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Do Client Narratives Belong in Attorney Ethics Hearings?

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I. Introduction

Client after client testified that the attorney failed to appear at proceedings, did not return phone calls, and repeatedly assured them that settlements had been reached when, in fact, they had not.[1] The lawyer for the accused attorney began his opening statement with his client's story, a story about a troubled wife who worked in the law office and a father-in-law who had committed suicide while living with the couple. The lawyer skillfully wove this story throughout the hearing, providing reasons for why his client did what he did.[2] The attorney's story had two goals: (1) to create empathy, and (2) to suggest that the attorney did not knowingly fail in his obligations (it was his wife's fault), and, therefore, he was not responsible for the missteps in his cases.

But the story did not produce its desired effect in that it neither created empathy nor convinced the hearing panel—composed of two attorneys and a lay person—that the attorney satisfied his professional responsibility. The hearing panel was troubled because regardless of why the attorney did or, in this case, did not do what he should have done, his behavior harmed his clients, and the panel feared he could hurt

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1 As members of New Jersey's District XB Ethics Committee, the author, another attorney, and a lay person were assigned to hear this case. The hearing lasted approximately two weeks and the panel considered ethics complaints filed by several clients against the same attorney. The different complaints had been consolidated so that the matter could be heard before one hearing panel. The transcript of the proceedings is not public. The panel's findings were issued in a sealed report dated November 19, 2021.

2 For example, the accused attorney did not attend his client's court hearing because his wife had hidden the court letter notifying him of the hearing date.

other clients as well. The layperson on the panel was especially outraged, stressing that there was no excuse for innocent clients to suffer at their lawyer's hands. She did not consider this defendant an outlier; rather, she feared other attorneys could behave the same way, and she wanted the attorney to be held accountable. In essence, the narrative did nothing to evoke empathy for the defendant because the defendant was not the only one on trial, rather the entire profession was being judged.

The primary purposes of attorney discipline are "to protect the public, maintain the integrity and professional standards of the bar, and preserve the public's confidence in the bar."[3] By minimizing an attorney's accountability, the story undermines these objectives. There has been scholarship on the importance of storytelling, how and why it works.[4] And there has been scholarship on the ethics of telling a story that the client does not want told.[5] In considering the ethics of the narrative, both scholarly and practical approaches consider the concern to represent the "truth."[6] No scholarship, however, has addressed the role the narrative plays in attorney ethics hearings or examined whether the narrative should even serve a role.

This article addresses this question and finds that narratives should play only a limited role in ethics hearings: Attorneys should not rely on storytelling techniques for the liability stage of ethics hearings. That is, when it comes to defending clients accused of violating their professional ethics, attorneys should refrain from introducing the narrative to deny wrongdoing. Instead, the narrative should only serve a role in terms of sanctions and challenges to the ethical rules themselves. Section II of this article will provide background regarding the history of monitoring the legal profession and the attorney disciplinary process. Section III will discuss the storytelling movement and the role of narratives in advocacy. Section IV will examine the role narratives have played in ethics hearings.

3 Jane J. Whang, *Improving Attorney Discipline*, 6 Geo. J. Legal Ethics 1039, 1040 (1993).

4 *See, e.g.*, Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 Rutgers L.J. 459 (2001); Cathren Koehlert-Page, *Come a Little Closer So I Can See You My Pretty: The Use and Limits of Fiction Techniques for Establishing an Empathetic Point of View in Appellate Briefs*, 80 UMKC L. Rev. 399 (2011).

5 *See generally* Helena Whalen-Bridge, *Negative Narrative: Reconsidering Client Portrayals*, 16 Legal Comm. & Rhetoric 151 (2019) (opining that negative client portrayals are sometimes the most persuasive); Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 Geo. J. Legal Ethics 1 (2000) (arguing that clients should play a larger role in developing and choosing case theory and how to tell their stories); Steven J. Johansen, *Was Colonel Sanders a Terrorist?: An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ALWD 63 (2010) (noting that while there are aspects of storytelling that could make it manipulative, storytelling is consistent with existing norms about the ethical practice of law); Jeanne M. Kaiser, *When the Truth and the Story Collide: What Legal Writers Can Learn from the Experience of Non-Fiction Writers About the Limits of Legal Storytelling*, 16 Legal Writing 163 (2010) (recognizing value in using tools of fiction in legal writing but noting that attorneys can only succeed if they use these tools with a blend of narrative and analysis).

6 *See generally* Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 J. ALWD 229 (2010).

Section V will consider whether the narrative should play a role in these hearings. Section VI will conclude.

II. The history of monitoring the legal profession and the attorney disciplinary process

Professional standards guide the practice of law, and a disciplinary system enforces these standards.[7] Attorneys who do not abide by them can be disbarred, suspended, reprimanded, or censured.[8] These standards are not stagnant but are a continual work in progress, driven by "changes in the practice of law and expectations of society"[9] and are reflected in ethical rules. A historical review of these rules reveals that the driving force behind each rule or its modification was for the public to perceive the legal profession more positively. Not only were the rules designed to win the public's favor, but the hearing process[10] similarly reflects the Bar's desire to ensure the public's faith in the profession.

A. Historical overview of attorney ethics rules

In 1964, the public thought less of lawyers than any other profession, propelling the American Bar Association (ABA) to create a committee to evaluate ethical standards and recommend alterations[11] to better guide lawyers and "to protect the public interest and assure clients that lawyers possessed sufficient professional skill and fidelity."[12] ABA president-elect Lewis F. Powell Jr.[13] noted that "[w]hile surely no one wishes punitive

7 *See, e.g.*, Model R. for Lawyer Disciplinary Enforcement 10 (Am. Bar. Ass'n 2020). State bar committees or state courts are responsible to enforce the disciplinary rules. *See* Whang, *supra* note 3, at 1041.

8 *See id.* at 1043. By adopting professional standards that serve as models for the regulatory law governing the legal profession, the American Bar Association (ABA) has provided leadership in legal ethics and professional responsibility. In 1908, the ABA promulgated Canons of Professional Ethics, which were derived from the Alabama State Bar Association's Code of Ethics, adopted by Alabama in 1887. The ABA's original Canons of Professional Ethics were guidelines that addressed what attorneys should **not** do, and they were written to advise attorneys rather than punish them. From 1908 to 1969, the ABA adopted new canons and amended others. John M. Tyson, *A Short History of the American Bar Association's Canons of Professional Ethics, Code of Professional Responsibility, and Model Rules of Professional Responsibility: 1908-2008*, 1 Charlotte L. Rev. 9, 10, 13 (2008).

9 *Id.* at 18.

10 Disciplinary hearings take place so that an ethics panel can hear evidence to determine whether the charges are true. Whang, *supra* note 3, at 1042.

11 Responding to changes in "[m]any aspects of the practice of law" as well as attorney dissatisfaction with the adequacy of discipline in the profession, the ABA created a special committee to evaluate ethical standards and recommend alterations. Tyson, *supra* note 8, at 14 (quoting *Proceedings of the House of Delegates to the 1964 Annual Meeting*, 89 A.B.A. Rep. 365, 381 (1964)).

12 Id. at 15–16 (noting "the public's opinion of the 'general reputation' of lawyers ranked below the reputations of other major professions").

13 Justice Powell ultimately became an Associate Justice of the U.S. Supreme Court.

action, it must be remembered that the bar has the privilege of disciplining itself to a greater extent than any other profession or calling."[14]

The committee's work resulted in a new set of ethical provisions called the Model Code of Professional Responsibility. This code embodied three parts: (1) canons (what attorneys should do), (2) ethical considerations (what attorneys should aspire to do), and (3) disciplinary rules. The canons generally state what conduct is expected of lawyers "in their relationship with the public, with the legal system, and with the legal profession."[15] Canons are the basis from which the ethical considerations and disciplinary rules are derived. The ethical considerations are the objectives to which members of the profession should strive, guiding lawyers in many specific situations. And, the disciplinary rules are mandatory, providing the minimum level of attorney conduct, and if a lawyer falls below such level, the lawyer is subject to disciplinary action.[16]

In 1970 public dissatisfaction with the bar was intense.[17] Concerns with the code led to another commission, which produced the Model Rules of Professional Conduct, adopted by the ABA in 1983 and by more than forty jurisdictions.[18] Unlike their predecessor, these rules were **not** intended to reflect "the lowest common denominator of the standards that must apply to all practicing lawyers."[19] Rather, the Model Rules of Professional Conduct marked a clear shift from collegial norms to a body of judicially enforced regulations.[20]

These rules remained untouched for nearly two decades until the ABA sought to improve the disciplinary system's procedures by promoting national uniformity and consistency[21] and recognizing changes in

14 Tyson, *supra* note 8, at 14 (quoting *Proceedings of the House of Delegates at the 1964 Annual Meeting,* 89 A.B.A. Rep. at 382). The Committee on Ethical Standards studied the effectiveness of the Canons and concluded that the existing Canons should be amended and there should be a newly drafted code of professional responsibility. *Id.*

15 *Id.* at 16 (quoting Model Code of Prof'l Responsibility Preliminary Statement (1983)); *see also* Louis Parley, *A Brief History of Legal Ethics*, 33 Fam. L.Q. 637, 642–43 (1999).

16 While the drafters did not intend for the Canons and Ethical Considerations to be enforced through disciplinary measures, *see* Parley, *supra* note 15, at 642, many state courts, bar associations, and disciplinary agencies interpreted and enforced the Model Code as one integrated set of rules.

17 *See* Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 15 J. Prof. Law. 359, 369 (2008). The distrust of the legal profession was amplified because attorney advertising was now permitted under *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) (holding Arizona's ethical rule banning attorney advertising as unconstitutional).

18 *See* Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 Okla. City U. L. Rev. 637, 640 (2005).

19 Tyson, *supra* note 8, at 18 (quoting *Proceedings of the 1983 Annual Meeting of the House of Delegates*, 108 A.B.A. Rep. 763, 778 (1983)).

20 *Id.*

21 Significant variations in particular rules from jurisdiction to jurisdiction caused uniformity problems. *See* Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 Geo. J. Legal Ethics 441, 442 (2002).

technology. The ABA formed the "Ethics 2000" commission, charged to study and evaluate the Model Rules of Professional Conduct.[22] Once again, the Commission was mindful of the public's perception of the legal profession and the "heightened public scrutiny of lawyers."[23] In doing its work, the commission opened its meetings to the public, communicated with a 250-member advisory council, reached out to special interest groups, and shared discussion drafts and meeting minutes on the Internet.[24] Ultimately, and with the public's input, it advocated for district ethics proceedings to be public[25] to "assure integrity of the disciplinary process in the eyes of the public."[26] The Commission achieved its goal: The ethics process in most states is open to the public from the time of the person's initial contact with the disciplinary agency until the matter is closed.

Additionally, the commission proposed several new rules and provided additional guidance in interpreting and applying the rules. The Commission, though, did not include suggestions for good practice to follow each rule, as the Commission concluded that such recommendations "would be out of place in a disciplinary code,"[27] which contained mandatory rules that if not followed would require discipline. In February 2002, the ABA adopted almost all the Commission's recommendations,[28] and over half of the states adopted some version of the 2000 revised model rules.[29]

This historical review of the ethical rules reveals that the public's perception of the legal profession stimulated every review and amendment to the ethical rules. The legal profession wants the public to trust it, and ethical rules were designed to garner this trust and promote public confidence in the profession.

B. How the hearing process works

Legal ethics establish legally binding standards.[30] Each state is responsible for investigating and disciplining its own attorneys.[31] All

22 *Id.* at 441.

23 *Id.* at 442.

24 *Id.* at 443. The commission held fifty-one full days of meetings. *Id.*

25 Whang, *supra* note 3, at 1042.

26 Devlin, *supra* note 17, at 376 (citation omitted).

27 Love, *supra* note 21, at 443.

28 *Id.* It did not include the recommended changes to two rules that were still under review by another Commission, the Commission on Multijurisdictional Practice. *Id.* at 444.

29 *See generally* Pera, *supra* note 18 (providing a comprehensive review of what jurisdictions adopted which revised rules).

30 Lawrence K. Hellman, *When Ethics Rules Don't Mean What They Say: The Implications of Strained Legal Ethics Opinions*, 10 Geo. J. Legal Ethics 317, 321 (1997).

31 Whang, *supra* note 3, at 1041.

fifty states have professionally staffed disciplinary organizations with statewide jurisdiction that closely monitor attorneys. The disciplinary process begins when someone files a complaint.[32] Next, the state's disciplinary review board investigates the grievance by interviewing witnesses and reviewing documents.[33] The board then determines whether the attorney violated the rules of professional responsibility and recommends sanctions.

If the attorney does not accept the finding of wrongdoing, a hearing takes place. Attorneys charged with ethical violations are entitled to due process, including the right to legal representation and to present arguments and defend against charges.[34] The hearing panel hears the case and determines whether the attorney violated particular ethical rules. While the number of people on each hearing panel varies by state, all panels include lawyers and nonlawyer members. At the end of the hearing, the hearing panel issues its report, which is reviewed by the disciplinary board and, ultimately, the state's highest court.[35]

While judicial in nature—briefs are filed, opening and closing statements are made, and witnesses are examined and cross-examined—attorney ethics hearings are neither civil nor criminal. Anyone who believes that an attorney behaved unethically in practice can file a grievance,[36] but a client can additionally file a civil suit for malpractice or, if there is a criminal wrong, alert the prosecutor. Indeed, a malpractice or criminal case against the attorney does not preempt an ethics hearing, evidencing that ethics hearings are neither criminal nor civil. Furthermore, the burden of proof in district ethics hearings, "clear and convincing," is higher than the "preponderance of evidence" used in civil cases but not as stringent as the "beyond a reasonable doubt" standard used in criminal cases.[37]

Finally, unlike criminal hearings, which are meant to punish wrongdoers, and civil hearings, which are meant to compensate someone for a wrong committed, attorney ethics hearings are primarily designed to uphold a standard in the profession, thereby protecting and promoting

32 *Id.*

33 Each jurisdiction differs in the amount of information it requires in the investigation. *Id.* at 1042.

34 Model R. for Lawyer Disciplinary Enforcement 18 (Am. Bar. Ass'n 2020).

35 Attorney discipline differs from other professions because state supreme courts oversee disciplinary agencies, whereas other professions are regulated by agencies within the executive branch. *See* Devlin, *supra* note 17, at 378. The ABA believed that the states' highest courts' involvement would promote public confidence in the judicial system. *Id.* at 386.

36 Sometimes adversaries or their clients will file an ethics complaint.

37 Model R. for Lawyer Disciplinary Enforcement 10.

the legal profession's reputation.[38] Ethics hearings are more about the legal profession than the attorney. Consequently, advocates in disciplinary hearings need to consider whether their advocacy skills used in civil or criminal litigation—specifically, the skill of relying on storytelling techniques—will serve the same purpose when representing a client in a disciplinary action. The next section will provide background on the Applied Legal Storytelling movement, a discipline that studies the role storytelling plays in advocacy.

III. The Applied Legal Storytelling movement

Stemming from the law and literature movement, Applied Legal Storytelling "examine[s] the use of stories—and of storytelling or narrative elements—in law practice, in law-school pedagogy, and within the law generally."[39] The Applied Legal Storytelling movement grew from a 2005 conference at the University of Gloucester, entitled *Power of Stories: Intersections of Law, Culture, & Literature Symposium.* While the conference primarily focused on the related field of law and literature, participants wanted to sustain the conversation. Thus, in 2007, Scholars Ruth Anne Robbins and Brian Foley held another conference entitled *Once Upon a Legal Time: Developing the Skills of Storytelling in Law*, specifically designed to focus solely on storytelling.[40] And hence a movement began.

Applied Legal Storytelling recognizes that stories are an integral part of legal persuasion.[41] Effective advocacy requires presenting facts in a way that compel both judge and jury, something that stories can do.[42] Often the story tells what happened through the client's eyes, explains away bad

38 Ostensibly, the hearings are also designed to protect the public from unscrupulous attorneys. *See* Tyson, *supra* note 8, at 16.

39 J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography,* 14 Legal Comm. & Rhetoric 247, 248 (2015); *see also* J. Christopher Rideout, *Applied Legal Storytelling: An Updated Bibliography*, 18 Legal Comm. & Rhetoric 221, 222 (2021). Legal education has recognized the importance of literature. In the early twentieth century literature was thought to be "one field that could supplement, enrich, or correct legal principles" because novels show life's characters and lawyers must know human nature. Judith D. Moran, *Families, Law, and Literature: The Story of a Course on Storytelling*, 49 U.S.F. L. Rev. 1, 7 (2015). In 1973 the modern law and literature movement formally began, and law schools began offering classes specifically designated law and literature. *Id.* at 8. The purpose behind the law and literature course was to provide students with more opportunities to write and to read good writing. Further, it was thought that literature would encourage students to understand stories—character, plot, setting—and thereby learn how to tell stories. *Id.* at 8–9.

40 *See* Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*, 14 Legal Writing 3, 4 (2008) (indicating the applied legal storytelling movement dates to a conference on the "*Power of Stories*," held at the University of Gloucester in 2005).

41 J. Christopher Rideout, *Discipline-Building and Disciplinary Values*: *Thoughts on Legal Writing at Year Twenty-Five of the Legal Writing Institute*, 16 Legal Writing 477, 487 (2010).

42 *See* Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 Legal Comm. & Rhetoric 1, 18 (2010) (revealing that judges preferred and ruled in favor of parties who submitted briefs that told stories compared to briefs that simply provided the legal standard).

facts, provides context for the client's perspectives, and communicates on an emotional level, often revealing the impact the law has on individuals.[43] By explaining and justifying client behavior, the story persuades because it does "what analytical reasoning alone cannot: resonate with a listener's emotion."[44]

While law schools do not yet require special classes devoted to the art of storytelling, many advocate for such.[45] And, while storytelling is not a mandatory part of the legal curriculum, most law students learn to write their client's story.[46] Law professors commonly assign students persuasive writing assignments like appellate and pretrial briefs, and oral exercises like appellate court arguments, all of which incorporate aspects of storytelling. Legal writing texts routinely include segments on persuasive writing and factual renderings, and professors commonly advise and encourage students to personalize clients, making them likeable and relatable.[47]

Applied Legal Storytelling scholarship abounds[48] as scholars analyze the persuasive use of storytelling.[49] Scholars have done empirical research,[50] analyzed how humans respond to stories,[51] explored psychological concepts to understand how stories persuade,[52] examined the ethical limits of storytelling,[53] and even questioned the ethical implications of telling stories that might differ from those the client wants told.[54] Applied Legal Storytelling scholars have also tried to distinguish between stories and narrative, recognizing that while interrelated, stories convey what events happened whereas narratives generally provide a broader theme or meaning to events.[55] Narratives build upon the raw

43 *Id*. at 9; *see also* Moran, *supra* note 39, at 10 (noting that the study of literature in law school helps create more empathetic and client-centered attorneys).

44 Steven J. Johansen, *This Is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 Ariz. St. L.J. 961, 981 (2006).

45 K. Jane Childs, *(Re)Counting Facts and Building Equity: Five Arguments for an Increased Emphasis on Storytelling in the Legal Curriculum,* 29 B.U. Pub. Int. L. J. 315, 317 (2020).

46 *Id.* at 327.

47 *See* Whalen-Bridge, *supra* note 5, at 153.

48 *See* Rideout, *Applied Legal Storytelling: An Updated Bibliography, supra* note 39.

49 *See* Whalen-Bridge, *supra* note 5, at 156.

50 *See generally*, Chestek, *supra* note 42, at 18 (providing empirical evidence that storytelling briefs persuaded judges better than briefs that did not tell stories).

51 Jessica Lynn Wherry, *(Not the) Same Old Story: Invisible Reasons for Rejecting Invisible Wounds*, 17 Legal Comm. & Rhetoric 15, 18 (2020) (looking to storytelling to understand why military boards failed to embrace liberal consideration for veterans petitioning for discharge relief due to mental health conditions).

52 *See generally* Ruth Anne Robbins, *Fiction 102: Create a Portal for Story Immersion*, 18 Legal Comm. & Rhetoric 27 (2021) (recognizing that the cognitive psychological concept of narrative transportation is what makes stories persuade).

53 *See* Johansen, *supra* note 44, at 961.

54 *See* Miller, *supra* note 5, at 4.

55 *Id.* at 1.

material of personal experience.[56] Applied Legal Storytelling scholars have suggested that narratives need not always be positive, and sometimes a narrative that negatively portrays a client is a persuasive strategy.[57] They have also opined that in telling a client's narrative, attorneys might need to balance the client's need with the longer-term needs of a group the client represents.[58]

But until now no scholarship has suggested that an attorney simply refrain from telling a story. Applied Legal Storytelling scholars must recognize that storytelling techniques simply do not work to anyone's advantage at the liability stage of an attorney ethics hearing. Rather, stories undermine the primary purpose of the proceeding—to protect the public and garner its trust—and they will not relieve a client of liability. Indeed, attorney ethics hearings are one forum in which attorneys should not rely on the narrative to challenge liability. The next section examines the limited role the narrative has played in attorney ethics hearings.

IV. The role the narrative has played in attorney disciplinary hearings

Often tales of human frailty and failure,[59] narratives in attorney ethics hearings do not help excuse those accused of ethical violations from culpability. Rather, they only serve to either limit sanctions or challenge the disciplinary rule itself.

A. Limiting sanctions

Attorneys who violate ethical rules are disciplined. The type of discipline depends on the offense and can range from admonition to disbarment.[60] In determining discipline, the hearing panel or court considers things such as the attorney's mental state and mitigating influences.[61] The narrative is the vehicle through which these factors are expressed. For example, when the narrative proposes that the attorney will be rehabilitated, or if it describes mental health issues, suggesting that such issues likely caused the behavior, some courts have reduced

56 *Id.*

57 *See* Whalen-Bridge, *supra* note 5, at 177.

58 JoAnne Sweeny and Dan Canon, *The Language of* Love v. Beshear*: Telling a Client's Story While Creating a Civil Rights Case Narrative*, 17 Legal Comm. & Rhetoric 129, 133 (2020) (discussing how civil rights attorneys might be constrained by dual roles of advising their clients and advocating for civil rights).

59 *See* Stephen Gillers, *Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public*, 17 N.Y.U. J. Legis. & Pub. Pol'y 485, 486 (2014).

60 Whang, *supra* note 3, at 1043. The type of sanction for a specific type of misconduct might vary from state to state. *Id.*

61 *Id.*; *see also* Model R. for Lawyer Disciplinary Enforcement 10.

sanctions.[62] Yet, regardless of how well the narrative encompasses the mitigating factors, it is only effective if it connects the factors to the misconduct;[63] and, if the misconduct is severe, mitigating facts will be ignored,[64] making the narrative worthless.

B. Challenging the disciplinary rules

Narratives have and can play a role in challenging specific disciplinary rules but only when the narrative concerns the public good, not just the attorney's individual plight. Consider the narrative's role in *Bates v. State Bar of Arizona*,[65] where the U.S. Supreme Court held that the ethical rule barring attorney advertising[66] was unconstitutional.[67] In that case, two Arizona-licensed attorneys who had worked for Arizona Legal Aid began their own law firm to provide modestly priced legal services to financially strapped people who did not qualify for governmental legal aid. Calling the firm a clinic, the attorneys' narrative discussed their goal of helping the poor navigate the legal system and providing services to those who could not afford most legal fees but did not qualify for legal aid. The attorneys depended on advertising to inform the public of their services as the firm needed high volume to keep its fees low and doors open.

Because Arizona's disciplinary rule banned attorney advertising, the Arizona disciplinary board charged the attorneys with an ethical violation.[68] The attorneys did not deny the charge but rather challenged the rule's constitutionality. The attorneys' narrative—they provide services to the under trodden and could only continue to do so if the public knows their services exist—swayed the Court. The narrative suggested that the

62 If the court is convinced that the attorney will be rehabilitated, then it is likely to accept the mitigating factors and limit sanctions. Whang, *supra* note 3, at 1060–62 (illustrating the different outcomes in different jurisdictions, with some courts recognizing the effect of mental health on misconduct and other courts refusing to do so). Even in jurisdictions that consider the effect of mental health on behavior, there must be a nexus between the health and the behavior, and if the behavior is criminal there will be no mitigation. *Id.* at 1062.

63 *Id.* at 1056.

64 *See id.* (citing In re Davis, 603 A.2d 12 (N.J. 1992), in which the court upheld disbarment for misappropriation despite evidence of alcoholism).

65 433 U.S. 350 (1977).

66 Prior to 1977, the American Bar Association held the traditional view that advertising for lawyers was "in bad taste and harmed the profession." Wyn Bessent Ellis, *The Evolution of Lawyer Advertising: Will It Come Full Circle?*, 49 S.C. L. Rev. 1237, 1239 (1998). Reflecting this view, Canon 27 of Professional Ethics declares it "unprofessional to solicit professional employment by circulars, advertisements, . . . or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, . . . and all other self-laudation, offend the traditions . . . of our profession and are reprehensible." *Id.* at n.11. In 1969, the American Bar Association adopted the Model Code of Professional Responsibility, which also prohibited attorney advertising. *Id.* at n.12.

67 *Bates*, 433 U.S. at 384.

68 *Id.* at 355 (noting that Arizona Disciplinary Rule 2-101B was being challenged).

disciplinary rule harmed the public by limiting the attorneys' ability to represent disadvantaged people. The narrative became the basis of the Court's opinion, an opinion that transformed the practice of law.

But it is unlikely that there would have been this transformation had the narrative been that the attorneys serviced high-paying clients, earned millions of dollars, and wanted the public to know of its talents so they could garner greater profits.[69] Indeed, consider how one of the dissenting and concurring opinions in *Bates* framed the facts: "[T]wo young members of the Arizona Bar placed an advertisement in a Phoenix newspaper apparently for the purpose of testing the validity of Arizona's ban on advertising by attorneys."[70] This opinion never mentioned the attorneys' legal aid background or the clientele the attorneys had hoped to attract. Rather, the dissent focused only on the attorneys being "young" and desiring to "challenge"[71] acceptable standards, suggesting that they were rogue, unseasoned attorneys who, like rebellious teenagers, wanted to defy their parents' orders.

As predicted by the dissent, the *Bates* Court opened the door for more challenges to the Bar's restrictions to attorney advertising, and more cases landed before the Court confronting this regulation of commercial speech by attorneys.[72] In these cases, once again, the narrative influenced whether ethical rules related to attorney advertising could withstand the Court's scrutiny, not the determination of whether the attorney committed the infraction. Consider the following three cases, where the enforcement of the disciplinary rules served to prevent underserved members of the communities from exercising their legal rights. In two of the cases, both of which originated in the South, the narrative, like that in *Bates,* encompassed the public good and persuaded the Court to have the ethical rule revisited.

First, in *In re Primus*, cooperating with the American Civil Liberties Union (ACLU), a South Carolina lawyer advised women of their legal

69 The Court recognized "many of the problems in defining the boundary between deceptive and [non-deceptive] advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly." Matthew Garner Mercer, *Lawyer Advertising on the Internet: Why the ABA's Proposed Revisions to the Advertising Rules Replace the Flat Tire with a Square Wheel,* 39 Brandeis L.J. 713, 713 (2001) (quoting *Bates*, 433 U.S. at 364).

70 433 U.S. at 389 (Powell J. with Stewart J., concurring in part and dissenting in part).

71 *Id.*

72 *See* Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 628 (1985) (examining whether a state may discipline an attorney for soliciting business by running newspaper advertisements containing legal advice); In re R.M.J., 455 U.S. 191, 206–07 (1982) (holding disciplinary rules violated First Amendment where there was no showing that the advertising was misleading); In re Primus, 436 U.S. 412, 426–29 (1978) (holding South Carolina's application of its disciplinary rules for solicitation violated the First and Fourteenth Amendments); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 449 (1978) (affirming that a state may constitutionally bar attorney solicitation if it is in person, for pecuniary gain, or dangerous circumstances that the state has a right to prevent).

rights resulting from their having been sterilized as a condition of receiving public medical assistance.[73] The lawyer sent a follow-up letter, indicating that the ACLU provided free legal assistance. The South Carolina disciplinary board charged and determined that by sending the letter, the lawyer violated certain disciplinary rules because he had engaged in soliciting a client. Upon review, the U.S. Supreme Court held the disciplinary rule that prevented this attorney to write on behalf of the ACLU was unconstitutional.[74]

In the second case, *Shapero v. Kentucky Bar Association*,[75] a Kentucky disciplinary review board enforced an ethical rule that prohibited lawyers from soliciting legal business for pecuniary gain when the lawyer sent letters to potential clients who faced foreclosure suits and were on the cusp of losing their homes.[76] The U.S. Supreme Court found that the Kentucky Bar Association failed to show how the rule, which prohibited truthful mail solicitation for pecuniary gain, advanced the public's special interest. The Court remanded the matter for further proceedings as the Court was unable to determine whether the attorney's letter was overreaching.[77]

Yet in a case where an attorney's narrative solely focused on his attempt to secure clients to sustain his practice, the Court upheld a disciplinary panel's finding that the attorney violated the ethical rule prohibiting the solicitation of clients.[78] The Court found that protecting the public from aspects of solicitation—fraud, undue influence, intimidation, and overreaching—is a legitimate and important state interest, so that certain forms of solicitation can be barred.[79] The attorney's narrative of sustaining his livelihood did not persuade the Court to revoke the bar's restriction of attorney solicitation.

The above-referenced cases reveal that in attorney ethics hearings, the narrative only influences a court in terms of sanctions or the rule's legitimacy, provided the narrative highlights the public's plight. When the narrative shows how an ethical rule negatively impacts the ability for a downtrodden client to learn about legal representation, the narrative serves to successfully challenge the rule. But when the narrative focuses

73 436 U.S. at 416.

74 The Court found that the rule violated the First and Fourteenth Amendments. *Id.* at 439.

75 486 U.S. 466 (1988).

76 *Id.* at 469.

77 *Id.* at 480.

78 *Ohralik*, 436 U.S. at 467 (finding attorney solicitation was rightfully barred where attorney went to great lengths to separately seek out a party injured in a car accident as well as her passenger and coerced them to sign a retainer agreement with him).

79 *Id.* at 468.

solely on the attorney's personal story, one that is unconnected to the client, the narrative fails to deliver.

V. The role the narrative should play in ethics hearings

The goal of the narrative is to persuade the factfinder to rule in the client's favor.[80] It does this in two ways: First, it evokes sympathy and creates empathy for the client; second, it explains client behavior, revealing the fabric of the client's life, not just telling a version of "what happened."[81] As noted in the prior section, the narrative plays a role in matters of attorney discipline, but should it?

In addressing this question, consider criminal defense attorneys who rely on the narrative to either exculpate and/or humanize their clients. A narrative can exonerate criminal defendants by showing why they could not have committed the crime in question.[82] And by humanizing criminal defendants, the defense attorney creates empathy for the client and provides a context in which the jury could sympathize as to why the defendants did what they did.[83] One way to humanize the criminal defendant is through the "mitigation counter-narrative,"[84] a narrative told by defense attorneys in criminal capital cases to portray the defendant's life in a way that convinces the jury that it is a life to be spared. In such cases, the narrative's success means the difference between life and death, and it serves a role through every aspect of the criminal case.[85] The mitigation counter-narrative persuades not by recreating scenes but by constructing events in a way that enables the reader to understand the client's psychology. Perhaps the jury recognizes that fault does not lie with the defendant but rather within our society and social systems.[86] By using

80 A narrative might also negatively portray a client if doing so could help the client's case. *See generally* Whalen-Bridge, *supra* note 5, at 170–71 (opining that an attorney might argue that a client's "flawed" personality would have prevented the client from committing the crime or wrongdoing.).

81 Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory,* 93 Mich. L. Rev. 485, 515 (1994).

82 Consider a criminal defendant accused of murder. The prosecution's theory of his extensive planning was inconsistent with the defendant's crass and disorganized personality, making it inconceivable that he could commit the crime. *See* Whalen-Bridge, *supra* note 5, at 166 (discussing the importance of negative client portrayals).

83 *See* Moran, *supra* note 39, at 43 (indicating how humanizing a defendant and telling a story from the defendant's point of view—point-of-view narration—is a way to develop empathy for clients as it tells the story of what happened as the client experienced it).

84 Michael N. Bert, *The Importance of Storytelling at All Stages of a Capital Case*, 77 UMKC L. Rev. 877, 879 (2009).

85 *Id.*

86 Consider the case of Mrs. G., a welfare recipient charged with overpayment of benefits. At the hearing, her attorney had urged her to explain she had used the money for "life necessities," something permitted under welfare law. Instead, the client spoke about buying her children Sunday shoes; that is, she had used the money to satisfy her own needs. The narrative illustrated the inherent problems within the welfare system where welfare recipients cannot really be heard. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 Buff. L. Rev 1, 31 (1990).

the mitigation counter-narrative, defense attorneys empower the jury to become heroes who can rescue the helpless defendant.

But there is no jury in an ethics case, and there is no human life to be spared.[87] The basic storytelling technique of turning the client into "the main character of a story with a compelling plotline"[88] does not work within the context of an ethics hearing where the profession, not the accused attorney, is the main character. The primary purpose of the ethics hearing is to monitor the profession; hearing boards and judges are less concerned about the defendant as they aim to earn the public's trust for attorneys. Unwarranted leniency affects other clients, which in turn affects the profession's reputation.

Moreover, a client's story and the theory of the case should integrate.[89] But this cannot happen in an attorney ethics hearing because no theory can excuse attorneys from shirking their professional obligations under the ethics rules. That is, attempts to explain behavior often appear in the realm of a story, but such justification of the behavior is irrelevant when it comes to whether the attorney violated a professional ethical duty.

Consequently, stories seemingly do not belong in attorney ethics hearings because permitting accused attorneys to share the details of their lives to challenge whether they violated their professional duties contradicts the very purpose of the ethical rules: To garner the public's trust and confidence in the legal profession.[90] In an ethics hearing, when the story achieves its goals—lessening the attorney's accountability and/or reducing sanctions—it undermines the hearing's primary purpose to increase the public's faith in the legal profession. That is, the narrative shifts the focus from protecting the public to protecting the attorney, something that is contrary to the ethics rules themselves.

But the ethical rules themselves require zealous advocacy[91] for the client, not the legal profession, and there is an inherent conflict between

87 Personal liberties are not at stake in attorney ethics hearings, only professional liberties. And the goal behind criminal laws differs from the goal behind ethics rules; the former is to punish a wrongdoer and protect society against further crimes, not to win the public's trust, monitor a profession, or protect its reputation. But like criminal defense attorneys, defense attorneys in ethics violations want to protect their clients, *see* Barbara Allen Babcock, *Defending the Guilty*, 32 Clev. St. L. Rev. 175, 178 (1983) (discussing the different reasons criminal defense attorneys represent criminal defendants), and similarly want to protect a process. In the case of attorney ethics, it is a process that ensures the integrity of the profession.

88 Kaiser, *supra* note 5, at 165.

89 The theory of a case is composed of an interplay between the law and the facts, with theory informing the facts, and the facts giving meaning to the theory. Miller, *supra* note 81, at 489. Case theory reveals itself in the opening statement and is reiterated in the closing, but it "also shapes every aspect of the trial." *Id.* at 494.

90 The public would hear these narratives because more than fifty percent of states have disciplinary proceedings that are open to the public. *See generally* Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 Geo. J. Legal Ethics 1, 19–20 (2007) (arguing for more transparency as the public is shielded from much of the disciplinary system).

91 Interestingly, some attorneys accused of ethical wrongdoing attempt to explain their behavior by invoking the concept of zealous advocacy and the ethics rules themselves contribute to this self-justification. *See* Leslie C. Levin & Jennifer K. Robbennolt, *To Err is Human, To Apologize Is Hard: The Role of Apologies in Lawyer Discipline,* 34 Geo. J. Legal Ethics 513, 531 (2021).

(1) advocating for your client (the attorney who committed the ethical violation) and (2) promoting the legal profession's reputation. While reconciling the tension between zealous advocacy and maintaining the standards of the profession is a subject for another article, practitioners need to recognize that to effectively advocate in the context of an ethics hearing, they should proceed with caution when using the narrative. By attempting to justify why an attorney may have shirked professional obligations, the narrative defeats the purpose of attorney ethics hearings. Moreover, no matter what the narrative reveals, courts strictly discipline attorneys who (1) practice dishonestly, fraudulently, deceitfully;[92] (2) commingle and/or misappropriate client funds;[93] or (3) sexually engage with a client.[94]

So, what should attorneys representing other attorneys accused of ethical violations do with their storytelling skills? Change the timeline. Unlike in other forms of litigation, the narrative should not be introduced at the liability stage of the hearing; rather, it should only be told at the sanction stage of the proceeding. That is, if attorneys find the evidence suggests that their clients violated the ethical rules, attorneys need to acknowledge the violation and/or encourage the client to apologize for the behavior rather than explain it away.[95] Only after doing so should attorneys share the story behind their clients' unethical acts.

First, it is okay and recommended to concede liability.[96] Admittedly this is often difficult to do because clients refuse to admit wrongdoing. One reason for clients not wanting to acknowledge wrongful conduct is they fear a malpractice lawsuit.[97] But most attorney misconduct is unlikely to serve as the basis for legal malpractice.[98] Another reason that lawyers fear admitting a mistake is because unethical behavior conflicts with "a core aspect of their identity as competent and ethical legal practitioners."[99] "Trying to square that incompatibility can lead people to deny,

92 Whang, *supra* note 3, at 1052.

93 *Id.* at 1054. In Florida and New Jersey, "knowing" misappropriations of funds automatically calls for disbarment. *Id.*

94 Strict liability applies regardless of the consensual nature of the sexual relationship. *See* In re Lewis, 415 S.E.2d 173, 174–75 (Ga. 1991) (suspending lawyer who had a sexual relationship with a client in a divorce-custody matter, even though the relationship began before the lawyer-client relationship, because court opined that the lawyer's sexual involvement subjected the client to risk alimony, custody, and attorney fees).

95 *See* Levin & Robbennolt, *supra* note 91, at 531. Note that regardless of when it is used, the narrative must relate to the ethical violation.

96 *See generally id.* (advocating to incorporate apologies into the lawyer discipline system to address lawyer misconduct).

97 *See id.* at 529.

98 *Id.* at 551–52. One option for states "might be to adopt a rule[,] which provides that apologies cannot be used against the respondent in subsequent discipline or legal malpractice proceedings." *Id.* Cases that result in diversion are unlikely to give rise to a lawsuit. *Id.* at 551.

99 *Id.* at 530.

recharacterize, or attempt to explain away their behavior, even to themselves."[100] Yet attorneys representing these attorneys can confront these fears head on and acknowledge that justifying the behavior through the story will not excuse an attorney from misconduct but could undermine the entire purpose of the ethical rules.

Second, the story can and should affect what the appropriate sanction will be. Sanctions vary,[101] with the same ethical violation warranting a different sanction depending on the facts. Attorneys should employ their storytelling skills only at the punishment stage of the hearing.

Attorneys should use narratives in ethics hearings cautiously and strategically. Attorneys should not just blindly tell their clients' story but instead recognize when it is simply better to withhold a story because it will not only work against your client but the entire profession.[102] Introducing the narrative to challenge findings of misconduct makes it appear as though there are reasons or justifications for the attorney to have shirked professional obligations, something that hurts the reputation of the profession and ultimately does not work to the accused attorney's advantage regarding whether the attorney committed an ethics infraction. Withholding the story until after a finding of misconduct would instill more trust in the legal profession and probably would garner more empathy from the hearing board than would using the story to relieve the person of wrongdoing.

VI. Conclusion

Even in attorney ethics hearings, the story plays a role; however, attorneys need to be mindful of what that role is, know when and how to play it, and recognize its limitations.

The narrative will not relieve an accused from the burdens of the ethics rules, but it could affect sanctions. And if the story does not solely concern the attorney but shows how the violated ethics rule harms the public, the story could persuade the court to question the rule itself. That is, the story needs to show that (1) the public can trust the profession, and (2) this attorney cannot hurt the public. If not used cautiously, the

100 *Id.*

101 Janine C. Ogando, *Sanctioning Unfit Lawyers: The Need for Public Protection*, 5 Geo. J. Legal Ethics 459, 461 (1991) (recommending a "comprehensive system for the sanctioning of lawyers" due to the inconsistencies in the administration of discipline of attorneys).

102 Stories should also not be told if they (1) steer the audience away from the legal merits of a matter or (2) promote stereotypes.

narrative will undermine ethical rules and damage the reputation of the legal profession.

While the narrative described at the start of this article troubled the hearing panel, it still positively affected the outcome in terms of sanctions.[103] Although the attorney was found to have violated several ethical rules, the panel considered the facts of his story in reducing the sanctions.[104] Perhaps if the narrative had acknowledged wrongdoing from the start,[105] there would have been a union of zealous advocacy and achieving the goals of the ethics rules; the sanctions would be reduced but the reputation of the profession would have been better protected. In cases when attorneys are charged with ethical misconduct, the story—character, problem, resolution—does not matter. In the public's eye, why what happened simply is irrelevant. Therefore, attorneys representing those accused of ethical violations should hesitate to tell their client's story, even when the client wants the story to be told. Just as clients have limitations, so do their stories, especially in the realm of attorney ethics.

103 *See supra* note 1.

104 *Id.*

105 *See id.* (noting that attorneys accused of wrongdoing should simply apologize for their behavior, possibly preventing a complaint from being filed in the first place and restoring confidence in the legal profession).