm.

Held: By refusing to file a responsive brief, Appellee violated Wis. Stat. R. 809.19(3), which requires respondents to file appellate briefs. “Giving reasons to sustain its position is a *party’s* obligation, and is not any court’s function. If a party defaults in its obligation to show why it should prevail, it cannot expect a court to assume its burden.”⁶²

Consequences: Respondent was ordered to file a responsive brief within 30 days. If not filed on time, the court would issue a summary reversal and direct entry of a default judgment against Respondent for whatever amount of damages the Plaintiff might be able to prove.⁶³

(b) Disrespect to lower courts and tribunals

- (i) *Peters v. Pine Meadow Ranch Home Ass’n*, 2007 UT 2, ___ P.3d ____, 2007 WL 79231 (Jan. 12, 2007).

Facts: Court of Appeals made a factual error regarding the signatories to a plat and improperly interpreted controlling precedent. Petitioner’s counsel wrote a brief to the Utah Supreme Court, not only pointing out the error but also accusing the author of the court of appeals opinion of improper motives. For example:

“Good judges never fabricate evidence because the actual evidence is the foundation for their decisions.”

“[I]f judges start with decision [sic] they want to reach for reasons of prejudice, bias, corruption or whatever, and then work backwards to the evidence, they may fabricate the evidence they need to make their decisions plausible.”

“So, if a court fabricates evidence, whether intentionally, negligently, or through innocent mistake, it destroys the moral premise of the legal system. A judge who fabricates

⁶² *Lee v. Legacy Bank*, 2007 WL 259840, slip op. at 2 (Wis. Ct. App. Jan. 30, 2007).

⁶³ *Id.* at 3.

evidence, even from a sincere motive to do justice in a particular case, has no moral standing whatsoever.”

Held: Petitioner’s counsel elected to present the appellate argument in “an accusatory, offensive, and disrespectful manner.”⁶⁴

There is a misconception among some lawyers and clients that advocacy can be enhanced by personal attacks, overly aggressive conduct, or confrontational tactics. Although . . . this type of advocacy may occasionally lead to some short-term tactical advantages, our collective experience as a court at various levels of the judicial process has convinced us that it is usually highly counterproductive. It distracts the decision-maker from the merits of the case and erodes the credibility of the advocate. *Credibility is often directly tied to civility and professionalism. Judges, jurors, and other lawyers are more likely to believe a lawyer who is courteous and treats others with dignity and respect.* Counsel in the case at bar would have been far more effective had he focused exclusively on the facts and the law without making his additional commentary disparaging and insulting the judiciary.⁶⁵

Consequences: While conceding that the Court of Appeals misstated facts and misinterpreted controlling law, the Utah Supreme Court struck the Petitioner’s briefs, declined to address the issues on which review had been granted, affirmed the result, and assessed attorney fees against Petitioner’s counsel.

(ii) *In re Wilkins*, 777 N.E.2d 714 (Ind. 2002).

Facts: Respondent, an experienced appellate attorney, revised an appellate brief drafted by in-house counsel for client insurance company after losing before the Indiana Court of Appeals. In the brief supporting the petition to transfer to the Indiana Supreme Court, respondent included the following footnote:

² 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 . . . , and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision).

⁶⁴ *Peters v. Pine Meadow Ranch Home Ass’n*, 2007 UT 2, ¶ 19, ___ P.3d ___, 569 Utah Adv. Rep. 20, 2007 WL 79231, 569 Utah Adv. Rep. 20 (Jan. 12, 2007).

⁶⁵ *Id.* at ¶ 21 (emphasis added).

Held: Respondent violated I.R.P.C. 8.2(a) by making statements he knew were false, or that he made with reckless disregard as to their truth or falsity concerning the integrity or qualifications of a judge, or in this case, a three-judge panel of the Indiana Court of Appeals. The comments in footnote 2 violated Rule 8.2(a) because they were made with reckless disregard as to their truth or falsity concerning the integrity of the three-judge Court of Appeals panel.

Consequences: The court suspended Wilkins from practicing law for 30 days.

(c) Civility in correspondence to other counsel

- (i) *In re Gershater*, 270 Kan. 620, 17 P.3d 929 (Kan. 2001).

Facts: While her law license was suspended, Respondent retained counsel to sue her landlord for specific performance of an oral office lease. The complaint alleged that she was an attorney and sought damages, in part, for “interruption of her profession.” After landlord was granted summary judgment, Respondent filed suit against her counsel and his law firm alleging malpractice in handling her claim. She later dismissed the case with a full settlement and mutual release.

Two days later, she wrote a “vicious, offensive, and extremely unprofessional” letter with harsh personal criticism, including “a number of vile and unprintable epithets” directed to her counsel and the firm’s principal. While the complaint was under investigation, she insisted the letter had been appropriate and truthful. She also claimed the letter’s contents were protected by attorney-client privilege.

Held: The court rejected Respondent’s argument that she had a First Amendment right to express her opinion to her counsel. However, “[u]pon admission to the bar of this state, attorneys assume certain duties as officers of the court. Among [them] is the duty to maintain the respect due to the courts of justice and to judicial officers [and to opposing counsel].”⁶⁶ The letter’s contents adversely reflected on her fitness to practice law. While it was of relatively minor importance given Respondent’s other violations, it was “without doubt, lacking in courtesy and civility. The abusive and threatening nature of the language has no place in the legal world.”⁶⁷

Consequences: The court indefinitely suspended Respondent’s license.

⁶⁶ *In re Gershater*, 270 Kan. 620, 630, 17 P.3d 929, 936-37 (Kan. 2001).

⁶⁷ *Id.* at 629, 17 P.3d at 936.

(d) A Reprise: “[C]ivility is the trademark of a winner.”⁶⁸

While incivility in written discourse is more hidden from the public and hence less frequently publicized than its oral counterpart, the problems are similar. Incivility in legal writing is just as damaging to the legal profession. “Briefs and memos to the courts often contain hyperbole and register accusations against other counsel within their substantive arguments.”⁶⁹ The judiciary all too frequently complain of misleading statements in written submissions by attorneys.⁷⁰

Much has been said and written about the problem, but the legal profession collectively must respond. Judges must have the courage to impose sanctions, if and when necessary, to deter hardball tactics that reflect poorly on the legal profession. Courts must adopt high standards of civility and decency that far exceed the minimum requirements of professional responsibility. Practicing attorneys must stop engaging in uncivil conduct and refuse to tacitly condone it among others. And law schools must do more to instill values of professionalism and civility throughout the law school curriculum, far beyond the traditional course covering the Model Rules of Professional Conduct.

For these efforts to make a significant difference, the legal profession must reach a consensus that lack of civility is a losing strategy. If “Rambo-style” litigation tactics cease to prevail, smart advocates will take a new approach. Winning strategies for advocacy writing are those that advance the client’s cause by marshalling the facts and law not only persuasively, but also truthfully, civilly, and professionally. This should be our message to law students:

Show everyone that *civility* is the trademark of a winner. Every time that you make uncivil lawyers lose, you score a big victory for civility. Every time an abrasive, abusive, hostile, harassing, combative, discourteous, hardball, win-at-all costs, take no prisoners, scorched earth, Rambo lawyer loses, it's a great day for civility. So if you don't have the drive or the ego to win for your client and for yourself, do it for the cause. Winning, and winning the right way, is a great motivation for others to be civil.⁷¹

“Lawyers, as officers of the court, should be problem-solvers, harmonizers, and peacemakers -- the healers, not the promoters, of conflict. In the words of Abraham Lincoln: ‘As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough.’”⁷²

⁶⁸ Robert C. Josefsberg, *Civility*, International Academy of Trial Lawyers Dean’s Address 2 (Mar. 30, 1996)).

⁶⁹ *Id.*

⁷⁰ Raymond M. Ripple, Note, *Learning Outside the Fire: The Need for Civility Instruction in Law School*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 359 (2001).

⁷¹ Robert C. Josefsberg, *The Topic is Civility*, OR. ST. B. BULL. 19 (Jan. 1999).

⁷² Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949 (1995) (quoting Abraham Lincoln, *Notes for a Law Lecture* (July 1, 1850), in THE LIFE AND WRITINGS OF ABRAHAM LINCOLN 327-28 (Phillip Van Doren Stern ed., 1940)).

Utah Standards of Professionalism and Civility

To enhance the daily experience of lawyers and the reputation of the Bar as a whole, the Utah Supreme Court, by order dated October 16, 2003, approved the following Standards of Professionalism and Civility as recommended by its Advisory Committee on Professionalism.

Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

Lawyers should exhibit courtesy, candor and cooperation in dealing with the public and participating in the legal system. The following standards are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

We expect judges and lawyers will make mutual and firm commitments to these standards. Adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this State. We further expect lawyers to educate their clients regarding these standards and judges to reinforce this whenever clients are present in the courtroom by making it clear that such tactics may hurt the client's case.

Although for ease of usage the term "court" is used throughout, these standards should be followed by all judges and lawyers in all interactions with each other and in any proceedings in this State. Copies may be made available to clients to reinforce our obligation to maintain and foster these standards. Nothing in these standards supersedes or detracts from existing disciplinary codes or standards of conduct.

1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.
4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.
5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.
6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.
7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.
8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.
9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.
10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.
11. Lawyers shall avoid impermissible ex parte communications.
12. Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.
13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court." Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

American Bar Association

Informal Opinion 1414 - Conduct of Lawyer Who Assists Litigant Appearing *Pro Se*

June 6, 1978

On behalf of the State Bar Association you inquire whether there are ethical restrictions applicable to a lawyer who, without entering an appearance as an attorney of record, counsels and advises a litigant who purports to appear before the Court *pro se*. Specifically you inquire about the propriety of a lawyer's conduct who assisted a "*pro se*" litigant in preparing jury instructions, memoranda of authorities and other documents submitted to the Court. You state that the lawyer involved also "sat in on" the trial and at one point during the trial informed the Court that he was "merely advising the *pro se* litigant on what he considered to be procedural matters."

Although it is not entirely clear from your inquiry, we assume that until the lawyer "sat in on" the trial and there counselled the litigant on "procedural matters" neither the Court nor the (lawyers) for the other party or parties knew of the lawyer's previous participation on behalf of the litigant or the extent of it.

It appears that the litigant was receiving active and extensive assistance from the lawyer in preparation for the trial as well as during the trial itself and, therefore, had not proceeded *pro se* as the Court and counsel for the other party or parties would have believed. In our opinion, the litigant, having received the extent of assistance indicated in your inquiry, has engaged in a misrepresentation (perhaps unwitting) by professing to be without representation, at least until it was otherwise disclosed during the trial when, in truth, he was receiving active and rather extensive assistance of undisclosed counsel. A lawyer who engages in such conduct is, in our view, involved in the litigant's misrepresentation contrary to DR 1-102(A)(4) which provides:

"A lawyer shall not: . . . (4) Engage in conduct involving dishonestly, fraud, deceit, or misrepresentation."

We do not intend to suggest that a lawyer may never give advice to a litigant who is otherwise proceeding *pro se*, or that a lawyer could not, for example, prepare or assist in the preparation of a pleading for a litigant who is otherwise acting *pro se*.

Obviously, the determination of the propriety of such a lawyer's actions will depend upon the particular facts involved and the extent of a lawyer's participation on behalf of a litigant who appears to the Court and other counsel as being without professional representation. Extensive undisclosed participation by a lawyer, however, that permits the litigant falsely to appear as being without substantial professional assistance is improper for the reasons noted above.

As you observed in your inquiry, the practice has been condemned in *Klein v. H.N. Whitney, Goadby & Co.*, 341 F. Supp. 699 (S.D. N.Y. 1971) and in the related case of *Klein v. Spear, Leeds & Kellogg*, 309 F. Supp. 341 (S.D. N.Y. 1970).

American Bar Association

Formal Ethics Opinion 149

It is the Duty of an Attorney Appearing in a Case to Advise the Court of Decisions Adverse to his Client's Contentions that are Known to Him and Unknown to his Adversary.

July 17, 1935

CANONS INTERPRETED: PROFESSIONAL ETHICS 15, 22, 32

A member of the Association requests our opinion on the following question:

Is it the duty of a lawyer appearing in a pending case to advise the court of decisions adverse to his client's contentions that are known to him and unknown to his adversary?

The opinion of the committee was stated by MR. PHILLIPS, Messrs. Carney, Sutherland, Strother, Martin, Harris and Arant concurring.

A lawyer is an officer of the court (Ex parte Garland, 4 Wall 333, 378; People vs. Gorman, 178 N. E. 880, 346 Ill. 432; Bowles vs. United States [C. C. A. 4] 50 Fed. [2d] 848). His obligation to the public is no less significant than his obligation to his client (In re Bergeron, 220 Mass. 472, 107 N. E. 1007). His oath binds him to the highest fidelity to the court as well as to his client (In re Bergeron, supra). It is his duty to aid the court in the due administration of justice (Dodge vs. State, 104 Ind. 284, 39 N. E. 745; People vs. Gorman, supra; United States vs. Frank, 53 Fed. [2d] 128).

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness. Canon 22.

We are of the opinion that this Canon requires the lawyer to disclose such decisions to the court. He may, of course, after doing so, challenge the soundness of the decisions or present reasons which he believes would warrant the court in not following them in the pending case.

American Bar Association

Formal Ethics Opinion 280

An Attorney Should Advise the Court of Decisions Adverse to his Case Which Opposing Counsel Has Not Raised if the Decision is One Which the Court Should Clearly Consider in Deciding the Case, if the Judge Might Consider Himself Misled by the Attorney's Silence, or if a Reasonable Judge Would Consider an Attorney Who Advanced a Proposition Contrary to the Undisclosed Opinion Lacking in Candor and Fairness to Him.

June 18, 1949

CANONS INTERPRETED: PROFESSIONAL ETHICS 5, 15, 22

A member of the Association has asked the Committee to reconsider and clarify the Committee's Opinion 146.

The Committee's Opinion was stated by MR. DRINKER, Messrs. Brand, Jackson, Jones, Miller, White and Wuerthner concurring.

Opinion 146, rendered July 17, 1935, was in response to a question by a member of the Association as follows:

Is it the duty of a lawyer appearing in a pending case to advise the court of decisions adverse to his client's contentions that are known to him and unknown to his adversary?

The Opinion, stated by Judge Phillips and concurred in by the other members of the Committee, was as follows:

A lawyer is an officer of the court (Ex parte Garland 4 Wall 333, 378; People vs. Gorman, 178 N.E. 880, 346, Ill. 432; Bowles vs. United States [C.C.A. 4] 50 Fed [2d] 848). His obligation to the public no less significant than his obligation to his client (In Re Bergeron, 220 Mass. 472, 107 N.E. 1007). His oath binds him to the highest fidelity to the court as well as to his client (In Re Bergeron, supra). It is his duty to aid the court in the due administration of justice (Dodge vs. State, 140 Ind. 284, 39 N.E. 745; People vs. Gorman, supra; United States vs. Frank, 53 Fed. [2d] 128).

The conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness. Canon 22.

We are of the opinion that this Canon requires the lawyer to disclose such decisions to the court. He may, of course, after doing so, challenge the soundness of the decisions or present reasons which he believes would warrant the court in not following them in the pending case.

It will be noted that in the last paragraph the Committee refers to the right of the lawyer to 'challenge the soundness of the decisions or present reasons which he believes would warrant

the court in not following them in the pending case,' but does not refer to his right to 'distinguish' them, thus indicating that the Committee had in mind only decisions which were directly adverse.

In the brief summary in the 1947 edition of the Committee's decisions (p. 17), Opinion 146 was thus summarized:

Opinion 146--A lawyer should disclose to the court a decision directly adverse to his client's case that is unknown to his adversary.

The lawyer, though an officer of the court and charged with the duty of 'candor and fairness,' is not an umpire, but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its inherent soundness. Nor is he under any obligation to suggest arguments against his position. His personal belief in the soundness of his cause or of the authorities supporting it, is irrelevant. See Canons 5 and 15.

We would not confine the Opinion to 'controlling authorities'--i.e., those decisive of the pending case--but, in accordance with the tests hereafter suggested, would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.

Of course, if the court should ask if there are any adverse decisions, the lawyer should make such frank disclosure as the questions seems to warrant. Close cases can obviously be suggested, particularly in the case of decisions from other states where there is no local case in point (see *Glebe Company v. Trustees*, 37 T.L.R. 436 [1921 A.C. 66] where the dicta of Lord Birkenhead are very broad. Also 15 Law Quarterly Rev. 259, 273-275; 69 Albany L.J. 300, 303; 'The Seven Lamps of Advocacy' by Edward A. Parry (1923) pp. 19-20, 'The Advocate' (Cecil Walsh) (2d Ed.) p. 100). A case of doubt should obviously be resolved in favor of the disclosure, or by a statement disclaiming the discussion of all conflicting decisions.

Canon 22 should be interpreted sensibly, to preclude the obvious impropriety at which the Canon is aimed. In a case involving a right angle collision or a vested or contingent remainder, there would seem to be no necessity whatever of citing even all the relevant decisions in the jurisdiction, much less those from other states or by inferior courts. Where the question is a new or novel one, such as the constitutionality or construction of a statute, on which there is a dearth of authority, the lawyer's duty may be broader. The test in every case should be: Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?

Judge Phillips, who wrote Opinion 146, has authorized the present Committee to state that he concurs in the foregoing.

American Bar Association

Informal Opinion 84-1505 -- Duty to Disclose Adverse Legal Authority

March 5, 1984

A lawyer who learns of a controlling court decision which may be interpreted as adverse to his client's position must promptly advise the court, even though the issue is not presently under consideration but may be revived at some later stage in the proceedings.

A trial court has denied defendants' motions to dismiss in a case of first impression interpreting a recently enacted statute. There was considerable analogous case law supporting the conclusion of the trial court. Some months later, during the pendency of the case, an appellate court in another part of the state, not supervisory of the trial court, handed down a decision interpreting the exact statute at issue in the motions to dismiss. The appellate decision, which controls the trial court until its own appellate court passes on the precise question involved, can be interpreted two ways, one of which is directly contrary to the holding of the trial court in denying the motions to dismiss.

Plaintiff's lawyer has learned of the recent decision and asks whether he has a duty to disclose it to the court. He notes that the particular issue is not presently under consideration in the case but may well be revived because the prior ruling was not a final, appealable order. The inquirer asks when, if he has a duty, must he make disclosure to the court. Must he do so immediately or may he await the conclusion of the appeals process in the other case and the revival of the precise issue by the defendants? Finally, the inquirer asks whether disclosure would constitute a concession that there are no reasonable distinctions between the case at bar and the decision of the appeals court.

The Committee believes, under the circumstances presented, that plaintiff's lawyer must disclose the newly discovered authority to the court and that he must do so promptly. Of course, he may challenge the soundness of the other decision, attempt to distinguish it from the case at bar, or present other reasons why the court should not follow or even be influenced by it.

Rule 3.3(a)(3) of the Model Rules of Professional Conduct provides '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.' This provision is virtually identical to its predecessor, DR 7-106(B)(1) of the Model Code of Professional Responsibility. Both provisions continue essentially unchanged the theme of Canon 22 of the Canons of Professional Ethics adopted by the American Bar Association in 1908.

Under Canon 22, this Committee issued two opinions bearing on the question presented. In 1935 the Committee decided that a lawyer has a duty to tell the court in a pending case of decisions, unknown to his adversary, that are adverse to his client's contentions. We said, 'He may, of course, after doing so, challenge the soundness of the decisions or present reasons which he believes would warrant the court in not following them in the pending case.' In 1949,

the Committee, in Formal Opinion 280, first interpreted Opinion 146 to limit the duty of disclosure to only those decisions which were 'directly adverse.' We then continued:

We would not confine the Opinion to 'controlling authorities'-- i.e., those decisive of the pending case--but . . . would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.

The Committee added: 'A case of doubt should obviously be resolved in favor of the disclosure, or by a statement disclaiming the discussion of all conflicting decisions.' We felt the duty should be interpreted sensibly so as not to produce absurd results, but concluded that 'Where the question is a new or novel one, such as the constitutionality or construction of a statute, on which there is a dearth of authority, the lawyer's duty may be broader.' (emphasis added) We concluded with this test:

Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?

In the question presented in this inquiry, the recent case is clearly 'legal authority in the controlling jurisdiction' and, indeed, is even controlling of the trial court until such time as its own appellate court speaks to the issue. Under one interpretation of the decision, it is clearly 'directly adverse to the position of the client.' And it involves the 'construction of a statute on which there is a dearth of authority.'

The Committee believes that the court must be advised promptly. Model Rule 3.3(b) provides that the duty of disclosure continues 'to the conclusion of the proceeding.' This, according to the comment, fixes an outside time limit on the duty: 'The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.' There is no such precision in the Model Code. DR 7-106(B) fixes the duty on a lawyer 'in presenting a matter to a tribunal. . . .' The Committee believes the duty continues in the circumstances here presented under either guide, where the same case is still pending in the same court, notwithstanding that the precise issue is not presently being considered by the court.

While there conceivably might be circumstances in which a lawyer might be justified in not drawing the court's attention to the new authority until a later time in the proceedings, here no delay can be sanctioned. The issue is potentially dispositive of the entire litigation. His duty as an officer of the court to assist in the efficient and fair administration of justice compels plaintiff's lawyer to make the disclosure immediately.

In a strikingly similar case, *Seidman v. American Express Company*, 523 F. Supp. 1107 (E.D. Pa. 1981), the court, applying DR 7-106(B)(1), came to the same conclusion on the duty to disclose as does the Committee in this opinion. There a trial court commended defendant's lawyer for calling attention, after oral argument, to a recent case that severely undercut the

position defendant had taken at oral argument, and consequently denied defendant's motion for summary judgment. See also *Miller v. Aaacon Auto Transport Inc.*, 447 F. Supp. 1201 (S.D. Fla. 1978); *United States v. Slodov*, 79-1 USTC P 9215; vacated and remanded on other grounds, 675 F.2d 808, 82-1 USTC P 9323 (6th Cir. 1982).

The inquirer should understand that the ABA Model Rules of Professional Conduct may not have been adopted in his jurisdiction, and accordingly, he should review the professional responsibility code and relevant law in his jurisdiction.

Federal Rule of Appellate Procedure 32.1

Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

- (i) designated as “unpublished,” “not for publication,” “nonprecedential,” “not precedent,” or the like; and
- (ii) issued on or after January 1, 2007.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

(As added Apr. 12, 2006, eff. Dec. 1, 2006.)

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-2636

In Re: Disciplinary Matter of	*	Appeal from the United States
Michael Robert Fletcher,	*	District Court for the
	*	Western District of Missouri.
Appellant.	*	

Submitted: April 14, 2005
Filed: September 23, 2005

Before RILEY, FAGG, and GRUENDER, Circuit Judges.

GRUENDER, Circuit Judge.

The United States District Court for the Western District of Missouri (“Western District”)¹ suspended Michael Robert Fletcher from the practice of law before that court for three years for numerous violations of the Missouri Rules of Professional Conduct, which apply to practice before the Western District. W.D. Mo. R. 83.5(c)(2). Fletcher appeals, arguing that the Western District erred in expanding the scope of the investigation into his misconduct beyond the facts that triggered the disciplinary proceedings, that two district judges should have recused themselves from the proceedings against him, and that the Western District denied Fletcher adequate pre-trial discovery. Fletcher also contends that the Western District erred

¹The United States District Court for the Western District of Missouri, sitting en banc.

in some of its findings of misconduct and that the sanctions imposed were too harsh given the circumstances of his case. We affirm.

I. BACKGROUND

Fletcher is an attorney with the firm of Simpson Sanders & Fletcher, L.C. in Kansas City, Missouri. He specializes in the area of employment discrimination. He was admitted to the Missouri bar on October 10, 1996, and to the Western District bar on May 20, 1998. Fletcher has a history of using ethically questionable tactics in litigation. In 2000, Western District Judge Ortrie D. Smith described Fletcher's conduct in depositions as "combative" and "macho posturing," in part because of comments that were "belittling" and "threat-like." *Ross v. Kansas City Power & Light Co.*, 197 F.R.D. 646, 657-58, 660 (W.D. Mo. 2000). Shortly thereafter, Western District Judge Scott O. Wright criticized Fletcher for using "race baiting" tactics in another case. See Mark Morris, *Judge Denounces Lawyer's Comments; Police Settlement Split among Family*, KANSAS CITY STAR, Oct. 12, 2000, at B1.

A. Turner Litigation

On August 25, 2000, Fletcher filed a lawsuit for a client, William Turner, in the Western District against Honeywell Federal Manufacturing & Technologies LLC ("Honeywell"). The lawsuit ("Turner litigation") alleged that Honeywell had denied Turner promotions on the basis of race. Early in the Turner litigation, the parties participated in mediation under the Western District's Early Assessment Program. As the mediation session concluded, Fletcher began directing profanities at Jill Marchant, Honeywell's in-house counsel, and Karen Cain and William Martucci, Honeywell's outside counsel. Among other things, Fletcher accused Marchant of being a "fucking liar." Needless to say, the parties were unable to resolve the case in mediation.

In conjunction with the Turner litigation, Daniel Craig, an associate working for Fletcher, deposed Karen Clegg, former president of Honeywell, on June 11, 2001. Craig asked Clegg whether she had made a comment that “the white man is an endangered species at Honeywell.”

Craig: Okay. Do you recall being in a management meeting in approximately early 1999 where you made a comment, in fact, wrote on a board something to the effect that the white man is an endangered species at Honeywell?

Clegg: I don't know when – what year that would have been made. I do recall that we provided diversity training to associates, and the trainers, and I happened to be one of the trainers, set out a chart, I believe it was, of perceptions that people had about each other, perceptions that are typically inaccurate and that may have – I believe that one of the statements on the presentation material that was prepared for the trainers.

Craig: But did you actually say something to that effect?

Clegg: I think it was on the chart and I stated that was a perception. I certainly never presented it as my perception. As I said, it was part of diversity training to understand how people misperceive each other.

Fletcher deposed Jimmie Banks, former Honeywell Manager of Human Resources Services and Diversity, on June 22, 2001. During the deposition of Banks, Fletcher asked a number of pointed questions about vernacular allegedly used in the African-American community. The following exchange is representative of Fletcher's behavior during the deposition of Banks:

Fletcher: Now do you think if I were to refer to your wife as a nigger bitch that would be highly offensive?

Banks: Yes, sir.

Fletcher: Okay. And why would it be highly offensive?

Banks: Because of the nature of the term.

...

Fletcher: Okay. Now, tell me why you think the term nigger bitch would be offensive.

Banks: In our culture, bitch is referred to as a female dog. In our culture, the word nigger in certain contexts is an offensive term. And you put those two together and you have very offensive identifiers.

Fletcher: Now tell me a context in which it's okay to refer to an African American as a nigger.

Banks: I don't know of any.

Fletcher: Didn't you just testify, sir, that, quote in certain contexts it's offensive?

Banks: Well, as I see it personally, it's always offensive. In terms of how certain people might use it, it could be a term of affection in our culture.

Fletcher: When you say "our culture," what do you mean?

Banks: In our culture. Black culture.

Fletcher relentlessly pressed this line of questioning until Honeywell's counsel objected. As part of the exchange between attorneys and in the presence of the witness, the plaintiff, the court reporter and others, Fletcher characterized Banks's testimony as follows: "The fact that this man has testified that for 40 years he refers

to African Americans as niggers, the fact that this man has testified that for 40 years he found it a compliment to be referred to as nigger is shocking.” Fletcher added, “This man, in my opinion, has done nothing but step on the backs of black people at Honeywell so he can get further, he could be further ahead.” The tirade concluded with Fletcher calling Banks a “self-hating racist” and comparing him to those “Jews that were willing to turn in other Jews to [the Nazis to] protect themselves.”

B. Honeywell Complaints

Fletcher eventually learned of several additional individuals who claimed they also suffered racial discrimination at the hands of Honeywell. Initially, Fletcher sought to join these individuals as additional plaintiffs in the Turner litigation. However, after the district court denied his request, Fletcher filed eighteen separate complaints against Honeywell on behalf of these new plaintiffs (the “Honeywell complaints”). These cases then were assigned to numerous judges in the Western District, except Judge Smith, who had recused himself under 28 U.S.C. § 455 from the one case that was assigned to him.

As in the Turner litigation, neither Clegg nor Banks were named as defendants or accused of any wrongdoing. Nonetheless, each of the eighteen complaints contained inaccurate and misleading allegations purportedly based on the deposition testimony that Clegg and Banks gave during the Turner litigation. For example, the Honeywell complaints contained the following with regard to Banks:

- b. [Banks testified that r]eferring to an African-American as a **nigger**, “could be a **term of affection** in our culture.” p.7;
- c. “It can be a **compliment** if I say **you’re my nigger**,” to an African-American. p.8-9;

- d. He himself has several people who compliment him by calling him a nigger. p.9-10;
- e. He **enjoys being called a nigger** by these people. p.10-11;
- f. It makes him **happy** when these **people call him a nigger**. p.14;
- g. Non-African Americans may **call him a nigger** without offending him. p.22;
- h. Use of the word **bitch** towards a female can be a **term of endearment** in “our culture.” p.23; and,
- i. Use of the term **nigger bitch** in reference to an African-American female “may be an acceptable expression that people use.” p.24.

Complaint at 5, *Brown v. Honeywell Fed. Mfg. & Techs., LLC*, No. 02-CV-219 (W.D. Mo. Mar. 12, 2002) (emphasis in original).

Absent from Fletcher’s selective quotations was much needed context. For example, with respect to subparagraph i, Banks actually gave the following testimony:

Fletcher: Okay. Now, so if it’s okay to refer to African Americans as niggers and okay to refer to African American females as bitch, why would you be offended if someone referred to your wife or daughter as a nigger bitch?

Banks: I think I’ve responded to the nature of your question, and what you’re doing is tying two things together to try to make it sound like I’ve said something that I actually haven’t said.

Fletcher: Okay. Well, is it okay to refer to your wife or daughter as a nigger bitch?

Banks: I told you the terms are highly offensive, but two people who have a relationship, that may be an acceptable expression that people use.

Fletcher: Okay. Tell me a scenario in which it's acceptable to refer to an African American female as a nigger bitch?

Banks: As far as I am personally concerned, there are none.

As is clear from the transcript, Banks testified that he found the terms “nigger” and “bitch” to be highly offensive and inappropriate.

The Honeywell complaints signed by Fletcher similarly distorted the deposition testimony of Clegg. For example, the complaint stated that: “[Clegg] admits that she told a group of management employees in a meeting at Honeywell that **“the white man is an endangered species at Honeywell.”** Complaint at 10, *Brown*, No. 02-CV-219 (emphasis in original). However, as is clear from her deposition testimony, Clegg stated this was an example of “how people misperceive each other.”

Honeywell moved to strike the portions of the complaints that involved its executives' deposition testimony on the grounds that the allegations were impertinent and scandalous. Judge Gary A. Fenner, the first judge to take up this issue, found that the offending paragraphs were “impertinent, scandalous, and taken out of context so as to be misleading.” *Samuel Coleman v. Honeywell Fed. Mfg. & Techs., LLC*, No. 02-CV-362, slip op. at 1 (W.D. Mo. June 18, 2002). One month later, Judge Wright entered a similar order in a Honeywell litigation case before him, finding that “with respect to the deposition testimony, plaintiff's counsel has taken statements out of context and mischaracterized other testimony beyond recognition.” *Combs v. Honeywell Fed. Mfg. & Tech., LLC*, No. 02-CV-220, slip op. at 2 (W.D. Mo. July 26, 2002). Both judges ordered the complaints to be amended without the offensive deposition-related allegations. Fletcher amended the two complaints before Judges Fenner and Wright but did not amend the complaints pending before other judges.

In September, Judge Howard F. Sachs granted Honeywell’s motion to strike, stating that the offending paragraphs “consist of conclusory allegations, at best, and fraudulent mischaracterizations at worst.” *Barbara L. Coleman v. Honeywell Fed. Mfg. & Techs., LLC*, No. 02-CV-361, slip op. at 1 (W.D. Mo. Sept. 5, 2002). One month later, Judge Nanette K. Laughrey granted, without substantive analysis, Honeywell’s motion to strike, holding that the issue had been “ably addressed by Judge Fenner and Judge Wright in parallel actions.” *Brown v. Honeywell Fed. Mfg. & Techs., LLC*, No. 02-CV-219, slip op. at 4 (W.D. Mo. Oct. 3, 2002).

C. Complaints of Misconduct

Initially, Chief Judge H. Dean Whipple notified Maridee F. Edwards, Chief Disciplinary Counsel for the State of Missouri, that Judges Smith and Fenner had “voiced complaints about the unprofessional and abusive conduct of Michael R. Fletcher in cases before them.” Edwards declined to exercise jurisdiction over the issues involving the Western District, instead leaving the matter to the Western District.

On November 7, 2002, Chief Judge Whipple granted yet another Honeywell motion to strike and ordered Fletcher to show cause why he should not be sanctioned. The order to show cause was based on his finding that “[Fletcher] has shamelessly included scandalous allegations” that were “inaccurate, misleading, and inflammatory.” *Smith v. Honeywell Fed. Mfg. & Techs., LLC*, No. 02-CV-234, slip op. at 3. The only reason Chief Judge Whipple could find for the inclusion of these allegations was to “harass and embarrass Honeywell management and to shamelessly publicize this case in the media prior to trial.” *Id.* at 6.

The Court can find no legitimate reason why [Fletcher] would include these allegations in a pleading to this Court. Even if these allegations were true—and the context of the depositions show they are not—these allegations are irrelevant and immaterial to the claims set forth in the

lawsuit. Plaintiff claims she was discriminated against by not being promoted, but does not allege that either Banks or Clegg was involved in the advancement decisions relating to her.

Id. at 6.

Although Fletcher filed a brief opposing sanctions and Honeywell filed a brief in support, Chief Judge Whipple made no further ruling on the show cause order. Instead, the Western District sent a letter to Fletcher on January 9, 2003, notifying him that Judges Fenner and Smith had referred allegations of misconduct against Fletcher pursuant to Local Rule 83.6(d). The letter explained that particular allegations prompting an investigation and possible disciplinary proceedings “stem from your representations to the Court in the Honeywell complaints and comparisons with the actual transcripts of the testimony cited.” The letter stated that the Western District had appointed Theresa Levings (“Appointed Counsel”) to investigate whether Fletcher had violated Missouri Rule of Professional Conduct (Mo. RPC) 4-3.3 (requiring candor toward the tribunal) or Mo. RPC 4-8.4 (prohibiting conduct that is prejudicial to the administration of justice) when he filed the Honeywell Complaints. The letter also notified Fletcher that Appointed Counsel would investigate “other conduct or allegations that may come to her attention during the course of her investigation.”

D. The Investigation

Appointed Counsel deposed Fletcher on May 23, 2003. During the deposition, Fletcher acknowledged four outstanding bar complaints against him. Three of these related to assertions Fletcher allegedly made to class representatives in a suit against Rent-a-Center. The fourth complaint involved allegations of bribery, assault and resisting arrest.

Appointed Counsel also mailed letters throughout the Kansas City legal community in order to ascertain whether Fletcher had acted improperly at other times in his career. Her investigation uncovered numerous other instances of Fletcher's demeaning and abusive behavior while participating in depositions and mediation. For example, during the mediation with St. Joseph Health Center of a case involving race discrimination and wrongful discharge, Fletcher threatened to publicize confidential patient information that his client had illicitly photocopied. In another instance of professional misconduct, Fletcher left threatening phone messages at the home and office of Laura Lesniewski, an architect with Habitat for Humanity. Fletcher promised to seek sanctions and bring a lawsuit for Lesniewski's "improper and unethical negotiations with [Billy Duncan, his] former client." Such threats were hollow and improper because Fletcher knew that Lesniewski was not an attorney bound by the rules that regulate contact with represented parties.

As a final example, Fletcher employed demeaning and inappropriate tactics during the deposition of Steven J. Cox, former police chief of the Leawood Police Department. After Cox had stated that he believed a prior incident of rape occurred sometime in 1989, 1990 or 1991, Fletcher pursued the following line of questioning:

Fletcher: Okay. So you can recall when you graduated high school, but you can't recall when one of your women employees was raped by another employee?

Cox: That's correct.

Fletcher: All right. Is that because the high school graduation had more significance to you than the rape of Miss Gibbs?

...

Cox: I – to – as far as a personal milestone in my life, yes, probably so.

Fletcher: Okay. And that is because your graduation from college had more significance to you than Mrs. Gibbs' rape by an officer?

Cox: No, sir.

Fletcher: Okay. Why don't you recall the date of Miss Gibbs' rape?

Cox: Those are also events that people traditionally associate with a year.

...

Fletcher: Also, ironically, you remember the decade you graduated from high school, but you can't remember the decade Miss Gibbs was raped, correct?

Fletcher later shifted gears in the deposition and began to threaten both the deponent and his attorney, Rebecca Yocum.

Fletcher: Does she represent you in your 19 – are you aware, sir, that there's a 1983 cause of action filed against you personally?

Cox: No, sir.

Yocum: First of all, sir, that is a misstatement. There is no such action.

Fletcher: Okay. Are you aware that there's an amended complaint in which you are cited specifically under section 1983 of the Civil Code?

Yocum: And you're misstating the record. There is no amended complaint that has been allowed to be filed.

Fletcher: Did she tell you that? Are you aware of that? . . . You can answer.

Cox: No, sir.

Fletcher: Okay. So are you aware that if she's representing you that you may have personal liability in this matter?

Yocum: Mr. Fletcher, you're misrepresenting the facts. Mr. Cox has not been named as a defendant in this litigation, period. And I resent the fact that you're misrepresenting things to him.

Fletcher: Sir, have you been advised that there's a lawsuit pending or a proposed amendment to the complaint which would potentially involve you personally in liability?

Cox: No, sir.

Fletcher: Is that a fact that you would have liked to have been advised of?

Yocum: Mr. Fletcher, you're misstating facts to him. Stop it. There is no litigation against Chief Cox – former Chief Cox in this litigation.

Fletcher: I don't know why you are getting upset. I'm simply asking him questions –

Yocum: I am upset because you are lying, sir. You are lying to the man. If there's some litigation pending –

Fletcher: You don't ever – you are – this is the second attack by you people, for you to call me a liar. This is done and we're taking it up with the judge.

Yocum: That's fine, sir. But you've totally misrepresented the facts to this man. There is no litigation personally pending against Chief Cox.

Fletcher: For you to attack – for you to attack a member of this Court and call him a liar just bought you a lawsuit. Let's go.

These and numerous other allegations paint a disturbing picture of an overzealous attorney who frequently resorts to unprofessional tactics in an attempt to harass, humiliate and intimidate deponents and their counsel.

E. Disciplinary Proceedings

On October 17, 2003, Appointed Counsel filed with the Western District a Motion for Order to Show Cause Why Michael Robert Fletcher Should Not Be Disciplined for Professional Misconduct (“motion for order to show cause”). The motion contained 157 counts of misconduct, which stemmed from 307 factual allegations. One week later, Chief Judge Whipple issued an order to show cause, which Fletcher answered on December 29, 2003. Pursuant to W.D. Mo. R. 83.6(d)(4), Chief Judge Whipple assigned the matter for a hearing before Judges Fernando J. Gaitan, Jr., Laughrey and Richard E. Dorr.

The three-judge panel convened on March 8, 2003, to hear three days of testimony and arguments. Two months later, the three-judge panel issued a Report of Findings and Recommendation (“report and recommendation”). According to the three-judge panel, Appointed Counsel proved by clear and convincing evidence 167 of the 183 factual allegations the panel considered.² Based on the findings in the

²The panel stated that it chose not to consider factual allegations 184-307 because it concluded “there was sufficient evidence of professional misconduct contained in paragraphs 1-183 of Appointed Counsel’s Motion for the court to take the necessary action to preserve the integrity of this court.”

report and recommendation, the three-judge panel concluded that Fletcher had violated the Missouri Rules of Professional Conduct and that a three-year suspension was appropriate. On May 18, 2004, the United States District Court for the Western District of Missouri, sitting en banc, issued an order (“the en banc order”) accepting the three-judge panel’s factual findings and adopting its recommendation for sanctions.

F. Western District’s En Banc Order

The Western District’s holdings fall into three basic categories. First, the court ruled that Fletcher made misrepresentations to the court in violation of Mo. RPC 4-3.3(a)(1) (making a false statement of fact to the tribunal) and 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); second, that Fletcher engaged in conduct with no substantial purpose other than to intimidate and harass third parties in violation of Mo. RPC 4-4.4 (respecting the rights of third persons); and third, that Fletcher engaged in conduct prejudicial to the administration of justice in violation of Mo. RPC 4-8.4(d). The Western District summarized:

While each and every action by Mr. Fletcher which has been proven by clear and convincing evidence may not constitute a separate ethical violation, the court is firmly convinced that Mr. Fletcher has engaged in a pattern and practice of unethical conduct and has done so to gain an unfair advantage in litigation and to profit financially. He has also exhibited disregard for the authority of the federal court.

In re Disciplinary Matter of Michael Robert Fletcher, No. 03-272, slip op. at 5-6 (W.D. Mo. May 18, 2004) (en banc). As a mitigating factor, the Western District noted that witnesses testified that Fletcher is a talented attorney who lacks appropriate guidance and training and that he is passionate about his clients’ causes and has used some of his own money to pursue those causes. The Western District concluded,

however, that “[w]hile Mr. Fletcher may possess some talent as an attorney, neither talent nor causes entitle him to violate the professional codes of conduct.” *Id.* at 6.

Accordingly, the en banc district court suspended Fletcher from practice before the Western District for three years, effective immediately. The en banc order provides that Fletcher is subject to reinstatement only pursuant to W.D. Mo. R. 83.6(f), which requires him to petition the court and show by clear and convincing evidence that “[he] has the necessary integrity, moral qualifications, and competency for readmission.” Fletcher appeals, arguing that his due process rights were violated because (1) the Western District considered conduct outside of the Honeywell complaints, (2) the judges who initiated the disciplinary proceeding did not recuse themselves from joining the en banc order, (3) Judge Smith did not recuse himself from the en banc order despite his recusal from the litigation that gave rise to the disciplinary action, and (4) limitations on pre-hearing discovery prejudiced Fletcher. Fletcher also contends that (5) the Western District erred in its factual findings and (6) imposed an excessive punishment upon Fletcher.

II. DISCUSSION

A. Due Process

“Courts have long recognized their authority to suspend or disbar attorneys, an inherent power derived from the attorney’s role as an officer of the court that granted admission.” *In re Hoare*, 155 F.3d 937, 940 (8th Cir. 1998). As such, a court’s power to discipline members of its bar is “autonomous.” *In re Attorney Discipline Matter*, 98 F.3d 1082, 1087 (8th Cir. 1996) (citing *Theard v. United States*, 354 U.S. 278, 281 (1957)). The exercise of this “autonomous” authority is, however, limited by the constitutional requirements of due process. *See Schware v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232, 238-39 (1957) (noting that a court cannot exclude a person from the practice of law in a manner that contravenes the Due

Process Clause of the Fourteenth Amendment). In an attorney disciplinary proceeding, due process requires, at a minimum, “notice and an opportunity to be heard,” *Charges of Unprofessional Conduct against 99-37 v. Stuart*, 249 F.3d 821, 825 (8th Cir. 2001), and that the district court follow its “procedural rules governing attorney discipline,” *In re Bird*, 353 F.3d 636, 638 (8th Cir. 2003).

Rule 83(d)(1) of the Western District’s local rules provides that “[w]hen misconduct or allegations of misconduct . . . come[s] to the attention of a Judge of [the] Court, . . . the judge shall refer the matter to counsel for investigation and the prosecution of a formal disciplinary proceeding.” W.D. Mo. R. 83.6(d)(1); *see also* W.D. Mo. R. 83.6(h) (“[The] Court shall appoint as counsel one or more members of the Bar of [the] Court to investigate allegations of misconduct or to prosecute disciplinary proceedings under these rules . . .”). If, after investigation and review, the appointed counsel concludes that a formal disciplinary proceeding should not be initiated, she must file a recommendation for disposition with the Western District. W.D. Mo. R. 83.6(d)(2). If, however, the appointed counsel concludes that formal disciplinary proceedings should be initiated, she must “obtain an order of [the] Court upon a showing of probable cause requiring the respondent-attorney to show cause within 30 days . . . why the attorney should not be disciplined.” W.D. Mo. R. 83.6(d)(3). A respondent-attorney is entitled to a hearing “if any issue of fact is raised [in the respondent-attorney’s answer to the order to show cause] or the respondent-attorney wishes to be heard in mitigation.” W.D. Mo. R. 83.6(d)(4). Where “the disciplinary proceeding is predicated upon the complaint of a judge of [the] Court, the hearing shall be conducted before a panel of three other judges of [the] Court appointed by the Chief Judge.” *Id.*

The Western District and Appointed Counsel assiduously complied with the procedures established in the Western District’s local rules. Judges Smith and Fenner complained of Fletcher’s improper litigation tactics to Chief Judge Whipple. Chief Judge Whipple then appointed counsel pursuant to the procedures established in W.D.

Mo. R. 83.6(h). After conducting an exhaustive investigation of Fletcher's misconduct, Appointed Counsel initiated formal disciplinary proceedings by filing a 136-page motion for order to show cause, which also served to notify Fletcher of specific factual allegations and formal charges of misconduct. Fletcher responded to the charges, and the matter was set for hearing before a three-judge panel that properly did not include either of the complaining judges. The three-judge panel heard testimony from witnesses for both Appointed Counsel and Fletcher. The three-judge panel then filed a report and recommendation, which was adopted in full by the en banc court.

1. Scope of the Investigation

First, Fletcher argues the scope of Appointed Counsel's investigation should have been limited to "allegations of misconduct' that came 'to the attention of a Judge of th[at] Court' prior to the appointment." Appellant's Opening Brief at 16, No. 04-2636 (8th Cir. 2005) (quoting W.D. Mo. R. 83.6(d)(1) & (h)). To the contrary, there is simply no language in Western District's local rules that limits the scope of an appointed counsel's investigation to allegations of misconduct known to the court "prior to the appointment." Appointed Counsel's search for information from those in the Kansas City legal community regarding other instances of Fletcher's professional misconduct was not only consistent with the terms of her appointment, but was indispensable in determining whether Fletcher's conduct during the Honeywell litigation was an isolated violation of the ethical rules. Indeed, the Western District even informed Fletcher of Appointed Counsel's investigation. *See In re Flanagan*, 690 A.2d 865, 873 (Conn. 1997) (noting that, during the investigatory phase, the Due Process Clause does not require notice of the sanctionable charges). Appointed Counsel also informed Fletcher of new allegations as they were discovered during the course of her investigation.

2. Recusal of Judges Smith and Fenner

Second, Fletcher argues that the failure of the complaining judges, Judges Smith and Fenner, to recuse themselves from the en banc order violated his due process rights. We disagree. Local Rule 83.6(d)(4) requires only that the disciplinary hearing be conducted before a panel of three judges of the Western District, none of whom referred a predicate complaint. Neither Judge Smith nor Judge Fenner participated in the three-judge panel that heard testimony, found Fletcher guilty of professional misconduct and recommended sanctions.

There is nothing to suggest that the participation of the complaining judges in the subsequent en banc order was improper. The Western District's local rules do not limit a complaining judge's role in a disciplinary matter after the three-judge panel makes its findings and recommendation. In general, doubt as to the impartiality of a judge arises where "the judge [has] demonstrated bias or personal prejudice to the parties." *A.J. by L.B. v. Kierst*, 56 F.3d 849, 862 (8th Cir. 1995). A judge's opinion of an attorney is wrongful or inappropriate where "it is undeserved, or . . . rests upon knowledge that the subject ought not to possess . . . or because it is excessive in degree." *Liteky v. United States*, 510 U.S. 540, 550 (1994). At most, Fletcher can show only that Judges Smith and Fenner suspected him of professional misconduct as a result of his conduct in matters before the Western District. No evidence suggests that Judges Smith and Fenner formed opinions of Fletcher that were undeserved, based on improper knowledge or excessive in degree.

Even if we were to hold that Judges Smith and Fenner should have recused themselves from the en banc order, we would find the error to be harmless. *See Bird*, 353 F.3d at 638 (applying harmless error analysis to district courts' failure to follow precisely their procedural rules governing attorney discipline). The en banc court unanimously accepted the three-judge panel's factual findings and adopted the recommended sanctions. Because the en banc order did not amend the findings or

recommendations made by the three-judge panel, Fletcher cannot demonstrate that Judge Smith's and Judge Fenner's participation in the en banc order prejudiced the investigatory or adjudicatory process.

3. Recusal of Judge Smith

Fletcher also argues that because Judge Smith recused himself from the Honeywell litigation, Judge Smith was prohibited from participating in the decision to initiate disciplinary proceedings. Again, we disagree. We do not know why Judge Smith recused himself from the Honeywell litigation, and we are not inclined to accept Fletcher's invitation to speculate. Second, Fletcher has failed to demonstrate how Judge Smith's concern over Fletcher's professional misconduct was tainted by his decision to recuse himself from the Honeywell litigation. Indeed, we believe that professional misconduct should be a matter of concern not only for the judges of the Western District, but for all those admitted to practice before the court. Regardless, the Honeywell litigation and Fletcher's disciplinary proceedings are distinct matters presenting different considerations for recusal. We also note Judge Smith's concern over Fletcher's behavior as an attorney was apparent as early as the Ross case in 2000. *See Ross*, 197 F.R.D. at 657-58, 660. Finally, as discussed above, we do not agree that Fletcher suffered any bias or prejudice from Judge Smith's participation in the decision to initiate an investigation or in the en banc order.

4. Pre-Hearing Discovery

Finally, Fletcher argues that the limitations on pre-hearing discovery placed on him by the three-judge panel violated the Due Process Clause. Once again, we disagree. The motion for order to show cause included a clear enumeration of the charges against Fletcher and a thorough explanation of the bases for those charges. As a result, Fletcher was on notice of the charges against him prior to the disciplinary hearing. Prior to the hearing, the three-judge panel gave Fletcher the opportunity to

engage in reasonable discovery. Fletcher, however, made vague and unnecessary requests for discovery, such as requests to depose Judges Smith and Fenner, Appointed Counsel and Maridee Edwards, which the three-judge panel denied. During the hearing, Fletcher was able to cross-examine witnesses and call witnesses of his own. After reviewing the transcript of the disciplinary hearing, we are confident that the Western District afforded Fletcher every protection of the Due Process Clause when it gave him notice of the charges of misconduct, an opportunity to engage in discovery and a hearing on the charges against him. *See Stuart*, 249 F.3d at 825 (finding no due process violation in the denial of a discovery request because “[a]ttorney discipline procedures require notice and an opportunity to be heard, but they do not require all the constitutional protections provided in criminal prosecutions”).

B. Western District’s Factual Findings and Conclusions

Fletcher also challenges the Western District’s substantive findings of misconduct. We review the district court’s disciplinary order for abuse of discretion. *In re Hoare*, 155 F.3d at 940. After carefully reviewing the record on appeal, we conclude that there is sufficient evidence to support the Western District’s multiple findings of professional misconduct by Fletcher. In particular, we agree that by selectively quoting deposition testimony in a way that grossly mischaracterized deponents’ statements, Fletcher went beyond zealous representation into deceptive and misleading practices. Accordingly, we affirm.

C. Sanctions

Finally, Fletcher challenges the length of his three-year suspension from practice before the Western District. The district court, like a state’s highest court, is given “considerable leeway in meting out the sanctions imposed.” *In re Hoare*, 155 F.3d at 941 (quotation omitted). We review the terms of a disciplinary order for

abuse of discretion. *In re Olkon*, 795 F.2d 1379, 1384 (8th Cir. 1986). Given the pervasiveness of the misconduct and Fletcher's refusal to accept responsibility for his actions, we are convinced that the Western District did not abuse its discretion in imposing the three-year suspension.

III. CONCLUSION

For the reasons discussed above, we affirm the Western District's en banc order suspending Fletcher from the practice of law before that court for three years.

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 30, 2007

A. JOHN VOELKER
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2148

Cir. Ct. No. 2006SC11347

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STEPHEN E. LEE,

PLAINTIFF-APPELLANT,

V.

LEGACY BANK,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL B. BRENNAN, Judge. *Order entered.*

¶1 FINE, J. Stephen E. Lee, *pro se*, appeals the dismissal of his small-claims case against Legacy Bank.¹ Although the Rules of Appellate Procedure

¹ The dismissal was ordered by the Honorable Michael G. Malmstadt. The written order was signed by the Honorable Michael B. Brennan on behalf of Judge Malmstadt.

require that a respondent file a brief presenting the respondent's argument, WIS. STAT. RULE 809.19(3), Legacy Bank's appellate lawyers have not filed a brief, and, in a letter dated January 11, 2007, addressed to the clerk of this court, said that they would not do so:

Please be advised that Legacy Bank, Defendant-Respondent, with respect to the above-referenced matter, will not be filing a responsive brief. Due to the economics of this case, our client has chosen not to expend the necessary funds to prepare and file a brief in this matter.

Defendant-Respondent would simply direct the Court to the record in this matter, most particularly the transcript of the proceedings before the Honorable Michael G. Malmstadt on July 19, 2006. Defendant-Respondent asserts that the record and transcripts, standing alone, are sufficient to warrant this Court upholding the Trial Court's decision on the Motion to Dismiss.

We disagree.² Giving reasons to sustain its position is a *party's* obligation, and is not any court's function. If a party defaults in its obligation to show why it should prevail, it cannot expect a court to assume its burden. *Raz v. Brown*, 2003 WI 29, ¶36, 260 Wis. 2d 614, 631, 660 N.W.2d 647, 655, recognized that "the Wisconsin Court of Appeals faces a heavy caseload and that it is entitled to wide latitude when enforcing procedural rules designed to make the appellate process more efficient." *Raz* holds, however, that the court of appeals may not summarily reverse an order entered against a respondent who does not file a brief unless the respondent is first warned that failure to file a brief will result (rather than "may" result) in summary reversal, as authorized by WIS. STAT. RULE 809.83(2). *Raz*, 2003 WI 29, ¶¶25, 36, 260 Wis. 2d at 627–628, 631, 660 N.W.2d at 653–654, 655.

² Ironically, Legacy Bank's appellate lawyers then, in one paragraph, berate Stephen E. Lee, who, as noted, appears *pro se*, for violating the Rules of Appellate Procedure, including the filing of a handwritten brief.

¶2 Our review of the Record persuades us that a respondent’s brief that complies with WIS. STAT. RULE 809.19 is necessary. Accordingly, as authorized by *Raz*, 2003 WI 29, ¶37, 260 Wis. 2d at 632, 660 N.W.2d at 655, we enter the following order:

It Is Hereby Ordered that Legacy Bank shall file a respondent’s brief on this appeal that fully complies with WIS. STAT. RULE 809.19, and, in conformity with RULE 809.19(3)(a)1a, the brief shall be filed within thirty days of the issuance of this order. Lee will then have fifteen days to file a reply brief or a letter that he will not file a brief. *See* RULE 809.19(4).

It Is Also Hereby Ordered that if Legacy Bank does not file the brief required by the previous paragraph, such failure will be taken as an egregious act amounting to its abandonment of its right to contest Lee’s appeal, and, accordingly, this court will summarily reverse the circuit court’s order from which this appeal is taken and remand the matter to the circuit court with directions that it enter judgment for Lee on his small-claims complaint, *see Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (“Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.”) (quoted source omitted), for whatever damages he is able to prove, *cf.* WIS. STAT. RULE 806.02 (on default, court shall take proof if necessary to enter judgment).

By the Court.—Order entered.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

*This opinion is subject to revision before final
publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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Paul Howard Peters,
Plaintiff and Petitioner,

No. 20050806

v.

Pine Meadow Ranch Home Association
aka Pine Meadow Ranch Home Owners
Association and as Pine Meadow
Ranch Association,
Defendant and Respondent.

Forest Meadow Ranch Property
Owners Association, L.L.C.,
Plaintiff and Petitioner,

No. 20050805

v.

Pine Meadow Ranch Home Association
aka Pine Meadow Ranch Home Owners
Association and as Pine Meadow
Ranch Association,
Defendant and Respondent.

F I L E D

January 12, 2007

Third District, Silver Summit
The Honorable Bruce Lubeck
Nos. 990600413, 000600092

Attorneys: Boyd Kimball Dyer, Salt Lake City, for plaintiffs
Edwin C. Barnes, Walter A. Romney, Jr., Salt Lake
City, for defendant

On Certiorari to the Utah Court of Appeals

DURRANT, Justice:

INTRODUCTION

¶1 We granted certiorari in these two related cases to
review the issue of whether the beneficiary of a trust has

authority to impose binding covenants, conditions, and restrictions on real property held in trust. We decline to reach this issue, however, because petitioners' briefs in each case are replete with unfounded accusations impugning the integrity of the court of appeals panel that heard the cases below. These accusations include allegations, both direct and indirect, that the panel intentionally fabricated evidence, intentionally misstated the holding of a case, and acted with improper motives. Further, petitioners' briefs are otherwise disrespectful of the judiciary. Accordingly, we strike petitioners' briefs as containing irrelevant and scandalous matters in violation of rule 24(k) of the Utah Rules of Appellate Procedure, affirm the result reached by the court of appeals in each case, and assess attorney fees against petitioners' counsel. Because we have not considered the certiorari question in either case and have not taken the opportunity to review the merits of the court of appeals' decisions, we limit those decisions to their facts and deem them without precedential effect.

BACKGROUND

¶2 These cases share in large measure a complex and interesting set of facts that, because of the conduct of counsel (the same lawyer represented the petitioners in both cases), is made irrelevant to our resolution of either case. Accordingly, we give only a brief overview here. A more detailed recitation of the facts can be found in the court of appeals' opinions.¹

¶3 In 1965, F.E. and Mae P. Bates deeded a large tract of land in Summit County to "Security Title Company" as "Trustee." Respondent Pine Meadow Ranch Home Owner's Association (the "Association") seeks to levy fees against each petitioner to maintain roadways and other improvements in subdivisions that were established on this tract of land and in which the petitioners now own property. The Association seeks to levy such fees against Petitioner Forest Meadow Ranch Property Owners Association, L.L.C. ("Forest Meadow") based on covenants, conditions, and restrictions ("CC&Rs") purportedly imposed by Deseret Diversified Development ("Deseret") in 1971. The Association seeks to levy such fees against Petitioner Paul Howard Peters based on CC&Rs purportedly imposed by Pine Meadow Ranch, Inc. ("PMRI") in 1973.

¹ Forest Meadow Ranch Prop. Owners Ass'n, L.L.C. v. Pine Meadows Ranch Home Ass'n, 2005 UT App 294, ¶¶ 2-15, 118 P.3d 871; Peters v. Pine Meadows Ranch Home Ass'n, 2005 UT App 295U, paras. 4-9.

¶4 The petitioners brought these actions to have the CC&Rs declared invalid. In both cases, the district court granted summary judgment to the Association, concluding that the CC&Rs were effective based on various legal and equitable principles. The petitioners appealed, and the court of appeals affirmed the district court's determinations that Deseret and PMRI had the authority as beneficial owners to impose the CC&Rs.² The court of appeals also concluded that even if Deseret or PMRI had lacked such authority as beneficial owners, Security had ratified the CC&Rs as trustee.³ We granted certiorari to consider whether Deseret and PMRI had the authority as beneficial owners to impose binding CC&Rs. We have jurisdiction pursuant to Utah Code section 78-2-2(3)(a), (5).

¶5 In his briefs in support of Peters's and Forest Meadow's petitions for certiorari, and in his briefs to us following our grants of certiorari, counsel accuses the court of appeals panel that heard the cases below of judicial misconduct. This accusation stems largely from the court of appeals' statement that W. Brent Jensen signed a plat on behalf of both Deseret and Security.⁴ The court of appeals erred in making this statement. In fact, W. Brent Jensen signed on behalf of Deseret, and Leo D. Jensen signed on behalf of Security. Based on this error, petitioners' counsel accuses the court of appeals panel of intentionally fabricating evidence. He further contends that the error was motivated by some improper motive. He offers no support for these accusations of impropriety beyond the mere fact that the error occurred.

¶6 Additionally, counsel accuses the court of appeals of misstating the holding in Capital Assets Financial Services v. Maxwell.⁵ Indeed, the court of appeals did err in its interpretation of this case. But counsel goes beyond demonstrating the error. He contends that this error, too, was intentional and the product of an improper motive by the court of appeals. Again, he offers no support for this accusation beyond the purported error itself.

² Forest Meadow, 2005 UT App 294, ¶ 36; Peters, 2005 UT App 295U, para. 10.

³ Forest Meadow, 2005 UT App 294, ¶ 36; Peters, 2005 UT App 295U, para.6.

⁴ Forest Meadow, 2005 UT App 294, ¶¶ 3 & n.2, 30.

⁵ 2000 UT 9, 994 P.2d 201.

ANALYSIS

¶7 Petitioners' counsel was fully entitled to note the factual error made by the court of appeals with respect to the signatories to the plat. Indeed, it was his obligation as an advocate to do so. So, too, was it fully appropriate for counsel to assert that the court of appeals had incorrectly interpreted the Capital Assets case. Indeed, to address errors of fact and law is the very purpose of the appellate process. But to argue that a court has committed an error is one thing; to argue that a court has intentionally committed that error due to an improper motive is quite another. There is a light year's difference between an innocent mistake of fact or law and the intentional fabrication of evidence or the intentional misstatement of a holding.

¶8 Should a lawyer be faced with genuine judicial misconduct, there are appropriate avenues available for him or her to address it, both within the context of a particular case and in a separate proceeding before the Judicial Conduct Commission. To make bald and unfounded accusations of judicial impropriety in briefs filed with this court is not such an avenue. In so doing, counsel has overstepped the bounds of appropriate appellate advocacy.

¶9 Rule 24(k) of the Utah Rules of Appellate Procedure provides that "[a]ll briefs under this rule must be . . . free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, . . . and the court may assess attorney fees against the offending lawyer."⁶ Counsel's unfounded accusations regarding the supposed improper motives of the court of appeals panel are irrelevant to the questions upon which we granted certiorari. Further, those accusations are scandalous in that they are defamatory and offensive to propriety.⁷

¶10 In his briefs, counsel argues that the court of appeals panel that decided these cases committed both legal and factual

⁶ Utah R. App. P. 24(k). When the briefs in these cases were filed in January 2006, this language was found in rule 24(j) of the Utah Rules of Civil Procedure. The rules have since been amended; however, this language remained the same and thus we cite to the current numbering of the rule.

⁷ Merriam-Webster's Collegiate Dictionary 1042 (10th ed. 1998) (defining "scandalous" as "libelous, defamatory" and "offensive to propriety or morality").

errors. As noted, it was fully appropriate for counsel to do so. But he has taken the additional step of claiming that these errors were intentional and the result of improper motives. In support of these accusations, counsel offers nothing beyond the fact that the errors were made.

¶11 That unsupported accusations of this kind are inappropriate should have been apparent to counsel. Rule 8.2 of the Utah Rules of Professional Conduct provides that “[a] lawyer shall not make a public 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”⁸ Further, standard 3 of the Standards of Professionalism and Civility provides that “[l]awyers shall not, without an adequate factual basis, attribute to . . . the court improper motives, purpose, or conduct.”⁹ Finally, standard 1 provides that “lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.”¹⁰

¶12 Counsel’s briefs before this court in both Forest Meadow and Peters include a substantial amount of material that is offensive, inappropriate, and disrespectful, and his conduct in either case, standing alone, violates rule 24(k) and warrants the sanctions we impose. In Forest Meadow, these accusations include the following:

- Good judges never fabricate evidence because the actual evidence is the foundation for their decisions.
- [I]f judges start with decision [sic] they want to reach for reasons of prejudice, bias, corruption or whatever, and then work backwards to the evidence, they may fabricate the evidence they need to make their decisions plausible. Petitioner respectfully asks the Court to judge for itself what happened in this case.

⁸ Utah R. Prof’l Conduct 8.2(a).

⁹ Utah Standards of Professionalism & Civility 3.

¹⁰ Id. 1.

- [The authoring judge] needed evidence to justify her decision that W. Brent Jensen was the trust beneficiary in 1965. There was no such evidence, so she simply fabricated it sua sponte.
- This was no innocent mistake.
- The Court might want to think about the question Petitioner's President asked when he read [the authoring judge's] opinion. "Everyone knows Brent Jensen was never president of Security Title, so why did she do this to me, is it because I'm German, is it because I'm not Mormon?" The only right way to deal with his "why" question is for this Court to grant certiorari and make it moot.
- [F]or the Court of Appeals to dispose of a case on the basis of prejudice, bias, corruption or any basis other than the actual evidence in the record was to deny Petitioner due process of law.
- The Court of Appeals then goes on to say that Security transferred title to the lots in Plat D to Deseret to develop, but that is another fabrication.
- No reasonable person could have drawn the Court of Appeal's holding from the actual holding of this Court. It is beyond the range of "innocent mistake" or even "negligent mistake." The truth is sometimes a matter of degree--as when the defendant claimed he didn't know the revolver was loaded when he accidentally shot his wife--six times.

Petitioner respectfully asks this Court to think about the question of why the Court of Appeals so mischaracterized this Court's holding. The degree of falsity is on a par with its holding that W. Brent Jensen signed the plat for Security Title when the document was

actually signed by Leo D. Jensen. Could any Utah judge write the words "[W. Brent] Jensen signed on behalf of both Security and Deseret" without reading the plat? Could any Utah judge write the words "holding beneficial interest in real property could encumber that interest" without reading this Court's opinion? If the Court of Appeals did read the plat and the opinion, why did it make these false statements? (Alteration in original).

- [T]he false claim that W. Brent Jensen signed the plat on behalf of Security Title originated with [the authoring judge].

Courts of law sit in judgment on other professions. Suppose a doctor operated on "Leo D. Jensen" when the true patient was "W. Brent Jensen." The doctor might become the defendant in a court of law. Doctors are expert in medicine. What are judges expert in? Does what [the authoring judge] did in this case meet this Court's professional standards?

¶13 In Peters, counsel made similar accusations in his briefs, often using the same language as he did in Forest Meadow:

- Turning from the actual evidence to the evidence fabricated by the Court of Appeals,
- This was no innocent mistake.
- The major point is that for the Court of Appeals to base its decision on evidence of its own fabrication denied Petitioner due process of law. The Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for this Court to exercise its power of supervision.
- Petitioner respectfully asks the Court to step back from the Court of Appeals'

false evidence and the confusion of its opinion

- The first thing wrong with that statement is that it is the facts fabricated by the Court of Appeals that support that conclusion, not the actual facts.
- [Our prior briefs] discuss three instances of the Court of Appeals fabricating evidence. There are more.
- It appears that the Court of Appeals solved the problem by fabricating a new status for Respondent.
. . . .

A cynic would say that once a Court decides to fabricate evidence, there is no limit to the problems it can solve.

- So, if a court fabricates evidence, whether intentionally, negligently, or through innocent mistake, it destroys the moral premise of the legal system. A judge who fabricates evidence, even from a sincere motive to do justice in a particular case, has no moral standing whatsoever.
- No reasonable person could have drawn the Court of Appeal's holding from the actual holding of this Court. It is beyond the range of "innocent mistake" or even "negligent mistake." The truth is sometimes a matter of degree--as when the defendant claimed he didn't know the revolver was loaded when he accidentally shot his wife--six times.
- Petitioner respectfully asks this Court to think about the question of why the Court of Appeals so mischaracterized this Court's holding . . . why did it make these false statements?
- The Court of Appeals falsified the identity of the declarant of the 1973

CC&R's to create false evidence that there actually was a trust.

¶14 One need only read these excerpts to be convinced of the scandalous nature of counsel's briefs. Counsel seeks to justify his accusations, however, by arguing that just as Biblical prophets "hate[d] the sin but love[d] the sinner," "a lawyer [may] challenge what a lower court did in the strongest terms without fear that it will be taken as a personal attack." Accordingly, he makes the following claim: "Counsel for Petitioner criticize[] the Court of Appeals and [the authoring judge] for what they did. He did not make a personal attack."

¶15 Yet counsel's briefs are decidedly personal.¹¹ Counsel repeatedly alleges that the court of appeals, and specifically the authoring judge, "fabricated evidence." Counsel also asserts that the court of appeals' characterization of our Capital Assets case went beyond the range of "innocent mistake" or even "negligent mistake." These statements personally attack the integrity of the court of appeals panel, suggesting serious intentional misconduct. Indeed, at oral argument for Peters, counsel specifically admitted that he intended his briefs to raise the question of judicial misconduct.

¶16 In addition to the unsubstantiated accusations of misconduct, counsel also makes statements generally disrespectful to this court as well as the court of appeals. Moreover, the statements quoted above and the statements detailed below illustrate counsel's failure in each case to "treat . . . judges . . . in a courteous and dignified manner" as required by the Utah Standards of Professionalism & Civility.¹²

¶17 In Forest Meadow, counsel's disrespectful statements include the following:

- Frankly, Petitioner is worried that the conduct of the Utah Court of Appeals was so outrageous that this Court will deny certiorari to avoid embarrassment.
- To use the Court of Appeal's metaphor, most of the trees are not in the forest!

¹¹ See In re Westfall, 808 S.W.2d 829, 832 (Mo. 1991) (holding that counsel's statements directed specifically at deciding judge's motivation and integrity were personal attacks).

¹² Utah Standards of Professionalism & Civility 1.

Extending the metaphor, the Court of Appeals does not even recognize the forest.

- But, on a practical level, how many Californian hunters would come to Utah if Utah declared open season on hunting deer? And as a practical matter, what will happen if this Court declares open season on hunting elderly trust beneficiaries?
- It is ludicrous for the Court of Appeals to hold that being covered by CC&R's is no different from not being covered at all, and that Petitioner is not a "similarly situated" with itself.

¶18 In Peters, counsel also made the following disrespectful statements:

- Granting certiorari in these cases is necessary to restore the integrity of the Utah Judicial Department.
- Petitioner respectfully points out that unless this Court takes up the agency issue, it will give its approval to what it knows is a gross injustice.
- The holding of the Utah Court of Appeals cannot be defended on any moral or legal grounds. It is contrary to every principle of decency and law. But, and perhaps this is the decisive point, it could be avoided. This Court has the power to say "well, we did not grant certiorari with respect to that issue so we will not take it up no matter how immoral and illegal it may have been." But, it would amount to ratifying a falsehood.
- This Court has the power to avoid the issue, but it cannot avoid the moral responsibility. A play ground bully cannot justify beating up a weaker child by saying "I promised myself I would

beat you, and it would be wrong for me to break my promise."

- I want to respond to [the alleged judicial misconduct] in terms of a recent news development with respect to a little town in Iraq called Haditha. And what's happened here is that news stories have come out that suggest that there is grave misconduct there--that some Marines went out of control and shot some innocent civilians. The response of the Marine Corps is immediately to start investigating, to immediately start an investigation. It doesn't make any assumptions because the Marine Corps is responsible for the conduct of the Marines.

You, you five are like the Commandant of the Marine Corps. You are in charge of the judicial conduct of the State of Utah. If something happens that, and I think this is true here, that could possibly, even could possibly go beyond the normal course of error--

¶19 It is regrettable that petitioners' counsel has elected to present his argument in an accusatory, offensive, and disrespectful manner. Our opinion should not be viewed, however, as questioning counsel's competency to practice law. Indeed, in both cases counsel has exhibited a firm grasp of the legal principles that should have been at issue. Unfortunately, the substantial amount of objectionable content in his briefs made irrelevant the potentially sound legal arguments he was making.

¶20 In both cases, the egregiousness of counsel's conduct has led to sanctions that have directly caused a detrimental result for his clients. We take this occasion to note, however, that the detriment to clients' interests caused by such conduct is not limited to cases in which sanctions are imposed. Even where a lawyer's unprofessionalism or incivility does not warrant sanctions, it often will nevertheless diminish his or her effectiveness.

¶21 There is a misconception among some lawyers and clients that advocacy can be enhanced by personal attacks, overly aggressive conduct, or confrontational tactics. Although it is true that this type of advocacy may occasionally lead to some

short-term tactical advantages, our collective experience as a court at various levels of the judicial process has convinced us that it is usually highly counterproductive. It distracts the decision-maker from the merits of the case and erodes the credibility of the advocate. Credibility is often directly tied to civility and professionalism. Judges, jurors, and other lawyers are more likely to believe a lawyer who is courteous and treats others with dignity and respect. Counsel in the case at bar would have been far more effective had he focused exclusively on the facts and the law without making his additional commentary disparaging and insulting the judiciary.

¶22 We have sought to encourage the bar to aspire to professionalism and civility in the practice of law through our adoption of the Standards of Professionalism and Civility. While these standards are not binding, we encourage members of the bar to study and follow them. Had counsel in the cases at bar observed these standards, he and his clients would not have incurred the severe sanctions we impose today.

CONCLUSION

¶23 Counsel's briefs in both the Forest Meadow and Peters cases are replete with attacks on the integrity of the court of appeals panel that decided the cases below. Those attacks are unfounded, scandalous, irrelevant to the questions upon which we have granted certiorari, and disrespectful of the judiciary. Accordingly, pursuant to rule 24(k) of the Utah Rules of Appellate Procedure, we strike those briefs and assess attorney fees against petitioners' counsel. We remand to the district court for a determination of the amount of attorney fees incurred by respondent in responding to petitioners' briefs to us following our grant of certiorari. We decline to consider the issues as to which we granted certiorari. Instead, we affirm the result reached by the court of appeals in both Forest Meadow and Peters, limit the court of appeals' decisions to the facts of each case, and deem the decisions to be without precedential effect.

¶24 Chief Justice Durham, Associate Chief Justice Wilkins, Justice Parrish, and Justice Nehring concur in Justice Durrant's opinion.