

WHEN ETHICAL WORLDS COLLIDE: TEACHING NOVICE LEGAL WRITERS TO BALANCE THE DUTIES OF ZEALOUS ADVOCACY AND CANDOR TO THE TRIBUNAL

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ABSTRACT

This article examines one of the most important ethical tensions that arise in legal writing – zealous advocacy versus candor to the tribunal – and explores how to educate, sensitize, and train young lawyers so that they may effectively navigate the boundaries of this conflict. Although this tension is manifested in a myriad of choices legal writers make, ethical issues arising in the context of written documents are generally not discussed in law school. Consequently, a law student may graduate with no appreciation for the complexities of ethical issues that arise in legal writing and without the tools to address those issues. To understand the dilemma confronting novice lawyers, this article analyzes the tension between the duties of zealous advocacy and candor; explores the judiciary’s inconsistent response to attorneys’ fulfillment of these duties and its impatience with a perceived lack of candor; examines the education presently provided to law students; and suggests various pedagogical and practice-based techniques that will heighten the novice legal writer’s awareness of and ability to embrace these dual ethical duties. This article concludes that legal education, specifically legal research and writing courses, must alert students to the ethical issues manifested in legal advocacy documents and provide students with the tools to draft ethical and effective legal arguments.

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INTRODUCTION

Imagine yourself as a young prosecutor in Arizona. The police have arrested a seventeen-year-old student in his high school principal's office and you have charged him with distributing illegal steroids to student athletes based, in part, on statements made prior to his arrest. Defense counsel moved to suppress any statements made by his client during the pre-arrest meeting in the principal's office, arguing that such statements were the product of custodial interrogation and must be suppressed because his client was never advised of his *Miranda* rights. As you draft your opposition to the motion to suppress, you rely on established precedent holding that the only relevant inquiry in determining whether a defendant was in custody "is how a reasonable man in the suspect's position would have understood his situation."¹

In the course of your research, you find an Arizona Supreme Court case, *State v. Carillo*, in which the court explicitly refused to consider subjective factors, including the defendant's diminished mental capacity, in the custody analysis because the court considers only objective criteria.² Notwithstanding this established precedent, you later find a case from the United States Court of Appeals for the

1. *Berkemer v. McCarty*, 468 U.S. 420, 422 (1984) (setting out standard for custodial interrogation); see, e.g., *Thompson v. Keohane*, 516 U.S. 99, 112 (1995); *State v. Perea*, 690 P.2d 71, 74 (Ariz. 1984).

2. 750 P.2d 883, 892 (Ariz. 1988).

Ninth Circuit, *Alvarado v. Hickman*, holding that courts should consider the age of a juvenile as one of the factors in the custody determination,³ and a case, *In re Jorge D.*, from an Arizona appellate court that adopted the objective test but noted that additional elements such as youth and inexperience should be considered in assessing custody.⁴ The holdings in *Alvarado* and *In re Jorge D.* allow courts to consider the reasonable person in the defendant's specific situation rather than the objective reasonable person standard set out in *Carrillo*. Given that the decisions in *Alvarado* and *In re Jorge D.* are inconsistent with *Carrillo* and deviate from binding United States Supreme Court precedent, you must now decide what to do with these cases.

Many experienced litigators will focus directly on being an effective advocate, affirmatively answering that they would cite *Alvarado* and *In re Jorge D.* because they would want to anticipate and refute one of the defense's stronger arguments. The question of an ethical duty to cite *Alvarado* and *In re Jorge D.* may be subsumed within their advocacy strategy. Their primary concern is drafting the most persuasive and effective document.⁵ In contrast, novice attorneys and law students may choose to ignore these potentially harmful cases because they are uncertain of how to reconcile the cases and, rationalizing that such cases are not binding, they conclude that there is no obligation to cite them. Ignoring these cases may be an ineffective advocacy strategy and/or an unethical choice. Ignoring these cases may also be the byproduct of a legal educational system and law practice environment that fails to prepare students for the challenges of legal practice and the ethical issues inherent in such practice.

Must you cite these cases in your opposition, and if so, what do you say about these cases? How would a court respond to your reli-

3. 316 F.3d 841, 850 (9th Cir. 2002), *rev'd*, *Yarborough v. Alvarado*, 541 U.S. 652 (2004). The hypothetical posed at the beginning of this article and the class assignments later discussed in the article occurred while *Alvarado* was pending before the Supreme Court, but before the issuance of an opinion.

4. 43 P.3d 605, 608-09 (Ariz. Ct. App. 2002).

5. Of course one can argue that zealous advocacy is ethical advocacy. See Allison Lucas, Note, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 FORDHAM URB. L.J. 1605, 1630 (1999) ("An attorney's ethical obligation to assist the judge or jury in arriving at its distillation of the 'truth' is best fulfilled through the zealous advocacy of the client's position under the existing paradigm of civil litigation."). But such assertion is disputed by those ethicists who challenge the value of the zealous advocacy model. See, e.g., DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 17-18 (2000); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); see also Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629 (2002) (discussing challenges to the traditional view of lawyer as zealous advocate).

ance on, or your failure to cite to, *Alvarado* or *In re Jorge D.*? What considerations guide your decision-making? What consequences flow from your decision-making?

Your answers to the above questions may reveal a number of things about you, your experience, your understanding of your ethical obligations, or your familiarity with the local courts. Your answers may reveal your status as a member of the legal discourse community.⁶ As you become socialized—more assimilated into the discourse community—you may become more conscious of ethical issues and questions than a pre-socialized law student.⁷ Your answers may also highlight your perception of the purpose of the adversary system and an attorney's role therein, your awareness of your duty to represent your client zealously, and your recognition of your duty of candor to the tribunal. At some level—consciously or subconsciously—your answers will also reflect your understanding of how to evaluate authority, your appreciation for the weight of authority, the development of your moral compass,⁸ and the formation of your professional identity.⁹

Your answers may also reveal something about your law school education. All too often law school fails to provide students with knowledge of the governing ethics rules as applied to legal documents, understanding of the judiciary's expectations with respect to candor, and appreciation of the complexities inherent in evaluating

6. See Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 LEGAL WRITING 1, 23–30 (1991) (discussing cognitive development, the acquisition of skilled critical thinking abilities as a pattern of socialization, and the application of these stages of socialization to the practicing lawyer).

7. See *id.* Following the Williams' stages of socialization model, a pre-socialized law student would not realize that the decision to cite *Alvarado* raises critical questions. The pre-socialized law student would focus on the concrete. Is *Alvarado* binding authority? If so, I must cite it. If not, I do not need to cite it. Or does *Alvarado* help my client? Socialized attorneys may not agree on whether to cite *Alvarado*, but they are likely to consider the consequences of their choice. Socialization alone does not lead to proper ethical behavior. But, socialization increases the likelihood that one will recognize an ethical issue because one is more aware of the expectations, requirements, and practices of the legal discourse community.

8. For a discussion of moral formation of attorneys, see generally Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 708–45 (1998). Specifically, Schiltz states, "The moral fabric of an attorney is stitched out of the dozens—hundreds—of decisions that she makes each day." *Id.* at 719. For use of the term moral compass, see 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, 444–46 (2005).

9. According to David Thomson, the term professional identity relates to one's own decisions about one's behavior as well as a sense of duty as an officer of the court and responsibility as part of the legal system. David Thomson & Ian Gallagher, ALWD Conference 2013 Planning Each Charted Course, Each Careful Step Along the Byway: Two Approaches to Teaching the Formation of Professional Identity to Contemporary Law Students.

authorities. While law students are required to take classes in basic substantive law such as torts, property, contracts, civil procedure, constitutional law, and criminal law,¹⁰ an introductory course in legal research and writing,¹¹ and one professional responsibility or ethics class,¹² none of these classes necessarily prepares students to engage in meaningful discussion of professional or ethical issues in writing.

In an introductory legal research and writing course, students are exposed to the intricacies of legal research and begin to learn to think and write like lawyers.¹³ In essence, the course is designed to provide a broad introduction to lawyering skills,¹⁴ a familiarization with the legal community, and an understanding of legal analysis and argument.¹⁵ While some legal research and writing courses do weave ethical issues into their curriculum, most do not engage in a comprehensive discussion of ethical issues or duties. Instead, a formal comprehensive discussion of ethics is left to the professional responsibility course students often take in their third year of law school that traditionally focuses on situational ethics, the case method,¹⁶ or a review of the rules of professional responsibility.¹⁷ Ethical

10. See ABA, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2004–2005, Standard 302(a)(1) at 24 (2004), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2004_2005_standards.authcheckdam.pdf.

11. See *id.* Standard 302(a) at 24 (requiring that a school offer instruction in one rigorous writing requirement and professional skills). See generally ALWD, REPORT OF THE ANNUAL LEGAL WRITING SURVEY (2014), available at <http://www.alwd.org/wpcontent/uploads/2014/07/2014-Survey-Report-Final.pdf> (showing best practices and recent trends of 177 legal writing programs throughout the country).

12. In 1973, the ABA added Standard 302(a)(iii) requiring each law school to “provide and require for all student candidates for a professional degree, instruction in the duties and responsibilities of the legal profession,” ABA, APPROVAL OF LAW SCHOOLS, Standard 302(a)(iii) at 7 (1973), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1973_standards.authcheckdam.pdf.

13. See LAUREL CURRIE OATES, ANNE ENQUIST & KELLY KUNSCH, THE LEGAL WRITING HANDBOOK: RESEARCH, ANALYSIS, AND WRITING 31 (1993), for a discussion of what “thinking like a lawyer” means.

14. The first-year introductory legal research and writing course is even called “Lawyering Skills” at some law schools. See, e.g., *First Year Curriculum*, THE CATHOLIC UNIV. OF AM., COLUMBUS SCH. OF LAW, <http://www.law.edu/academic/jd/firstyearcourses.cfm> (last visited Sept. 24, 2014).

15. Indeed, the value of such courses has been noted in MacCrate Report. See Task Force on Law Schools and Professionalism: Narrowing the Gap, *Legal Education and Professional Development – An Educational Continuum*, 1992 A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR REP. 135–38 (identifying legal analysis and reasoning as Skill § 2 in Statement of Fundamental Lawyering Skills and Professional Values).

16. See Alfred R. Light, *Civil Procedure Parables in the First Year: Applying the Bible to Think Like a Lawyer*, 37 GONZ. L. REV. 283, 284 n.5 (2002), for a discussion of the percentage of schools using the Socratic method, lecture method, or problem method to teach legal ethics.

issues arising in the context of written documents are generally not a focus of traditional professional responsibility classes.¹⁸ Consequently, a law student may graduate without ever thinking about the ethical consequences inherent in the choices made when drafting a legal document. Or, more likely, the student will graduate with a faint understanding that there are ethical issues that arise in legal writing, but the student will fail to understand the complexities of such issues or will lack the tools to address those complex issues.

Having had little opportunity to ponder and discuss the ethical consequences of the choices she made in her research and writing, the novice attorney has no moral compass to guide her in the future.¹⁹ She is not equipped to think about and resolve ethical issues that may arise in the future. And in the present legal environment, she is not likely to receive the mentoring or training that will allow her to wrestle with these issues.²⁰ The deficiencies of her legal education follow her into practice where she runs the risk of being sanctioned for her ethical choices.²¹

This article examines one of the most important ethical choices that arise in legal writing: advocacy versus candor. Although ethical issues may arise in any form of legal writing, they most definitely

17. Designing the course as a review of rules of professional responsibility is undoubtedly a response to the ABA's requirement that students pass the MPRE, a multiple-choice examination that tests knowledge of the ABA ethical rules. For a criticism of this method of legal ethics instruction and the bar examiners' decision to use a multiple-choice format to test legal ethics, see Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 40-41 (1992).

18. Traditional legal ethics casebooks do not appear to devote significant attention to ethical issues that manifest themselves specifically in drafting documents. A review of several leading legal ethics and professional responsibility casebooks reveals that these books generally devote a chapter to addressing the advocate's role in an adversary system, see DEBORAH L. RHODE, DAVID LUBAN & SCOTT L. CUMMINGS, *LEGAL ETHICS* 135 (6th ed. 2013), ethical issues that arise in litigation, see THOMAS D. MORGAN, RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* 385 (11th ed. 2011); GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK, ROGER C. CRAMTON, GEORGE M. COHEN & W. BRADLEY WENDEL, *THE LAW AND ETHICS OF LAWYERING* 752 (5th ed. 2010), or a lawyer's duties to clients, the court and third parties, see RUSSELL G. PEARCE, DANIEL J. CAPRA & BRUCE A. GREEN, *PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH* 297, 513, 573 (2011). Yet, the substance of these chapters focuses on questions of frivolous litigation, discovery abuse, litigation strategy, client perjury, and confidentiality. *Id.* Indeed, only one of those casebooks included a brief discussion of an attorney's obligation to cite to adverse authority or to disclose adverse facts. MORGAN ET AL., *supra*, at 421-30.

19. As David Thomson notes in his work on formation of professional identity, we cannot "teach" formation of one's professional identity. We need to create situations in which our students are confronted with ethical questions and reflect on the decisions they make. See Thomson & Gallagher, *supra* note 9, at slide 4.

20. See Schiltz, *supra* note 8, at 746.

21. See MELISSA H. WERESH, *LEGAL WRITING: ETHICAL AND PROFESSIONAL CONSIDERATIONS* 131-71 (2006) (setting out examples of cases where courts have admonished attorneys for misrepresentation or a lack of candor).

arise in the context of advocacy documents, a context that vividly demonstrates the perils awaiting a novice attorney who lacks the experience to balance her duties of zealous advocacy and candor to the tribunal. The tension between the duty of zealous advocacy and the duty of candor to the tribunal has existed since the creation of ethical codes,²² has been the subject of considerable debate and scholarship,²³ and will undoubtedly continue to vex lawyers in the future. As Deborah Rhode recognizes, “[this] clash between lawyers’ responsibilities as officers of the court and advocates of client interests creates the most fundamental dilemmas of legal ethics.”²⁴ This article assumes the continued existence of such conflict and explores how we can educate, sensitize, and train young lawyers so that they may navigate the boundaries of this conflict to become effective advocates. To understand the dilemma confronting novice lawyers, one must understand the tension between the duty of candor and the duty of zealous advocacy; appreciate the judiciary’s inconsistent response to attorneys’ fulfillment of these duties and its impatience with a perceived lack of candor in pleadings and documents; and examine the education and training presently provided to law students.

Part I of this article analyzes the duty of zealous advocacy and the duty of candor as set out in the rules of professional responsibility and discusses the tension created by such dual duties. Part II discusses judicial opinions to glean the judiciary’s view of the tension

22. Even the Alabama Code of Ethics of 1887 reflected the dual duties of an attorney. Compare ALA. CODE OF ETHICS Canon 5 (1887), “Candor and Fairness Should Characterize Attorney,” which stated:

The utmost candor and fairness should characterize the dealing of attorneys with the courts and with each other. Knowingly citing as authority an overruled case, or treating a repealed statute as in existence; knowingly misquoting the language of a decision . . . and all kindred practices, are deceits and evasions unworthy of attorneys.

with Christopher Deering, *Candor Toward the Tribunal: Should an Attorney Sacrifice Truth and Integrity for the Sake of the Client?*, 31 SUFFOLK U. L. REV. 59, 64 n.35 (1997) (citing the “Duties to Be Performed within Limits of Law,” ALA. CODE OF ETHICS Canon 10 (1887) (“[A]n attorney ‘owes entire devotion to the interest of this client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability,’ to the end, that nothing may be taken or withheld from him, save by the rules of law, legally applied.”), quoted in HENRY S. DRINKER, LEGAL ETHICS 354–55 (1953)). The tension between these dual duties appears to have intensified over the years, as evidenced by the heated debates and criticisms of some of the language proposed by the Kutak Commission during the drafting of the Model Rules. See *id.* at 73–75.

23. See Dolovich, *supra* note 5, at 1630–31, for a discussion of those who criticize the zealous advocacy model. But see Monroe H. Freedman, *Legal Ethics from a Jewish Perspective*, 27 TEX. TECH. L. REV. 1131, 1134 (1996) (arguing in favor of the role of attorney as zealous advocate).

24. See RHODE, *supra* note 5, at 50.

between the duty of candor and the duty of zealous advocacy. As this review will highlight, a litigator confronts inconsistent judicial interpretations of the duty of candor. Against the backdrop of these varied interpretations of an advocate's duties, Part III examines the present method of instruction in both legal writing and ethics courses and concludes that students leave law school and enter practice with insufficient guidance and training because ethical issues in writing are not the focus of these courses. Finally, Part III also suggests various pedagogical and practice-based techniques that will heighten the novice legal writer's awareness of her dual ethical duties and empower her to assume such dual duties in an assertive, confident, and effective manner. This article concludes that legal education in general, and legal research and writing courses in particular, must raise the consciousness of our students concerning ethical duties manifested in legal advocacy documents, and provide our students with the tools, understanding, and foundation necessary to draft legal arguments that ethically and effectively navigate the tangled web of conflicting interests and obligations.²⁵ And we must continue to offer training in practice that allows novice attorneys the opportunity to grapple with these issues.

I. PUTTING IN CONTEXT A LITIGATOR'S DUAL ETHICAL DUTIES:
ZEALOUS ADVOCACY FOR THE CLIENT AND CANDOR TO THE
TRIBUNAL

Public perception of a lawyer generally includes an image of a lawyer zealously advocating on behalf of his client. A less pervasive image is that of a lawyer as an officer of the court. Nonetheless, for more than a century, lawyers have served both roles. As far back as 1887, when the first comprehensive code of ethics governing attorneys was adopted by the State of Alabama,²⁶ an attorney has been tasked with "ow[ing] entire devotion to the interest of his client [and] warm zeal in the maintenance and defense of his cause,"²⁷ while being required to show "[t]he utmost candor and fairness . . .

25. Others have reached the same conclusion. See, e.g., Weresh, *supra* note 8, at 427; Brook K. Baker, *Traditional Issues of Professional Responsibility and a Transformative Ethic of Client Empowerment for Legal Discourse*, 34 NEW ENG. L. REV. 809, 810 (2000); Beverly J. Blair, *Ethical Considerations in Advocacy: What First Year Legal Writing Students Need to Know*, 4 LEGAL WRITING 109, 109-10 (1998); Margaret Z. Johns, *Teaching Professional Responsibility and Professionalism in Legal Writing*, 40 J. LEGAL EDUC. 501, 502 (1990). See also Thomson & Gallagher, *supra* note 9, at slide 25 (noting that Syracuse's first-year legal writing program is designed to encourage students to consider issues related to professional identity).

26. Deering, *supra* note 22, at 68.

27. ALA. CODE OF ETHICS Canon 10 (1887), *quoted in* Deering, *supra* note 22, at 64 n.35.

[in] dealings . . . with the courts and with each other.”²⁸ Although the balance between these duties has fluctuated over the years, lawyers have been expected to honor both duties.

Throughout the history of the legal profession, the balance between these two duties has shifted in the various restatements and interpretations of an attorney’s duty set out in code provisions. In 1908, the American Bar Association promulgated its Canons of Professional Ethics,²⁹ including Canon 22, stating that “[t]he conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness.”³⁰ In 1935, the ABA’s Committee on Professional Ethics and Grievances construed Canon 22 to imply that an attorney must voluntarily submit to the court any adverse cases because failing to do so would constitute a breach of an attorney’s duty to display candor and fairness before the court.³¹ This interpretation challenged the traditional view held by attorneys at the time and was attacked for weakening the attorney’s loyalty to her clients.³² Notwithstanding such criticism, the ABA Committee on Professional Ethics and Grievances subsequently affirmed the attorney’s duty to disclose and noted that the duty to disclose was not limited to controlling authority.³³ Rather, the Committee wrote:

We would not confine the Opinion to “controlling authorities” —i.e., those decisive of the pending case—but, in accordance with the tests hereafter suggested, would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.³⁴

The Committee then set out the following test:

Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced as the law a proposition adverse to the undisclosed decision was lacking in candor and fairness to

28. *Id.* at Canon 5, quoted in Deering, *supra* note 22, at 68.

29. CANONS OF PROF’L ETHICS (1908) (listing formal rules of legal ethics). See Deering, *supra* note 22, at 68 n.60, for a discussion of the modeling of ABA Canons after the Alabama Code of Ethics of 1887.

30. Deering, *supra* note 22, at 68–69 (quoting CANONS OF PROF’L ETHICS Canon 22 (1926)).

31. *Id.* at 69 (citing Robert B. Tunstall, *Ethics in Citation: A Plea for Re-Interpretation of a Canon*, 35 A.B.A. J. 5 (1949)).

32. *Id.*

33. *Id.* at 71 (citing ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 280 (1949)).

34. *Id.* at 71 n.74 (quoting ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 280 (1949)).

him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?³⁵

According to the ABA Committee, answering “yes” to any of the above questions suggested that the attorney should disclose the adverse authority to the court regardless of the consequences to the client. This interpretation arguably elevated the duty of candor above the historic duty of zealous advocacy while continuing to leave open the scope of the duty of candor. Indeed, instead of providing a bright-line test, this interpretation inevitably raises additional questions. What case should a court clearly consider? Does the answer depend on the circumstances? Should a court consider a case from a different jurisdiction that would not be binding on the court?³⁶

After sixty-one years, the ABA replaced the canons with the Model Code of Professional Responsibility.³⁷ The Model Code reiterated the zealous advocate model but tempered this paradigm “with specific standards for an attorney acting as an officer of the court.”³⁸ While declaring that attorneys should represent their clients competently and zealously,³⁹ the Model Code contained a disciplinary rule requiring an attorney, in presenting a matter to the tribunal, to “disclose legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.”⁴⁰ In the ethical considerations accompanying this Disciplinary Rule, the ABA drafters noted “[t]he adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client.”⁴¹ The drafters went on to state, “Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.”⁴² Here, the attorney’s duty of candor to the tribunal does not appear as expansive as the duty

35. *Id.* at 71 (quoting ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 280 (1949)).

36. *See Emp’rs Ins. of Wausau v. United States*, 815 F. Supp. 255, 257–58 (N.D. Ill. 1993) (admonishing attorney for failure to disclose precedent from other federal courts).

37. *See* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 310 (John S. Dzienkowski ed., 1996–97).

38. Deering, *supra* note 22, at 73–75.

39. MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1983).

40. *Id.* at DR 7-106(B)(1).

41. *Id.* at EC 7-23 (1983).

42. *Id.*

under the 1908 Code because it is limited to “legal authority in the controlling jurisdiction directly adverse to the position of his client.”⁴³

In 1977, the ABA responded to criticism about the Model Code by establishing a commission to create another code of ethics for attorneys.⁴⁴ Some suggest that part of the rationale for creating the Model Rules was to expand the role of the lawyer as an officer of the court from the limited role established in the Model Code.⁴⁵ A reporter for the Kutak Commission, Professor Geoffrey Hazard, advocated for a more expansive duty to disclose: “If a lawyer discovers that the tribunal has not been apprised of legal authority known to the lawyer that would probably have a substantial effect on the determination of a material issue, the lawyer shall advise the tribunal of that authority.”⁴⁶ This alternative would have required the disclosure of “[1] authority from the controlling jurisdiction that would ‘probably have a substantial effect’ even though it is not ‘directly adverse’ and [2] authority from a sister jurisdiction that would ‘probably have a substantial effect.’”⁴⁷ The Commission declined to adopt this broader duty.⁴⁸

Rather, in 1983, the ABA promulgated its new code, the Model Rules of Professional Conduct (“Model Rules”).⁴⁹ The Model Rules not only retain an attorney’s duty to zealously represent one’s client,⁵⁰ but also impose an affirmative duty to disclose adverse authority to the tribunal,⁵¹ and an affirmative duty on counsel to re-

43. *Id.*

44. In 1977, the ABA established the Kutak Commission to create another code of ethics for the legal profession in response to criticism of the Code’s focus on litigation as well as the Code’s three-tiered structure of canons, ethical considerations, and disciplinary rules. Deering, *supra* note 22, at 73 n.87 (citing 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 203 (1994)).

45. *See, e.g.*, Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 61 (1989).

46. Geoffrey C. Hazard, Jr., *Arguing the Law: The Advocate’s Duty and Opportunity*, 16 GA. L. REV. 821, 826 (1982) (quoting MODEL RULES OF PROF’L CONDUCT R. 3.1(c) (Discussion Draft 1980)); Deering, *supra* note 22, at 86.

47. Hazard, *supra* note 46, at 827 (quoting MODEL RULES OF PROF’L CONDUCT R. 3.1(c) (Discussion Draft 1980)).

48. *See id.* at 826.

49. *See* MODEL RULES OF PROF’L CONDUCT (2013) (Commission on Evaluation of Professional Standards Chair’s Introduction).

50. *Id.* at Preamble.

51. *Id.* at R. 3.3(a)(2).

frain from misstating the law.⁵² The Model Rules, as amended, constitute the current ethical norms governing lawyers.⁵³

Notwithstanding the multiple restatements of ethical norms, nothing in the various codes or rules has resolved the tension between an attorney's dual duties to his client and to the tribunal, or mitigated the controversy created by the original articulation of the duty to disclose implied in Canon 22. Instead, the current Model Rules maintain the vexing ethical dilemma inherent in a system that has two conflicting imperatives: zealous advocacy of client and candor to tribunal. If one is charged with representing one's client zealously within the bounds of the law, then how is one to be candid with the tribunal and inform the court of opinions and arguments adverse to that client?

Even if one were to ignore the philosophical debate as to the validity and appropriateness of the model upon which these rules are based, one would still struggle to interpret and apply these rules in daily practice. Varying interpretations of critical terms in the rules create additional obstacles for lawyers striving to draft documents that are both advantageous to their clients and ethical. For example, while Rule 3.3(a)(2) requires that directly adverse authority be cited, the term "directly adverse authority" is never defined.⁵⁴ Instead, lawyers must look to ABA Committee Opinions, opinions that historically suggest a meaning beyond the parameters of the language of the rule.

In 1984, the ABA Committee again dealt with a lawyer's duty of candor, this time in an informal opinion seeking advice under Model Rule 3.3(a).⁵⁵ This informal opinion arose from a state court proceeding wherein the state trial court had denied several defendants' motions to dismiss based on the court's interpretation of a recently enacted statute.⁵⁶ Several months after the trial court's ruling, but while the case was still pending, an appellate court in another part of the state handed down a decision construing the same recently enacted statute.⁵⁷ The ruling in the appellate court opinion could be construed in two ways, only one of which was directly contrary to

52. *Id.* at R. 4.1.

53. Gaetke, *supra* note 45, at 49-50.

54. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2013) [hereinafter "Model Rule 3.3"].

55. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1505 (1984).

56. *Id.*

57. *Id.* Despite being from another part of the state, the appellate court decision was deemed binding under state law until the trial court's own appellate court had ruled on the issue. *Id.*

the trial court's ruling.⁵⁸ Given that the opinion could be interpreted in a way that was not directly adverse, the plaintiff's lawyer asked whether a lawyer had a duty to tell the trial court about the appellate court decision.⁵⁹ The ABA Committee found that the lawyer must disclose the newly discovered authority.⁶⁰ Arguably, the ABA Committee again defined the duty of candor more broadly than the duty is defined in Model Rule 3.3 because the ABA required disclosure even though an attorney could interpret the appellate court opinion in a way not adverse to the trial court's ruling.⁶¹

As in the past, the Committee's interpretation appears to provide conflicting guidance by interpreting a narrow rule quite broadly. Adding to this confusion is the fact that an attorney is being asked to interpret a rule that governs the attorney's own conduct. In fact, the authority that must be revealed is defined in terms of the attorney's subjective assessment of whether the authority is directly adverse to his client's position.⁶² This "subjective knowledge requirement" is imposed within the "context of a code that tells the advocate to resolve any doubts about the law in favor of the client."⁶³ Given the subjective component of the Model Rule as well as the disparity between the text of the rule and opinions interpreting the rule, it is no wonder that novice lawyers may be uncertain as to where to draw the line between candor and zealous advocacy.

Admittedly, the rule is not generally the basis for disciplinary proceedings by bar associations.⁶⁴ Indeed, Professor Hazard has suggested that attorneys do not reveal adverse authority, in part, because they know that there is little likelihood they would be disciplined for such failure.⁶⁵ Although attorneys may not risk disciplinary action from the bar, attorneys face an increasing risk that courts will sanction them for failure to cite adverse authority, for misrepresenting the law, and for lack of candor toward the tribu-

58. *Id.*

59. *Id.*

60. *Id.*

61. *See id.*

62. It is for this reason that some commentators suggest that the duty to disclose is virtually meaningless. *See* Monroe H. Freedman, *Arguing the Law in an Adversary System*, 16 GA. L. REV. 833, 835-37 (1982).

63. Daisy Hurst Floyd, *Candor Versus Advocacy: Courts' Use of Sanctions to Enforce the Duty of Candor Toward the Tribunal*, 29 GA. L. REV. 1035, 1039 (1995) (quoting Freedman, *supra* note 62, at 836).

64. *Id.* at 1044.

65. *See* Hazard, *supra* note 46, at 828. For a fuller discussion of the dearth of enforcement of the duty to disclose adverse authority, see Floyd, *supra* note 63, at 1044.

nal.⁶⁶ Moreover, attorneys risk undermining their credibility and tarnishing their professional identity if they act in a way that a court deems to be less than candid. Thus, before novice attorneys can make an informed decision about what to cite, they must know the Model Rules, be aware of the judiciary's expectations, and consider the consequences of their decisions.

II. JUDICIAL EXPECTATION OF ADVOCATES' DUTIES

The organized bar and the courts appear to have differing perceptions of the purpose of the adversary system and the role of lawyers.⁶⁷ The organized bar emphasizes the lawyer's duty of zealous advocacy to her client: "[i]n the profession's scheme of things, loyalty to one's client is the cardinal priority . . . Confidentiality and client interest subordinate duties to courts, third persons, and the legal system."⁶⁸ In contrast, most courts take a broader view of the profession's public responsibilities and a narrower view of adversarial zeal.⁶⁹ These differing perceptions may explain why the judiciary holds attorneys to differing standards than the bar.

Differing perceptions of the purpose of litigation also factor into interpretations of an attorney's dual duties to client and the court. A duty to disclose adverse authority such as found in Rule 3.3 supports the concept that the purpose of litigation is to promote justice and truth.⁷⁰ This begs the question of whether the attorney's job is to ascertain such truth. While some may claim that is precisely the role of an attorney,⁷¹ others strenuously reject any notion that an attorney's role is a seeker of truth.⁷² In fact, the professional rules governing attorney conduct do not appear to elevate truth over client. Although a number of scholars and legal ethicists criticize the amoral

66. See Floyd, *supra* note 63, at 1049.

67. For a fuller discussion of how these differing perceptions affect attorney conduct and attorney writing, see discussion *infra* Part II at 17-18.

68. Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 181 (1996).

69. *Id.*

70. See Edward F. Barrett, *The Adversary System and the Ethics of Advocacy*, 37 NOTRE DAME L. REV. 479, 479 (1962) (quoting MCCARTY, *PSYCHOLOGY & THE LAW* 223 (1960)) ("The purpose of a lawsuit is, indeed, 'to arrive at the truth of the controversy, in order that justice may be done.'").

71. See, e.g., John Humbach, *The National Association of Honest Lawyers: An Essay on Honesty, "Lawyer Honesty" and Public Trust in the Legal System*, 20 PACE L. REV. 93, 105 (1999).

72. See Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1288 (1975) ("Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty.").

advocacy of lawyers,⁷³ the predominant view of lawyers is as morally neutral advocates for their clients.⁷⁴ Consequently, few practicing attorneys would describe themselves as “seekers of truth.”⁷⁵

Given such perception and belief, it is surprising to read historical descriptions of the purpose of litigation as achieving the truth.⁷⁶ Indeed, some may be startled to read the following description of an attorney’s duty:

An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client’s interests may seem to require a contrary course. The lawyers cannot serve two masters; and the one they have undertaken to serve primarily is the court.⁷⁷

Yet, these descriptions still exist. For example, in discussing the Ethics 2000 Commission’s recommended revisions that address the special ethical problems of lawyers in alternative dispute resolution, Professor Yarn noted the confusion over the extent to which arbitrators, mediators, and other neutrals qualify as “tribunal,” and attributed such confusion, in part, to the fact that the rule governing candor to the tribunal envisioned only adjudicative bodies engaged in the search for and determination of truth.⁷⁸ Professor Yarn went on to note, “Rule 3.3’s rationale is that it promotes the determination of truth, which is a fundamental objective of the adversarial system.”⁷⁹

Even courts continue to highlight the role of truth in the adversarial process. In *United States v. Shaffer Equipment Co.*, the court explained:

Our adversary system for the resolution of disputes rests on

73. See RHODE, *supra* note 5, at 51 (“In essence, lawyers need to accept moral responsibility for the consequences of their professional actions. That responsibility requires advocates to consider all the societal interests at issue in particular practice settings. Loyalty to clients is a crucial concern, but it needs to be balanced against other values involving truth, justice and prevention of unnecessary harm.”).

74. *Id.* at 51.

75. This view is shared by the American public. See RHODE, *supra* note 5, at 4 (“Two thirds of surveyed Americans believe that attorneys are no longer ‘seekers of justice.’”).

76. See Barrett, *supra* note 70, at 479–80.

77. *In re* Integration of Neb. State Bar. Ass’n, 275 N.W. 265, 268 (Neb. 1937).

78. See Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 252–53 (2001).

79. *Id.* at n.201 (quoting *Mediation and Arbitration – Ethical Considerations*, 32 BOSTON B.J. 1, 5–6 (1988)).

the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition.⁸⁰

Similarly, the chief judge of the United States District Court for the Northern District of Illinois reminds attorneys that “[a]ny notion that the duty to represent a client trumps obligations of professionalism is, of course, indefensible as a matter of law.”⁸¹ He went on to quote the United States Court of Appeals for the Eleventh Circuit,

All attorneys, as ‘officers of the court,’ owe duties of complete candor and primary loyalty to the court before which they practice. An attorney’s duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly.⁸²

These differing views of an attorney’s role and the purpose of litigation directly affect how and what one writes. An attorney’s perception of her role and the purpose of her written document are integral to an understanding of her actions and words. If the purpose of a document filed in court is to help promote justice and truth, the attorney will draft a document differently than if the purpose is to persuade a court to rule in favor of the attorney’s client. Correspondingly, if a court expects a document to help the court learn the truth and achieve justice, then the court is entitled to demand that the document contain certain information, such as a discussion of all potentially relevant law. Conflict arises, however, if the attorney believes that the purpose of her document is to persuade the court to rule in the client’s favor and the court believes that the purpose of the document is to assist the court in uncovering the truth. In such a situation, the court may well be frustrated by the attorney’s document.

Such judicial frustration is evident. Some courts appear to expect broader disclosure from attorneys appearing before the court and are growing impatient with the perceived lack of candor afforded to the tribunal. Yet, other courts are more accepting of such conduct.

80. 11 F.3d 450, 457 (4th Cir. 1993).

81. See Marvin Aspen, *Let Us Be ‘Officers of the Court,’* 83 A.B.A. J. 94, 95 (1997).

82. *Id.* (quoting *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546 (11th Cir. 1993)).

Indeed, the judiciary's inconsistent response to perceived weaknesses or errors in writing creates ambiguity and uncertainty. At times, courts have refrained from reprimanding or sanctioning lawyers for alleged ethical violations in written documents.⁸³ For example, in *Miera v. Dairyland Insurance Co.*, the United States Court of Appeals for the Tenth Circuit vacated the award of sanctions that had been imposed for failure to cite controlling case law.⁸⁴ Noting that the case was originally filed in state court, the court concluded that the search of relevant case law that counsel would likely have conducted would not have led him to the controlling federal case at question.⁸⁵ Consequently, the court held that the failure to cite the controlling federal case was not sanctionable.⁸⁶

Other times, courts seem inclined toward sanctioning or reprimanding attorneys. In some of these cases, courts have reprimanded counsel for conduct that appears to violate the Model Rules,⁸⁷ while in other cases the courts appear to impose sanctions for conduct that is beyond the scope of the duty of candor under Model Rule 3.3.⁸⁸ In some instances, the court openly acknowledged that the conduct might not give rise to disciplinary action under the Model Rules, but still imposed sanctions or reprimanded the attorney for lack of candor to the tribunal.⁸⁹ For example, in *Employers Insurance of Wausau v. United States*, the court admonished attorneys even though the

83. See, e.g., *White v. Carlucci*, 862 F.2d 1209, 1213 (5th Cir. 1989) (admonishing but failing to sanction attorney); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1542 (9th Cir. 1986) (vacating district court imposition of Rule 11 sanctions for failure to cite cases identified in Shepard's as "distinguishing" the case upon which counsel relied (see FED. R. CIV. P. 11)); *United States v. Bailey*, 892 F. Supp. 997, 1021-22 n.9 (N.D. Ill. 1995) (admonishing attorney for failing to disclose adverse case but not imposing sanctions).

84. 143 F.3d 1337 (10th Cir. 1998).

85. *Id.* at 1343.

86. *Id.*

87. See, e.g., *Amstar Corp. v. Envirotech Corp.*, 730 F.2d 1476, 1486 (Fed. Cir. 1984) (explicitly setting out Model Rule 3.3 as the basis for sanctions); *Salahuddin v. Coughlin*, 999 F. Supp. 526, 539-40 (S.D.N.Y. 1999) (issuing an order to show cause why sanctions should not be awarded where the attorney failed to cite one very important case that was adverse to his client); *U.S. Equal Emp't Opportunity Comm'n v. Taylor Elec. Co.*, 155 F.R.D. 180, 182 (N.D. Ill. 1994) (warning published in opinion where counsel for the plaintiff noted that the Supreme Court was currently hearing a case that would eventually be controlling but failed to cite the then-controlling precedent).

88. See *Pfohl v. Pelican Landing*, 567 F. Supp. 134, 138 n.11 (N.D. Ill. 1983) (finding that the attorney breached the duty of candor, although noting that the "adverse authority" not disclosed was a ruling made by another judge in the same federal district, and, therefore, technically not controlling). Some federal district courts find that Rule 3.3(a)(3) is applicable when the attorney fails to cite adverse authority from other courts in the same district. See *Time Warner Entm't Co. v. Does*, 876 F. Supp. 407, 415 (E.D.N.Y. 1994).

89. See *Emp'rs Ins. of Wausau v. United States*, 815 F. Supp. 255, 258 (N.D. Ill. 1993).

court indicated that “such nondisclosure [did not technically] violate Rule 3.3(a)(3) of the District Court Rules of Professional Conduct because the directly adverse authority from another Circuit does not bind this Court.”⁹⁰ Here, the court’s contradictory interpretation of the rule once again illustrates the need to engage law students in thinking about how to navigate this morass. Relying merely on compliance with the literal text of the rule may not be sufficient to protect young attorneys from incurring the wrath of the judiciary or undermining the attorney’s credibility.

Indeed, there appears to be a growing trend among the judiciary to criticize, reprimand, or sanction attorneys for ethical choices, particularly a perceived lack of candor. This perceived lack of candor may relate to the failure to cite adverse authority or the making of a false statement of the law.⁹¹ It may also relate to a myriad of choices that attorneys make when drafting court documents and discussing authority, such as representing case holdings, selectively quoting authority,⁹² and using ellipses to alter the meaning or import of authority.⁹³ The judiciary appears willing to hold lawyers to a higher standard than mandated by the Rules of Professional Responsibility.⁹⁴ If courts are going to hold attorneys to a higher standard or expect more rigorous adherence to existing principles, then attorneys must have the training necessary to understand and meet these expectations. “Lawyers face uncertainty because competing messages come from the hydra-headed sources of guidance—the organized

90. *Id.*

91. Model Rule 3.3(a)(1) also mentions a duty of candor with respect to statements of the law. It prohibits the lawyer from making false statements of law to the court. See Floyd, *supra* note 63, at 1038 n.12 for a discussion of Hazard and Hodes’ hypothetical distinguishing between Rule 3.3(a)(1) and Rule 3.3(a)(3).

92. See *Precision Specialty Metals Inc. v. United States*, 315 F.3d 1346, 1357 (Fed. Cir. 2003) (reprimanding a Department of Justice attorney for misquoting and failing to quote fully from two judicial opinions upon which she relied in a motion for reconsideration).

93. See *id.* For a fuller discussion of cases where attorneys have been reprimanded, sanctioned, or suspended for engaging in such conduct, see Douglas R. Richmond, *Appellate Ethics: Truth, Criticism and Consequences*, 23 REV. LITIG. 301, 314–15 (2004).

94. Some courts expect lawyers to cite cases even when the lawyers determine that the language in a case that appears to render the adverse decision is mere dictum. See *Precision Specialty Metals Inc.*, 315 F.3d at 1358 (rejecting an attorney’s argument that a reprimand was unwarranted where her misrepresentations of a statement in a Supreme Court opinion involved dicta, and criticizing the Department of Justice’s defense of such conduct). Other courts have criticized attorneys’ failure to cite non-controlling authority if it is on point and known to counsel. See, e.g., *Plant v. Doe*, 19 F. Supp. 2d 1316, 1318–19 (S.D. Fla. 1998); *Rural Water Sys. No. 1 v. City of Sioux Center*, 967 F. Supp. 1483, 1498 n.2 (N.D. Iowa 1997). Some courts have even criticized the failure to cite non-dispositive authority from intermediate state appellate courts. See *Mannheim Video Inc. v. Cnty. of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989).

bar, on one hand, and the enforcing agencies and court[s], on the other."⁹⁵ Given these conflicting messages, it is incumbent that law students graduate with exposure to and skills for navigating such uncertainties. A novice lawyer would be better prepared to reconcile the seemingly inconsistent expectations of the bar and judiciary if she previously had been exposed to this dilemma, thought about the conflict, and reflected on how she might approach the situation.⁹⁶ At a minimum, she would better understand the standard to which the bar and the judiciary will hold her.

III. ETHICS AND PROFESSIONALISM IN LEGAL WRITING INSTRUCTION

Novice attorneys could prepare to navigate these ethical challenges through education and instruction, beginning in law school and continuing throughout practice. All accredited law schools in the United States are required to provide students with instruction in professional responsibility, professional skills, and at least one rigorous writing course.⁹⁷ Most U.S. law schools do so through a legal writing program that: (1) spans at least two semesters; (2) is taught by full-time legal writing professionals; (3) assigns grades that are included in student grade point averages; and (4) integrates research and writing instruction.⁹⁸ Almost all legal writing programs include a mandatory first-year course.⁹⁹ In addition to the first-year writing course, a number of law schools require an additional upper-level writing requirement that may take the form of a seminar paper.¹⁰⁰ During the 2012–13 academic year, the most common writing assignments in first-year legal research and writing courses included: office memoranda, appellate briefs, client letters, email memos, and

95. Cramton & Koniak, *supra* note 68, at 181–82.

96. See Thomson & Gallagher, *supra* note 9.

97. See STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, *supra* note 10, at 302(a).

98. See 2013 ALWD, REPORT OF THE ANNUAL LEGAL WRITING SURVEY (2013), available at <http://www.alwd.org/wp-content/uploads/2013/08/2013-Survey-Report-final.pdf> [hereinafter 2013 ANNUAL LEGAL WRITING SURVEY]. The ALWD/LWI national survey of legal writing programs includes data about the operation of legal research and writing programs during the 2012–2013 academic year from 190 North American law schools (189 from the United States and 1 from Canada), representing approximately 95% of the law schools eligible to complete the survey.

99. *Id.*

100. *Id.*

pretrial briefs.¹⁰¹ These are the types of documents that lawyers will produce in practice and in which questions of professionalism and ethics often manifest. Yet, a review of these student-written documents highlights student struggles with navigating the divide between advocacy and misrepresentation.

A. Current State of Legal Writing Instruction

Notwithstanding the obvious connection between writing and professionalism, much of the legal writing material – texts designed for classroom use as well as law review articles – has historically offered little discussion about legal ethical issues. Indeed, as Brook Baker noted, “these classroom texts have been remarkably silent about the rules of professional responsibility and the principles of professionalism which should guide the research, analysis and writing activities of both law students and lawyers.”¹⁰² Beginning in the 1990s, legal writing scholars recognized the need, and began thinking of how to incorporate discussion of legal ethics into legal research and writing classes.¹⁰³ This discussion began as a call to introduce ethical issues into legal writing assignments,¹⁰⁴ and sought to stress the importance of professionalism in legal writing.¹⁰⁵ Notwithstanding the broadening scope of scholarship, the reality remains that there is much more we should do to integrate issues of legal ethics and questions of professionalism into legal writing courses.¹⁰⁶

101. *Id.*

102. Baker, *supra* note 25, at 810–11.

103. *See id.* at 810; Blair, *supra* note 25, at 109–10; Johns, *supra* note 25, at 501.

104. *See, e.g.*, Johns, *supra* note 25, at 503–07 (setting out ethical issues that could be raised in demand letters, office memos, client letters, complaints, briefs, and oral argument).

105. *See generally* Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 SUFFOLK U. L. REV. 1, 1, 37 (1997) (stressing the need for lawyers to be professional in their writing).

106. There has been much written about the failure to integrate ethical discussions across the law school curriculum. *See, e.g.*, Rhode, *supra* note 17, at 200–03; Cramton & Koniak, *supra* note 68, at 168. The blame for such failure does not lie with any one group. With respect to legal writing programs, there are a number of reasons for the insufficient discussion of legal ethics and professional responsibility. First, not all legal research and writing programs are free to expand their curriculum goals into issues that have historically been viewed as doctrinal. Second, even if faculty were free to include a discussion of ethics in the legal research and writing curriculum, many have insufficient credit hours in which to cover the basic legal research and writing material. Although a number of schools have increased the number of credit hours accorded legal writing programs to an average of 2.50 credit hours in the fall and 2.39 credit hours in the spring, *see* 2013 ANNUAL LEGAL WRITING SURVEY, *supra* note 98, at 7, the majority of programs must teach the first-year course in four credits. *Id.* at 20. Third, there are some legal research and writing faculty who believe that a discussion of ethics is beyond

While a number of schools have incorporated some discussion of legal ethics or professional responsibility into their legal writing courses,¹⁰⁷ often the discussion is cursory or simply highlights some of the key Model Rules. For example, a number of courses weave a discussion of the traditional issues of professionalism—competence, diligence, and promptness—into a discussion of why students must take a legal research and writing course.¹⁰⁸ Ethical rules require that attorneys be competent legal researchers and writers; hence a student must pass this course so that the student may become a competent lawyer. A small number of first year legal research and writing courses introduce ethics into most classes,¹⁰⁹ with at least one modeling the legal research and writing course around ethical rules.¹¹⁰ More include a brief discussion of ethics as it relates to one’s client, or to use the phrase coined by Brook Baker, “representational ethics,” during the discussion of drafting an office memorandum, client letter or appellate brief.¹¹¹ Often, this discussion focuses on the duty of loyalty owed to a client and the duty of zealous advocacy.¹¹² Be-

their realm of expertise and is better left to those faculty members teaching an ethics or professional responsibility course. Cramton & Koniak, *supra* note 68, at 147–48. Indeed, this is the reason often cited by faculty who oppose the “ethics across the curriculum” movement. *See id.* This unfamiliarity with teaching legal ethics is exacerbated by the inability to develop a deeper understanding and command of pedagogical and substantive material that accompanies those programs where legal writing professionals are hired on a short term basis. *See* 2013 ANNUAL LEGAL WRITING SURVEY, *supra* note 98, at 19 (finding that the majority of legal research and writing faculty members operate pursuant to short term contracts). Notwithstanding these obstacles, more legal writing faculty are striving to include some instruction in professionalism and ethics in their classes. This article argues for even greater integration of ethics into legal writing classes.

107. *See, e.g.,* Thomson & Gallagher, *supra* note 9, at slides 23–24; Edwin S. Fruehwald, *Legal Writing, Professionalism, and Legal Ethics*, 1, 5–7 (Hofstra Univ. Sch. of Law Legal Studies Research Series, Working Paper No. 0820, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1238484 (last modified Mar. 31, 2014); *see also* Almas Khan, *Infusing Ethics into the Legal Writing Curriculum – and Beyond*, 19 THE L. TEACHER 7, 7–8 (2013).

108. *See* Baker, *supra* note 25, at 812–13 (discussing legal writing texts that discuss the traditional issues of professionalism).

109. *See* Thomson & Gallagher, *supra* note 9, at slides 24–25; *see also* Fruehwald, *supra* note 107, at 1–5 (explaining how he incorporates ethics into his first-year legal writing class at Hofstra).

110. Margaret Johns explicitly incorporates ethical issues into assignments given to first-year legal research and writing students by identifying different ethical rules that are implicated by the various documents assigned to first-year students. MARGARET Z. JOHNS & CLAYTON S. TANAKA, *PROFESSIONAL WRITING FOR LAWYERS* 3–7 (2d. ed. 2012); *see also* WERESH, *supra* note 21, at 6.

111. Baker, *supra* note 25, at 814, Chart II (illustrating legal texts that include a discussion of ethics).

112. *See id.* at 814–15, Chart II, for a discussion of legal texts that address traditional duties owed to a client. According to Baker’s chart, the texts and articles are relatively silent, addressing the ethical norm of zealous advocacy directly only eleven times.

cause many first-year students will not have held positions where they had clients, the course often needs to highlight the obligations toward one's clients and the responsibilities that accompany such obligations.

Even when confronted with a factual scenario that includes an ethical issue relating to one's clients, first-year law students are often unaware that such an issue exists. For several years, I created a problem where a secretary within a law firm sought legal advice for her nineteen-year-old child who had used a classmate's university identification to obtain on-campus housing. While the substantive legal issue concerned the Wisconsin identity theft statute, the facts created an ethical issue concerning the identity of the actual client. Did the firm represent the mother or her nineteen-year-old child? If the firm represented the nineteen-year-old child, should the firm convey its legal advice and opinion to the mother without the express consent of the child? When I did not identify this secondary issue as an issue in the case, it went unnoticed by most first-year students. When I raised the issue with the students, some recognized there could be a potential conflict of interest, acknowledged that the firm should have been aware of the potential dilemma, and questioned whether the firm should be dealing with the mother if the child was the actual client. Yet, in the thirty-minute discussion, we were unable to discuss any specific ethical rules that might provide guidance or instruction.¹¹³ Moreover, because they were not asked to address ethical issues, the few students who had recognized a potential conflict of interest chose not to even raise a question about it.

This exercise demonstrates the single-mindedness with which first-year law students often approach legal research and writing problems. It may also indicate a willingness of law students and lawyers to wear blinders when it comes to spotting ethical issues. Often they lull themselves into believing that if they do not raise the ethical issue, it will go away. In fact, in the instances when I directly raised the issue at the beginning of our discussion by asking the class to identify our client, students responded with a much richer discussion and embraced a follow-up research project to find applicable rules of professional responsibility. Although our classroom discussion was again limited by time constraints, hopefully it high-

113. Although a few law schools do offer an ethics course to first-year students, most do not, and thus first-year law students have no knowledge of ethical rules governing their conduct. Most law schools offer ethics or professional responsibility as one or two-credit required courses to upper-level students. See, e.g., Stephen Gillers, *Eat Your Spinach?*, 51 ST. LOUIS U. L.J. 1215, 1219 (2007); Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719, 724 (1998).

lighted for students that ethics is not a discipline unto itself, but pervades the many choices they will make as future lawyers. For me, the exercise illuminated the need to raise ethical issues directly and to engage students in an explicit discussion of these issues. Such need is particularly warranted with respect to a discussion of persuasive writing.

Not surprisingly, questions of ethics often arise when the legal writing course focuses on persuasive writing. In the discussion of persuasion, students wonder whether there are limits or restrictions on what they can say to the court. Correspondingly, the ethical rules that have garnered the most explicit attention in legal writing texts involve those concerning the duty of candor to the tribunal.¹¹⁴ Indeed, according to Brook Baker, “the texts are most explicit concerning the duty of candor to the court, giving near universal coverage to the obligation to disclose adverse authority and/or the obligation to avoid misrepresentations of law or fact.”¹¹⁵ Notwithstanding this “near universal coverage,” few, if any of the texts, actually explain how to be candid with the tribunal and advocate zealously on behalf of a client.

Margaret Johns’ text appears to come the closest to this challenge. Johns identifies both the duty of zealous advocacy and the duty of candor toward the tribunal and attempts to reconcile the conflict. She notes that the “obligation to the court does not conflict with advocate’s obligations to client because ‘the advocate’s role is to present the client’s cause within the framework of the law, which requires common terms of legal reference with the court and opposing counsel.’”¹¹⁶ Indeed, of all the legal writing texts reviewed, her book most clearly explains the conflicting duties and offers some practical guidance.¹¹⁷ Yet, her in-depth discussion relies on a reading of the ethical rules that suggests a much more limited duty of candor than that envisioned and expected by many judges.¹¹⁸ Moreover, while

114. See Baker, *supra* note 25, at 815–16, Chart III, for a discussion of legal writing texts that address the obligations to disclose adverse authority and to avoid misrepresentations of law or fact.

115. *Id.* at 815.

116. JOHNS & TANAKA, *supra* note 110, at 124 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 111 cmt. c (2000)).

117. *Id.* at 124–26.

118. See *id.* at 124 (stating that the duty to disclose is narrowly stated by both the Model Rules and the Restatement, and explaining that if a case is distinguishable, from another jurisdiction, or not from the highest court in the jurisdiction, there is no duty to disclose). But see *supra* Part II for a discussion of courts that have criticized or reprimanded attorneys for failing to disclose adverse authority even when such authority was distinguishable or was not binding on the court.

recognizing that there are no easy answers for how to resolve the tension between the duties of candor and zealous advocacy, Johns suggests that this theoretical tension often dissolves when drafting persuasive documents because persuasive advocacy demands disclosure of adverse authority.¹¹⁹ She suggests that, “[b]eyond controlling authority, the lawyer should also consider disclosing any other authority which the court would want to ponder in resolving the dispute.”¹²⁰

Most legal writing books simply state that students must not misrepresent the law or facts; however, there is little explicit discussion of what constitutes a misrepresentation.¹²¹ Texts also remind students that they are bound by the governing rules of professional responsibility and must disclose directly adverse authority under Rule 3.3(a)(3).¹²² Students are given the rules, but there is insufficient discussion of the rules in context or of what the rules mean in practical terms.¹²³ While texts are filled with examples contrasting a recitation of the law in objective versus persuasive documents, examples of how a prosecutor and defense counsel could describe the same case to support their divergent positions, and examples of how to bury harmful information within a brief,¹²⁴ there are few examples explaining why a particular statement of the rule of law may be a misstatement or misrepresentation. Even Johns’ text does not set out examples or provide an in-depth discussion of situations where courts have deemed an attorney’s discussion of the law to be a misrepresentation or reflect a lack of candor to the tribunal.¹²⁵

In other words, these texts provide the “rules” but omit the stories.¹²⁶ A mere recitation of the “normative statements embodied in legal rules”¹²⁷ does not lead to a sophisticated understanding of the

119. JOHNS & TANAKA, *supra* note 110, at 125.

120. *Id.* at 126.

121. *Id.* at 123; Baker, *supra* note 25, at 815; WERESH, *supra* note 21, at 130.

122. JOHNS & TANAKA, *supra* note 110, at 123; WERESH, *supra* note 21, at 130.

123. See, e.g., LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS 8-9 (3d ed. 2011) (listing ethical rules that apply to legal writing); see also *id.* at 163-66 (discussing specific ethic rules in the context of brief-writing).

124. See, for example, LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH AND WRITING 321-327 (5th ed. 2010) for a discussion of how to present rules in the light most favorable to one’s client.

125. JOHNS & TANAKA, *supra* note 110, at 99.

126. See WERESH, *supra* note 21, at 131-71 for an example of where the text does provide stories. Weresh provides examples of cases where courts have admonished attorneys for misrepresentation or a lack of candor and effectively raises questions for students to consider with respect to the attorney conduct in each case. Yet, the book provides little guidance to students on how to avoid such problems in drafting.

127. Cramton & Koniak, *supra* note 68, at 176-77.

law and its applicability. According to Cramton and Koniak, “[s]tories in the form of cases act as more than a vehicle for understanding rules, honing skills of legal analysis, and developing practical judgment; they are a good avenue for the general exploration of the terrain of ethics.”¹²⁸ It is for precisely this reason that problem-based legal research and writing courses provide the optimal venue for addressing these ethical issues.¹²⁹ If woven into the research and writing problems assigned, students will have the opportunity to grapple with the conflicting duties of zealous advocacy and candor to the tribunal. In researching and drafting legal documents, students will explore how to balance their obligations to client and court, and will become more conscious of the choices they make in their writing.

B. Struggles of Novice Legal Writers in Navigating the Divide Between Advocacy and Misrepresentation

Returning to the story of the young prosecutor in Arizona trying to decide what to do with the *Alvarado* decision, we can appreciate the potential consequences of insufficient law school instruction. By witnessing the unsophisticated manner in which a number of first-year law students responded to the challenge of how to deal with *Alvarado* and *In re Jorge D.*, we can anticipate similar struggles as those students transition to novice attorneys.

During the spring semester, 130 first-year law students were asked to research and draft an appellate brief arguing whether the Arizona trial court had properly suppressed statements made by a seventeen-year-old student during a meeting in his high school principal’s office. The prosecutor appealed the trial court’s order holding that such statements were the product of a custodial interrogation in the absence of Miranda warnings, and thus violated the defendant’s Fifth Amendment rights. Half of the students represented the State of Arizona and half represented the defendant, Lance Harbor. In arguing their respective positions, the student advocates adopted varying strategies with respect to treatment of *Alvarado* and *In re Jorge D.* The samples ranged in effectiveness with respect to both candor and advocacy.

128. *Id.* at 179.

129. Moreover, as Almas Khan notes, “[a]s teachers of sequential courses that are increasingly spanning from the first year of law school into the second and third years, legal writing professors are uniquely positioned to underscore . . . legal ethics.” Khan, *supra* note 107, at 7.

Samples A and B reflect efforts to provide the court with full disclosure, in that both inform the reader that the Arizona Supreme Court has not directly addressed whether a defendant's age should be considered in a determination of custody, but that other courts have done so.

Sample A (Defendant):

The Arizona Supreme Court has not spoken directly to juvenile status in considering custodial interrogation but decisions in Arizona and the Ninth Circuit indicate juvenile status is a factor to be weighed. Alvarado, 316 F.3d at 848. Additional elements that bear upon a child's perceptions and vulnerabilities including age, maturity and experience with law enforcement should be considered for custody purposes. In re Jorge D., 43 P.2d 605, 608 (Ariz. Ct. App. 2002). In the instant case, Harbor's maturity and lack of experience with law enforcement are significant factors that support a finding of custody.

Sample B (State):

While Arizona does not interject subjective criteria in its objective determination of custody, Harbor would not be in custody even under the heightened juvenile standard several courts have suggested be included in an analysis of custody. See Carrillo, 750 P.2d at 892 (suspect's diminished mental capacity status not accounted for in finding of custody under objective standards). Cf. Alvarado v. Hickman, 316 F.3d 481 (9th Cir. 2002) (appellate court overrules finding of custody upon inclusion of suspect's juvenile status into custody analysis). Analysis of a juvenile's reasonable expectation of his environment may include recognition of additional elements that bear upon some children's perceptions and vulnerabilities, including a child's age, maturity, and presence of a parent. In re Jorge D., 43 P.3d 605 (Ariz. Ct. App. 2002).

In contrast, Samples C and D are less candid because they fail to advise the reader that there is no binding law in Arizona requiring consideration of juvenile status. Moreover, they both fail to inform the reader that the Arizona Supreme Court has already refused to consider non-objective criteria such as a defendant's diminished mental capacity.

Sample C (Defendant):

In applying this reasonableness test to juveniles, however,

courts should also consider the defendant's age, maturity and experience with law enforcement in determining whether a reasonable person in the defendant's position "would have reasonably considered his freedom of action to be curtailed in a significant way." In re Jorge D., 43 P.3d 605, 608-09 (Ariz. Ct. App. 202). See also Alvarado v. Hickman, 316 F.3d 841 (9th Cir. 2003).

Sample D (Defendant):

Because the Supreme Court has determined that a juvenile is more susceptible to police coercion during custodial interrogation, it follows that the same juvenile is also more susceptible to the impression that he is, in fact, in custody in the first instance. Alvarado, 316 F.3d at 843. Therefore, a "reasonable person" in the objective standard must be the age of the defendant. Id. A majority of courts that have addressed the question of juvenile status in an "in custody" determination have acknowledged juvenile status as part of either the totality of the circumstances or of the reasonable person standard. See id. at 850-51.

This Court has determined that for the purposes of custodial interrogation, the same objective test for determining whether an adult was in custody "applies also to juvenile interrogations, but with additional elements that bear upon a child's perceptions and vulnerability, including the child's age, maturity and experience with law enforcement and the presence of a parent or other supportive adult." In re Jorge D., 43 P.3d 605, 608 (Ct. App. 2002). The standard thus is whether a person of defendant's age in the same position would have reasonably considered his freedom of action to be curtailed in a significant way. Id. at 609. Under the standard as applied by this Court, Lance Harbor's juvenile status is a defining element of the reasonable person standard.

Finally, Sample E, which is representative of the approach taken by a fair number of student-advocates representing the State, provides the reader with the current state of binding law, relying exclusively on the binding law in the Arizona and Supreme Court prece-

dent. Nevertheless, it fails to inform the reader of other potentially relevant case law such as *Alvarado* or *In re Jorge D.*¹³⁰

Sample E (State):

Harbor's juvenile status should not play a role in evaluating whether or not he was in custody during his meeting in Principal Gulch's office. In *Carrillo*, a defendant with a diminished mental capacity was not found to be in custody when he voluntarily came to the police station to answer questions. *Carrillo*, 750 P.2d at 892. The court reasoned that the defendant's subjective perception might have been to the contrary, but the court deals with objective criteria *only* in determining whether an interrogation is custodial. *Id.* Similar to mental capacity, Harbor's juvenile status should not be taken into account when deciding if he was in custody because his age is also a subjective factor.

Whether the failure to inform the court of *Alvarado* or *In re Jorge D.* violates the Model Rules, misstates the law, demonstrates a lack of candor toward the tribunal, or constitutes ineffective advocacy depends on Arizona's rules of professional responsibility and the judiciary's interpretation of those rules.¹³¹ Similar to the requirements of Model Rule 3.3,¹³² Arizona's rules require an attorney to disclose "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."¹³³ Under this rule, an attorney is not ethically bound to cite *Alvarado* because it is a federal case and therefore not from the controlling jurisdiction. An attorney adhering to this interpretation of the rule may rightfully believe that his failure to cite *Alvarado* is perfectly legitimate. Nonetheless, the attorney's lack of candor may prove frustrating to a judge who considers the case particularly relevant.

Citation to *In re Jorge D.* is a more complex question because, although the case is from the controlling jurisdiction, *In re Jorge D.* is not from the highest court of Arizona and does not bind lower courts. Therefore, if an attorney views the obligation to disclose di-

130. Some students representing defendant Harbor also failed to cite either precedent. Research assignments and comments on draft arguments highlighted the existence of both cases; thus, the failure to cite to the cases was not the result of a failure to find these cases.

131. See ARIZ. RULES OF PROF'L CONDUCT R. 3.3(a). Specifically, Comment 4 states, "A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities." *Id.* at cmt. 4.

132. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (2013).

133. ARIZ. RULES OF PROF'L CONDUCT R. 3.3(a)(2).

rectly adverse authority from the controlling jurisdiction as an obligation to disclose binding authority only, then he or she has no obligation to disclose *In re Jorge D.*¹³⁴ Similarly, if an attorney views only binding authorities as directly adverse, then he or she does not have an obligation to disclose. However, if an attorney views the obligation as an obligation to disclose any authority in the controlling jurisdiction that is directly adverse regardless of whether it is binding, then the attorney has an obligation to disclose *In re Jorge D.*¹³⁵

An Arizona judge may have a different view of the ethical obligations of attorneys appearing in his court.¹³⁶ The judge may believe that such precedent should have been cited and may reprimand an attorney for failure to cite *Alvarado* or *In re Jorge D.* This belief may stem from a broader vision of the duty of candor to the tribunal or a more expansive view of authority. Alternatively, the judge may share the view that the attorney was not ethically bound to cite *Alvarado* or *In re Jorge D.*, but may consider such failure as evidence of a poorly reasoned argument or of a less-than-credible attorney. In either case, the attorney's decision to refrain from citing *Alvarado* or *In re Jorge D.* may have unintended consequences in that particular courtroom.

As evident from the discussion above, there is no obvious answer to the question of how to deal with *Alvarado* or *In re Jorge D.* Similarly, there is no one explanation for student struggles.¹³⁷ Students

134. *But see* *Jorgenson v. Cnty. of Volusia*, 846 F.2d 1350, 1352 (11th Cir. 1988) (rejecting counsel's argument that counsel did not know authority was binding as "simply post hoc efforts to evade the imposition of sanctions").

135. According to some courts, a lawyer's duty to reveal directly adverse authority is not limited to appellate decisions; these courts may draw a distinction between "directly adverse authority in a controlling jurisdiction" and "controlling authority." See *Tyler v. State*, 47 P.3d 1095, 1104-06 (Alaska Ct. App. 2001) (rejecting attorney's argument that attorney was only required to reveal controlling authority and explaining that a lawyer has a duty to disclose directly adverse authority in the "controlling jurisdiction," not "controlling authority"); see also *Richmond*, *supra* note 93, at 319.

136. A judge may believe that the duty of candor to the tribunal is paramount, finding support for this view in the Arizona Rules. See ARIZ. RULES OF PROF'L CONDUCT R. 3.3(a) cmt. 2 (recognizing that the duty of the "lawyer acting as an advocate in an adjudicative proceeding . . . to present the client's case with persuasive force" is "qualified by the advocate's duty of candor to the tribunal."). See also *Jorgenson*, 846 F.2d at 1352 (upholding the imposition of Rule 11 sanctions where attorney failed to cite adverse, controlling precedent in support of a motion for a temporary restraining order and a preliminary injunction even though the conduct fell outside the parameters of Model Rule 3.3 because opposing counsel later cited the case to the court (see FED. R. CIV. P. 11)); *Saturn Sys., Inc. v. Saturn Corp.*, 659 F. Supp. 868, 870 n.2 (D. Minn. 1987) (imposing Rule 11 sanctions notwithstanding specific finding that attorney's conduct did not violate Model Rule 3.3).

137. Some students struggled because of a misunderstanding of the hierarchy of authority. In student conferences subsequent to submission of the brief, some students explained that

struggled to deal with such precedent notwithstanding class discussion of the law, the weight of authority, the obligations under Model Rule 3.3, the desire of a tribunal to be fully informed of the law, and the need for counsel to anticipate and rebut the opponent's strongest arguments. Upon receipt of briefs with the above discussions, legal writing professors are faced with the challenge of crafting comments and responses to the students' arguments, analysis, organization, and style. Such comments often focus on analytical paradigms utilized or lacking in the students' argument, the organization of the argument, the persuasive techniques employed, and the basic writing tools used. While the failure to disclose adverse binding authority or the misstatement of law will generate a comment, the failure to disclose adverse law that is not binding may not always generate a comment and often will not result in an in-depth discussion of the ethical obligations manifested in writing.

Moreover, the manner in which we teach students to persuade may inadvertently encourage students to misstate the law. Specifically, instruction on using persuasive techniques may have unintended consequences when novice attorneys must argue difficult positions. Most legal research and writing courses teach students to use various persuasive techniques to convince the court to rule in their client's favor. These techniques include position of emphasis, sentence structure, detail, word choice, airtime, and viewpoint.¹³⁸ Beyond these techniques, students are taught to think about how they frame the law.¹³⁹

In contrasting a statement of the law, legal writing texts suggest that the recitation in the objective memorandum should consist of a neutral statement of the law, whereas a recitation of the law in a persuasive document should emphasize those parts of the rule of law that favor one's client.¹⁴⁰ Thus, a criminal defendant seeking to suppress witness identification testimony may begin her recitation of the law by reminding the reader of the due process rights of every American citizen and what that means in terms of her client's case.¹⁴¹ In contrast, the prosecutor may begin by emphasizing the

they thought decisions of the federal courts of appeals were binding on state courts when the courts were considering constitutional issues.

138. See, e.g., OATES & ENQUIST, *supra* note 124, at 289-90, 293-96.

139. See, e.g., *id.* at 267.

140. *Id.* at 288; see also LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS AND ORGANIZATION 249 (5th ed. 2010).

141. For an example of this rule statement, see Example 2 set out in OATES & ENQUIST, *supra* note 124, at 323.

goal of providing jurors with all evidence unless there is a compelling reason to exclude the evidence.¹⁴²

Both defense counsel and prosecutors would be encouraged to state the law broadly or narrowly depending upon which statement is most favorable to their client.¹⁴³ If an attorney wants the law to govern the client's situation, the attorney would state the rule of law as broadly as possible so that the client's situation falls within the parameters of the rule.¹⁴⁴ If an attorney does not want the law to govern the client's situation, the attorney would state the rule of law as narrowly as possible so that the client's situation falls outside the narrow confines of the rule.¹⁴⁵ Such guidance on emphasis and framing the rule of law may help explain the misstatements of the law set out earlier in the student briefs in the Arizona prosecutor hypothetical.

Certainly such misstatement is not the goal of the instruction or examples. The instruction and examples set out in the text are intended to demonstrate the different stance, purpose, and audience of persuasive documents,¹⁴⁶ not to encourage writers to misstate the law. Yet, even with an understanding of this instruction, it is not difficult to imagine how a young attorney, seeking to represent her client zealously, could misconstrue her instruction in persuasive techniques, leading to misrepresentations. Students in the Arizona hypothetical chose to frame the law broadly or narrowly depending on the identity of their client. Such framing may explain why some students chose to disclose or not to disclose authority. Likewise, a misguided attempt to emphasize law that was helpful to their client may have led some students to misstate the law inadvertently.

A choice to emphasize a certain rule or place a rule in context is not problematic as long as the choice does not translate into a misleading statement of the law. Such misstatement may result from a lack of precision in writing or a misunderstanding of the hierarchy of authority.¹⁴⁷ Those students who relied on *Alvarado* or *In re Jorge D.*, to argue that the court should consider the juvenile status of the

142. For an example of this rule statement, see Example 3 set out in OATES & ENQUIST, *supra* note 124, at 324.

143. *Id.* at 321.

144. *Id.*

145. *Id.*

146. *Id.* at 321-24.

147. For a fuller discussion of why precision in writing and an understanding of hierarchy of authority is critical to drafting an analysis that falls within a "reasonable zone of right answers," see Jane Kent Gionfriddo, *The "Reasonable Zone of Right Answers": Analytical Feedback on Student Writing*, 40 GONZ. L. REV. 427, 431-33 (2005).

defendant in determining whether the defendant was subject to a custodial interrogation, did nothing wrong as long as they adequately represented the weight of such authority. A statement that Arizona law *requires* consideration of such a factor or that the Arizona state court *must* consider such a factor is a misstatement of the law. Likewise, a statement that Arizona courts *refuse* to consider juvenile status as a factor is also misleading because no Arizona Supreme Court has so held and an Arizona court has held to the contrary. Some students defended such statements by arguing that because neither *Alvarado* nor *In re Jorge D.* is binding, there is no authority compelling consideration of subjective factors. Indeed, because many first-year students struggle to understand the hierarchy of authority, legal writing instruction often highlights the difference between binding and persuasive authority.¹⁴⁸ Such emphasis is needed because many law students do not understand weight of authority and have difficulty determining what authority governs. Yet, in an effort to simplify the concept, students may leave with the impression that only binding authority counts. Thus, students misconstrue their ethical obligation as one requiring them to disclose only directly adverse binding authority. Those who chose to ignore the non-binding authority construed their duty to disclose directly adverse authority quite literally and narrowly. While their failure to cite *Alvarado* or *In re Jorge D.* may not have violated any rules, it may well have demonstrated ineffective advocacy. And, such failure in practice may lead to reprimand, sanctions, or judicial frustration with counsel because, as discussed earlier, many courts view the duty to disclose more broadly.¹⁴⁹

Law students leave their first-year legal research and writing course with varied responses to persuasive writing. Some first-year students, still unsure of their “legal” voice, draft documents that differ very little in stance from objective documents. Through an inability to advocate forcefully, these students draft documents that easily satisfy any duty of candor owed to the tribunal; however, they often fail to meet the duty to argue zealously for their client.¹⁵⁰ Other students feel empowered by their ability to argue on behalf of their client and become “Rambo” litigators. While these students embrace their duty to advocate zealously on behalf of their client, they view such a duty as a license to exaggerate, distort, or mislead. This group of students often fails to meet the duty of candor to the tribu-

148. OATES & ENQUIST, *supra* note 124, at 26–29.

149. *See infra* Part II.

150. *See, e.g.*, OATES & ENQUIST, *supra* note 124, at 288.

nal. Another group of students lies in between the first two extremes. They struggle to write arguments that will persuade a reader without misrepresenting fact or law. The goal of every legal research and writing course should be to have a classroom of “struggling” students who recognize the challenges inherent in effective advocacy, and to provide them with the tools to navigate such a struggle as they transition to practice.

Without such explicit instruction and opportunities to grapple with these ethical questions, students become novice attorneys making the same uninformed and potentially damaging decisions. The challenge of dealing with conflicting authority or unfavorable precedent is not limited to first-year law students and hypothetical problems. Young attorneys struggle to write persuasively without misrepresenting the law, and they struggle to use the persuasive techniques taught in legal writing courses in an effective and ethical manner.

Consider, for a moment, the plight of a Department of Justice (“DOJ”) attorney in *Precision Specialty Metals, Inc. v. United States*, who was sanctioned for the manner in which she discussed and quoted authority.¹⁵¹ Facing an imminent deadline, the DOJ attorney sought an extension of time in which to oppose Precision’s motion for summary judgment.¹⁵² The court denied the motion, ordering the government to file its response “forthwith.”¹⁵³ The government’s response was filed twelve days later; the court struck it from the record as untimely and granted Precision’s motion for summary judgment.¹⁵⁴ The government moved for reconsideration, arguing that its response was compliant with the court’s order to file such response “forthwith.”¹⁵⁵ In support of the government’s argument, the DOJ attorney relied on a definition of “forthwith” adopted by several courts and quoted from two judicial opinions discussing the definition of “forthwith.”¹⁵⁶ One such quotation contained an ellipsis, and another omitted a relevant sentence.¹⁵⁷ The court was troubled by these omissions, deeming them misrepresentations.¹⁵⁸ The DOJ attorney was formally reprimanded “for misquoting and failing to

151. 315 F.3d 1346, 1357 (Fed. Cir. 2003).

152. *Id.* at 1348.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* (referring to the definition of “forthwith” in BLACK’S LAW DICTIONARY 654 (6th ed. 1990)).

157. *See id.* at 1348–49.

158. *See id.* at 1349.

quote fully from two judicial opinions¹⁵⁹ upon which she relied in a motion for reconsideration and for failing to disclose precedent.¹⁶⁰ Assuming that her conduct was not in bad faith,¹⁶¹ it is conceivable that she thought she was using persuasive techniques to convince the court. Perhaps her omissions were a misguided attempt to emphasize the favorable parts of the definition of “forthwith” so as to support the timeliness of the government’s filing. Perhaps she defined the term “forthwith” broadly so as to include the government’s conduct. Perhaps she did not believe that she had to include a reference to authority when the authority was dictum. Whatever the reason, the attorney’s apparent choice of advocacy over candor was ineffective and problematic.

IV. EMPOWERING NOVICE ATTORNEYS TO ENGAGE IN ETHICAL DISCOURSE

Against the backdrop of such tension, we expect novice legal writers to draft documents that zealously advocate for their clients and satisfy the duty of candor to the tribunal. Such an expectation is unfair and unrealistic in the absence of specific guidance, education, and training—none of which takes place on a regular basis at U.S. law schools or within the U.S. law firm structure. Given the existence of these dual duties, we need to provide novice attorneys with the necessary tools to navigate the murky waters created by the ambiguous language of the rules, inconsistent judicial interpretation of the rules, and conflict between the rules.

Legal research and writing courses should provide such guidance to our students and, indeed, are the appropriate courses in which to raise ethical issues that may confront students in practice. If cases are a good avenue for the general exploration of the terrain of ethics, as Cramton and Koniak suggest,¹⁶² then legal research and writing courses should more explicitly and directly incorporate ethics. But to do so, classes may need more credits and more resources. Alternatively, law schools can broaden the coverage provided in professional responsibility courses or can add an upper level course that focuses explicitly on questions of ethics and professionalism in writ-

159. *Id.* at 1347.

160. *See id.* at 1355-57.

161. Although initially considering the attorney’s conduct to be intentional, the court ultimately stated that it did not find her to have acted “in bad faith.” *Id.* at 1350.

162. Cramton & Koniak, *supra* note 68, at 170-71.

ing.¹⁶³ We cannot continue to graduate law students who have not grappled with these questions.

In the interim, there are some specific steps for implementing these goals within the context of most current legal writing classes.

First, we can have a deeper discussion of how to evaluate authority. We focus so heavily on the binding/persuasive dichotomy that our students often think too narrowly and may not anticipate authority that a court would consider adverse. For example, in my Arizona brief problem, I could devote more class time discussing the results of their research with particular emphasis on which cases are binding, which cases in the controlling jurisdiction are directly adverse, and which cases are likely to be deemed relevant by a judge hearing the case.

Second, we can expand our discussion of rhetorical tools to include a meaningful discussion of ethos. In the first year legal writing class, we devote considerable attention to logos, persuading through appeals to logic or reason.¹⁶⁴ We teach our students how to utilize various paradigms to prove their case with rational legal arguments. In discussing persuasive writing, we also introduce pathos as a rhetorical tool, persuading through an appeal to an audience's emotions.¹⁶⁵ We explain how to frame the facts to place one's client in favorable light, and how to use persuasive techniques to make the reader feel favorably toward one's client. While we may mention ethos, persuading through an appeal to the speaker's credibility and character,¹⁶⁶ this rhetorical tool often gets shortchanged in our discussions. Our discussion of ethos often consists of reminding students to avoid undermining one's credibility as a writer. Yet, we fail to explain that if the reader does not consider the writer to be ethical and credible, then the reader will not be persuaded by the writer's logical arguments. Moreover, we often fail to explain how a writer establishes one's credibility by evincing intelligence, character, and goodwill.¹⁶⁷ We could have students read specific cases where courts

163. David Thomson does incorporate a discussion of ethical issues into his upper level discovery practicum course at the University of Denver, Sturm College of Law. Thomson & Gallagher, *supra* note 9, at slide 10.

164. See, e.g., KRISTEN KONRAD ROBBINS-TISCIONE, RHETORIC FOR LEGAL WRITERS, THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION 101 (2009).

165. *Id.*

166. *Id.*

167. Michael Smith argues that ethos may be more important to persuasive legal writing than either logos or pathos because an advocate who lacks credibility in the eyes of the decision-maker will likely be unsuccessful in persuading the decision-maker to adopt the advocate's position. MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 123 (2002). Smith explains that there are three components of ethos: intel-

have praised attorneys' ethical advocacy and where courts have reprimanded attorneys for deficiencies in their written submissions.¹⁶⁸ In the context of my Arizona brief problem, a discussion of ethos would ask students to consider how a court would view an attorney who failed to discuss *Alvarado*, *In re Jorge D.*, or even *Carillo*.

Third, we can create legal writing problems that prompt a meaningful discussion of ethical issues. Such problems may involve areas of unsettled law, jurisdictions in which lower courts have reached adverse holdings, and questionable conduct by clients or even by opposing counsel. Having created such problems, we can engage students in discussing the issues and challenges. The ethical challenges of my Arizona brief problem were not planned in advance. In hindsight, the struggle with whether and how to use *Alvarado* or *In re Jorge D.* was a very useful exercise and something I should strive to include in future assignments if I am willing to devote class time and commenting time to addressing the struggle. In my comments, I must address the students' use of such precedent. If we create such problems, we should ask students to reflect on the ethical issues inherent in the problem, much like David Thomson does in his upper level seminar, where a component of the writing assignment requires each student to identify the ethical issue and explain the student's choice with respect to that ethical issue.¹⁶⁹

Fourth, we can discuss effective advocacy in terms of ethical obligations and demonstrate that ethical advocacy is a stronger, more effective advocacy. We can explain that ignoring contrary cases is rarely effective; instead, a strong advocate thinks about how to distinguish contrary authority, provides reasons why the law is no longer good law, or advocates for a change in law. In the context of my Arizona brief problem, I could provide samples of written arguments that address all of the law — *Carillo*, *Alvarado*, and *In re Jorge D.* — and samples that do not address all of the precedent. I could ask students to react, in turn, as legal readers, supervising attorneys, and judges to the various arguments. These discussions would allow students to understand the consequences of their decisions.

Beyond academia, bar associations and law firms can also engage young attorneys in thinking about the ethics of writing. While many bar associations require continuing legal education ("CLE"), includ-

ligence, character, and goodwill. *Id.* at 125. See also ROBBINS-TISCIONE, *supra* note 164, at 203–12 (discussing how legal writers establish honesty and credibility in their writing).

168. In her book, Melissa Weresh provides numerous examples of such cases along with probing questions for students to consider. WERESH, *supra* note 21, at 111–71.

169. See Thomson & Gallagher, *supra* note 9, at slides 9–10.

ing courses in ethics as well as legal writing, there are few CLE classes offered in the ethics of legal writing. Moreover, individual firms can raise general awareness by hosting a luncheon or roundtable discussion of ethical issues in writing as part of the monthly attorney lunches hosted by many firms. Finally, supervising attorneys can question why an attorney relied on certain cases; inquire about research strategies, searches, and results; and discuss choices that the attorney made in writing the document.

CONCLUSION

No law school writing course can resolve the tension resulting from dual sources of ethical rules. Likewise, law school writing classes may not be able to tackle every ethical issue. Nonetheless, we can and must do something about this ethical issue. Legal writing courses can better prepare law students and novice attorneys to respond to the tension between zealous advocacy and candor. Courses can ask novice attorneys to consider whether, as a general principle, advocacy that is unethical can be effective. If not, then the most effective advocacy is ethical advocacy. At a minimum, a legal research and writing course can give students practice in navigating the dual duties confronting advocates, can encourage students to reflect on their choices, and can provide them with a toolbox to help chart the course ahead. In short, we must prepare young attorneys to persuade without misrepresenting, to advocate for one's client while treating the tribunal with full candor, and to determine where the line between zealous advocacy and ethical candor is in any particular courtroom.