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## Entertaining and Embracing Professional Identity Development in the 1L Legal Writing Curriculum

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## ENTERTAINING AND EMBRACING PROFESSIONAL IDENTITY DEVELOPMENT IN THE 1L LEGAL WRITING CURRICULUM

Charles W. Oldfield\*

### ABSTRACT

Because of their already heavy workload, legal writing faculty sometimes resist taking on new curricular responsibilities, including calls to incorporate ethics and professionalism training in the first-year legal writing curriculum. But the ABA now requires law schools to provide students with opportunities to develop their professional identities throughout their time in law school. This requirement means that faculty will need to add professional identity development to their courses. Rather than resist this change, first-year legal writing faculty should embrace the opportunity by using the Model Rules of Professional Conduct to incorporate concepts of ethics and professionalism in their first-year courses.

Legal writing faculty can use the Model Rules to incorporate professional identity development into their courses without making significant changes to the content or structure of their courses. Further, the cases where lawyers are disciplined or sanctioned for violating the Rules of Professional Conduct often involve absurd and entertaining facts—which make for interesting class discussion.

Using the Model Rules to incorporate professional identity development in the first-year legal writing curriculum benefits students in at least two ways. It helps them in their first summer employment by exposing them to the ethical obligations of lawyers—something that they usually do not learn until they take Professional Responsibility in their second or third year of law school. It also helps them in their Professional Responsibility course because they have begun to learn how ethical rules work in the daily practice of law.

This Article offers a definition of professional identity and explains why the requirement to provide opportunities for professional identity development across the curriculum renders objections to taking on this curricular responsibility largely irrelevant. This Article calls on first-year legal writing faculty to be leaders in professional identity development and offers a proposal for how they can use the Model Rules of Professional Conduct to introduce ethics and professionalism in the first-year legal writing curriculum in an interesting and entertaining way.

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## I. INTRODUCTION

Zachariah C. Crabill was admitted to practice law in Colorado in October 2021.<sup>1</sup> In April 2023, a client hired Crabill to move to set aside a judgment in a civil case.<sup>2</sup> Crabill had not drafted such a motion before, so he turned to ChatGPT for help.<sup>3</sup> Crabill cited cases that ChatGPT found, but he did not read the cases or verify their accuracy.<sup>4</sup> At some point before a hearing on the motion, Crabill discovered that the cases ChatGPT had found were either incorrect or fictitious,<sup>5</sup> but he did not tell the court, correct the misrepresentations, or withdraw the motion.<sup>6</sup> The court expressed concern about the cases cited in the motion, and Crabill initially blamed the mistakes on a legal intern.<sup>7</sup> He eventually admitted that he had used ChatGPT to draft the motion.<sup>8</sup>

The Office of Presiding Disciplinary Judge of the Supreme Court of Colorado found that Crabill's conduct violated Colorado Rule of Professional Conduct 1.1 (a lawyer must competently represent a client); Colorado Rule of Professional Conduct 1.3 ("a lawyer shall act with reasonable diligence and promptness when representing a client"); Colorado Rule of Professional Conduct 3.3(a)(1) ("a lawyer shall not knowingly make a false statement of material fact or law to a tribunal"); and Colorado Rule of Professional Conduct 8.4(c) ("it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation").<sup>9</sup> As a result of his misconduct, Crabill's license to practice law was suspended for 366 days.<sup>10</sup> Crabill is one of several lawyers who have relied on artificial intelligence to draft briefs only to discover that the artificial intelligence program cited cases that did not exist.<sup>11</sup>

Mr. Crabill's misconduct occurred in the realm that first-year legal writing faculty teach—research and persuasive writing.<sup>12</sup> His case illustrates the peril to lawyers and their clients when lawyers do not meet their ethical obligations.<sup>13</sup> But students usually do not take an ethics course, Professional Responsibility, until their second or third year of

1. COLORADO SUPREME COURT OFFICE OF ATTORNEY REGULATION COUNCIL, <https://coloradosupremecourt.com/Search/Attinfo.asp?Regnum=56783> (last visited Apr. 5, 2024).

2. *People v. Crabill*, No. 23PDJ067, 2023 WL 8111898, at \*1 (Colo. O.P.D.J. Nov. 22, 2023).

3. *Id.*

4. *Id.*

5. Instances where artificial intelligence platforms produce false or misleading results are called "hallucinations." Google Cloud, *What Are AI Hallucinations?*, <https://cloud.google.com/discover/what-are-ai-hallucinations> (last visited Apr. 5, 2024).

6. *Crabill*, 2023 WL 8111898, at \*1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *See Crabill*, 2023 WL 8111898, at \*1 (finding that part of the suspension was stayed on the condition that Crabill meet certain requirements).

11. *Mata v. Avianca, Inc.*, No. 22-cv-1461 (PKC), 2023 WL 4114965, at \*1 (S.D.N.Y. June 22, 2023); *United States v. Cohen*, 1:18-cr-00602-JMF, 2023 WL 8635521 (S.D. N.Y. 2023); Order, 1:18-cr-00602-JMF, ECF No. 102; Affirmation, 1:18-cr-00602-JMF, ECF No. 103; Letter from Barry Karmins & John M. Leventhal to Judge Jesse M. Furman, 1:18-cr-00602-JMF, ECF No. 103; Letter from Danya Perry to Judge Jesse M. Furman, 1:18-cr-00602-JMF, ECF No. 104; Letter from Barry Karmins & John M. Leventhal to Judge Jesse M. Furman, 1:18-cr-00602-JMF, ECF No. 105; Decl. of David M. Schwartz, 1:18-cr-00602-JMF, ECF No. 106; Letter from Michael Cohen to Judge Jesse M. Furman, 1:18-cr-00602-JMF, ECF No. 107.

12. *Legal Writing*, COLUMBIA LAW SCHOOL, <https://www.law.columbia.edu/academics/experiential/legal-writing> (last visited Apr. 5, 2024).

13. *See Crabill*, 2023 WL 8111898, at \*1.

law school.<sup>14</sup> Therefore, first-year legal writing courses teach law students to do the work that lawyers do, without systematically exposing them to the ethical standards within which that work occurs.<sup>15</sup> It is like teaching someone how to play a game without explaining what the rules of the game are.

Others have suggested that first-year legal writing courses should introduce ethics and professionalism.<sup>16</sup> But legal writing faculty have objected to taking on new or additional curricular responsibilities.<sup>17</sup> Their objections include the fact that legal writing faculty already have a heavy workload, Professional Responsibility is already a required upper-level course,<sup>18</sup> and legal writing, and those who teach it, are undervalued.<sup>19</sup> Therefore, they reason, legal writing faculty should not voluntarily assume another pedagogical burden that would further undermine their value.<sup>20</sup>

Recently adopted ABA Standard 303(b)(3) requires law schools to offer opportunities for professional identity “development during each year of law school and in a variety of courses . . . .”<sup>21</sup> Thus, it seems that Standard 303(b)(3) has rendered objections to incorporating professional identity development in the first-year legal writing program largely irrelevant.<sup>22</sup> All faculty should be expected to incorporate professional identity development in their classes.

Rather than resist including opportunities for professional identity development in their curriculum, first-year legal writing faculty should be leaders in the field, and they are well suited to do so. This Article suggests that first-year legal writing faculty use the Model Rules of Professional Conduct and cases like *Crabill’s*, to provide their students with opportunities for professional identity development. Professional identity development can be easily incorporated into traditional first-year legal writing assignments and doing so will enhance those assignments without detracting from or sacrificing the other things legal writing faculty must teach.

First-year legal writing courses provide students with their first exposure to what lawyers do daily.<sup>23</sup> Within the first-year curriculum, legal writing courses are most like the

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14. See e.g., Harvard Law School, *Handbook of Academic Policies (2023–24)*, [https://hls.harvard.edu/wp-content/uploads/2022/07/HLS\\_HAP.pdf](https://hls.harvard.edu/wp-content/uploads/2022/07/HLS_HAP.pdf) (last visited Apr. 4, 2024).

15. See e.g., *Legal Writing*, *supra* note 12.

16. E.g., Melissa H. Weresh, *Fostering A Respect for Our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum*, 21 *TOURO L. REV.* 427, 427 (2005).

17. *Id.* at 429–30.

18. AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, 2023–2024 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 18 (2023) [hereinafter ABA STANDARDS]. Legal Writing, Professional Responsibility, and experiential courses are the only subjects or classes specifically required by the ABA Standards and Rules of Procedure for the Approval of Law Schools. Standard 303(a) says:

A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following:

- (1) one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members;
- (2) one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised; and
- (3) one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement, as defined in Standard 304.

19. Weresh, *supra* note 16, at 429–30.

20. *Id.*

21. ABA STANDARDS, *supra* note 18, at 19.

22. *Id.* at 18–19.

23. *Legal Writing*, *supra* note 12.

practice of law because first-year legal writing courses teach lawyering behavior<sup>24</sup>—legal analysis and communication, in the context of simulated law office work—writing memos and briefs. We do our students a disservice when we teach them the skills that they will use as lawyers without also providing them the opportunity to understand the ethical and professional obligations that relate to those skills.

Further, first-year legal writing courses are often taught by faculty with significant practice experience.<sup>25</sup> These professors will likely have dealt with counsel who behaved unethically or unprofessionally and can discuss those examples with their students. Similarly, because of their practical experience, legal writing faculty can discuss instances when they faced moral or ethical dilemmas in practice and how they resolved them, or they can discuss instances of exemplary professional behavior that they saw in practice.

Introducing concepts of ethics and professionalism in the context of the first-year legal writing curriculum will also help students by laying a solid foundation for the material students will learn in their Professional Responsibility class in their second or third year of law school. Because Professional Responsibility is taught as a doctrinal course, it does not lend itself well to an understanding of how ethical and professionalism issues play out in the day-to-day practice of law.<sup>26</sup> Introducing ethical and professionalism concepts in the first-year legal writing curriculum—when students are learning lawyering behavior—will help students better understand how the ethical rules they later learn in Professional Responsibility affect and apply to the daily practice of law.<sup>27</sup>

Finally, introducing ethics and professionalism in the first-year legal writing curriculum will help students in their first summer employment. As we have discussed, Professional Responsibility is an upper-level course. So students enter their first summer clerkship or internship with little or no exposure to the ethical standards of the profession.

This Article begins by giving background on the adoption of Standard 303(b)(3)'s requirement to provide opportunities for professional identity development.<sup>28</sup> The next section discusses why first-year legal writing courses are uniquely suited (within the first-year curriculum at least) to help students develop their professional identity. Section Three suggests ways that legal writing faculty can use the Model Rules of Professional Conduct to expose students to ethical considerations inherent in written and oral advocacy. The Article concludes by encouraging legal writing faculty to use the Model Rules of Professional Conduct to provide opportunities for professional identity development in their first-year legal writing courses.

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24. Weresh, *supra* note 16, at 454. Weresh's definition of "lawyering behavior" includes the ability to spot and analyze an issue and then communicate the information effectively in the appropriate format. *Id.* at 454 n.73.

25. Peter Nemerovski, *Help Wanted: An Empirical Study of LRW Hiring*, 24 J. LEGAL WRITING INST., 315, 334 (2020) (finding that 93.4 percent of legal writing faculty in the study had experience as a practicing attorney at the time that they were hired, with median experience of five years).

26. Weresh, *supra* note 16, at 454 n.73.

27. See Sophie Sparrow, *Practicing Civility in the Legal Writing Course: Helping Law Students Learn Professionalism*, 13 J. LEGAL WRITING INST. 1, 134 (2007). This is like the way that a good trial advocacy course helps students understand and use the Rules of Evidence. See Alli Gerkman, *Teaching Evidence Law in Advocacy Context* (Jan. 22, 2014), <https://iaals.du.edu/blog/teaching-evidence-law-trial-advocacy-context>.

28. See Memorandum from Scott Bales, Chair, Council, Section of Legal Education and Admissions to the Bar and William Adams, Managing Director of Accreditation and Legal Education, ABA Standards and Rules of Procedure – Matters for Notice and Comment – Standards 303 and 508 and Rules 2 and 13 (Mar. 1, 2021), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/20210301-notice-and-comment-standards-303-and-508-rules-2-and-13.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/20210301-notice-and-comment-standards-303-and-508-rules-2-and-13.pdf).

## II. BACKGROUND ON STANDARD 303(B)(3)

A. *The MacCrate and Carnegie Reports*

Calls for professional identity training or development as part of legal education are not new.<sup>29</sup> In 1992, the American Bar Association Section of Legal Education and Admissions to the Bar published a report of the Task Force on Law Schools and the Profession: Narrowing the Gap.<sup>30</sup> The report was titled *Legal Education and Professional Development—an Educational Continuum*, and is commonly called the MacCrate Report<sup>31</sup> Among other topics, the MacCrate Report said that law schools must make students aware of the “fundamental professional values of ‘competent representation,’ ‘striving to improve the profession,’ ‘professional self-development,’”<sup>32</sup> and “the need to ‘promote justice, fairness, and morality.’”<sup>33</sup> The MacCrate Report also recommended that ABA Standard 301(a) be amended to “affirm that education in lawyer skills and professional values is central to the mission of law schools and recognize the current stature of skills and values instruction.”<sup>34</sup>

Then, in 2007, the Carnegie Report was published.<sup>35</sup> This study proposed a three-part model for legal education in which each part interacted with the others.<sup>36</sup> The proposed model was:

1. The teaching of legal doctrine and analysis, which provides the basis for professional growth;
2. Introduction to the several facets of practice, included under the rubric of lawyering, leading to acting with responsibility for clients; and
3. A theoretical and practical emphasis on inculcation of the identity, values, and dispositions consonant with the fundamental purposes of the legal profession.<sup>37</sup>

The Carnegie Report contended that this three-part model “would help students fit together the various elements of their educational experience, preparing them for the varied demands of professional legal work.”<sup>38</sup> Important to the discussion here, the Carnegie Report said that “[i]n the first phase of legal education, well-designed lawyering courses should be taught as intentional complements to doctrinal instruction.”<sup>39</sup> These reports were the precursors to ABA Standard 303(b)(3).<sup>40</sup>

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29. See, e.g., ABA, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 262 (1992) [hereinafter MACCRATE REPORT].

30. See generally MACCRATE REPORT, *supra* note 29.

31. *Id.*

32. *Id.* at 235.

33. *Id.* at 236.

34. *Id.* at 330.

35. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (Jossey-Bass 2007).

36. *Id.* at 194.

37. *Id.*

38. *Id.*

39. *Id.* at 195.

40. See generally MACCRATE REPORT, *supra* note 29; see also SULLIVAN ET AL., *supra* note 35.

B. *ABA Standard 303(b)(3)*

In March 2021, the ABA Section on Legal Education and Admissions to the Bar published proposed amendments to Standard 303 for notice and comment.<sup>41</sup> The proposed amendments included Standard 303(b)(3), which would require law schools to provide substantial opportunities for the development of a professional identity.<sup>42</sup> After Notice and Comment, in May 2021, the ABA Section on Legal Education and Admissions to the Bar published a second round of proposed amendments to Standard 303.<sup>43</sup> The proposed amendments added Section 303(c), which requires training and education on bias, cross-cultural competency, and racism.<sup>44</sup> The amendment also included Standard 303(b)(3), which was originally published for notice and comment in March 2021.<sup>45</sup> The ABA House of Delegates concurred in the proposed amendments at its February 14, 2022, meeting.<sup>46</sup> The amendments became effective fall semester of 2023.<sup>47</sup>

Standard 303(b)(3) requires law schools to “provide substantial opportunities to students for: . . . the development of a professional identity.”<sup>48</sup> Interpretation 303-5 to Standard 303(b)(3) says that “[p]rofessional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society.”<sup>49</sup> The interpretation emphasizes that professional identity development “should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice.”<sup>50</sup> The interpretation concludes by noting that “developing a professional identity requires reflection and growth over time” so students should have frequent opportunities to develop their professional identities “during each year of law school and in a variety of courses and co-curricular and professional development activities.”<sup>51</sup>

Interpretation 303-5 has three key points.<sup>52</sup> First, professional identity is both lawyer and client focused.<sup>53</sup> Second, professional identity development requires intentionality—it does not happen organically.<sup>54</sup> Finally, it takes time to develop a professional identity so students must begin that process during the first year of law school and continue it throughout law school and beyond.<sup>55</sup> However, the ABA standards do not define

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41. Bales & Adams, *supra* note 28.

42. *Id.*

43. Memorandum from Scott Bales, Chair, Council, Section of Legal Education and Admissions to the Bar and William Adams, Managing Director of Accreditation and Legal Education, ABA Standards – Matters for Notice and Comment – Standards 205, 206, 303, 507, and 508, (May 25, 2021), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/comments/2021/21-may-notice-and-comment-standards-205-206-303-507-508.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/21-may-notice-and-comment-standards-205-206-303-507-508.pdf).

44. *Id.*

45. *Id.*

46. *ABA House Approves New Policies Seeking to Preserve Voting Rights, Change Electoral Count Act*, ABA (Feb. 14, 2022), <https://www.americanbar.org/news/abanews/aba-news-archives/2022/02/aba-house-approves-new-policies/#:~:text=CHICAGO%2C%20Feb.,limit%20voting%20rights%20of%20Americans>.

47. ABA STANDARDS, *supra* note 18, at 18.

48. *Id.*

49. ABA STANDARDS, *supra* note 18, at 19.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. ABA STANDARDS, *supra* note 18, at 19.

55. *Id.*



“professional identity” or mandate particular things that a law school must do to meet this requirement.<sup>56</sup>

### III. DEFINING PROFESSIONAL IDENTITY

#### A. *Professionalism—I Know it When I See it.*

Standard 303(b)(3) does not expressly define “professional identity”;<sup>57</sup> nor did the Carnegie or MacCrate reports.<sup>58</sup> Nor do scholars agree on a definition of professional identity.<sup>59</sup> Perhaps professional identity is not easily definable because it may mean different things to different people. Even if professional identity or professionalism is not easily defined, we know it when we see it.<sup>60</sup> That said, we need to define or at least identify what constitutes one’s professional identity to know how to incorporate professional identity development into the law school curriculum.

The MacCrate report offers insight into part of what professional identity means.<sup>61</sup> The MacCrate Report identified four fundamental values of the legal profession,<sup>62</sup> including providing competent representation; striving to promote justice, fairness, and morality; striving to improve the profession; and professional self-development.<sup>63</sup>

Interpretation 303-5 also provides a basis for defining or at least better understanding the concept of professional identity.<sup>64</sup> The interpretation says that “[t]he development of professional identity should involve an intentional exploration of the values,

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56. *Id.*

57. ABA STANDARDS, *supra* note 18, at 18. When the ABA first published Standard 303(b)(3) for notice and comment, the draft of Interpretation 303-5 tried to define professional identity. The original draft of Interpretation 303-5 said:

Professional identity includes, but is not limited to, the knowledge, skills, values and morals, goals, and personality traits considered foundational to successful legal practice. Students should have frequent opportunities to develop their professional identity during their time in law school, starting in the first year. These opportunities should not take place solely in one course but should be varied across the curriculum as well as in co-curricular and professional development activities as the development of a professional identity requires student reflection and growth over time.

Bales & Adams, *supra* note 28.

After notice and comment, Interpretation 303-5 was changed and as adopted reads:

Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society. The development of professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice. Because developing a professional identity requires reflection and growth over time, students should have frequent opportunities during each year of law school and in a variety of courses and co-curricular and professional development activities.

ABA STANDARDS, *supra* note 18, at 19.

58. MACCRATE REPORT, *supra* note 29, at 330; SULLIVAN ET AL., *supra* note 35, at 194.

59. MACCRATE REPORT, *supra* note 29, at 140–41; ABA STANDARDS, *supra* note 18.

60. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Steward, J., concurring and saying that with respect to defining hard-core pornography, “I shall not today attempt further to define the kinds of materials I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it and the motion picture involved in this case is not that.”).

61. MACCRATE REPORT, *supra* note 29, at 140–41.

62. *Id.*

63. *Id.*

64. *See e.g.*, ABA STANDARDS, *supra* note 18.

guiding principles, and well-being practices considered foundational to successful legal practice.”<sup>65</sup> So “professional identity” is more than merely ethical behavior,<sup>66</sup> it even includes the physical and mental well-being of the lawyer, but as discussed below, ethical behavior is integral to the idea of professional identity.<sup>67</sup>

### B. *Ethics and Professionalism*

Part of professional identity and thus professionalism must include adherence to the ethical standards that govern the legal profession and guide the lawyer’s relationship with clients, other lawyers, the courts, and the public.<sup>68</sup> Indeed, they are called the Model Rules of *Professional* Conduct, not the Model Rules of *Ethical* Conduct.<sup>69</sup> Ethical behavior is part of professional identity because the Rules of Professional Conduct reflect some of the values and guiding principles of the profession—competence, diligence, candor, and zealous advocacy, to name a few.<sup>70</sup>

The Model Rules also help us define what professional identity means.<sup>71</sup> The Preamble notes that, in addition to ethical rules, “a lawyer is . . . guided by personal conscience and the approbation of professional peers.”<sup>72</sup> It continues, “[a] lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.”<sup>73</sup> The Preamble also acknowledges that, even within the ethical framework established by the Rules of Professional Conduct, difficult issues will arise and a lawyer must resolve those issues by exercising her professional and moral judgment.<sup>74</sup> But the Model Rules of Professional Conduct set a floor, not a ceiling; the Model Rules are the minimum standards lawyers must abide by.<sup>75</sup> Professional identity and professionalism include more than adherence to the minimum professional standards.<sup>76</sup>

Professor Daisy Hurst Floyd defined professional identity this way: “Professional identity refers to the way that a lawyer integrates the intellectual, practical, and ethical aspects of being a lawyer and also integrates personal and professional values.”<sup>77</sup> This is a good definition because it focuses on the need for law students and lawyers to internalize the values of the profession rather than just governing their actions by whether a particular course of conduct violates an ethical rule.<sup>78</sup>

In *Law Student Professional Development and Formation*, Professors Neil W. Hamilton and Louis D. Bilonis say that professional identity includes four components:

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65. *Id.*

66. *Id.*

67. See, e.g., Benjamin H. Barton, *The ABA, The Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 411 (2005).

68. See generally MODEL RULES OF PRO. CONDUCT (AM. BAR ASS’N 1983).

69. *Id.*

70. *Id.*

71. MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS’N 1983).

72. *Id.*

73. *Id.*

74. *Id.*

75. See, e.g., Barton, *supra* note 67, at 411.

76. Daisy Hurst Floyd, *Practical Wisdom: Reimagining Legal Education*, 10 U. ST. THOMAS L.J. 195, 201 (2012).

77. *Id.*

78. See *id.*

1. Ownership of continuous professional development toward excellence at the major competencies that clients, employers, and the legal system need;
2. a deep responsibility and service orientation to others, especially the client;
3. a client-centered problem-solving approach and good judgment that ground each student's responsibility and service to the client; and
4. well-being practices.<sup>79</sup>

I propose this definition: Professional Identity is the internalization of ethical, moral, societal, and professional values that manifests itself in professional conduct that promotes fairness, justice, civility, and the well-being of the lawyer and the profession. This definition acknowledges that professional identity is something that must be internalized, that is, professional identity and professionalism cannot be mandated or legislated. Second, this definition encompasses the key components of professional behavior: ethical, moral, societal, and professional values. Finally, the definition emphasizes that the purpose of professional identity and professionalism is to serve the ends of the legal profession and society: promoting fairness, justice, and civility and to ensure the well-being of the lawyer and the profession.

#### IV. FIRST-YEAR LEGAL WRITING CLASSES ARE WELL SUITED TO INTRODUCE PROFESSIONAL IDENTITY DEVELOPMENT

##### *A. The MacCrate and Carnegie Reports Recognize that Skills Courses Provide Opportunities for Professional Identity Development*

As noted above, the MacCrate and Carnegie Reports both proposed incorporating professional identity development into the law school curriculum.<sup>80</sup> And both highlighted skills courses as places suitable for introducing opportunities for professional identity development.<sup>81</sup> The MacCrate Report recommended that ABA Standard 301(a) be amended to “affirm that education in lawyer skills and professional values is central to the mission of law schools and recognize the current stature of skills and values instruction.”<sup>82</sup> The Carnegie Report said that “[i]n the first phase of legal education, well-designed lawyering courses should be taught as intentional complements to doctrinal instruction.”<sup>83</sup>

Rather than devalue legal writing instruction and faculty, the MacCrate and Carnegie Reports emphasize the importance and value, perhaps even prominence, of these and other skills courses in inculcating professional ideals into law students.<sup>84</sup> In other words, lawyering courses, such as Legal Analysis, Research, and Writing, play an important role in helping students develop their professional identities.

##### *B. First-Year Legal Writing Courses Teach Lawyering Behavior*

Professor Melissa Weresh observed that “[l]egal writing provides a uniquely well-suited forum within which we can expose our students to issues of ethics and professionalism.”<sup>85</sup> Professor Jan Levine wrote that, “[t]eaching legal writing means intense

79. NEIL W. HAMILTON & LOUIS D. BILIONIS, LAW STUDENT PROFESSIONAL DEVELOPMENT AND FORMATION 1-2 (2022).

80. MACCRATE REPORT, *supra* note 29, at 330; SULLIVAN ET AL., *supra* note 35, at 194.

81. MACCRATE REPORT, *supra* note 29, at 330; SULLIVAN ET AL., *supra* note 35, at 194.

82. MACCRATE REPORT, *supra* note 29, at 330.

83. SULLIVAN ET AL., *supra* note 35, at 195.

84. MACCRATE REPORT, *supra* note 29, at 330; SULLIVAN ET AL., *supra* note 35, at 194.

85. Weresh, *supra* note 16, at 440.

contact with students, a chance to influence them as no one else does, and an opportunity for tremendous pedagogical and personal rewards.”<sup>86</sup>

Students enter law school ready to change the world. They are enthusiastic, ready to learn, and eager to begin their journey from law student to lawyer.<sup>87</sup> First-year students want to learn and know what lawyers do. First-year legal writing courses give students their first exposure to what lawyers do in the real world by “teach[ing] lawyering behavior.”<sup>88</sup> Legal writing classes do this by requiring students to perform tasks that they will perform as summer law clerks, summer associates, interns, externs, and lawyers—analyzing a legal issue and communicating that analysis in a predictive memo to a senior partner or a persuasive brief to a trial judge or appellate panel. But, because Professional Responsibility is usually an upper-level course, first-year students begin to learn lawyering behavior without any context or understanding of the ethical rules and professional expectations within which lawyers perform these tasks.

Further, students complete their first year of legal education and then work in summer positions, using the lawyering behavior that they have begun to learn, without any structured opportunity for professional identity development and likely little or no exposure to the ethical rules that govern the practice of law. Thus, because first-year legal writing classes most closely expose students to lawyering behavior, the first-year legal writing curriculum should incorporate opportunities for professional identity development.

### C. *First-year Legal Writing Courses Provide more Opportunities for One-on-One Interaction*

First-year legal writing courses are structured in ways that provide more opportunities for one-on-one or small-group interaction between students and faculty. This is so for at least two reasons: First-year legal writing class sections are usually smaller than the sections for first-year doctrinal classes, and legal writing faculty provide direct feedback on multiple assignments and then meet with students individually or in small groups. The ABA standards for law school accreditation essentially mandate the kind of individualized contact first-year legal writing faculty have with students.<sup>89</sup> Under these standards, a student must complete “one writing experience in the first year and at least one additional writing experience after the first year[.]”<sup>90</sup> The interpretation of this standard says that “[f]actors to be considered in evaluating the rigor of a writing experience include the number and nature of writing projects assigned to students, the form and extent of individualized assessment of a student’s written products, and the number of drafts that a student must produce for any writing experience.”<sup>91</sup>

Because of the one-on-one and small group interaction first-year legal writing faculty have with their students, these faculty have significant opportunities to model professionalism and to discuss professional identity and what it means to be a lawyer.<sup>92</sup> For example, individual or small-group meetings with students to discuss their writing assignments and offer feedback give legal writing faculty the opportunity to simulate how senior

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86. Jan M. Levine, *Leveling the Hill of Sisyphus: Becoming A Professor Legal Writing*, 26 FLA. ST. U. L. REV. 1067, 1071–72 (1999).

87. Weresh, *supra* note 16, at 440.

88. *Id.* at 454 n.73. Weresh’s definition of “lawyering behavior” includes the ability to spot and analyze an issue and then communicate the information effectively in the appropriate format). *Id.* at 454 n.73.

89. ABA STANDARDS, *supra* note 18, at 18.

90. *Id.*

91. ABA STANDARDS, *supra* note 18, at 18–19.

92. Levine, *supra* note 86, at 1071–72.

attorneys in a law firm might interact with law clerks or junior associates. Legal writing faculty can model good professional mentorship in these meetings with students.

## V. USING THE MODEL RULES TO INCORPORATE PROFESSIONAL IDENTITY TRAINING

### A. *Selecting the Model Rules*

Let us return to our definition of professional identity: Professional Identity is the internalization of ethical, moral, societal, and professional values that manifests itself in professional conduct that promotes fairness, justice, civility, and the well-being of the lawyer and the profession. One part of this definition is the ethical aspects of lawyering. The Model Rules of Professional Conduct provide the minimum ethical standards that lawyers must abide, and thus, must be incorporated into opportunities for professional identity development.<sup>93</sup> Further, if the ethical standards are the minimum level of professionalism needed, then lawyers cannot develop a higher level of professional identity and eventually professionalism without complying with their ethical obligations.

Legal writing faculty could devise ways to incorporate discussion of each of the Model Rules into their curriculum, but an attempt to survey all the Rules would be impractical and likely ineffective. So, the first question to answer is which of the Model Rules are best suited for discussion during the first-year legal writing program.

The Model Rules cover eight broad categories: (1) The Client-Lawyer Relationship; (2) Counselor; (3) Advocate; (4) Transactions with Persons other than Clients; (5) Law Firms and Associations; (6) Public Service; (7) Information About Legal Services; and (8) Maintaining the Integrity of the Profession.<sup>94</sup> I propose that the following rules offer the best opportunity for professional identity development in the first-year legal writing curriculum:

**Rule 1.1:** Competence: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.<sup>95</sup>

**Rule 1.3:** Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client.<sup>96</sup>

**Rule 2.1:** Advisor: In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.<sup>97</sup>

**Rule 3.1:** Meritorious Claims & Contentions: A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or

93. Barton, *supra* note 67.

94. *See generally*, MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).

95. MODEL RULES OF PRO. CONDUCT. r. 1.1 (AM. BAR ASS'N 1983).

96. MODEL RULES OF PRO. CONDUCT. r. 1.3 (AM. BAR ASS'N 1983).

97. MODEL RULES OF PRO. CONDUCT. r. 2.1 (AM. BAR ASS'N 1983).

reversal of an existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.<sup>98</sup>

**Rule 3.3:** Candor Toward the Tribunal: (a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) 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; . . .<sup>99</sup>

**Rule 8.2:** Judicial and Legal Officials: (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal official, or a candidate for election or appointment to a judicial or legal office.<sup>100</sup>

Particular rules are in some ways better suited to discussion during the typical first-semester predictive writing class, e.g., the duties of competence and diligence, while others are better suited for discussion during the second-semester persuasive writing class, e.g., the duties of candor toward the tribunal and of respect toward judicial and legal officials. But all of the Rules identified above have direct relevance to the lawyering behavior taught in the first-year legal writing program and provide a plethora of real-world examples of lawyers who violated these rules, and also provide fertile ground for discussion and assignments that help students to develop their professional identities.<sup>101</sup>

Rule 1.1's duty of competence provides opportunities to discuss things like the importance of thorough research and continuous learning.<sup>102</sup> Rule 1.3's duty of diligence opens the door to discussing the importance of time management.<sup>103</sup> Rule 2.1 allows lawyers to consider moral, economic, social, and political factors when advising a client.<sup>104</sup> Rule 3.1 allows legal writing faculty to discuss ways lawyers can shape the law by arguing for changes to the law in non-frivolous ways.<sup>105</sup> A lawyer's ethical obligations to make true and honest representations about facts and the law are encompassed in Rule 3.3 and this rule provides opportunities to discuss why it might be better to be the first to call to the court's attention adverse facts or law.<sup>106</sup> Finally, Rule 8.2 allows for discussion of the status of the judiciary in our legal system, free speech rights and the regulation of speech by professionals, and the integrity of the judiciary in a polarized political climate.<sup>107</sup>

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98. MODEL RULES OF PRO. CONDUCT. r. 3.1 (AM. BAR ASS'N 1983).

99. MODEL RULES OF PRO. CONDUCT. r. 3.3 (AM. BAR ASS'N 1983).

100. MODEL RULES OF PRO. CONDUCT. r. 8.2 (AM. BAR ASS'N 1983).

101. *See generally*, MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).

102. MODEL RULES OF PRO. CONDUCT. r. 1.1 (AM. BAR ASS'N 1983).

103. MODEL RULES OF PRO. CONDUCT. r. 1.3 (AM. BAR ASS'N 1983).

104. MODEL RULES OF PRO. CONDUCT. r. 2.1 (AM. BAR ASS'N 1983).

105. MODEL RULES OF PRO. CONDUCT. r. 3.1 (AM. BAR ASS'N 1983).

106. MODEL RULES OF PRO. CONDUCT. r. 3.3 (AM. BAR ASS'N 1983).

107. MODEL RULES OF PRO. CONDUCT. r. 8.2 (AM. BAR ASS'N 1983).

*B. Incorporating the Model Rules--A Two-Semester Approach*

There are many ways to incorporate the Model Rules listed above into the first-year legal writing curriculum without detracting from what legal writing faculty must teach. A class or two could be devoted to the topic; students could be assigned to find a case where a lawyer was found to have violated an ethical rule in their written advocacy and present to the class about it or post it to a discussion board;<sup>108</sup> students could be assigned to research and write a memo on a particular ethical issue; or hypotheticals could be posed that raise particular ethical concerns.

I have chosen to incorporate discussion of these ethical rules in my predictive and persuasive writing class. I take this approach for two reasons. First, while all the rules identified above apply in the context of a persuasive writing class, Rules 3.1, 3.3, and 8.2 concern the lawyers' role as an advocate and their duty to the legal system.<sup>109</sup> Thus, those rules do not directly apply in the context of a predictive memo writing class.<sup>110</sup> Second, as students learn and develop new skills, it is beneficial to reinforce the ethical standards that apply to a lawyer's job as a writer and an advocate.<sup>111</sup>

My approach is to give a brief overview of Rules 1.1, 1.3, and 2.1 early in the first-semester predictive writing class. I then ask students to think about how those rules apply to their class work. At the end of the semester, I assign cases applying each of these rules and then ask the students to complete a reflection exercise asking whether their conduct in class met those ethical standards and if not, what they can do to ensure that they are meeting those ethical obligations. Similarly, in the second-semester persuasive writing class we review Rules 1.1, 1.3, and 2.1 in the context of written and oral advocacy and add discussions and cases under Rules 3.1, 3.3, and 8.2. The students then reflect on whether their work representing their imaginary client met or exceeded those standards and how they can ensure that they meet their ethical obligations in the future.

To clarify, I try to select cases that present an almost absurd scenario, or an interesting or unexpected fact, to help hold the students' attention and make the discussion more interesting. Fortunately (or perhaps, unfortunately), there is no dearth of the absurd or unexpected in bar discipline cases.<sup>112</sup> Below I give examples of cases that could be used for each of the rules identified above and suggest topics to discuss for each rule and exercises or assignments that could be used to provide students with opportunities to develop their professional identity for each rule.

- i. Model Rule 1.1: Competence: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Competent representation includes an inquiry into, and analysis of the facts and law related to the problem.<sup>113</sup> Competent representation also includes adequate

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108. Kristen E. Murray, *Legal Writing Missteps: Ethics and Professionalism in the First-Year Legal Research and Writing Classroom*, 20 PERSPS: TEACHING LEGAL RSCH. & WRITING 134, 136, 138–40 (2012).

109. See MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 1983); MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 1983); MODEL RULES OF PRO. CONDUCT r. 8.2 (AM. BAR ASS'N 1983).

110. See MODEL RULES OF PRO. CONDUCT r. 3.1, 3.3, 8.2 (AM. BAR ASS'N 1983) These model rules deal with the roles of attorneys, not memo writing.

111. See Murray, *supra* note 108, at 135–36.

112. See *e.g.*, *Disciplinary Couns. v. Smith*, 197 N.E.3d 533, 536 (Ohio 2022); *Disciplinary Couns. v. Valenti*, 175 N.E.3d 520, 521 (Ohio 2021).

113. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 5 (AM. BAR ASS'N 1983).

preparation.<sup>114</sup> The attorney in *Disciplinary Counsel v. Smith* violated Rule 1.1 because he failed to adequately research the statute of limitations or jurisdictional issues in three civil cases.<sup>115</sup>

Alberta Payton retained Smith in 2012 to represent her in three civil matters.<sup>116</sup> One case involved a claim against a county probation department and a probation officer.<sup>117</sup> Payton alleged negligent infliction of emotional distress and fraudulent misrepresentation from events that happened between January 2007 and February 2009.<sup>118</sup> Another case involved claims against a psychiatric clinic and a doctor who worked for the clinic based on a 2003 competency evaluation.<sup>119</sup> The third case involved a claim against a state university.<sup>120</sup>

With respect to the first two cases, Smith determined that the statute of limitations started running in early 2009, yet he did not file the actions until late in 2016.<sup>121</sup> Both claims were dismissed because the statute of limitations had run and because the defendants were immune from liability under state law.<sup>122</sup>

In the third case—the one against the state university, Smith determined that the statute of limitations began running on January 31, 2011, but he did not file the claim until January 2017.<sup>123</sup> When he finally filed the claim, he filed it in a county court of general jurisdiction rather than in the state court of claims.<sup>124</sup> The complaint alleged that the state university was a county agency.<sup>125</sup> The state university moved to dismiss the case for lack of jurisdiction. Smith voluntarily dismissed the case and did not re-file it.<sup>126</sup>

At his disciplinary hearing Smith “acknowledged that he had been ‘a little bit’ concerned about the statute of limitations[.]”<sup>127</sup> He said that he researched the issue and concluded that he could delay filing the claims on a “theory of continuing harm,” which extended the statute of limitations.<sup>128</sup> He also “testified that he had ‘kind of’ researched the issue of governmental immunity as a possible defense to Payton’s claims . . . [but] he ‘had not fully done the research.’”<sup>129</sup> He also testified that he “thought” that he filed the claim against the state university in the proper court.<sup>130</sup>

The Board of Professional Conduct did not believe Smith had conducted any meaningful research as “a competent attorney would” and that under his “continuing-harm” theory, the statute of limitations would never run in a case where the plaintiff had suffered a permanent injury.<sup>131</sup> The board found that Smith performed “superficial and inadequate research and that his failure to provide Payton with well-reasoned, competently

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114. *Id.*

115. *Smith*, 197 N.E.3d at 543.

116. *Id.* at 541.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Smith*, 197 N.E.3d at 542.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Smith*, 197 N.E.3d at 542.

126. *Id.*

127. *Id.*

128. *Id.* at 542–43.

129. *Id.* at 543.

130. *Smith*, 197 N.E.3d at 543.

131. *Id.*



researched advice regarding the viability of her claims prevented her from making an informed decision about the representation” in violation of Rule 1.1.<sup>132</sup>

The Supreme Court of Ohio adopted the board’s finding that Smith had violated Rule 1.1.<sup>133</sup> In doing so, the court highlighted that Smith presented nothing “other than his own testimony, demonstrating that he conducted anything more than cursory research.”<sup>134</sup> The court also said, “[w]e are not aware of any rule that tolls the statutes of limitations in a negligence or personal-injury case based on the plaintiff’s permanent injury or “continuing harm[.]”<sup>135</sup>

*Smith* and other cases applying Rule 1.1 provide an opportunity to discuss the requirement of competent representation and the need for thorough research as part of that ethical obligation.<sup>136</sup> This discussion helps first-year students connect the lawyering behavior they are learning to the real-life work of lawyers.<sup>137</sup> In addition to class discussion, students could be assigned to research early in the semester what their ethical obligations are when representing clients and how those ethical obligations relate to their first-year research and writing assignments.

- ii. Rule 1.3: Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client.

The comments to Rule 1.3 stress that lawyers must control their workload so that they can manage each matter competently.<sup>138</sup> The comments also note that:

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.<sup>139</sup>

The comment’s discussion of the danger of the risks of procrastination is an important reminder for lawyers and law students.<sup>140</sup> The comment rightly highlights the needless anxiety that a lawyer’s procrastination can cause a client, but it is also worth noting the added stress procrastination causes the procrastinator.<sup>141</sup>

In *Disciplinary Counsel v. Valenti*, an attorney was issued a six-month stayed suspension for violating Rule 1.3 (among others) for her conduct in three cases, including two appeals.<sup>142</sup> There, the attorney was appointed to represent a client, Richard B. Doak,

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132. *Id.*

133. *Id.* at 544. Smith was also found to have violated Rules 1.3 and 1.4(b) in the Payton matter. *Id.*

134. *Smith*, 197 N.E.3d at 543.

135. *Id.*

136. *See Smith*, 197 N.E.3d at 543.

137. *See id.*

138. MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 2 (AM. BAR ASS’N 1983).

139. MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 3 (AM. BAR ASS’N 1983).

140. *See id.*

141. *See id.*

142. *Disciplinary Couns. v. Valenti*, 175 N.E.3d 520, 523–24 (Ohio 2021).

who had been sentenced to life without the possibility of parole.<sup>143</sup> The attorney received three extensions of the briefing deadline but still failed to file the brief before the filing deadline passed.<sup>144</sup> About six weeks later the court of appeals sua sponte ordered the attorney to file the brief within fourteen days.<sup>145</sup> She filed the brief but did not file a reply brief after the appellee filed its brief.<sup>146</sup>

The attorney appeared for oral argument but told the court that the parties had agreed to waive the argument.<sup>147</sup> A member of the panel was troubled by the brief the attorney had filed.<sup>148</sup> He said that the citations and abbreviations used in the brief made no sense, “and that the brief was ‘52 pages of the most difficult reading I’ve ever probably done in 12 years.’”<sup>149</sup> The attorney asked for a continuance and the court granted her a two-week extension to file a reply brief to clarify her arguments.<sup>150</sup> The court also rescheduled the oral argument.<sup>151</sup>

Next, the attorney asked for an extension to file the reply brief, but she again missed the deadline, and the court, sua sponte, removed her from the case.<sup>152</sup> In its entry removing the attorney, the court said that Valenti’s merit brief was “‘inadequate, incoherent and unintelligible’ and that she was unprepared for oral argument.”<sup>153</sup>

At her disciplinary hearing, the attorney “acknowledged that her appellate brief included confusing abbreviations, incomplete sentences, improper citations to constitutional provisions, a confusing statement of facts, and unclear legal arguments.”<sup>154</sup> She said that she had inadvertently filed a draft of the brief and had not saved the final version.<sup>155</sup> She testified that she had intended to file the reply brief on time but that her flash drive “‘broke off’” and that she was removed from the case before she could file the brief.<sup>156</sup>

While the Doak saga was playing out, the same attorney was appointed to represent Dwight D. Evans<sup>157</sup> in an appeal to the same court where Doak’s case was pending.<sup>158</sup> The attorney failed to file a timely notice of appeal in the Evans case.<sup>159</sup> Almost a month after the appeal time had run, the attorney moved to file a delayed appeal.<sup>160</sup> Fortunately for Evans, two judges on his panel had also been on the Doak panel.<sup>161</sup> The court granted the motion for a delayed appeal and sua sponte removed the attorney from the Evans case.<sup>162</sup>

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143. *Id.* at 521.

144. *Id.* at 521–22.

145. *Id.* at 522.

146. *Valenti*, 175 N.E.3d at 522.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Valenti*, 175 N.E.3d at 522.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Valenti*, 175 N.E.3d at 522.

157. Not the Dwight Evans who played for the Boston Red Sox from 1972 to 1990 and won eight gold gloves. *Dwight Evans*, BASEBALL REFERENCE, <https://www.baseball-reference.com/players/e/evansdw01.shtml> (last visited Apr. 5, 2024).

158. *Valenti*, 175 N.E.3d at 522.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

Finally, the attorney had also been appointed to represent a client in a contempt proceeding about a child-support obligation.<sup>163</sup> The court set a hearing for June 4, 2019.<sup>164</sup> Disciplinary counsel was investigating the attorney in an unrelated grievance and the attorney had agreed to reschedule a deposition for the same date as the contempt hearing had been scheduled.<sup>165</sup> The attorney failed to appear for the contempt hearing and did not notify her client or the court of the scheduling conflict.<sup>166</sup> The court appointed new counsel and rescheduled the hearing.<sup>167</sup>

Disciplinary counsel filed charges against the attorney based on her conduct in the three cases.<sup>168</sup> The parties stipulated to the facts but the attorney denied that her conduct violated the ethical rules.<sup>169</sup> The matter went to a hearing and the panel found that the attorney's conduct violated Rules 1.1, 1.3, and 8.4(d).<sup>170</sup> The Supreme Court of Ohio agreed with the hearing panel and issued a conditionally stayed six-month suspension.<sup>171</sup> As part of its sanction, the court ordered the attorney to complete six hours of continuing legal education on law office management, including calendar management and law office technology.<sup>172</sup> It also required her to complete six hours of continuing legal education on criminal appellate practice.<sup>173</sup>

Cases like *Valenti* can open many avenues for class discussion. The cases bring to the forefront the importance of case and calendar management, the risks inherent in procrastination, and that lawyers have an ethical obligation to be competent in the use of technology. This latter point will become more important with the expanded use of artificial intelligence in the legal profession.

Additionally, students could also be required to prepare a timeline for completing tasks related to their research and writing assignments. After the assignments are completed, students could prepare reflection pieces on whether they allowed sufficient time to complete the tasks, whether things like family emergencies or illness interfered with their timeline and how they responded, and how they could better manage their time going forward.

- iii. Rule 2.1: Advisor: In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 2.1 recognizes that legal issues do not arise in a vacuum, and the rule allows lawyers to consider things other than the laws when giving advice. As the comments to Rule 2.1 note:

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163. *Valenti*, 175 N.E.3d at 522.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Valenti*, 175 N.E.3d at 521.

169. *Id.*

170. *Id.* at 523.

171. *Id.* at 524.

172. *Id.*

173. *Valenti*, 175 N.E.3d at 524.

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.<sup>174</sup>

Rule 2.1's non-legal advice provision is fertile ground for professional identity development. It provides opportunities to consider subjects beyond "technical legal advice" and how these considerations might affect a client's decision.

Unsurprisingly, because the non-legal advice provision uses the word "may,"<sup>175</sup> apparently there has never been an instance where a lawyer was disciplined for failing to provide non-legal advice. But courts have cited with approval the rule's non-legal advice provision and either admonished lawyers for failing to refer to other factors when advising clients,<sup>176</sup> suggested that it would be appropriate to offer such non-legal advice under certain circumstances,<sup>177</sup> or encouraged lawyers to consider this provision and work to settle a case.<sup>178</sup>

For example, an attorney preparing a prenuptial agreement for one party where the other party is unrepresented "should seriously consider the implications of [Rule 2.1]" because "[a] client is not well served by an unenforceable contract."<sup>179</sup> The court made this statement in the context of these facts: The parties entered into a prenuptial agreement that was prepared by the husband's lawyer.<sup>180</sup> The wife was unrepresented, although the husband's lawyer advised the wife that she should seek independent counsel—which she did not do.<sup>181</sup> When the parties signed the agreement the husband's net worth was \$1,198,500 and the wife's was \$8,200.<sup>182</sup> The prenuptial agreement allowed the husband "to preclude or substantially restrict the accumulation of [marital] property . . . and enabled [the husband] to enrich his separate estate at the expense of the marital community."<sup>183</sup> The husband "took full advantage of these opportunities."<sup>184</sup> The parties divorced and the wife challenged the enforceability of the prenuptial agreement.<sup>185</sup> The trial court found that the prenuptial agreement was unenforceable and the court of appeals affirmed.<sup>186</sup>

The Supreme Court of Minnesota found that Rule 2.1's non-legal advice provision supported its conclusion that a motorist arrested for driving under the influence had a limited right to counsel under the Minnesota Constitution before submitting to chemical

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174. MODEL RULES OF PRO. CONDUCT r. 2.1 cmt. 2 (AM. BAR ASS'N 1983).

175. *Id.*

176. *In re Marriage of Foran*, 834 P.2d 1081, 1089 n.14 (Wash. Ct. App. 1992).

177. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 834–35 (Minn. 1991).

178. *Graham v. Prudential Ins. Co. of Am.*, No. CV-05-S-102-NW, 2006 WL 8436807, \*3 (N.D. Ala., July 12, 2006).

179. *Foran*, 834 P.2d at 1089 n.14.

180. *Id.* at 1084.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Foran*, 834 P.2d at 1084.

185. *Id.*

186. *Id.*

testing for blood alcohol.<sup>187</sup> Citing the non-legal advice provision of Minnesota Rule of Professional Conduct 2.1<sup>188</sup> the court said:

If the objective of DWI prosecution is to get drunk drivers off the highways, into treatment, and on the way to sobriety, an attorney can play a very important role. A good lawyer is not only interested in protecting the client's legal rights, but also in the well-being and mental and physical health of the client. A lawyer has an affirmative duty to be a counselor to his client.<sup>189</sup>

Finally, in *Graham v. Prudential Life Insurance Co.* the court “wonder[ed] how the amount spent in legal fees [could] justify the actual amount in controversy or cause at stake.”<sup>190</sup> There, the plaintiff sued her insurance company after the insurance company determined that the plaintiff had lost her right to convert a group insurance policy to an individual policy.<sup>191</sup> The plaintiff had cancer and was fired from her job after she missed several months of work because of chemotherapy treatments.<sup>192</sup> While she was employed, she participated in a group life insurance policy having a face value of \$35,000.<sup>193</sup> She had the right to convert the policy to an individual policy with a face value of \$20,000 and took steps to do so,<sup>194</sup> but the life insurance company determined that she had not complied with the technical requirements to convert the policy.<sup>195</sup> The plaintiff sued the life insurance company for breach of contract in state court and the insurance company removed the case to federal court and moved for summary judgment.<sup>196</sup> The court denied the insurance company’s motion summary judgment and in doing so said:

It is rare to see a case still in litigation with such distasteful facts. The court cannot help but wonder how the amount spent in legal fees can justify the actual amount in controversy or cause at stake. At some point, members of what one hopes will continue to be a noble profession, must step back and carefully consider that one of the most important duties of attorneys is that of counselor and advisor. Rule 2.1 of the Rules of Professional Conduct states:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

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187. *Friedman*, 473 N.W.2d at 833.

188. MINN. RULES OF PROF. CONDUCT r. 2.1 (2005). The provision is the same as Model Rule 2.1’s non-legal advice provision.

189. *Friedman*, 473 N.W.2d at 834–35.

190. *Graham v. Prudential Life Ins. Co. of Am.*, No. CV-05-S-102-NW, 2006 WL 8436807, at \*2 (N.D. Ala., July 12, 2006).

191. *Id.*

192. *Id.* at \*1.

193. *Id.*

194. *Id.*

195. *Graham*, 2006 WL 8436807, at \*2.

196. *Id.*

Alabama Rules of Prof'l Conduct R. 2.1 (1991). It is the sincere hope of this court that the parties, with the aid of counsel, will be able to resolve this dispute through mediation.<sup>197</sup>

While the trial court did not limit its reference to Rule 2.1 to only the non-legal advice provision, the court's language referencing the "distasteful facts" of the case and the costs of ongoing litigation suggest that the court was referring, at least in part, to the non-legal advice provision of Rule 2.1.<sup>198</sup>

While these cases encourage lawyers to provide non-legal advice, at least one court has held that a lawyer does not have to give non-legal advice, at least where the facts show the client received the advice anyway.<sup>199</sup> In *Wooten v. Heisler*, a former client sued his lawyer for malpractice.<sup>200</sup> The plaintiff had been injured in an automobile accident and retained the defendant to represent him.<sup>201</sup> The plaintiff fired the defendant and retained new counsel who then settled the plaintiff's personal injury case for \$70,000.<sup>202</sup> The plaintiff sued the defendant for malpractice, alleging that the defendant failed to advise him as to the medical treatment and testing he needed to diagnose properly and to document completely the full extent of his injuries.<sup>203</sup> The plaintiff claimed that if the defendant had properly provided him non-legal advice, i.e., medical advice, the personal injury claim would have been worth \$150,000.<sup>204</sup> The trial court granted summary judgment for the defendant, and the appellate court affirmed.<sup>205</sup> The court found that the evidence showed that the plaintiff's healthcare providers had advised the plaintiff about different diagnostic and treatment options but the plaintiff elected other treatment options.<sup>206</sup> The court said that an attorney has an obligation to "provide advice on such legal and nonlegal matters that are relevant to the client's situation," but "those obligations do not extend to offering medical advice to a client, particularly for the purpose of increasing the value of a negligence claim."<sup>207</sup>

In *Wooten*, the court said that lawyers have an "obligation" to give non-legal advice.<sup>208</sup> This goes beyond the text of Rule 2.1, which says that lawyers "may" give non-legal advice.<sup>209</sup> Seemingly the outcome of the case turned on the fact that the plaintiff had received the non-legal advice that he claimed the defendant should have provided him.<sup>210</sup> Professor Larry O. Natt Gant, II, noted that "[t]he court's reasoning [] implies that, had the facts been different, the attorney might have been obligated to discuss nonlegal concerns with the plaintiff."<sup>211</sup> The case also left open the question of "whether an attorney advising

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197. *Id.* at \*2-3.

198. *Id.* at \*2. And perhaps the parties took the court's advice to heart. The trial court issued its opinion and order denying the insurance company's motion for summary judgment on July 12, 2006. Less than two months later, the case was dismissed with prejudice.

199. *Wooten v. Heisler*, 847 A.2d 1040, 1044 (Conn. App. Ct. 2004).

200. *Id.* at 1042.

201. *Id.* at 1041.

202. *Id.*

203. *Id.* at 1042.

204. *Wooten*, 847 A.2d at 1042.

205. *Id.* at 1042, 1044.

206. *Id.* at 1044.

207. *Id.*

208. *Id.*

209. Larry O. Natt Gantt, II, *More than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO J. LEGAL ETHICS 1, 15 (2005). See MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N, Discussion Draft 1983).

210. *Wooten*, 847 A.2d at 1044.

211. Natt Gantt, *supra* note 209, at 18.

a client who was not even aware of relevant nonlegal considerations might have an obligation to raise those considerations with the client.<sup>212</sup>

As discussed in the opening to this section, Rule 2.1 uses the word “may” when referring to a lawyer’s ability to give non-legal advice. The use of the word “may” has caused some commentators to conclude that this provision of the rule is permissive and thus, “not really a rule.”<sup>213</sup> Others, however, have concluded that Rule 2.1 can impose a duty for lawyers to provide non-legal advice in certain circumstances.<sup>214</sup>

In *Friedman v. Commissioner of Public Safety*, the Minnesota Supreme Court cited Rule 2.1 saying that “[a] lawyer has an affirmative duty to be a counselor to his client.”<sup>215</sup> Similarly, the court in *Wooten*, albeit in dicta, said that lawyers have an “obligation” to provide legal and non-legal advice.<sup>216</sup> Thus, it is logical to ask whether Rule 2.1’s non-legal advice provision is mandatory or permissive and whether the answer to that question might change in certain circumstances.

Another area for legal writing faculty to address under Rule 2.1’s non-legal advice provision is what fee lawyers may charge for giving non-legal advice.<sup>217</sup> Cases suggest that lawyers cannot charge the same fee for non-legal advice as they would charge for legal advice.<sup>218</sup>

In *Cincinnati Bar Association v. Alsfelder*, the lawyer charged annual fixed retainers that ranged from \$13,000 to \$20,000 per year.<sup>219</sup> While the lawyer provided some legal advice during the representation, much of his work for the client involved discussing personal concerns.<sup>220</sup> The client often contacted the lawyer three or more times a day during and after regular business hours.<sup>221</sup> The client would contact the lawyer to discuss “relationships with boyfriends and relatives, her bills and cash flow, her purchase of various vehicles, her complaints about how her driveway was repaired, even the food and restaurants she enjoyed.”<sup>222</sup> The court found that the lawyer had charged a clearly excessive fee (among other things) and suspended his license for a year with the suspension stayed on the condition that he make restitution to the client of \$30,000.<sup>223</sup>

The court cited Ethical Consideration 7-8<sup>224</sup> and acknowledged that “a lawyer’s duty to assist his client in making informed decisions . . . often implicates nonlegal

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212. *Id.*

213. John M. Burman, *Advising Clients About Non-Legal Factors*, WYO. LAW. 40, 41 (2004), citing R.J. Cochran, et al., *Symposium: Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591, 592 (2003).

214. Burman, *supra* note 213, at 41; Natt Gantt, *supra* note 209, at 4 (stating, “despite the innocuous, permissive language in Rule 2.1, attorneys may be required to discuss nonlegal considerations with their clients in certain instances.”)

215. *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 834–35 (Minn. 1991).

216. *Wooten v. Heisler*, 847 A.2d 1040, 1044 (Conn. App. Ct. 2004).

217. See MODEL RULES OF PRO. CONDUCT r. 2.1 (AM BAR ASS’N 1983).

218. See, e.g., *Cincinnati Bar Ass’n v. Alsfelder*, 816 N.E.2d 218, 223 (Ohio 2004).

219. *Id.* at 220.

220. *Id.* at 221.

221. *Id.*

222. *Id.* at 222.

223. *Alsfelder*, 816 N.E.2d at 224.

224. MODEL CODE OF PRO. RESP. EC 7-8 (AM. BAR ASS’N 1980). The American Bar Association adopted the Model Rules of Professional Conduct in 1983. Before the Model Rules were Adopted, the Model Code of Professional Responsibility was the set of model professional standards for lawyers. The Model Code included Disciplinary Rules (DRs) and Ethical Considerations (ECs). EC 7-8 said in relevant part:

Advice of a lawyer to the client need not be confined to purely legal considerations. A lawyer should advise the client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer’s objective viewpoint. In assisting the client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. The lawyer may emphasize the

considerations.”<sup>225</sup> Nonetheless, the court concluded that “an attorney may not serve in ‘a self-appointed role as a paraclete, comforter, helper or hand holder, under the guise of legal services at a lawyer’s compensation rate.’”<sup>226</sup>

The question of the appropriateness of a legal fee when a lawyer discusses something with a client involving both legal and nonlegal advice raises issues for discussion, such as how we differentiate between legal and nonlegal advice and whether, if Rule 2.1’s nonlegal advice provision is mandatory (as discussed above) rather than permissive, a lawyer can charge the same rate for legal and nonlegal advice.<sup>227</sup>

Rule 2.1’s allowance of non-legal advice and its specific reference to “moral, economic, social and political factors” allows for discussion of professional identity in the context of client advice.<sup>228</sup> Class discussion could focus on what role, if any, one’s own sense of morals should play when advising clients; whether the economic situation of an opposing party should decide a course of action; what the political ramifications of a course of action might be; and whether there are political, social, or economic benefits to not enforcing a right.<sup>229</sup> For example, a class could discuss whether a professional sports league like Major League Baseball should sue Little League teams to stop them from using or to require them to pay to use the names or logos of major league teams.<sup>230</sup>

Rule 2.1 also provides unique opportunities for simulated client-counseling activities.<sup>231</sup> Legal writing faculty could design client intake scenarios that raises legal as well as specific moral, economic, social, or political issues.<sup>232</sup> Students could research the legal issues and reflect on those issues and then draft a memorandum or client letter that discusses all the issues, both legal and non-legal presented by the scenario and propose a course of action for the client.<sup>233</sup>

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possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for [the lawyer].

*Id.*

225. *Alsfelder*, 816 N.E.2d at 223.

226. *Id.* (quoting *Stanley v. Bd. of Pro. Resp.*, 640 S.W.2d 210, 213 (Tenn. 1982)); *Disciplinary Couns. v. Harmon*, 141 N.E.3d 142, 151 (Ohio 2019) (finding that a lawyer charged a clearly excessive fee when he charged the same fee for legal and non-legal services, such as taking the client to the gym, ensuring the client took his medications, and visiting with the client.); *Erie-Huron Cnty. Bar Ass’n v. Zlevy*, 122 N.E.3d 1267, 1268–69 (Ohio 2018) (finding that a lawyer charged a clearly excessive fee when he charged the same rate of \$250 per hour for performing legal services and for providing non-legal services “such as supervising his client’s healthcare, taking him shopping, or running errands with him.”).

227. See MODEL RULES OF PRO. CONDUCT r 2.1 (AM. BAR ASS’N 1983); *Alsfelder*, 816 N.E.2d at 223.

228. MODEL RULES OF PRO. CONDUCT r 2.1 (AM. BAR ASS’N 1983).

229. *Id.*

230. Greg Johnson, *Going to Bat for its Trademarks*, L.A. Times (Sept. 28, 1994, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1994-09-28-fi-43980-story.html>.

231. MODEL RULES OF PRO. CONDUCT r 2.1 (AM. BAR ASS’N 1983).

232. *Id.*

233. *Id.*



- iv. Rule 3.1: Meritorious Claims & Contentions: A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of an existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.<sup>234</sup>

Lawyers must use the law to its fullest extent for the benefit of the client, but must not abuse the law in doing so.<sup>235</sup> Before bringing an action or asserting a position, lawyers must “inform themselves about the facts of their clients’ cases and the applicable law” and decide if they can make good faith arguments to support their clients’ positions.<sup>236</sup> But a claim or position “is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence” through discovery.<sup>237</sup>

Courts have struggled to draw the line between frivolous and nonfrivolous conduct.<sup>238</sup> The Comments to Rule 3.1 recognize that lawyers sometimes must file claims or assert positions before all the facts are known.<sup>239</sup> In *Neely*, the court said that “[w]hile we remain concerned about the increasing number of cases that clog our court dockets, we recognize that there are instances where an attorney has exhausted all avenues of pre-suit investigation and needs the tools of discovery to complete the factual development of the case.”<sup>240</sup>

In *Neely*, attorneys filed a claim on behalf of an autistic child and his parents against a care center alleging that the child had been strapped to a chair and left alone in a dark room for hours on many occasions.<sup>241</sup> The attorneys made this allegation based on interviews with people associated with the care center.<sup>242</sup> However, none of these individuals’ discovery testimony supported the allegation.<sup>243</sup> The attorneys were charged with violating Rule 3.1 for making the allegation and the hearing panel found that the attorneys had violated the rule and recommended an admonishment as a sanction.<sup>244</sup> The Supreme Court of West Virginia found that the attorneys had not violated Rule 3.1 because, although the facts did not ultimately support the specific allegation, the attorneys made a reasonable investigation before making the allegation.<sup>245</sup>

In another case, the court found that a lawyer had engaged in frivolous conduct when he sued a doctor for malpractice without adequately investigating whether the person identified in medical records was in fact the defendant whom the lawyer sued.<sup>246</sup> There the lawyer (Weatherbee) had reviewed an operative report that identified Bob Vaughan as an

234. MODEL RULES OF PRO. CONDUCT r 3.1 (AM. BAR ASS’N 1983).

235. MODEL RULES OF PRO. CONDUCT r 3.1 cmt.1 (AM. BAR ASS’N 1983).

236. MODEL RULES OF PRO. CONDUCT r 3.1 cmt.2 (AM. BAR ASS’N 1983).

237. *Id.*

238. *See, e.g.,* Law. Disciplinary Bd. v. Neely, 528 S.E.2d 468, 472 (W.Va. 1998).

239. MODEL RULES OF PRO. CONDUCT r 3.1 cmt. 2 (AM. BAR ASS’N 1983) “The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery.”

240. *Neely*, 528 S.E.2d at 473.

241. *Id.* at 470.

242. *Id.*

243. *Id.*

244. *Id.* at 469.

245. *Neely*, 528 S.E.2d at 474.

246. *Weatherbee v. Va. State B. ex rel. Fourth Dist.-Sec. I Comm.*, 689 S.E.2d 753, 756 (Va. 2010).

assistant to the surgeon who performed the surgery.<sup>247</sup> The lawyer reviewed the Virginia Board of Medicine's website and learned that fifteen doctors with the last name of "Vaughan" were licensed to practice in Virginia.<sup>248</sup> Three of the fifteen specialized in obstetrics and gynecology and two of those three were women whose practices were located outside of Virginia.<sup>249</sup> Thus, the lawyer deduced that the remaining one of the three, Dr. Ward P. Vaughan, must be the person identified in the operative report, so the lawyer sued that Dr. Vaughan.<sup>250</sup> In fact, Dr. Ward P. Vaughan was not present during the surgery.<sup>251</sup> Further, he was not a member of the medical staff where the procedure was performed and did not have privileges at the facility.<sup>252</sup> The publicity surrounding the lawsuit caused Dr. Vaughan to lose patients and caused him to suffer ridicule and scorn.<sup>253</sup> The court noted that "[a] local radio station repeatedly informed its listeners, approximately once each hour for a full day, that Dr. Vaughan had been sued for medical malpractice. Also, the litigation against Dr. Vaughan was reported on a local television station."<sup>254</sup>

The Supreme Court of Virginia found that Weatherbee had engaged in frivolous conduct because he did not even try to obtain Dr. Vaughn's medical records or take other steps that would have shown that the Dr. Vaughan he sued was not involved in the surgery.<sup>255</sup>

Frivolous conduct often involves lawyers attempting to use the legal system to "harass, embarrass, or otherwise injure or inconvenience" those whom the lawyers or clients perceive to have wronged them.<sup>256</sup> One such case made national news.<sup>257</sup> Roy L. Pearson, Jr., an attorney and former administrative law judge in Washington, D.C., sued a dry cleaner for losing his pants.<sup>258</sup> Pearson alleged that the cleaners violated the District of Columbia Consumer Protection Act and committed common law fraud, negligence, or conversion based on signs at the cleaners stating "Satisfaction Guaranteed," "Same Day Service," and "All Work Done on Premises."<sup>259</sup> Pearson initially sought \$15,000 to compensate him for the emotional distress he claimed to have suffered and \$15,000 in punitive damages.<sup>260</sup> His damage claims skyrocketed from there. By the time of trial, he claimed that he was entitled to, among other things, \$3,000,000 for emotional damages, \$90,000 to rent a car to travel to a different dry cleaner; and \$500,000 in attorney's fees.<sup>261</sup> Eventually, Pearson claimed that he was entitled to \$67,000,000 in compensatory and punitive

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247. *Id.* at 755.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Weatherbee*, 689 S.E.2d at 756.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 386 (Am. Bar Ass'n 2023) (collecting cases).

257. *The \$67 Million Pants*, ABC NEWS, <https://abcnews.go.com/TheLaw/LegalCenter/story?id=3119381&page=1> (last visited Apr. 5, 2024).

258. *In re Pearson*, 228 A.3d 417, 420 (D.C. App. 2020).

259. *Id.*

260. *Id.* More details about the case can be found in the District of Columbia Court of Appeals decision affirming the trial court's judgment for the defendants following a bench trial. *Pearson v. Chung*, 961 A.2d 1067, 1067 (D.C. App. 2008).

261. *Pearson*, 228 A.3d at 420.

damages.<sup>262</sup> Pearson's theories of liability likewise expanded to the extreme.<sup>263</sup> The case eventually proceeded to a bench trial and the defendants prevailed.<sup>264</sup>

Pearson was charged with violating Rule 3.1 and Rule 8.4(d) of the District of Columbia Rules of Professional Conduct.<sup>265</sup> The Board of Professional Conduct recommended an unstayed ninety-day suspension.<sup>266</sup> The District of Columbia Court of Appeals agreed.<sup>267</sup> With respect to the Rule 3.1 violation, the court said, "[a]ttorneys have a continuing responsibility to make an objective appraisal of the legal merits of a position, asking how a reasonable attorney would evaluate whether a claim is truly meritless or merely weak."<sup>268</sup>

Pearson argued that his claims could not have been frivolous because they survived a motion to dismiss and a motion for summary judgment and had proceeded to a bench trial.<sup>269</sup> The court rejected that argument saying, "[w]hile relevant, those decisions are not dispositive of whether the legal theories ultimately were frivolous."<sup>270</sup> The court then noted that "Pearson's claims continually expanded throughout the litigation and his liability and damages theories became more clear—and more outlandish—as the case progressed."<sup>271</sup> The court also found that, in addition to his outlandish theories of liability and damages, Pearson "regularly exaggerated or misrepresented procedural facts, case law, and statutory support for his positions."<sup>272</sup>

Finding that Pearson's conduct violated Rule 3.1, the court said:

Simply put, by pursuing theories of liability with no logical limit, attempting to justify those theories by misquoting and misrepresenting pertinent cases and laws, and using those theories to escalate a minor disagreement into litigation supposedly requiring 1,200 hours of his own legal research, Pearson violated his duty under Rule 3.1 to conduct a continuing objective inquiry into the merits of his positions. No reasonable attorney could have concluded that Pearson's liability and damages claims had even a faint hope of success on the legal merits.<sup>273</sup>

These and other cases applying Rule 3.1 provide opportunities to discuss topics like the limits of zealous advocacy and the steps that lawyers must take to investigate the facts and research the law before filing a claim or asserting a position.

Rule 3.1 also provides opportunities to discuss the lawyer's role in advancing the development of the law by advocating for the extension or modification of existing law.<sup>274</sup> Three examples of Supreme Court cases that could foster such a discussion include: *Obergefell v. Hodges*,<sup>275</sup> the same-sex marriage case, *Katz v. United States*,<sup>276</sup> which held that

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262. *Id.* at 421.

263. *Id.*

264. *Pearson v. Chung*, 961 A.2d 1067, 1067 (D.C. App. 2008).

265. *Pearson*, 228 A.3d at 420.

266. *Id.* at 421.

267. *Id.*

268. *Id.* at 424 (internal quotation marks and citations omitted).

269. *Id.*

270. *Pearson*, 228 A.3d at 424.

271. *Id.* at 424–25.

272. *Id.* at 426.

273. *Id.* (citing *In re Spikes*, 881 A.2d 1118, 1125 (D.C. 2005)) (internal quotation marks and citation omitted).

274. See MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 1983).

275. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

276. *Katz v. United States*, 389 U.S. 347 (1967).

the government needed a warrant to place a listening device on a phone booth, or *Batson v. Kentucky*,<sup>277</sup> forbidding the use of race in preemptory challenges.

Students could also be tasked with researching cases like the “McDonald’s Coffee Case”<sup>278</sup> in both legal databases and popular media. Students could then reflect on how the media can shape the public’s perception of lawyers and frivolous lawsuits.

- v. Rule 3.3: Candor Toward the Tribunal: (a) A lawyer shall not knowingly (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) 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; . . . .<sup>279</sup>

Rule 3.3 governs a lawyer’s conduct when representing a client in “the proceedings of a tribunal.”<sup>280</sup> This rule seeks to balance the lawyer’s duty to present the client’s case persuasively with the duty of candor toward the tribunal with respect to the facts and the law.<sup>281</sup> “[T]he lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.”<sup>282</sup> The obligations imposed by the rule continue until the proceedings conclude.<sup>283</sup>

a. Rule 3.3(a)(1)

Rule 3.3(a)(1) can be violated by acts of commission and omission.<sup>284</sup> The Supreme Court of Louisiana suspended a lawyer for two years for misrepresenting the need for a continuance and knowingly submitting altered evidence.<sup>285</sup> The lawyer moved to continue claiming that he was scheduled to be in trial in another state and that the trial would last three to five days.<sup>286</sup> Opposing counsel notified the judge that the basis for the continuance was false and the judge directed his assistant to investigate the matter.<sup>287</sup> The

277. *Batson v. Kentucky*, 476 U.S. 79 (1986).

278. *Liebeck v. McDonald’s Rests., P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309, at \*1 (N.M. Dist. Ct. Aug. 18, 1994), *vacated by* *Liebeck v. McDonald’s Rests., P.T.S., Inc.*, No. CV-93-02419, 1994 WL 16777704 (N.M. Dist. Nov. 28, 1994).

279. MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1–2) (AM. BAR ASS’N 1983).

280. MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 1. Model Rule of Professional Conduct rule 1.0(m) defines a tribunal as:

a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

MODEL RULES OF PRO. CONDUCT r. 1.0(m) (AM. BAR ASS’N 1983).

281. MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 2 (AM. BAR ASS’N 1983).

282. MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 2 (AM. BAR ASS’N 1983).

283. MODEL RULES OF PRO. CONDUCT r. 3.3(c) (AM. BAR ASS’N 1983).

284. MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1) (AM. BAR ASS’N 1983).

285. *In re Bailey*, 848 So. 2d 530, 530 (La. 2003).

286. *Id.* at 533.

287. *Id.*

assistant learned that the trial had occurred several months earlier and that the only remaining matter was a hearing on a post-trial motion that would take less than an hour and that did not conflict with the scheduled hearing.<sup>288</sup>

In another matter, the same lawyer was representing a client who claimed to have been assaulted in her home.<sup>289</sup> The lawyer attempted to enter into evidence a doctor's report that said, "[t]he patient came in having alleged that she was accosted."<sup>290</sup> However, opposing counsel noticed a suspicious gap after the word "accosted" and objected to the admission of the exhibit.<sup>291</sup> Another copy of the report was obtained, and it said, "[t]he patient came in having alleged that she was accosted *at work*."<sup>292</sup> Ultimately, the lawyer claimed the client had altered the copy without his knowledge.<sup>293</sup> The court found that both instances of misconduct were serious and warranted a two-year suspension.<sup>294</sup>

In another case, the court found that a lawyer had violated Rule 3.3(a)(1) by failing to speak and failing to correct a misstatement another lawyer had made.<sup>295</sup> There, two lawyers, Daniels and Driscoll, were representing a client in an ex-parte custody proceeding.<sup>296</sup> Driscoll was an associate in Daniels's firm.<sup>297</sup> During the hearing, Daniels made representations to the court about a conversation Driscoll had had with a lawyer representing the client in a related proceeding in a different jurisdiction.<sup>298</sup> Daniels's representations about the conversation were false, but Driscoll did not speak at the hearing, so he did not make any representations about the conversation.<sup>299</sup> But, he also did not try to correct Daniels's misstatements.<sup>300</sup> The court rejected Driscoll's argument that Rule 3.3(a) "applies only to the attorney who actually makes the misstatement, and not to an attorney who simply fails to correct it."<sup>301</sup> The court relied on the commentary to Rule 3.3, which says, "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."<sup>302</sup> The court concluded that this comment showed that those who drafted Rule 3.3 "did not intend to limit its application solely to the party actually making the affirmative misstatement" and that, "[d]epending upon the circumstances, the rule can pertain to an attorney who fails to correct a misstatement to the court that was made in his presence by another attorney."<sup>303</sup>

Lawyers who use artificial intelligence platforms like ChatGPT to draft documents that will be filed in court must also be aware of the ethical obligations imposed by Rule 3.3(a)(1).<sup>304</sup> For example, the United States Court of Appeals for the Second Circuit referred a lawyer to the grievance process because the lawyer used ChatGPT to draft a reply brief, and the reply brief included cases that did not exist.<sup>305</sup> The court cited both the obligations imposed by Rule 11 of the Federal Rules of Civil Procedure and Rule 3.3(a)(1) to support referring the lawyer to the grievance process.<sup>306</sup>

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288. *Id.*

289. *Id.* at 534.

290. *In re Bailey*, 848 S.2d at 534.

291. *Id.* at 534–35.

292. *Id.* at 535 (emphasis added).

293. *Id.*

294. *Id.* at 536.

295. *Daniels v. Alander*, 844 A.2d 182, 183–84 (Conn. 2004).

296. *Id.* at 184.

297. *Id.*

298. *Id.*

299. *Id.* at 188.

300. *Daniels*, 844 A.2d at 188.

301. *Id.*

302. *Id.* (quoting MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 3).

303. *Daniels*, 844 A.2d at 188.

304. *See Park v. Kim*, 91 F.4th 610, 615 n.3 (2d Cir. 2024).

305. *Id.* at 614.

306. *Id.*; *see Mata v. Avianca, Inc.*, No. 22CV01461 (PKC) 2023 WL 4114965, at \*12 (S.D.N.Y. June 22, 2023)

Reviewing these and other cases applying Model Rule 3.3(a)(1) allows students to explore a lawyer's obligation to ensure that a tribunal understands the true facts of the matter and the obligation to correct any misrepresentations. This Rule also allows students to discuss the importance of a lawyer's reputation and credibility and how those can be enhanced by candidly disclosing facts, even those that might harm a client's case. Rule 3.3 presents the opportunity to discuss how being the first to disclose bad facts allows a lawyer to control and shape the discussion of that information.

Legal writing faculty could also create client-counseling scenarios where a client discloses adverse facts to the lawyer for the first time after litigation is ongoing. Or legal writing faculty could add an adverse fact to a problem while students are writing a memo or brief and have the students disclose that fact to the court through a letter or brief.

Finally concerning Rule 3.1(a)(1), legal writing faculty could use ChatGPT or other forms of artificial intelligence to create briefs with hallucinated cases to demonstrate the possible pitfalls of relying solely on those types of platforms. Another possibility would be assigning cases where lawyers have misused artificial intelligence and assigning students to draft court rules or law firm policies to mitigate the potential problems with the use of artificial intelligence platforms.

b. Rule 3.3(a)(2)

Rule 3.3(a)(2) requires a lawyer to disclose adverse legal authority under certain circumstances.<sup>307</sup> Adverse authority must be disclosed when (1) it is from the controlling jurisdiction, (2) known to the lawyer to be "directly adverse" to the client's position, and (3) not disclosed by opposing counsel.<sup>308</sup> The concept underlying this rule is that "legal argument is a discussion seeking to determine the legal premises properly applicable to the case."<sup>309</sup>

With respect to the question of what "controlling jurisdiction" means, one scholar said that Rule 3.3(a)(2) requires "disclosure of cases decided by the same court or higher courts in the same jurisdiction."<sup>310</sup> And the Supreme Court of New Jersey held that an attorney did not violate New Jersey Rule of Professional Conduct 3.3(a)(3) (its counterpart to Model Rule 3.3(a)(2)), when the attorney failed to disclose an unpublished, nonbinding trial court decision,<sup>311</sup> while another court said that "controlling jurisdiction" includes "not only decisions of relevant appellate courts, but also decisions of the same court, courts of coordinate jurisdiction and even lower courts."<sup>312</sup>

ABA Formal Opinion 280 provides some guidance on what "directly adverse" means.<sup>313</sup> That opinion said that the phrase is not limited to those that would be decisive in the pending case, but would also apply "to a decision directly adverse to any proposition

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(stating, "[a] fake opinion is not 'existing law' and citation to a fake opinion does not provide a non-frivolous ground for extending, modifying, or reversing existing law, or for establishing new law. An attempt to persuade a court or oppose an adversary by relying on fake opinions is an abuse of the adversary system."). This case suggests that citing AI hallucinated authority might also violate Rule 3.1's prohibition on frivolous claims or defenses.

307. MODEL RULES OF PRO. CONDUCT r. 3.3(a)(2) (AM. BAR ASS'N 1983).

308. *Id.*

309. MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 4 (AM. BAR ASS'N 1983).

310. Angela Gilmore, *Self-Inflicted Wounds: The Duty to Disclose Damaging Legal Authority*, 43 CLEV. ST. L. REV. 303, 308 (1995).

311. *Brundage v. Estate of Carambio*, 951 A.2d 947, 963–64 (N.J. 2008).

312. *Former Emps. of Chevron Prods. Co. v. U.S. Sect. of Lab.*, 245 F. Supp. 2d 1312, 1335 n.7 (Ct. Int'l Trade 2002).

313. ABA Comm. on Pro. Ethics and Grievances, Formal Op. 280 (1949).

of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.”<sup>314</sup> The opinion then said:

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?<sup>315</sup>

If the answer to any of those questions is “yes” then disclosure is the best path.

Failure to disclose adverse authority can result in a harsh admonishment from the court. In *Gonzalez-Servin v. Ford Motor Co.*, the Seventh Circuit Court of Appeals consolidated “two appeals that raise[d] concerns about appellate advocacy.”<sup>316</sup> Both cases concerned grants of forum non conveniens.<sup>317</sup> One case involved litigation arising from accidents allegedly caused by defects in tires installed on certain vehicles.<sup>318</sup> The other case involved tainted blood products used by hemophiliacs.<sup>319</sup>

In *Abad v. Bayer Corp.*, the Seventh Circuit Court of Appeals had, two years earlier, affirmed the transfer of a similar vehicle accident case under the doctrine of forum non conveniens.<sup>320</sup> The appellants in *Gonzalez-Servin* did not cite the earlier case in their opening brief.<sup>321</sup> The appellees cited *Abad* heavily in their response brief, and argued it was “nearly identical” to the facts in the pending case.<sup>322</sup> The court noted that, despite the fact that the appellees cited *Abad*, the appellants did not mention *Abad* in their reply brief, “let alone try to distinguish it.”<sup>323</sup> The court took this failure as “an implicit concession that the circumstances of that case [were] indeed ‘nearly identical’ to those in the present case.”<sup>324</sup>

In *Chang v. Baxter Healthcare Corp.*, the Seventh Circuit affirmed the transfer of another case involving blood products.<sup>325</sup> The *Chang* decision was released while the parties were briefing *Gonzalez-Servin*.<sup>326</sup> Both *Abad* and *Chang* were decided after the appellants filed their opening brief in the blood-product case.<sup>327</sup> However, the appellees’ brief was filed after both cases were decided and the appellees’ brief relied heavily on those cases.<sup>328</sup> Yet, the appellants’ reply brief discussed *Abad* “a little” but did not discuss *Chang*.<sup>329</sup>

Responding to the parties’ failure to disclose controlling adverse authority, the court said, “[t]he ostrich is a noble animal, but not a proper model for an appellate advocate

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314. *Id.*

315. *Id.*

316. *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931 (7th Cir. 2011).

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 933 (citing *Abad v. Bayer Corp.*, 563 F.3d 663 (7th Cir. 2009)).

321. *Gonzalez-Servin*, 662 F.3d at 933.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* at 933–34 (citing *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728 (7th Cir. 2010)).

326. *Gonzalez-Servin*, 662 F.3d at 934.

327. *Id.*

328. *Id.*

329. *Id.*

. . . . The ‘ostrich-like tactic of pretending that potentially dispositive authority against a litigant’s contention does not exist is as unprofessional as it is pointless.’”<sup>330</sup>

This rule provides an opportunity to discuss what “controlling jurisdiction” means and whether courts agree on the meaning (they do not). This rule could also be used to create research assignments such as whether the rule requires disclosure of only binding precedent, i.e., a precedent that the court must follow, or does it also include decisions that are not binding on a particular court, for instance, a decision by a coordinate or even a lower court. Students could be asked to research and discuss what it means for the authority to be known to the lawyer and how that might relate to a lawyer’s obligations under Model Rule 1.1 (Duty of Competence) and Model Rule 1.3 (Duty of Diligence).<sup>331</sup>

Model Rule 3.3(a)(2) and cases applying it supply opportunities to discuss ways to distinguish adverse precedent either on the law or the facts.<sup>332</sup> Much like Model Rule 3.3(a)(1), Model Rule 3.3(a)(2) invites discussion about the credibility enhancement that might come from disclosing and responding to adverse authority in the first instance, rather than waiting to see if opposing counsel discloses it (because again, the duty under Model Rule 3.3(a)(2) is only triggered if opposing counsel has not disclosed the adverse authority).<sup>333</sup> The question could be posed as to whether an appellant filing their opening brief should disclose and attempt to distinguish the adverse authority and whether doing so might enhance the advocate’s credibility. Students could also discuss how being the first to disclose adverse authority (or facts) might let the advocate shape the conversation. Another discussion could focus on what an advocate should do if there is no way to distinguish the adverse authority or if a court decides a case adverse to the client’s position while an appeal is pending and the ethical issues those situations raise with respect to the tribunal and the client.

Students could also be presented with a set of authorities that they must analyze to determine whether they would have a duty to disclose the authorities in a particular jurisdiction. This would require the students to determine if the authority was actually adverse, for example by distinguishing the holding of a case from dictum, and whether the authority was from a controlling jurisdiction. They could then be required to write a letter or brief disclosing that authority to the court. Or the students could be asked to show how they would deal with that authority in a section of their brief. Finally, legal writing faculty could create a problem where there was controlling, adverse authority that the students would have to disclose and attempt to distinguish in a memo or brief.

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330. *Id.* (quoting *Mannheim Video, Inc. v. Cnty. of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989)).

331. Alan D. Strasser, *Candor Toward the Tribunal; The Duty to Cite Adverse Authority*, ABA, <https://www.americanbar.org/groups/litigation/resources/newsletters/ethics-professionalism/candor-toward-tribunal-duty-cite-adverse-authority/> (last visited Apr. 5, 2024):

The psychological pull to omit the adverse authority can be powerful, so a lawyer might be tempted to conduct such limited or sloppy research that he or she never finds the adverse authority and so did not “knowingly” avoid it. Deliberately conducting sloppy research would violate a lawyer’s duty of competence under Model Rule 1.1 and diligence under Model Rule 1.3.

332. *See* MODEL RULES OF PRO. CONDUCT r 3.3(a) (AM. BAR ASS’N 1983).

333. *Id.*



- vi. Rule 8.2: Judicial and Legal Officials: (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal official, or a candidate for election or appointment to a judicial or legal office.

There is a robust debate about the constitutionality of Rule 8.2,<sup>334</sup> but the rule has repeatedly withstood First Amendment challenges.<sup>335</sup> The Supreme Court has said that the First Amendment does not protect knowingly false statements or statements made with reckless disregard for the truth.<sup>336</sup> Rule 8.2 adopts this standard and requires that the statement be made knowing that it is false or with reckless disregard as to its truth or falsity.<sup>337</sup>

The Florida Supreme Court explained that the purpose of ethical rules “that prohibit attorneys from making statements impugning the integrity of judges are not to protect judges from unpleasant or unsavory criticism. Rather, such rules are designed to preserve public confidence in the fairness and impartiality of our system of justice.”<sup>338</sup> The rules apply whether the statements are made in the context of a case or outside of a court proceeding.<sup>339</sup>

While Rule 8.2 applies to false statements about a judge’s qualifications or integrity, it does not apply to opinions that cannot be objectively verified.<sup>340</sup> For example, one court held that an attorney’s comments referring to a judge as “dishonorable” and a “brainless coward” did not violate Rule 8.2 because the statements were rhetorical hyperbole that could not be proven true or false.<sup>341</sup>

Violating Rule 8.2 or otherwise making disparaging comments about a judge can be injurious to the client’s case. For example, in *Sanches v. Carrollton Farmers Branch Independent School District*,<sup>342</sup> the plaintiff’s brief attacked the credibility of the magistrate judge who heard the case.<sup>343</sup> The lawyer spent several minutes of oral argument in the case responding to questions from the court about the disparaging comments made in the brief about the magistrate judge.<sup>344</sup> That time would have been better spent discussing the substance of the plaintiff’s claims. The court’s decision also called out the plaintiffs’ lawyers’ unprofessional attack on the magistrate judge:

Not content to raise this issue of law in a professional manner, Sanches and her attorneys launched an unjustified attack on Magistrate

334. Compare, e.g., Erwin Chemerinsky, *Silence is not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 861 (1998); Adam R. Long, Note, *Keeping Mud Off the Bench: The First Amendment and Regulation of Candidates’ False or Misleading Statements in Judicial Elections*, 51 DUKE L.J. 787, 793–94 (2001).

335. E.g., *The Fla. Bar v. Ray*, 797 So. 2d 556, 558 (Fla. 2001) (holding that attorney’s statements impugning integrity of the judge were not protected by the First Amendment because the attorney did not have an objectively reasonable basis in fact for the statements.).

336. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

337. MODEL RULES OF PRO. CONDUCT r 8.2 (AM. BAR ASS’N 1983).

338. *Ray*, 797 So. 2d at 558–59.

339. *In re Howe*, 865 N.W.2d 844, 845 (N.D. 2015) (reprimanding attorney under Rule 8.2 for posting a “notice on his office door stating and included in letters to clients that he was interim suspended by the Supreme Court and charged with a crime as a result of a “witch hunt” by the Drug Task Force, State’s Attorney and district court judge.”).

340. BENNETT ET AL., *supra* note 256, at 748.

341. *In re Oladiran*, No. MC-10-0025-PHX-DGC, 2010 WL 3775074, at \*3 (D. Ariz. Sept. 21, 2010).

342. *Sanches v. Carrollton Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156 (5th Cir. 2011).

343. *Id.* at 172.

344. Oral Argument, *Sanches*, 647 F.3d 156, <https://www.ca5.uscourts.gov/oral-argument-information/oral-argument-recordings>.

Judge Stickney. The main portion of the argument on this point, contained in Sanches's opening brief, reads verbatim as follows:

The Magistrate's egregious errors in its [sic] failure to utilize or apply the law constitute extraordinary circumstances, justifying vacatur [sic] of the assignment to [sic] Magistrate. Specifically, the Magistrate applied improper legal standards in deciding the Title IX elements of loss of educational opportunities and deliberate indifference, ignoring precedent. Further, the Court failed to consider Sanches' Section 1983 claims and summarily dismissed them without analysis or review. Because a magistrate is not an Article III judge, his incompetence in applying general principals [sic] of law are [sic] extraordinary.

(Footnote omitted.)

These sentences are so poorly written that it is difficult to decipher what the attorneys mean, but any plausible reading is troubling, and the quoted passage is an unjustified and most unprofessional and disrespectful attack on the judicial process in general and the magistrate judge assignment here in particular. This may be a suggestion that Magistrate Judge Stickney is incompetent. It might be an assertion that all federal magistrate judges are incompetent. It could be an allegation that only Article III judges are competent. Or it may only mean that Magistrate Judge Stickney's decisions in this case are incompetent, a proposition that is absurd in light of the correctness of his impressive rulings. Under any of these possible readings, the attorneys' attack on Magistrate Judge Stickney's decision making is reprehensible.<sup>345</sup>

The court was so put off by the attack on the magistrate judge that it also took the unusual step of commenting on the technical and grammatical errors in the appellant's brief, noting that, "the miscues are so egregious and obvious that an average fourth grader would have avoided most of them."<sup>346</sup> The court then called out the misuse of the word "principals" rather than "principles," the misspelling of the word "vacatur," and the lack of subject-verb agreement in a sentence.<sup>347</sup> Finally, the court noted:

the sentence containing the word "incompetence" makes no sense as a matter of standard English prose, so it is not reasonably possible to understand the thought, if any, that is being conveyed. It is ironic that the term "incompetence" is used here, because the only thing that is incompetent is the passage itself.<sup>348</sup>

Similarly, in *Swinka Realty Investments LLC v. Lackawanna County Tax Claim Bureau*,<sup>349</sup> the appellant's brief contained statements such as "The District Court . . . smugly contradicted itself"; "a genuine issue of fact was clearly and intentionally overlooked by the District Court"; the District Court's analysis is "quite frankly, outright false."<sup>350</sup> The court rejected Swinka's appeal noting that the unprofessional and

345. *Sanches*, 647 F.3d at 172.

346. *Id.* at n.13.

347. *Id.*

348. *Id.*

349. *Swinka Realty Invs. LLC v. Lackawanna Cnty. Tax Claim Bureau*, 688 F. App'x 146 (3d Cir. 2017) (unpublished).

350. *Id.* at 50 n.2.

unwarranted attacks on the district court's ability reflected poorly on the lawyer.<sup>351</sup> The court then said, "When counsel wastes ink attacking the ability of able District Courts instead of advancing his or her client's legal arguments, we smell more than a hint of desperation and confusion about how an appeal works. It is an unbecoming way to brief an appeal."<sup>352</sup>

In addition to Rule 8.2, there may be other regulations restricting a lawyer's comments about a judge. For example, the Supreme Court of Ohio Rules for the Government of the Bar has this provision:

It is the duty of the lawyer to maintain a respectful attitude toward the courts, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges and Justices, not being wholly free to defend themselves, are peculiarly entitled to receive the support of lawyers against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit a grievance to proper authorities. These charges should be encouraged and the person making them should be protected.<sup>353</sup>

An attorney was charged with violating this rule for her conduct at a bar association holiday party.<sup>354</sup> The lawyer and her husband attended the holiday party and the lawyer consumed alcohol and appeared intoxicated.<sup>355</sup> During the party, the bar association presented an award to a judge.<sup>356</sup> The lawyer "loudly and rudely interrupted the presentation of the award and called [the judge] a 'piece of shit,' an 'asshole,' and a 'mother-fucker.'"<sup>357</sup> The court rejected the lawyer's argument that her comments were political speech protected by the First Amendment and imposed a stayed six-month suspension.<sup>358</sup>

Rule 8.2 and other rules regulating lawyer speech raise many issues beyond the obvious constitutional questions. Students could discuss the linguistic limits of zealous advocacy, the effect critical or hyperbolic speech might have on the client's case, or if there might be times when critical or hyperbolic speech might be appropriate. Students could also discuss whether the limits on speech imposed by Rule 8.2 and other rules regulating attorney speech should be applied more broadly or narrowly. For example, students could discuss whether lawyers turned political pundits who make knowingly or recklessly false statements about judges should be found to have violated Rule 8.2. And, as with the other rules discussed in this Article, legal writing faculty could design research assignments around Rule 8.2.

## VI. CONCLUSION

Law schools now must provide students with opportunities to develop their professional identity throughout their time in law school. Legal writing faculty should be leaders in the field of professional identity development. Legal writing faculty often have significant practice experience and have seen firsthand examples of unethical and

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351. *Id.* at 148–49.

352. *Id.*

353. OHIO GOV. BAR. R. 4(2).

354. *Columbus Bar Ass'n v. Bahan*, 203 N.E. 634, 649 (Ohio 2022).

355. *Id.* at 637.

356. *Id.*

357. *Id.*

358. *Id.*

unprofessional behavior and conversely examples of those who uphold the highest standards of ethics and professionalism.

Further, the first-year legal writing curriculum is a law student's first exposure to the work that lawyers do daily. It makes no sense to teach lawyering behavior—how to analyze a legal issue and use and communicate that analysis—without also providing an understanding of the ethical and professional context within which lawyers do that work.

Legal writing faculty should use the Model Rules of Professional Conduct in ways that allow students to develop their professional identity. Doing so lays a foundation for what they will learn in their upper-level Professional Responsibility class and helps the students see how ethical and professionalism issues work in practice. Incorporating professional identity development in the way this Article suggests will also help students in their first summer clerkships or internships.

Legal writing faculty are overburdened, but they should embrace the opportunity to provide professional identity development to their students. Doing so will enhance the first-year legal writing experience and ultimately, improve the profession.

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