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**From the Selected Works of Hon. Gerald Lebovits**

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## Legal-Writing Ethics—Part II

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# Journal



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## Legal-Writing Ethics — Part II

The Legal Writer continues from last month, discussing ethical legal writing.

### The Facts

Lawyers must set out their facts accurately. They may never knowingly give a court a false fact,<sup>1</sup> especially a false material fact. Giving a court a false material fact can subject the lawyer to court-ordered and disciplinary sanctions.<sup>2</sup> In an illustrative case, the Appellate Division, Second Department, suspended a lawyer for five years for repeatedly providing courts with false facts.<sup>3</sup>

To write ethically and competently, lawyers must communicate the factual basis of their clients' claims and defenses. One federal district court in New York noted that two types of substandard fact pleadings can lead to dismissal or denial: (1) a pleading written so poorly it is "functionally illegible" and (2) a pleading so "baldly conclusory" it fails to articulate the facts underlying the claim.<sup>4</sup> As the Ninth Circuit explained, "[a] skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. Especially not when the brief presents a passel of other arguments . . . . Judges are not like pigs, hunting for truffles buried in briefs."<sup>5</sup>

Lawyers must choose which facts to include in their pleadings. Omitting important adverse facts is not necessarily dishonest.<sup>6</sup> Lawyers may omit facts adverse to the client's position and focus on the facts that support their arguments. It might be poor lawyering or even malpractice to inform the court of all the cases' pertinent facts. A criminal-defense lawyer, for example, can be disbarred for telling the court the client is guilty without the client's consent.

But lawyers who omit facts lose an opportunity to mitigate adverse facts. Being candid with the court about facts adverse to the client's position, moreover, gives credibility to the lawyer's arguments. And the court is more likely to consider the lawyer's other arguments credible.

To prove they are using facts honestly, lawyers must cite the record.<sup>7</sup> They may not add to their record on appeal new facts not part of the record before the trial court. Thus, the Appellate Division, Second Department, sanctioned two lawyers for including new information in their record on appeal and then certifying that their record was "a true and complete copy of the record before the motion court."<sup>8</sup>

### Writing Style

A lawyer's writing must project ethos, or credibility and good moral character: candor, honesty, professionalism, respect, truthfulness, and zeal.<sup>9</sup> To evince good character, lawyers should write clearly and concisely.<sup>10</sup> They should avoid using excessively formal, foreign, and legalistic language. They should also avoid bureaucratic writing. Bureaucratic writers confound their readers with the passive voice and nominalizations.

The active voice: "The plaintiff signed the contract." The passive voice: "The contract was signed by the plaintiff." The double-passive voice: "The contract was signed." Think: "Mistakes were made." A lawyer who uses that phrase is hiding the name of the person who made the mistake. The passive voice is wordy. The double-passive voice omits an important part of a sentence — the "who" in "who did what to whom" — a necessary feature unless the object of a sentence is more important than the subject.

Nominalizations are verbs turned into nouns. Nominalization: "The police conducted an investigation of the crime." No nominalization: "The police investigated the crime." Nominalizations are wordy and make sentences difficult to understand. They can also make writing abstract and conclusory.

Lawyers who combine the passive voice with nominalizations are poor communicators. Worse, they might be trying to disguise, confuse, or warp.<sup>11</sup> The following illustrates how vague writing damages a lawyer's effectiveness and credibility: "The court clerk has a preference for the submission of documents." To correct the sentence, the lawyer writer must do three things. First, remove the two nominalizations. The sentence becomes: "The court clerk *prefers* that documents be *submitted*." Second, remove the double-passive. Who submits? The judge? The police? Without the double passive, the sentence becomes: "The court clerk prefers that litigants submit documents." Third, explain. What documents? Submit them where? With the explanation, the sentence might read: "The court clerk prefers that litigants file motions in the clerk's office."

Subject complements also deceive readers. They appear after the verb "to be" and after linking verbs like "to appear" and "to become." "Angry" is the subject complement of "The judge became angry." This construction hides because it does not explain how the judge became angry. Compare "Petitioner's claim is procedurally barred" with "Petitioner is procedurally defaulted because he did not preserve his claim."

Lawyers shouldn't use role reversal to disguise what happened. A lawyer who reverses roles moves the object of the sentence to the first agent or subject in the sentence. Compare: "Police Shoot and Kill New Yorkers During Riot" with "Rioting New Yorkers Shot Dead."<sup>12</sup>

Skeptical courts can easily spot obfuscation. In one such case, the Tenth

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Circuit noted that the appellees' "creative phraseology border[ed] on misrepresentation."<sup>13</sup> The court also noted that incoherent writing is "not only improper but ultimately ineffective."<sup>14</sup>

Lawyers shouldn't use adverbial excessives like "obviously" or "certainly." Overstatement is unethical while understatement persuades. In that regard, shouting at readers with bold, italics, underlining, capitals, and quotation marks for emphasis raises ethical concerns of overstatement.<sup>15</sup> Nor should lawyers use cowardly qualifiers like "generally" or "usually" to avoid precision.

Courts must dispose of motions and cases quickly. Courts might sanction lawyers for wasting the court's time with poor writing. As one court sarcastically put it when faced with incoherent pleadings, "the court's responsibilities do not include cryptography."<sup>16</sup>

## Plagiarism

Lawyers must not present another's words or ideas as their own. Doing so deceives the reader and steals credit from the original writer. Plagiarism, prohibited in academia, can affect a lawyer's ability to practice. In one case, the Appellate Division, Second Department, censured a lawyer dismissed from law school for plagiarizing half his LL.M. paper who failed to disclose his dismissal in his bar application.<sup>17</sup> In another, the Appellate Division, First Department, censured a lawyer who plagiarized the writing sample he submitted as part of his application for the Supreme Court (18-B) criminal panel for indigent defendants.<sup>18</sup>

Lawyers reuse form motions and letters, law clerks write opinions for their judges, and some judges incorporate parts of a litigant's brief into their opinions.<sup>19</sup> But plenty remains of the obligation to attribute to others their contributions, thoughts, and words.

To avoid plagiarizing, lawyers should cite the sources:

- On which they relied to support an argument;

- From which they paraphrased language, facts, or ideas;
- That might be unfamiliar to the reader;
- To add relevant information to the lawyer's argument;
- For specialized or unique materials.<sup>20</sup>

Courts don't forgive lawyers who plagiarize.<sup>21</sup> A federal district court in Puerto Rico, for example, reprimanded a lawyer who copied verbatim a majority of his brief from another court's opinion without citing that opinion.<sup>22</sup>

Lawyers must quote accurately.<sup>23</sup> A reader who checks a quotation and finds a misquotation will distrust everything the lawyer writes.<sup>24</sup> To quote accurately, lawyers must use quotation marks, even if the lawyer omits or changes some words. Lawyers must use ellipses to note omissions and put changes in brackets.<sup>25</sup> The key to honest writing is to use quotation marks when quoting even a few key words and then to cite. That's the difference between scholarship and plagiarism.

Lawyers must not substitute practice forms for their professional judgment. While not plagiarism, it's bad lawyering to rely on forms or boilerplate. One federal district court in New Jersey sanctioned a lawyer for reproducing without analysis a complaint from a Matthew Bender practice form.<sup>26</sup> As part of the sanction, the court ordered the lawyer to attend either a reputable continuing-legal-education class or a law-school class on federal practice and procedure and civil-rights law.<sup>27</sup> The court concluded that despite the availability of practice forms and treatises, lawyers are "expected to exercise independent judgment."<sup>28</sup>

## Court Rules

Most courts have rules that govern the length and format of papers. Under the Second Circuit's Local Rule 32, a brief must have one-inch margins on all sides and not exceed 30 pages.<sup>29</sup> New York State courts have their own rules.<sup>30</sup> State and federal courts in New York and elsewhere may reject papers

that violate the courts' rules regarding font, paper size, and margins.

Lawyers shouldn't cheat on font sizes or margins. And they must put their substantive arguments in the text, not in the footnotes. In one illustrative case, the Second Circuit declined to award costs to a successful appellant whose attorney "blatantly evaded" the court's page limit for briefs by including 75 percent of the substantive arguments in footnotes.<sup>31</sup> Lawyers must edit and re-edit their work to set forth their strongest arguments in the space allowed. A court may, in its discretion, grant a lawyer leave to exceed page limits. Conversely, lawyers shouldn't try to meet the page limit with irrelevancies or unnecessary words for bulk.<sup>32</sup>

Lawyers who ignore court rules risk the court's disdain.<sup>33</sup> Worse, the court can dismiss the case.<sup>34</sup> The Ninth Circuit did just that when an appellant disregarded its briefing rules.<sup>35</sup> The appellant's lawyers submitted a brief that didn't cite the record or provide the standard of appellate review. Instead, the brief exceeded the court's word-count limit and cited cases without precedential value.<sup>36</sup> The lawyers also submitted a reply brief that had no table of contents or table of authorities.<sup>37</sup> The court stated that despite the appellant's poorly written briefs, it examined the papers and decided that appellants were not entitled to relief on the merits.<sup>38</sup> Other than to comment on the lawyers' ethics and briefing errors, the court didn't explain its reasoning for dismissing the appeal.<sup>39</sup>

Even if a court doesn't have rules about a brief's format and length, lawyers shouldn't burden the court with prolix writing. In a 1975 New York Court of Appeals case decided before the court instituted rules to regulate brief length, the court sanctioned a lawyer who submitted a 284-page brief about issues "neither novel nor complex."<sup>40</sup> To illustrate the brief's absurdity, the court broke down the number of pages it devoted to each issue, including 50 pages for the facts,

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126 for one argument, and 4 to justify the brief's length.<sup>41</sup>

### Lawyer's Role as Advisor

Lawyers must mind the Disciplinary Rules when advising a supervising attorney or a client. Lawyers are often asked to prepare memorandums for a supervising attorney or a client directly. A memorandum is intended to predict objectively how the law will be applied to the facts of the client's case, not to persuade the reader what the law should be. A memorandum must take a position, but it must also provide the strongest arguments for and against the client's position. A skewed memorandum is no strategic or planning tool.

Lawyers mustn't give unsolicited advice to non-clients. Publicly discussing the law, however, is essential to understanding how the law works and applies. The Disciplinary Rules allow lawyers to write about legal topics, but they forbid lawyers to give unsolicited advice to non-clients.<sup>42</sup> A lawyer who participates in an on-line chat, for example, should notify the other participants that the discussion doesn't create a lawyer-client relationship, that none of the communications are confidential, and that the advice is general in nature and not intended to provide specific guidance. The notice should contain unequivocal language that non-lawyers will understand.

Clients pay the bills. They can use their economic influence to pressure lawyers to break the law or violate a Disciplinary Rule. A lawyer is prohibited from assisting a client to engage in unlawful or fraudulent conduct.<sup>43</sup> A lawyer can choose to refuse to aid or participate in conduct the lawyer believes is unlawful, even if there's some support for the argument that the conduct is legal.<sup>44</sup> The Disciplinary Rules recognize that when clients place their lawyers in an ethical quandary, and when it is unclear whether the lawyer will be advising a client to commit legal or illegal conduct, the lawyer should err on the side of not advising rather than face possible disciplinary action.

### Conclusion

Ethics permeates all aspects of the legal profession. The way a lawyer writes can establish the lawyer's reputation as ethical and competent. Reputation is a lawyer's most precious asset. By embodying the profession's ethical ideals in their writing, lawyers will insure that their reputation remains positive and increase the possibility that their clients will prevail in litigation. ■

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1. DR 7-102(a)(5) (22 NYCRR 1200.33(a)(5)).
2. 22 NYCRR 130-1.1(c)(3).
3. See *In re Abrahams*, 5 A.D.3d 21, 22-27, 770 N.Y.S.2d 369, 371-75 (2d Dep't 2003) (per curiam), appeal dismissed, 1 N.Y.3d 619, 808 N.E.2d 1273, 777 N.Y.S.2d 13 (2004).
4. See *Duncan v. AT&T Communications, Inc.*, 668 F. Supp. 232, 234 (S.D.N.Y. 1987).
5. *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (citation omitted).
6. Except when the other side is absent. See Part I of this column.
7. Margaret R. Milsky, *Ethics and Legal Writing*, 85 Ill. B.J. 33, 34 (1997) (noting that citing record enhances lawyer's credibility).
8. *DeRosa v. Chase Manhattan Mtge. Corp.*, 15 A.D.3d 249, 249, 793 N.Y.S.2d 1, 2 (1st Dep't 2005) (mem.).
9. Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* 122 (2002).
10. Wendy B. Davis, Writing Clinic, *An Attorney's Ethical Obligations Include Clear Writing*, 72 N.Y. St. B.J. 50, 50 (Jan. 2000) (calling clear legal writing an ethical obligation).
11. George Orwell, *The Politics of Language*, in 4 *The Collected Essays: Journalism and Letters of George Orwell* 165-69 (1968).
12. Laura E. Little, *Hiding With Words: Obfuscation, Avoidance, and Federal Jurisdictional Opinions*, 46 UCLA L. Rev. 75, 101 (1998).
13. *Wilson v. Meeks*, 52 F.3d 1547, 1558 (10th Cir. 1995).
14. *Id.*
15. See *United States v. Snider*, 976 F.2d 1249, 1251 n.1 (9th Cir. 1992) (Kozinski, J.) (referring to brief's bold-faced font, capital letters, and quotation marks for emphasis, the court wrote that "[w]hile we realize counsel had only our welfare in mind in engaging in these creative practices, we assure them that we would have paid no less attention to their briefs had they been more conventionally written").
16. *Duncan*, 668 F. Supp. at 234.
17. See *In re Harper*, 223 A.D.2d 200, 201-02, 645 N.Y.S.2d 846, 847 (2d Dep't 1996) (per curiam).
18. *In re Steinberg*, 206 A.D.2d 232, 233, 620 N.Y.S.2d 345, 346 (1st Dep't 1994) (per curiam) (citing DR 1-102(a)(4) (22 NYCRR 1200.3 (a)(4)); see also

*Kingvision Pay Per View, Ltd. v. Wilson*, 83 F. Supp. 2d 914, 916 n.4 (W.D. Tenn. 2000) (noting that lawyer failed to give credit to source).

19. Linda H. Edwards, *Legal Writing Process, Analysis, and Organization* 10 (2002).
20. Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. Legal Educ. 236, 245 (1999).
21. See, e.g., Wayne Scheiss, *Ethical Legal Writing*, 21 Rev. Litig. 527, 538-39 (2002) (documenting courts reprimanding lawyers for plagiarism).
22. See *Pagan Velez v. Laboy Alvarado*, 145 F. Supp. 2d 146, 160-61 (D.P.R. 2001).
23. See generally Gerald Lebovits, Legal Writer, *You Can Quote Me: Quoting in Legal Writing — Part I*, 76 N.Y. St. B.J. 64 (May 2004); Gerald Lebovits, Legal Writer, *You Can Quote Me: Quoting in Legal Writing — Part II*, 76 N.Y. St. B.J. 64 (June 2004).
24. See Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 Suffolk U. L. Rev. 1, 30-31 (1997) (providing example of courts sanctioning lawyers for misquoting).
25. Louis J. Sirico, Jr., *A Primer on Plagiarism*, Second Draft 11 (May 1988).
26. See *Clement v. Pub. Serv. Elec. & Gas Co.*, 198 F.R.D. 634, 635-36 (D.N.J. 2001); see also *DeWilde v. Guy Gannett Publ'g Co.*, 797 F. Supp. 55, 56 n.1 (D. Me. 1992) (reprimanding attorney for copying opposing counsel's memorandum of law).
27. See *Clement*, 198 F.R.D. at 636.
28. *Id.*
29. Local Rule 32(a), available at <http://www.ca2.uscourts.gov/Docs/Rules/LR32.pdf> (last visited June 20, 2005).
30. See, e.g., 22 NYCRR 500.1(k) (Ct. App.); 600.10(a)(1) (1st Dep't); 670.10.1(f) (2d Dep't); 800.8(a) (3d Dep't); 1000.4(h) (4th Dep't).
31. See *Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 640 (2d Cir. 1995).
32. Thomas R. Haggard, *Good Writing as Professional Responsibility*, 11 S.C. Law. 11, 11 (May/June 2000).
33. See, e.g., *La Reunion Francaise, S.A. v. Halbart*, No. 96-CV-1445, 1998 WL 1750128, at \*1 n.1 (E.D.N.Y. Sept. 28, 1998) (expressing court's disfavor with plaintiff's using "microscopic font and half-inch margins" to circumvent page limit); *LaGrange Mem'l Hosp. v. St. Paul Ins. Co.*, 317 Ill. App. 3d 863, 876, 740 N.E.2d 21, 32 (2000) (reprimanding lawyers for exceeding page limits).
34. See, e.g., *Richmond v. Springfield Rehab. & Healthcare*, 138 S.W.3d 151, 154 (Mo. App. S.D. 2004) (dismissing case because lawyer's briefs did not conform to court's rules); *Frazier v. Columbus Bd. of Educ.*, 70 Ohio St. 3d 1431, 1431, 638 N.E.2d 581, 582 (Ohio 1994) (same).
35. See *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146-47 (9th Cir. 1997).
36. *Id.* at 1146.
37. *Id.*
38. See *id.* at 1147.
39. *Id.*
40. *Slater v. Gallman*, 38 N.Y.2d 1, 4-5, 339 N.E.2d 863, 864-65, 377 N.Y.S.2d 448, 450-51 (1975).
41. See *id.* at 5 n.1, 339 N.E.2d at 865 n.1, 377 N.Y.S.2d at 450 n.1; accord *Stevens v. O'Neill*, 169 N.Y. 375, 376, 62 N.E. 424, 424 (1902) (per curiam) (commenting on how typewriters rather than pens allow verbosity).
42. DR 2-104(e) (22 NYCRR 1200.9(e)).
43. DR 7-102(a)(7) (22 NYCRR 1200.33(a)(7)).
44. DR 7-101(b)(2) (22 NYCRR 1200.32(b)(2)).