EFFECTIVE LEGAL WRITING IS NOT VITRIOL- CONSIDER FOR WHOM YOU MUST WRITE?

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I. Effective Advocacy Begins With The Client's Understanding of An Attorney's Job.

Consider this: a new client comes to see you. The client tells you what she wants out of the proposed litigation she wants to initiate. Have you heard this, or something like it before?

> "I want to hire a mean bulldog to make [the opponent] hurt, make their lives miserable. I want a hired gun. Take no prisoners."

If you have not heard that, or something like it, from a so called "zealous" client you will at some point.

Some clients of this ilk fail to even consider what they actually need from their lawyer. What even a "zealous" client needs is sound advice on the law, thorough preparation, well-conceived strategy, *effective advocacy*, and the ability to conceive of effective ways to resolve problems. The "zealous" client described above apparently did not get the word that trial by combat was outlawed in the middle ages.[1] A good lawyer can proceed effectively and still be tenacious in

[1] "Saint Louis abolished battle in his country because it happened often that when there was a contention between a poor man and a rich man in which trial by battle was necessary, the rich man paid so much that all the champions were on his side and the poor man could find none to help him." Grandes Chroniques de France,

pursuing the goal of a victory. However, when you are visited by a "zealous" client, your first challenge is to advise the client of that fact. If after some discussion, the client does not "get it," you may well be better off refusing to represent that person or company.[2]

II. Can The Client Understand What is Important?

There are at least two lines of discussion a lawyer can pursue with a client about the "take no prisoners approach." First, assure the client advocates must be tough and steadfast, but making the opponent "hurt" using tools such as oppressive (frequently unnecessary and expensive) discovery and unbridled "zealous advocacy"[3] frequently gets the client nothing more than huge legal bills.

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publiees par **M.** Paulin, **Paris,** vol. 4, p. 427, 430, al. 3." James B. Thayer, *The Older Modes of Trial*, 5 *Harvard Law Review 45*-70, (May 15, 1891).

[2] See Paula Schaefer, *Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor's Touchstone*, 38 Fla. St. U. L. Rev. 251, 255, n.33 (2011) .W. Bradley Wendel, *Lawyers and Butlers: The* Remains *of Amoral Ethics,* 9 GEO. J. LEGAL ETHICS 161, 161 (1995), "The notion that one should feel no shame or regret on one's own account [when our clients require us to do distasteful things] is the principle of nonaccountability, also known as the *amoral* role of professionals."

[3] See generally, *Dondi Props. Corp. v. Commerce Sav. & Loan Ass'n,* F.R.D 284, 288-289 (N.D. Tex. 1988) (citing 28 U.S.C. § 1927 (2012)), "We think the standards we now adopt are a necessary corollary to existing law, and are appropriately established to signal our strong disapproval of practices that have no place in our system of justice and to emphasize that a lawyer's conduct, both with respect to the court and lawyers, should at all times be characterized by honesty and fair play." Also, see "Nothing in the Pennsylvania Rules of Professional Conduct obligates a lawyer to use hyperbole or falsehood to make her client's case, and those Rules make clear that zealous advocacy is bounded by other concerns, such as the rules of the adversarial system." *Trs. of the Nat'l Elevator Indus. Pension v. Access Lift & Serv. Co.,* 2015 U.S. Dist. LEXIS 43068 *9 (E.D. Pa. 2015); *See* also, *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018), "The Government also suggests that opposing counsel made "what appear to be material misrepresentations and omissions" that were "designed to thwart this Court's review." Pet. for Cert. 26. Respondent says this suggestion is "baseless." Brief in Opposition 23. The Court takes allegations like those the Government makes here seriously, for ethical rules are necessary to the maintenance of a culture of civility and mutual trust within the legal profession. On the one hand, all attorneys must remain aware of the principle that zealous advocacy does not displace their obligations as officers of the court. Especially in fast-paced, emergency proceedings like those at issue here, it is critical that

On this point, the risk to the lawyer and the client is obvious. Many commentators warn that blindly pursuing what the client wants can be "technically legal," but end up being detrimental to the client. For instance as one commentator wisely observes,

> "The problem with business lawyers separating morality from legality is that morality often bears upon legal liability. Ignoring moral intuitions about a business client's plan often means ignoring the basis for liability, such as a lack of good faith or fraudulent intent. Similarly, a fiduciary's obligations of loyalty and trust are inextricably intertwined with doing what is 'right.'"[4]

Hence, a lawyer should carefully consider following the client's misguide wishes. Further, when a client directs pursuit of a case the whole representation could end in catastrophe for the lawyer that merely follows the prospect of fees.

Second, point out to the client what does work. Trial and appellate judges see the obvious. "Take no prisoners" approaches are obvious and do nothing to convince the court of the merits of a position. Judges can easily distinguish between tenacious, stalwart, and candid advocacy and unbridled, unnecessary, so called, "zealous advocacy."

Civility is foundational to tenacious, stalwart, and candid advocacy. This does not mean being "easy," or docile. Some commentators suggest civility, therefore,

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lawyers and courts alike be able to rely on one another's representations. On the other hand, lawyers also have ethical obligations to their clients and not all communication breakdowns constitute misconduct."

[4] Schaefer, 38 Fla. St. U. L. Rev. 251, at 265.

its antithesis incivility (the unbridled "zealous advocate"), is an obvious trait once it is observed, similar in a way to what Justice Potter Stewart suggested about pornography, "I know it when I see it."[5]

So, a lawyer must focus on the target of the advocacy. Are you trying to convince the opponent whom your client wants to "hurt" or is it the person or persons, the judges and possibly a jury, who apply the law to the facts? If you do not know the correct answer to this, your success as an advocate is very much in doubt.

On this point, as with the first point, there is a risk for both the lawyer and the client. A purported advocate can certainly hurl accusations and invectives in the writings filed with the court. The advocate can improperly misrepresent facts, "stretch" facts, and legal precedent. However, "stretching" or even misrepresentation is easily revealed by competent opponents. For a careful advocate writing in opposition to the excessively "zealous advocate," showing the lack of candor of a "stretcher" is like "shooting fish in a barrel."[6] Moreover, the client must understand that misrepresentations in written matters filed with a court can result in disciplinary charges and sanctions to the lawyer and clients. An

[5] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1963) (Stewart, J., concurring).

[6] Perhaps other metaphors are even more helpful: "like a walk in the park," or "a piece of cake."

advocate simply must maintain independence and candor with the court and opponents.

The rules make the lawyer's obligations clear. The American Bar Association Model Rules of Professional Conduct,[7] which most jurisdictions follow at least in substance, require absolute candor toward the court.[8] The central directive of Model Rule 3.3 is the following: "A lawyer shall not knowingly [] make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . .." Also, Model Rule 4.1[9] mandates that a lawyers shall not knowingly make a false statement of material fact. Finally,

[7] American Bar Association Model Rules of Professional Conduct, Available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/, (Last Accessed October 13, 2021).

[8] Model Rule of Professional Conduct, Rule 3.3, Candor Toward the Tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

[9] Model Rule of Professional Conduct, 4.1, "***Transactions With Persons Other Than Clients***
In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

Federal Rule of Civil Procedure 11(b)[10] imposes stringent obligations on attorneys as to any court pleading, written motion, or other paper signed, submitted, or later advocated by the lawyer. The rule states in part, that "after reasonable inquiry" a lawyer may present "the claims, defenses, and other legal contentions" that are "*warranted* by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law. . . . " (Emphasis added).

III. What is Persuasive Written Advocacy?

Of course, the first tenant of persuasive written advocacy is candor as noted above. However, the following additional points are noteworthy.

a. **Less is more.**

State and federal Appellate briefs are limited as to the total number of words in the material parts of the brief. In most state and in federal trial courts, the general rules do not limit the number of words or pages that comprise motions and other

[10] Federal Rule of Civil Procedure 11(b) provides, "Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
(2) the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law;
(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information."

pleadings. Local rules and a judge's personal rules must be consulted as to any restrictions.

Never the less, as stated above, consider for whom you write. Does the judge for whom you write have law clerks or any assistance available to digest the motion of pleading substance, the applicable case law, and any exhibits? If not, the judge's time will be limited. When such a judge has a full docket, reviewing a voluminous motion or response that includes scores or even hundreds of exhibits is close to impossible. Even when a trial judge has a staff of law clerks and staff lawyers, time is limited for review of voluminous motions or responses. So, the "bottom line" is be concise.

a. Avoid Verbosity.

Even if you succeed in being somewhat concise, be sure you use plain language. Jargon, hyperbole, and law review style writing will obscure the message you must convey. The focus is to give the court a "roadmap" of what you want and where you are going, but get to the point. The key points to address without excessive musing are: 1. Set forth a very short summary the status of the case, 2. State the purpose of the motion, response or pleading; *i.e.*, what do you want the court to do?, 3. State the issues and the short answers, 4. Address the law, both the standard of review and the material and controlling statutory and case law, and 5.

Concisely state the facts applicable to the issue, apply the law to the facts, and state the suggested disposition.

b. Form.

A logical structure and organization of the motion, response, or pleading makes it easier to follow. For instance, setting out subtitles of sections; *e.g.,* introduction, subject of the motion, factual context, applicable law, application of law to the facts, resolution, and requested relief. This kind of organization will allow the reader to focus on the subject of each part of the brief. Also, it will allow the reader to refer back to a subsection if necessary as the review of the material proceeds.

IV. Conclusion.

Our obligation as lawyers is to serve the client's needs competently.[11] However, more is necessary. That is the exercise of good judgment. You are not a "hit man" for hire. You are an attorney *and counselor* at law.

[11] Model Rule of Professional Responsibility 1.1, provides as follows: "Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."