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ETHICAL CONCERNS IN CIVIL APPELLATE ADVOCACY*

by

J. Michael Medina**

"In much of literature the idea of an ethical lawyer is regarded as a contradiction in terms."¹

"But isn't legal ethics an oxymoron?"²

It would seem that only lawyers take legal ethics seriously.³ A majority of

* As noted in the title, this Article concerns only civil appellate practice. For example, an attorney's duty to refuse to appeal a frivolous case, a duty well-established in the civil appellate practice, is considerably modified in the context of the court-appointed criminal counsel. See *McCoy v. Court of Appeals*, 108 S. Ct. 1895 (1988); *Anders v. California*, 386 U.S. 738 (1967); Note, *Withdrawal of Appointed Counsel from Frivolous Indigent Appeals*, 49 IND. L.J. 740 (1974). Criminal cases will therefore only be used as illustrations when the basic issue would not vary from the civil to the criminal context. The ABA has separately promulgated detailed guidelines for both prosecutors and defense counsel in its STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE (1980). Although the Model Rules of Professional Conduct (Model Rules) have been adopted by a majority of jurisdictions, a substantial number still enforce the Model Code of Professional Responsibility (Model Code). This Article discusses both sets of ethical rules, as officially promulgated by the American Bar Association. In most instances relevant to this Article, the Model Rules and the Model Code provide identical results. Where a divergence exists, the Article so notes.

For literary references to lawyers, see D. MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 1-15 (1973); Joyner, *Law School and Legal Ethics—A Part of the Illness or the Cure?*, 60 OKLA. B.J. 743 (1989). Shakespeare's classic plan of action, "the first thing we do, let's kill all the lawyers," (King Henry VI, act IV, scene ii, line 86), is not alone in its disdain for the legal profession. Ambrose Bierce, in his *DEVIL'S DICTIONARY* 75 (Dover ed. 1958), once defined a lawyer as "one skilled in the circumvention of the law." The great satirist Jonathan Swift, in his *Gulliver's Travels*, caustically noted:

It is likewise to be observed, that this society [of lawyers] hath a peculiar cant and jargon of their own, that no other mortal man can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood

J. SWIFT, *GULLIVER'S TRAVELS*, pt. 4, ch. 5 (1726).

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1. G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 1, 1 (1978).

2. Gee & Elkins, *Resistance to Legal Ethics*, 12 J. LEGAL PROF. 29, 29 (1987).

3. The ABA Model Rules have spawned a profusion of articles. See, e.g., Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 WASH. L. REV. 823 (1986); Gaetke, *Why Kentucky Should Adopt the ABA's Model Rules of Professional Conduct*, 74 KY. L.J. 581 (1985-86); Kulhman, *Pennsylvania Considers The A.B.A. Model Rules of Professional Conduct*, 59 TEMP. L.Q. 419 (1986); Stevens, *Wyoming Rules of Professional Conduct: A Comparative Analysis*, 23 LAND & WATER L. REV. 463 (1988); Walter, *An Overview of the Model Rules of Professional Conduct*, 24 WASHBURN L.J. 443 (1985); Note, *Indiana Rules of Professional Conduct: A Comparison with the Old Code*, 21 IND. L. REV. 307 (1988); Note, *Oklahoma's Proposed Rules of Profes-*

the public assumes as a matter of course that most lawyers are unethical, if not outright dishonest.⁴ Lawyers do, however, take ethics seriously, although their motives for doing so have been cynically examined.⁵ A plethora of legal literature abounds on almost every ethical facet of the legal practice,⁶ and extends even to articles about ethics issues surrounding lawyers'

sional Conduct: Changes That May Affect You, 23 TULSA L.J. 283 (1987). A useful, but somewhat outdated annotated bibliography of legal ethics resources is VAN SCHAICK, *LEGAL ETHICS: AN ANNOTATED BIBLIOGRAPHY AND RESOURCE GUIDE* (1984). In addition, local bar associations enact supplemental codes, most often concerning trial courtesy and conduct. See Briggs, *El Paso County Bar Association Standards of Professional Courtesy*, 18 COLO. LAW. 212 (1989).

4. For a less than flattering look at various perceptions of the trustworthiness of lawyers, see Luke 11:52 (King James) ("Alas for you experts in the law! For you have taken the key to the door of knowledge but you have not entered it yourselves, and you have kept out those who tried to enter."); Burbank & Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFFOLK U.L. REV. 66, 67 (1974) (poll rating lawyers at bottom of twelve professional groups with respect to trust); Sloviter, *Perceptions of the Legal Profession*, 10 W. NEW ENG. L. REV. 175, 175 (1988) (noting *National Law Journal* poll finding only 5% of those queried rated legal profession most deserving of respect). In 1945, a Mississippi lawyer lamented, "a large number, probably a majority of the people of Mississippi believe, and take for granted, that only a very few lawyers are honest." Stone, *Our Low Estate*, 17 MISS. L.J. 90, 91 (1945). In 1940, a survey by the California State Bar found that while a majority of those questioned rated doctors and dentists highly on issues of ethics and honesty, only about 25% (ethics) and 21% (honesty) of those questioned rated lawyers high in those categories. O. PHILLIPS & P. MCCOY, *CONDUCT OF JUDGES AND LAWYERS* ix (1952); see also Blaustein, *What Do Lawmen Think of Lawyers?*, 38 A.B.A. J. 39 (1952) (polls showing need for better public relations); Sallus, *Professional Image: Can a Good Person Ever Become a Good Lawyer?*, 11 L.A. LAW 30 (1988); Thomforde, *Public Opinion of the Legal Profession: A Necessary Response By the Bar and the Law School*, 41 TENN. L. REV. 503 (1974) (public opinion of lawyers reflects society's feelings toward our entire legal system); Waltz, *The Unpopularity of Lawyers in America*, 25 CLEV. ST. L. REV. 143 (1976) (lighthearted discourse on mockery lawyers subjected to); Comment, *Public and Professional Assessment of the Nebraska Bar*, 55 NEB. L. REV. 57 (1975) (public confidence at all time low); Panel Discussion, *The Public's Impression of Lawyers' Ethics*, 7 U. FLA. L. REV. 439 (1954) (nine scholars and community notables debate public's perception).

5. One legal journalist noted: "The Code of Professional Responsibility, as the Canons of Professional Ethics before it, is a treasure trove of moral platitudes Virtually none of this inspirational material, however, has anything to do with legal ethics as actually enforced by the courts and bar associations." Schnapper, *The Myth of Legal Ethics*, 63 A.B.A. J. 202, 203 (1978); see also Abel, *Why Does the ABA Promulgate Ethics Rules?*, 59 TEX. L. REV. 639 (1981) (rules for controlling market and legitimizing role of elite attorneys); Andrews, *Non-Lawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577 (1989) (examining rules prohibiting nonattorney ownership or management of law firms and concluding basis for rule is economic self-interest); Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985) (most binding requirements in Model Rules duplicative of existing elements of agency, tort, and contract law); Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985) (ABA Model Rules not rules of ethics).

6. For an analysis of the ethical obligations of attorneys in a variety of situations and specializations, see, e.g., Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355 (1986); Crouch, *The Matter of Bombers: Unfair Tactics and the Problem of Defining Unethical Behavior in Divorce Litigation*, 20 FAM. L.Q. 413 (1986); Durst, *The Tax Lawyer's Professional Responsibility*, 39 U. FLA. L. REV. 1027 (1987); Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions*, 39 VAND. L. REV. 275 (1986); Garcia & Batey, *The Roles of Counsel for the Parent in Child Dependency Proceedings*, 22 GA. L. REV. 1079 (1988); Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 U.C.L.A. L. REV. 811 (1987); Henry, *Ethics in United States Patent Practice*, 62 A.B.A. J. 465 (1976); Johnson, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*, 45 OHIO ST.

support staffs.⁷ Yet, in this wealth of ethics literature, one area has been neglected: civil appellate practice. Only a handful of articles devote themselves to this area,⁸ a realm with increasing caseloads and lengthening dockets.⁹

Given this dearth of scholarship, this Article examines a selected number of ethics issues in the context of appellate practice. For purposes of this work, the scope of legal ethics is broadly painted. As one New York court defined the term, legal ethics means "the usages and customs among members of the legal profession involving their moral and professional duties toward one another, toward the clients and toward the courts"¹⁰ Research resources in this area are therefore not limited to disciplinary pro-

L.J. 57 (1984); Kershen, *Ethical Issues for Corporate Counsel in Internal Investigations: A Problem Analyzed*, 13 OKLA. U.L. REV. 1 (1988); Koqut, *Professional Responsibility and Representing Older Persons with Diminished Competence*, 67 MICH. B.J. 1118 (1988); Martin, *Professional Responsibility and Probate Practices*, 1975 WIS. L. REV. 911; O'Brien, *Multistate Practice and Conflicting Ethical Obligations*, 16 SETON HALL 678 (1986); Riger, *The Model Rules and Corporate Practice—New Ethics for a Competitive Era*, 17 CONN. L. REV. 729 (1985); Sanford, *Ethical, Statutory and Regulatory Conflicts of Interest in Real Estate Transactions*, 17 ST. MARY'S L.J. 79 (1985); Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988); Snyder, *Ethics and the Settlement of Civil Rights Cases: Can Attorneys Keep Their Virtue and Their Fees?*, 16 N.M.L. REV. 283 (1986); Terry, *Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups*, 61 TEMP. L. REV. 1055 (1988); Underwood, *Legal Ethics and Class Actions: Problems, Tactics and Judicial Responses*, 71 KY. L.J. 787 (1982-1983); Fishman, Book Review, 8 PACE L. REV. 303 (1988).

7. See, e.g., Buehring, *Setting Standards for Legal Assistants*, 53 FLA. B.J. 8 (1979); Dunlop, *Ethical Guidelines for Legal Support Staff*, 66 MICH. B.J. 168 (1986); Lehan, *Ethical Considerations of Employing Paralegals in Florida*, 53 FLA. B.J. 14 (1979); Stevenson, *Using Paralegals in the Practice of Law*, 62 ILL. B.J. 432 (1974); Ulrich & Clarke, *Working With Legal Assistants: Professional Responsibility*, 67 A.B.A. J. 992 (1981); Panel, *An Ethical Code for Law Librarianship?*, 62 L. LIBR. J. 409 (1969); see also Buckley, *Law Office Economics and the Associates: Ethical Considerations*, 24 GA. ST. B.J. 136 (1988) (discussing ethical considerations of client billing); Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259 (1985) (guidance for resolving certain ethical problems).

8. R. LYNN, APPELLATE LITIGATION §§ 3.6-10 (1985); R. UNDERWOOD & W. FORTUNE, TRIAL ETHICS §§ 19.1-.4 (1988); Aidisert, *The Appellate Bar: Professional Responsibility and Professional Competence—A View from the Jaundiced Eye of One Appellate Judge*, 11 CAP. U.L. REV. 445 (1982); Seidenfeld, *Professional Responsibility Before Reviewing Courts*, 25 DE PAUL L. REV. 264 (1976); Tiedemann, *The Outer Limits of Florida Appellate Advocacy*, 60 FLA. B.J. 11 (1986); Uviller, *Zeal and Frivolity: The Ethical Duty of the Appellate Advocate to Tell the Truth About Law*, 6 HOFSTRA L. REV. 729 (1978); see also Alexander, *The Appellate Court and The Lawyer*, 20 MISS. L.J. 435 (1949) (discussing interaction between judges and lawyers); Clark, *The Lawyer's Duties to the Court*, 7 U. FLA. L. REV. 404 (1954) (describing legal ethics in the courtroom); Harwood, *What I Expect from an Appellate Lawyer*, 25 ALA. LAW. 356 (1964) (judge's ethical guidelines for appellate lawyers).

9. See Carpenter, *Appellate Delay as Catalyst for Change in Virginia*, 23 U. RICH. L. REV. 141 (1988); Marvell, *Appellate Capacity and Caseload Growth*, 17 AKRON L. REV. 43 (1982); Marvell, *Is There an Appeal from the Caseload Deluge?*, 24 JUDGES J. 34 (1985); McCormick, *Appellate Congestion in Iowa: Dimensions and Remedies*, 25 DRAKE L. REV. 133 (1975); Overton, *A Prescription for the Appellate Caseload Explosion*, 12 FLA. ST. U.L. REV. 206 (1984); Peters, *The Problems of Caseload and Delay in the Minnesota Supreme Court—An Introduction to a Symposium*, 7 WM. MITCHELL L. REV. 41 (1981); Talmadge, *Toward a Reduction of Washington Appellate Court Caseloads and More Effective Use of Appellate Court Resources*, 21 GONZ. L. REV. 21 (1985); Project, *The Pennsylvania Project—The Pennsylvania Supreme Court: Perspectives from Within*, 23 VILL. L. REV. 1041 (1977-1978).

10. Kraushaar v. LaVin, 181 Misc. 508, 42 N.Y.S.2d 857, 859 (Sup. Ct. Sp. Term, Queens Cty. 1943) (citing BALLENTINE'S LAW DICTIONARY 481 (1st ed. 1930)) (oral statements accusing certain lawyer of unethical behavior slanderous per se).

ceedings, but also include court-imposed sanctions outside the disciplinary process, legal malpractice cases considering ethical norms, cases discussing sanctions for violation of procedural rules, and nonsanction instances where courts express concern over the ethics of an attorney's particular conduct.¹¹

Although the issues discussed in this Article are not unique to appellate practice, they often arise in that context. This Article first analyzes various ethical factors involved in the initiation of an appeal. The Article then focuses on positional conflicts, which raise ethical questions for the appellate attorney advocating competing legal positions. Finally, the Article considers specialized elements of the general requirement that the appellate attorney exercise the highest degree of candor with the court. Throughout this analysis, the overarching theme of the Article is the attorney's obligation of integrity to his client and to the court.

I. INITIATION OF THE APPEAL

The fundamental question an appellate lawyer must consider is whether to initiate the appeal process, either as losing trial counsel or as new counsel brought on board for the appeal. In this day of legal specialization,¹² an attorney inexperienced with the appellate process might be considered negligent or unethical in not referring a case to an attorney who handles appellate work.¹³ Failure to follow appellate rules and norms can lead to severe penal-

11. See, e.g., 1 R. MALLEN & J. SMITH, *LEGAL MALPRACTICE* §§ 9.4-.6 (3d ed. 1989) (addressing inherent power, FED. R. CIV. P. 11, and 28 U.S.C. § 1927 respectively); Note, *Liability for Proceeding With Unfounded Litigation*, 33 VAND. L. REV. 743 (1980) [hereinafter Note, *Liability*]; Note, *When is an Attorney Unreasonable and Vexatious?*, 45 WASH. & LEE L. REV. 249 (1988) (analyzing 28 U.S.C. § 1927).

12. See, e.g., 1 R. MALLEN & J. SMITH, *supra* note 11, § 15.4; C. WOLFRAM, *MODERN LEGAL ETHICS* § 5.5 (2d ed. 1986); Kaskoff, *Specialization, Ethics and Advertising*, 7 U. BRIDGEPORT L. REV. 47 (1986); Rollins, *The Coming of Legal Specialization*, 19 U. RICH. L. REV. 479 (1985); Comment, *Specialization: Resulting Standard of Care and Duty to Consult*, 30 BAYLOR L. REV. 729 (1978) [hereinafter Comment, *Specialization*]. *But cf.* 1 R. MALLEN & J. SMITH, *supra* note 11, § 24.39; R. UNDERWOOD & W. FORTUNE, *supra* note 8, § 19.4 (although appellate work becoming more of specialty, no reported cases holding appellate lawyers to higher standard of care); ABA Comm. on Professional Ethics Informal Ops. 234, 496 (1970), *digested in* O. MARU, *DIGEST OF BAR ASSOCIATION ETHICS OPINIONS* 17 (1970 Supp.) [hereinafter O. MARU (1970 Supp.)] (arguing before United States Supreme Court not specialized legal service within canon 4).

13. *Horne v. Peckham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714, 720 (Ct. App. 1979) (duty to refer complex trust issues to specialist); *In re Hardage*, 713 S.W.2d 503, 505-06 (Mo. 1986) (attorney reprimanded, in part, for accepting a bankruptcy case while not admitted to practice in relevant federal district court); *cf. In re Dempsey*, 632 F. Supp. 908, 920 (N.D. Cal. 1986) (attorney inexperienced and ignorant of federal criminal procedures had duty to associate with knowledgeable counsel or to obtain advice of competent counsel); *Russo v. Griffin*, 147 Vt. 20, 510 A.2d 436, 439 (1986) (court points out the need for attorney to advise clients on referrals to specialists in particular cases); 1 R. MALLEN & J. SMITH, *supra* note 11, § 15.4, at 871 (attorney's duty to inform client his knowledge and experience in a particular field is limited). *But cf. McManus, Malpractice Dangers in Tort Case Referrals*, 24 TRIAL 62, 63 (1988); Owens, *New Counsel on Appeal?*, 15 LITIG. 1 (1989) (analyzes different skills and tactics essential in successful trial and appellate litigation and concludes appellate specialist often necessary); Uviller, *supra* note 8, at 730 (noting differences between criminal trial and appellate practice). The Code, in prohibiting fee-splitting under DR 2-107(A), served to discourage referral to an appellate specialist. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1983) permits fee-splitting if done with full disclosure to, and consent from, the client.

ties. Courts have sanctioned attorneys for filing rambling briefs¹⁴ and for failing to comply with appropriate appellate rules.¹⁵

Assuming the attorney decides to accept the case, the next issue is whether to take the appeal. Although the many factors to consider in initiating an appeal are covered in depth elsewhere,¹⁶ the following briefly summarizes the factors most pertinent to this Article's focus.

(a) *Is the appeal frivolous?* The Model Rules of Professional Conduct (Model Rules) provide a good faith objective test¹⁷ for determining whether

R. UNDERWOOD & W. FORTUNE, *supra* note 8, § 1.6. Failure to follow the applicable appellate rules and customs can lead to sanctions. See Comment, *Specialization*, *supra* note 12, at 729; Comment, *General Practitioners Beware: The Duty to Refer an Estate Planning Client to a Specialist*, 14 CUMB. L. REV. 103 (1984); Note, *Legal Malpractice, Expansion of the Standard of Care: Duty to Refer*, 56 WASH. L. REV. 505 (1981); see also R. LYNN, *supra* note 8, § 3.1 (discussing the growth of appellate practice as a speciality); R. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* § 2.3 (1st. ed 1981) (addressing whether new counsel should be brought in on an appeal).

Of course, an attorney specializing in appellate practice might be held to the higher standard of a specialist. *Weitzel v. Oil Chem. & Atomic Workers*, 667 F.2d 785, 787 (9th Cir. 1982) (NLRB Specialist); *Procanik v. Cillo*, 206 N.J. Super. 270, 502 A.2d 94, 103 (Super Ct. Law Div. 1985) (medical malpractice specialist); *Walker v. Bangs*, 92 Wash. 2d 854, 601 P.2d 1279, 1283 (1979) (trial specialist); cf. *Huettig & Schronn, Inc. v. Landscape Contractors Council*, 582 F. Supp. 1519 (N.D. Cal. 1984) (sanctioning labor law specialists under rule 11, court noted lawyers not merely engaged in general practice, but held themselves out as specialists), *aff'd*, 790 F.2d 1420 (9th Cir. 1986). See generally *Schnidman & Salzler, The Legal Malpractice Dilemma: Will New Standards of Care Place Professional Liability Insurance Beyond Reach of the Specialist?*, 45 U. CINN. L. REV. 541 (1976) (discussing increase in legal malpractice); 1 R. MALLIN & J. SMITH, *supra* note 11, § 15.4 (specialization).

14. See *Olympia Co. v. Celotex Corp.*, 771 F.2d 888 (5th Cir. 1985) (counsel sanctioned for filing rambling briefs and failing to address the issues); *Morse v. Nelson*, 48 Ill. App. 2d 895, 363 N.E.2d 167 (1977) (duty of appellate counsel to provide lucid and persuasive argument rather than obtuse, confusing argument); *Dortch v. Lugar*, 255 Ind. 545, 266 N.E.2d 25 (1971) (duty of appellate counsel to argue issues suitably).

15. See, e.g., *In re Tranakos*, 639 F.2d 492 (9th Cir. 1981) (attorney suspended until he demonstrates knowledge of appellate rules); *Ferguson v. Ferguson*, 504 So. 2d 541 (Fla. Dist. Ct. App. 1987) (attorney publicly reprimanded for failure to follow appellate rules); *Mitchell v. State*, 433 So. 2d 632 (Fla. Dist. Ct. App. 1983) (attorney publicly reprimanded for failing to file appellate briefs and failing to respond to court's show cause order); *Hong v. Kong*, 67 Haw. 15, 675 P.2d 769 (1984) (attorney sanctioned for filing brief in violation of court rules).

16. See M. HOUTS & W. ROGOSHESKE, *ART OF ADVOCACY-APPEAL* §§ 1.01-10 (1981); R. LYNN, *supra* note 8, §§ 6.1-6; R. MARTINEAU, *MODERN APPELLATE PRACTICE* §§ 2.1-6 (1983); R. STERN, *supra* note 13, § 2.2.

17. Compare with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) (1980) (subjective test requiring lawyer not knowingly to advance a claim unwarranted under existing law, unless good faith argument can be made for extension, modification, or overruling of existing law); see 1 G. HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 329-35 (1985); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 comment (1983).

an appeal is frivolous.¹⁸ The literature is voluminous on this issue.¹⁹

18. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983) provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

No "duty of candor" exists, however, compelling the attorney to label his argument so as to show the court that the argument (1) is supported by existing law, or (2) is contrary to existing law but is supported by a good faith argument for reversal or modification. *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 96 (3d Cir. 1988); *Golden Eagle Distrib. Co. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986), *rev'g on this point* 103 F.R.D. 124 (N.D. Cal. 1984). *Contra Davis v. Aetna Casualty & Sur. Co.*, 696 F. Supp. 634, 636 (N.D. Ga. 1988) (attorney should clearly delineate good faith arguments for extension, modification, or reversal).

19. For a sampling of the literature, see R. UNDERWOOD & W. FORTUNE, *supra* note 8, § 19.2; Kallay, *The Dismissal of Frivolous Appeals by the California Courts of Appeal*, 54 CAL. ST. B.J. 92 (1979); Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 DUKE L.J. 845 (1984); Saunders, *Plying the Erie Waters: Choice of Law in the Deterrence of Frivolous Appeals*, 21 GA. L. REV. 653 (1987); Underwood, *Taking and Pursuing a Case: Some Observations Regarding "Legal Ethics" and Attorney Accountability*, 74 KY. L.J. 173 (1985-1986); Note, *Liability*, *supra* note 11, at 743; Note, *The Lawyer's Duty to Reject Groundless Litigation*, 26 WAYNE L. REV. 1561 (1980).

In branding one appeal frivolous, a Missouri court observed:

We find nothing which points to a good faith belief in the merits of this appeal. The total lack of evidentiary support, the misstatements of the evidence, the apparent failure to research the law and supply authority for the point on appeal, the reference to the incorrect standard of review, and the minimal effort to present a fairly debatable issue convince us that this appeal is frivolous and an attempt to delay the dissolution proceedings or harass the wife.

Jensen v. Jensen, 670 S.W.2d 16, 19 (Mo. Ct. App. 1984).

Two examples of frivolous appeals are as follows: (1) the appeal merely invites the appellate court to second-guess the trial court on conflicting evidence; and (2) the law is well settled and no showing is made that it was misapplied. *Booth v. Weiser Irrigation Dist.*, 112 Idaho 684, 735 P.2d 995, 998 (1987); *accord* *Ross v. Ross*, 200 Cal. App. 2d 229, 19 Cal. Rptr. 271 (1962) (appeal frivolous when only argument was weight of evidence and credibility of witnesses). In *In re Solerwitz*, 848 F.2d 1573 (Fed. Cir. 1988), the court, finding counsel worthy of disciplinary action, stated:

[His] conduct in filing and maintaining frivolous appeals having no colorable basis in law or fact has wasted the time and limited resources of this court, has denied availability of the court's resources to deserving litigants, and has constituted flagrant and totally inexcusable abuse of the judicial process.

Id. at 1575; *see also In re Cook*, 526 N.E.2d 703 (Ind. 1986) (attorney disbarred in part for bringing appeal in bad faith merely to harass or injure opposing party). Indeed, one useful measuring stick in determining frivolity may well be the amount of care the appellate court has to expend to determine the issue. *Shreveport v. United States Fidelity & Guar. Co.*, 131 La. 933, 60 So. 621, 622 (1913). The most often-used sanction against frivolous appeals is not disciplinary action, but imposition of monetary sanctions against either (or both) attorney and client under 28 U.S.C. § 1927, FED. R. APP. P. 38, and their state counterparts. *Coghlan v. Starkey*, 852 F.2d 806, 807-08 (5th Cir. 1988) (analyzing precedents and policy behind FED. R. APP. P. 38; sanctions merited where result of appeal obvious from a comprehensive and decisive exposition of the law by the court below); *see* Note, *Liability*, *supra* note 11, at 743; Annotation, *What Conduct Constitutes Multiplying Proceedings Unreasonably and Vexatiously so as to Warrant Imposition of Liability on Counsel Under 28 U.S.C. § 1927 for Excess Costs, Expenses, and Attorney's Fees*, 81 A.L.R. FED. 36 (1987); Annotation, *Attorneys' Fees; Obduracy as a Basis for State Court Award*, 49 A.L.R.4TH §§ 13, 14, at 825 (1986); Annotation, *Award of Damages or Costs Under 28 U.S.C. § 1912 or Rule 38 of Federal Rules of Appellate Procedure Against Appellant Who Brings Frivolous Appeal*, 67 A.L.R. FED. 319 (1984); Annotation, *Award of Damages For Dilatory Tactics in Prosecuting Appeal in State Court*, 91 A.L.R.3D 661 (1979); Annotation, *Construction and Application of 28 U.S.C. § 1927 Authorizing Imposition of Liability for Excess Costs on Counsel Who Multiplies the Proceedings Unreasonably and Vexatiously*, 12 A.L.R. FED. 910 (1972). Several states provide the appellate court with au-

Clearly, a fine distinction inheres in this question, for not every losing appeal is frivolous,²⁰ and a healthy margin of safety for those wishing to challenge existing law is desirable.²¹ Courts are aware of this fine line.²² If an attorney does determine that an appeal is frivolous, the attorney has the responsibility so to inform the client.²³ In fact, the attorney who does not advise the client of the fruitlessness of the appeal may be held liable for malpractice.²⁴

thority to impose a penalty of 10% of the amount in dispute upon a finding that the appeal was frivolous. See, e.g., *Burleson v. Jordan*, 163 Ga. App. 496, 295 S.E.2d 335 (1982); *Property Management Servs., Inc. v. PMC Village Inn, Ltd.*, 91 Or. App. 225, 754 P.2d 611 (1988); *Beckham v. City Wide Air Conditioning Co.*, 695 S.W.2d 660 (Tex. App.—Dallas 1985, no writ). These discretionary statutes are to be compared to the mandatory penalty provisions described *infra* note 20.

20. One court noted, "the line between a frivolous appeal and one which simply has no merit is fine." *Price v. Price*, 134 Ariz. 112, 654 P.2d 46, 48 (Ct. App. 1982) (citing *In re Marriage of Flaherty*, 31 Cal. 3d 637, 646 P.2d 179, 188 (1982)); *accord* *Meeks v. Jewel Cos.*, 845 F.2d 1421 (7th Cir. 1988); *Textor v. Board of Regents*, 711 F.2d 1387 (7th Cir. 1983); *In re Marriage of Flaherty*, 31 Cal. 3d 637, 646 P.2d 179 (1982); *Mission Denver Co. v. Pierson*, 674 P.2d 363 (Colo. 1984); *Polyloom Corp. v. Varsity Carpet Servs., Inc.*, 175 Ga. App. 806, 334 S.E.2d 386 (1985); *George A. Hormel, Inc. v. Ford*, 486 So. 2d 927 (La. Ct. App. 1986); *Nissen v. Fargo*, 338 N.W.2d 655 (N.D. 1983); *cf.* *Neitzke v. Williams*, 109 S. Ct. 1827 (1989) (in forma pauperis complaint not automatically frivolous under 28 U.S.C. § 1915 because it fails to state a claim under FED. R. CIV. P. 12(b)(6)). Opposing counsel should therefore be cautious in requesting sanctions for frivolous appeals. There are sanctions for filing what the court deems to be a frivolous motion for sanctions. *Parrington v. Jedan*, 870 F.2d 464 (9th Cir. 1989); *Meeks v. Jewel Cos.*, 845 F.2d at 1421; *Nakash v. United States*, 708 F. Supp. 1354 (S.D.N.Y. 1988); *Annual Judicial Conference of the Second Circuit*, 101 F.R.D. 161, 200 (1984). Note, however, that some states impose a mandatory penalty of a specified percent for unsuccessful appeals. See *Collins v. North Miss. Sav. & Loan Ass'n*, 445 So. 2d 828 (Miss. 1984) (discussing Mississippi's 15% penalty when appeal unsuccessful regardless of merits of case); Note, *Mandatory 10 Percent Penalty on Unsuccessful Appeals of Money Judgments in Alabama—Constitutional and Policy Considerations*, 32 ALA. L. REV. 197 (1980). The Supreme Court recently found such a statute constitutional in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 701 (1988), but inapplicable to federal diversity actions, *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1 (1987).

21. As well put by the Indiana Supreme Court in *Orr v. Turco Mfg. Co.*, 512 N.E.2d 151 (Ind. 1987):

The vitality of the law as a living institution rests largely upon its capacity to embrace and promote the opposing concepts of stability and growth. We are mindful of Dean Pound's aphorism: "Law must be stable and yet it cannot stand still." To facilitate these objectives, we must invite, not inhibit, the presentation of new and creative argument. We therefore hold that punitive sanctions may not be imposed to punish lack of merit unless an appellant's contentions and argument are utterly devoid of plausibility.

Id. at 153 (quoting POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923)).

22. One court implored attorneys to be careful "not to 'stifle the enthusiasm or chill the creativity that is the very lifeblood of the law.'" *Mone v. Commissioner*, 774 F.2d 570, 574 (2d Cir. 1985) (citing *Eastway Constr. Corp. v. New York*, 762 F.2d 243, 254 (2d Cir. 1985)).

23. *Seidenfeld*, *supra* note 8, at 268-69; *see also* R. LYNN, *supra* note 8, § 3.7 (discussing attorney's duty to advise and communicate to client all aspects of appeals). The duty to advise is a continuing one, as a case not frivolous at its inception can become frivolous when appealed. *Seyler v. Seyler*, 678 F.2d 29 (5th Cir. 1982). Indeed, an appeal not frivolous when originally filed may later become frivolous as a result of intervening case law or other reasons. *Holloway v. Walker*, 811 F.2d 263 (5th Cir. 1987); *cf.* *Westcot Corp. v. Edo Corp.*, 857 F.2d 1387 (10th Cir. 1988) (attorney sanctioned \$250 for filing meritless petition for rehearing).

24. See D. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 15.4 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983); R. LYNN, *supra* note 8, § 3.7; MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980); *cf.* *In re Paauwe*, 294 Or. 171, 654 P.2d 1117 (1982) (attorney who undertook appeal without consulting clients disciplined when appeal found meritless and prejudicial to administration of justice; clients

Should the client insist on appealing, the attorney must decline to represent the client.²⁵ Ultimately, courts hold the attorney fully responsible for failing to disclose such information to the client.²⁶ In order to avoid malpractice exposure the attorney should advise the client of possible deadlines and the client's option to seek another attorney's opinion.²⁷

(b) *What is the objective of the appeal?* Is the objective to press a meritorious issue, or is it to harass the winning party or to delay the process of justice? If the purpose is either to harass the opposing party or to appeal to secure a delay in execution of the judgment, the appeal may be unethical.²⁸ Courts may impose sanctions even if the legal and factual basis for the litigation is not totally frivolous.²⁹ Model Rule 3.2 provides that "a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of

nonetheless responsible for additional court costs resulting from appeal); *Smith v. Saint Paul Fire & Marine Ins. Co.*, 366 F. Supp. 1283 (M.D. La. 1973) (if attorney believes adverse consequences possible from taking course of action he advises, he has duty so to inform client), *aff'd*, 500 F.2d 1131 (5th Cir. 1974).

25. See *McConnell v. Critchlow*, 661 F.2d 116 (9th Cir. 1981); *Cosenza v. Kramer*, 152 Cal. App. 3d 1100, 200 Cal. Rptr. 18 (1984); *Tupling v. Britton*, 411 A.2d 349 (D.C. 1980); *Evans v. Commonwealth*, 64 Pa. Commw. 34, 447 A.2d 1119 (1982); MO. B.A., Informal Op. 78-26 (1978), *digested in O. MARU* (1970 Supp.), *supra* note 12, ¶ 11,355; PHILADELPHIA B.A., Op. (1978) (unnumbered opinion rendered on Oct. 24), *digested in O. MARU* (1970 Supp.), *supra* note 12, ¶ 12,700; see also *Polk County v. Dodson*, 454 U.S. 312, 323 (1981) (dictum stating public defender has no obligation to file frivolous appeal); R. LYNN, *supra* note 8, § 6.9 (ethical duty to refuse litigation of frivolous appeal); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983) (duty to refuse frivolous appeal); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1980) (duty not to take action serving only to harass). Conversely, it is unethical for an attorney to initiate an appeal without the client's authorization. *Soliman v. Ebasco Servs., Inc.*, 822 F.2d 320 (2d Cir. 1987); *cf. Burke v. Burke*, 169 Mich. App. 348, 425 N.W.2d 550 (1988) (disregarding client's instructions, attorney filed motion to amend judgment; court awarded sanctions of \$900 to opposing counsel against attorney).

26. *McCandless v. Great Atl. & Pac. Tea Co.*, 697 F.2d 198, 202 (7th Cir. 1983).

27. R. LYNN, *supra* note 8, § 6.9; *cf. In re Henke*, 121 Wis. 2d 689, 359 N.W.2d 924 (1985) (attorney suspended both for failing to notify client that attorney had concluded appeal would be without merit and for refusing to return retainer to client); *cf. Harris v. Maready*, 84 N.C. App. 607, 353 S.E.2d 656 (attorney not liable since, after declining employment on basis that suit fruitless, attorney helped plaintiff locate new counsel and promptly turned pertinent files over to new counsel), *review denied*, 320 N.C. 168, 358 S.E.2d 50 (1987).

28. See, e.g., *In re TCI, Ltd.*, 769 F.2d 441 (7th Cir. 1985) (suit brought with plausible basis, but pursued only to impose cost on other side, constitutes abuse of process subject to 28 U.S.C. § 1927); *Hibbert v. I.N.S.*, 554 F.2d 17 (2d Cir. 1977) (avoid deportation); *Overmeyer v. Fidelity & Deposit Co.*, 554 F.2d 539, 543 n.3 (2d Cir. 1977) (avoid paying judgment); *People v. Kane*, 655 P.2d 390 (Colo. 1982) (avoid support order); OKLA. B.A., Op. 23 (1922) (improper to assert invalid defense for sole purpose of delay in hope that note can be paid off before judgment); see 1 G. HAZARD & W. HODES, *supra* note 17, at 336.1-38 (rule 3.2); C. WOLFRAM, *supra* note 12, § 11.2.5. *But see* ABA Comm. on Professional Ethics, Informal Op. 689 (1963), 1 INFORMAL ETHICS OPINIONS 271 (1975) (under Canons of Ethics, no violation to take appeal in case to gain time for settlement unless appeal wholly without merit).

29. *Hersch v. Citizens Sav. & Loan Ass'n*, 146 Cal. App. 3d 1002, 194 Cal. Rptr. 628 (1983) (appellate court, disclaiming any need to determine frivolousness of appeal, imposed \$125,000 sanction for filing and pursuing appeal solely for purpose of delay); *cf. Aetna Life Ins. Co. v. Alla Medical Servs., Inc.*, 855 F.2d 1480 (9th Cir. 1988) (motion to dismiss brought for improper purpose can be sanctioned under rule 11 even if not frivolous); *San Bernadino Community Hosp. v. Office of State Wide Health Planning & Dev.*, 187 Cal. App. 3d 459, 231 Cal. Rptr. 673 (1986) (dictum).

the client.”³⁰ The comment to rule 3.2 further refines the client’s interest to exclude “[r]ealizing financial or other benefit from otherwise improper delay in litigation” as a legitimate client interest.³¹ One such impermissible purpose would be to reap the benefits of the disparity between the market rate for the use of money and the statutory judgment rate.³²

(c) *Is the attorney prepared to prosecute the appeal through to its conclusion?* Once the attorney has agreed to undertake the appeal, the attorney is bound to exercise professional zeal in conducting the appeal, including the appeal’s perfection, the appellate briefs, oral argument, and any other procedural or substantive requirement of the applicable court rule or statute. Rule 1.3 requires a lawyer to act with promptness and reasonable diligence in representing the client.³³ Failure to represent the client adequately on appeal can result in severe disciplinary sanction.³⁴ Competent representation, of course, includes an obligation to follow all applicable court rules.³⁵

(d) *What are new counsel’s responsibilities?* If the appeal is referred by the trial attorney, or more importantly, is handed to the attorney by a new client, special considerations enter into the picture. The appellate attorney needs to assure the cooperation of trial counsel to help understand the record and to answer questions throughout the appellate process.³⁶ The new appellate counsel need not decline representation until trial counsel has been

30. The Code contains a similar directive, DR 7-102(A)(1) preventing conduct serving merely to harass or maliciously injure another. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1980).

31. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 comment (1983); see 1 G. HAZARD & W. HODES, *supra* note 17, rule 1.3.

32. See C. WOLFRAM, *supra* note 12, § 11.2.5; cf. Bankers’ Trust Co. v. Publicker Indus., Inc., 641 F.2d 1361 (2d Cir. 1981) (dictum).

33. See *In re Grubbs’ Appeal*, 403 P.2d 260 (Okla. Crim. App. 1965) (once attorney agrees to undertake appeal, attorney is obligated to prosecute appeal diligently, using all ethical means). See also MODEL OF CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(3) (lawyer not to neglect matter entrusted to him), DR 7-101(A)(1) (lawyer not to fail intentionally to seek lawful objectives of client through reasonably available means permitted by law), DR 7-102(A)(2) (lawyer not to fail to carry out contract of employment), DR 7-102(A)(3) (lawyer not to damage or prejudice client during course of relationship) (1980).

34. Case overload has been rejected as a mitigating factor. See *In re Kennedy*, 97 Wash. 2d 719, 649 P.2d 110 (1982); *In re Fraser*, 83 Wash. 2d 884, 523 P.2d 921 (1974). For result of disciplinary action for failure to pursue properly the appellate process, see *In re Palmer*, 110 Ariz. 414, 519 P.2d 1155 (1974); *Florida Bar v. King*, 242 So. 2d 705 (Fla. 1971); *Florida Bar v. Dingle*, 220 So. 2d 9 (Fla. 1969); *In re Jones*, 455 N.E.2d 903 (Ind. 1983); *In re Garrett*, 399 N.E.2d 369 (Ind. 1980); *Committee on Professional Ethics v. Jackson*, 391 N.W.2d 699 (Iowa 1986); *State v. Thompson*, 208 N.W.2d 926 (Iowa 1973); *State v. Regier*, 228 Kan. 746, 621 P.2d 431 (1980); *State v. Shumacher*, 210 Kan. 377, 502 P.2d 748 (1972); *In re Dagg*, 411 Mich. 304, 307 N.W.2d 66 (1981); *In re Montrey*, 511 S.W.2d 805 (Mo. 1974); *In re Geraghty*, 128 A.D.2d 913, 512 N.Y.S.2d 569 (1987); *In re Taylor*, 81 A.D.2d 59, 439 N.Y.S.2d 206 (1981); *In re McKinnon*, 200 N.W.2d 62 (N.D. 1972); *In re Loew*, 292 Or. 806, 642 P.2d 1171 (1982).

35. See, e.g., *Nelson v. Nelson*, 137 Ariz. 213, 669 P.2d 990 (1983) (failure to follow court rule requiring appropriate references in the record for statements of fact); *Frances v. State*, 261 Ind. 461, 305 N.E.2d 883 (1974) (failure to follow rule requiring citation of authority or cogent argument); *Dortch v. Lugar*, 255 Ind. 545, 266 N.E.2d 25, 51 (1971) (adherence to applicable rules not left to option of appellate attorney).

36. R. LYNN, *supra* note 8, § 6.2; Lyons, *Appellate Practice Pointers for Alabama Lawyers in Civil Cases*, 44 ALA. LAW. 6, 8 (1983). Counsel who is replacing the trial attorney should inquire regarding the reason for replacement; see Drinker, *The Ethical Lawyer*, 7 U. FLA. L.

paid but should notify trial counsel of the new representation in the case.³⁷

A sensitive yet unresolved ethical area concerns appellate counsel's obligation to inform the client of trial counsel's malpractice. In Informal Opinion 1465³⁸ the American Bar Association's Committee on Ethics and Professional Responsibility (Committee) ruled, on a very narrow set of facts, that the appellate attorney had no ethical obligation to report the malpractice to the client. In this opinion appellate counsel to a prisoner asked the ABA whether he had an obligation to inform the client that the client might have a civil cause of action against the trial counsel for malpractice. The issue posed is an important one, as appellate criminal defendants often raise the issue of ineffective trial counsel.³⁹ Based upon the limited representation undertaken by appellate criminal counsel, the Committee reasoned that appellate counsel did not have such an obligation.⁴⁰ The client had not sought the advice and the appellate counsel's scope of representation did not include civil claims for damages.⁴¹

The Committee felt that the Disciplinary Rules of the Model Code neither prohibited nor required the advice.⁴² Citing Ethical Consideration 2.2 urging lawyers to assist lay persons to recognize legal problems that may not be self-revealing, however, the Committee, however, did conclude that it would

REV. 375, 381 (1954). For a good general discussion of the problems engendered by the last minute referral, see Underwood, *supra* note 19, at 182-86.

37. See ABA Comm. on Professional Ethics, Formal Op. 10 (1926), reprinted in AMERICAN BAR ASSOCIATION OPINIONS ON PROFESSIONAL ETHICS 246 (1967); ABA Comm. on Professional Ethics, Informal Op. 1142 (1970), reprinted in II INFORMAL ETHICS OPINIONS 357 (1975); CLEVELAND B.A., Op. 56 (1967), digested in O. MARU (1970 Supp.), *supra* note 12, ¶ 7145; COLO. B.A., Op. 40 (1968), digested in O. MARU (1970 Supp.), *supra* note 12, ¶ 6214; L.A. COUNTY B.A., Op. 183 (1951), digested in O. MARU & R. CLOUGH, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 426 (1970); MICH. B.A., Op. 204 (1968), digested in O. MARU (1970 Supp.), *supra* note 12, ¶ 6775; SAN DIEGO COUNTY B.A., Op. 1972-17 (1972), digested in O. MARU (1970 Supp.), *supra* note 12, ¶ 7938; WIS. B.A., Memo Op. 8770 (1977), reprinted in 57 WIS. B. BULL. 101-02 (1984). *Contra* IND. B.A., Op. 2-1966 (1967), digested in O. MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS ¶ 8429 (1975 Supp.) [hereinafter O. MARU (1975 Supp.)].

38. FORMAL AND INFORMAL ETHICS OPINIONS 385 (1985). The ABA Committee issues both formal and informal opinions. The ABA Committee issues formal opinions on subjects of widespread interest. Those opinions are published in full in the *A.B.A. Journal*. Informal opinions are only summarized in the *A.B.A. Journal* pursuant to American Bar Association Standing Committee on Ethics and Professional Responsibility (Committee), Rule of Procedure 3. Neither form of opinion is binding on attorneys unless made so by the appropriate state governing body. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1420 (1978), reprinted in FORMAL AND INFORMAL ETHICS OPINIONS 312 (1985). The work of the Committee is critically analyzed in Finman & Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67 (1981). See also C. WOLFRAM, *supra* note 12, § 2.6.6 (ethics opinions "rarely cited and relied upon in judicial decisions").

39. See, e.g., *Darden v. Wainwright*, 477 U.S. 168 (1986); *Strickland v. Washington*, 466 U.S. 668 (1984). WEST'S FEDERAL PRACTICE DIGEST 3D (vol. 27, Crim. Law, headnote 641.13—641.13(8)) has over 170 pages of decisions involving claims of ineffective representation, with over 100 pages in its 1988 pocket part.

40. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1465 (1978), reprinted in FORMAL AND INFORMAL ETHICS OPINIONS 385 (1985).

41. *Id.*

42. *Id.*

be proper for the lawyer not only to inform the client of the possible cause of action but also fully to discuss the cause's practical limitations.⁴³ It is uncertain whether the Committee's reasoning would exonerate a civil appellate counsel from notifying the client of possible trial malpractice. The better view would require such notification.⁴⁴ Not requiring the appellate counsel to notify the client of the malpractice, but requiring counsel to notify the appropriate court or disciplinary body of the trial lawyer's breach of professional ethics would be incongruous.⁴⁵ Although a breach of professional

43. *Id.*

44. The MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(a)(3) (1980) instructs the attorney not to prejudice the client during the course of the professional relationship. Not disclosing the prior attorney's malpractice could certainly prejudice the client. *Id.* The Model Rules, however, have no exact counterpart; the closest provision is rule 1.3, requiring diligence on the part of the attorney. *Id.* see Tallon v. Committee on Professional Standards, 86 A.D.2d 897, 447 N.Y.S.2d 50 (1982) (duty to inform client of possible malpractice claims against him); COLO. B.A., Informal Op. 4-27-74 (1974), *digested in O. MARU, supra* note 37, ¶ 8020 (duty to report partner's negligence to client); Ill B.A. Comm. on Professional Responsibility, Op. 88-11 (1989), *extracted in ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT [CURRENT REPORTS] 156* (1989) (duty of lawyer to whom case is referred to disclose potential malpractice committed by referring counsel under MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(a)(3) (1980)); L.A. COUNTY B.A., Op. 313 (1969), *digested in O. MARU* (1975 Supp.), *supra* note 37, ¶ 7668 (duty to inform client without recommendation to sue); MICH. B.A., Informal Op. 363 (1979), *digested in O. MARU, DIGEST OF AMERICAN BAR ASSOCIATION ETHICS OPINIONS* ¶ 11719 (1980 Supp.) [hereinafter O. MARU (1980 Supp.)] (duty to report to client malpractice of co-counsel); Wis. B.A. Comm. on Professional Ethics, Formal Op. E-82-12 (1982), *reprinted in 57 WIS. B. BULL.* 78 (1984) (duty to inform client of own malpractice); *cf.* Swann, *The Ethical Obligation to Disclose Attorney Negligence*, 13 COLO. LAW. 232 (1984) (discussing duty to disclose own negligence to client).

45. The incongruity would approach the ridiculous in the common situation where the breach was discovered by the appellate attorney under circumstances that made discovery a privileged communication. The attorney would then need the client's permission to inform the disciplinary body. The Model Rules require that the violation "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." See MODEL RULE OF PROFESSIONAL CONDUCT Rule 8.3 (1983). The Model Code contains no such limitation. See 1 R. MALLEEN & J. SMITH, *supra* note 11, § 1.9; Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 64 n.132 (1989); see also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1210 (1972), *reprinted in II INFORMAL ETHICS OPINIONS* 445 (1975) (duty to report violations of associate); ARIZ. B.A., Op. 213 (1966), *digested in O. MARU* (1970 Supp.), *supra* note 12, ¶ 5967 (duty to report unethical conduct); ILL. B.A., Op. 429 (1974), *digested in O. MARU* (1975 Supp.), *supra* note 37, ¶ 8339 (duty to report incompetence if knowledge not obtained through privilege); L.A. COUNTY B.A., Op. 355 (1976), *digested in O. MARU* (1980 Supp.), *supra* note 44, ¶ 10,548 (duty to report incompetence if knowledge unprivileged); MO. B.A., Informal Op. 2 (1978), *digested in O. MARU* (1980 Supp.), *supra* note 44, ¶ 11860 (if knowledge privileged, can only reveal professional violation with client's consent); TEX. B.A., Informal Op. 78-9 (1979), *digested in O. MARU* (1980 Supp.), *supra* note 44, ¶ 12,760 (duty to report incompetence if knowledge unprivileged); VA. B.A., Informal Op. 366, *digested in O. MARU* (1980 Supp.), *supra* note 44, ¶ 12,989 (duty to report violations if information not privileged); VA. B.A., Informal Ops. 349, 350, 366, *digested in O. MARU* (1980 Supp.), *supra* note 44, ¶ 12,977, ¶ 12,978, ¶ 12,989 (duty to report incompetence if knowledge unprivileged); VA. B.A., Informal Op. 113, *digested in O. MARU* (1975 Supp.), *supra* note 37, ¶ 10044 (improper to report violation if knowledge obtained from client in confidence and client refuses to consent to disclosure). *But see* SAN FRANCISCO B.A., Op. 1977-1 (1977), *digested in O. MARU* (1980 Supp.), *supra* note 44, ¶ 10,694 (California rules impose no reporting duty). The duty of disclosure may be tempered, however, by the injunction against bringing a frivolous action under MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983). See *In re Belue*, 766 P.2d 206 (Mont. 1988) (attorney disciplined for filing frivolous and unfounded ethical violation against opposing counsel). The ethical obligations of confidentiality are greater and more encompassing than those imposed by the attorney-client

ethics is not per se malpractice,⁴⁶ the two areas do overlap to a considerable

privilege. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1980); NCK Org. Ltd. v. Gergman, 542 F.2d 128 (2d Cir. 1976); United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974) (statutory privilege protects only confidences, while ethical obligations include any other information client requests to be inviolate or the disclosure of which would be embarrassing or detrimental to the client); Skokie Gold Standard Liquors v. Joseph, 116 Ill. App. 3d 1043, 452 N.E.2d 804 (1983); Seventh Elect Church v. Rogers, 102 Wash. 2d 527, 688 P.2d 506 (1984) (while statutory privilege covers only confidences, ethical rule covers both confidences and secrets). The Model Rules abolished the Code's distinction between confidences and secrets and simply enjoin disclosure of any "information relating to representation of a client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983).

The contours of the attorney's duty to report unethical conduct has been exhaustively examined. See C. WOLFRAM, *supra* note 12, § 12.10.1; Levy, *The Judge's Role in the Enforcement of Ethics—Fear and Learning in the Profession*, 22 SANTA CLARA L. REV. 95 (1982); Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491; Marcotte, *The Duty To Inform*, 75 A.B.A. J. (1989) (discussing *In re Hinnel*, 125 Ill. 2d 531, 533 N.E.2d 790 (1988) (case involving settlement agreement that prohibited disclosure of former attorney's conversion of client funds to disciplinary authorities; client's present attorney who settled action against former attorney suspended for one year)); Swann, *supra* note 44, at 232; Thode, *The Duty of Lawyers and Judges to Report Other Lawyer's Breaches of the Standards of the Legal Profession*, 1976 UTAH L. REV. 95; Note, *The Lawyer's Duty to Report Professional Misconduct*, 20 ARIZ. L. REV. 509 (1978).

46. See MODEL RULES OF PROFESSIONAL CONDUCT preamble (1983). The scope of the Model Rules is limited:

Violation of a Rule should not give rise to a cause of action They are not designed to be a basis for civil liability Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Id. at 12. The Model Code's preliminary statement contains a similar, but less emphatic disclaimer: "The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct." See MODEL CODE OF PROFESSIONAL RESPONSIBILITY preamble (1980); Terry Cove N., Inc. v. Marr & Friedlander, Inc., 521 So. 2d 22 (Ala. 1988); Noble v. Sears, Roebuck & Co., 33 Cal. App. 3d 654, 109 Cal. Rptr. 269 (1973); Bob Godfrey Pontiac, Inc. v. Roloff, 291 Or. 318, 630 P.2d 840 (1981). Most of the reported cases, however, involve a third party's (not the client's) attempt to impose liability on the attorney; see generally 1 R. MALLEN & J. SMITH, *supra* note 11, ch. 7 (liability to nonclient for negligence). Indeed, most of the cases involve attempts to avoid the limitations imposed on the remedy of malicious prosecution. See, e.g., Nolan v. Foreman, 665 F.2d 738 (5th Cir. 1982); Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978); Young v. Hecht, 3 Kan. App. 2d 510, 597 P.2d 682 (1979); Hill v. Willmott, 561 S.W.2d 331 (Ky. Ct. App. 1978); Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). The strict limitation of standing to the client alone is, however, eroding. See Fiebach, *A Chilling of the Adversary System: An Attorney's Exposure to Liability from Opposing Parties or Counsel*, 61 TEMPLE L. REV. 1301 (1988).

The literature on this subject, of particular financial concern to the profession, is understandably enormous. See Dahlquist, *The Code of Professional Responsibility and Civil Damage Actions Against Attorneys*, 9 OHIO N.U.L. REV. 1 (1982) (distinguishing between client and third-party actions); Faure & Strong, *The Model Rules of Professional Conduct: No Standard for Malpractice*, 47 MONT. L. REV. 363 (1986); Gaudineer, *Ethics and Malpractice*, 26 DRAKE L. REV. 88 (1976-1977); Gillers, *Ethics that Bite: Lawyer's Liability to Third Parties*, 13 LITIGATION 8 (1987); Hoover, *The Model Rules of Professional Conduct and Lawyer Malpractice Actions: The Gap Between Code and Common Law Narrows*, 22 NEW. ENG. L. REV. 595 (1988); Mallen & Evans, *Attorneys' Liability for Errors of Judgment—At the Crossroads*, 48 TENN. L. REV. 283 (1981); Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C.L. REV. 281 (1979); see also Note, *The Code of Professional Responsibility in Attorney Malpractice: Illinois Attorneys Have a Duty to Inform Clients of an Intent to Settle—Rogers v. Robson*, Masters, Ryan, Brumund & Belom, 30 DE PAUL L. REV. 499 (1981) (duty to inform clients of intent to settle); Note, Lipton v. Boesky, *The Code of Professional Liability as an Independent Basis for Legal Malpractice Liability*,

extent,⁴⁷ especially under the requirement of competence of Model Rule 1.1.⁴⁸

In states that have adopted the Model Rules, a procedure avoids this problem. The Model Rules permit the appellate practitioner to limit the objectives of the representation so as to exclude the duty to disclose trial counsel's malpractice. The client, of course, must consent to the limitation.⁴⁹ The prudent attorney would document the consent in writing, specifically setting forth the limitations on the scope of representation.⁵⁰

II. POSITIONAL CONFLICTS

The literature is extensive on the relationship between ethical rules and

1984 DET. C.L. REV. 135 (Model Code as basis for malpractice); Note, *Standard of Care in Malpractice Actions Against Insurance Defense Counsel: Inapplicability of the Code of Professional Responsibility*, 51 FORDHAM L. REV. 1317 (1983) (Model Code inapplicable to insurance defense counsel).

47. Lynch, *The Lawyer As Informer*, 1986 DUKE L.J. 491, 544-45; 1 R. MALLIN & J. SMITH, *supra* note 11, §§ 1.8, 1.9; *see, e.g.*, Woodruff v. Tomlin, 616 F.2d 924 (6th Cir.), *cert. denied*, 449 U.S. 888 (1980) (Model Rules provide some evidence of standards required of lawyers); Gomez v. Hawkins Concrete Co., 623 F. Supp. 194, 199 (N.D. Fla. 1985) (where client sues attorney for breach of fiduciary duty, Model Code "constitutes some evidence" of standards); Fishman v. Brooks, 396 Mass. 643, 487 N.E.2d 1376 (1985) (where disciplinary rule's purpose is to protect plaintiff, violation of such rule may be some evidence of negligence); Albright v. Burns, 206 N.J. Super. 625, 503 A.2d 386 (Super. Ct. App. Div. 1985) (ABA standards adopted in New Jersey set minimum standards of competence and are therefore evidence in malpractice case); Terry, *Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups*, 61 TEMPLE L. REV. 1055, 1112-16 (1988) (collecting cases in which ethical rules were used in legal malpractice actions); *cf.* 10TH CIR. R. 46.5.3 (disciplinary action may be taken against counsel who inadequately represent clients during appellate process).

48. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983) provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(a)(1) (1980) directs the lawyer not to "[h]andle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it." In *id.* DR 6-101(a)(2) an attorney is further instructed to prepare adequately in the circumstances. *See also* R. LYNN, *supra* note 8, § 3.6 (discussing appellate lawyer's duty to be competent); Spaeth, *To What Extent Can a Disciplinary Code Assure the Competence of Lawyers?*, 61 TEMPLE L. REV. 1211 (1988) (disciplinary Code helps but does not ensure attorney competence).

49. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(c) (1983) provides: "A lawyer may limit the objectives of the representation if the client consents after consultation." The Model Code contains no similar provision.

50. 1 G. HAZARD & W. HODES, *supra* note 17, at 24-30; R. UNDERWOOD & W. FORTUNE, *supra* note 8, § 1.12; *cf.* Reich, *Beyond Yes and No*, 75 A.B.A. J. 110 (1989) (discussing ethical issues implicated when client of attorney A seeks second opinion from another attorney as to attorney A's representation of that client).

conflicts of interest.⁵¹ Both the Model Code⁵² and the Model Rules⁵³ devote much attention to conflicts of interest. The conflicts addressed, however, consist primarily of (1) lawyer self-interest vis-à-vis a client's interest, (2) lawyer as witness, (3) conflict between current clients, and (4) conflict between a current client's interest and a former client's interest.⁵⁴ The rules do not provide guidance on positional conflicts occurring when two clients have differing political or ideological views, or economic or legal interests that affect each other adversely.⁵⁵ In the rarefied atmosphere of appellate practice, such conflicts can and do occur.

In certain polarized areas of the law, law firms customarily represent only one viewpoint. For example, in the labor relations field, a law firm often becomes known as either a management firm or a union firm.⁵⁶ A firm with substantial union clientele would be wary of taking an isolated management case. Similarly, in the area of personal injury actions, attorneys most often align themselves as either plaintiffs' attorneys or defense counsel.⁵⁷

51. See, e.g., Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807 (1976); Fordham, *There are Substantial Limitations on Representation of Clients in Litigation Which Are Not Obvious in the Code of Professional Responsibility*, 33 BUS. LAW. 1193 (1978); Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227 (1987); Liebman, *The Changing Law of Disqualification: The Role of Presumption and Policy*, 73 NW. U.L. REV. 996 (1979); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244 (1981); see also C. WOLFRAM, *supra* note 12, chs. 7-8 (discussing conflicts of interest issues); Annotation, *Representation of Conflicting Interests as Disqualifying Attorney from Acting in a Civil Case*, 31 A.L.R.3D 715 (1970) (concerning issue of whether attorney representation of conflicting interests is sufficient reason to disqualify attorney in civil cases); Annotation, *What Constitutes Representation of Conflicting Interests Subjecting Attorney to Disciplinary Action*, 17 A.L.R.3D 835 (1968) (concerning issue of whether attorney representation of conflicting interests will result in disciplinary action against attorney).

52. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 & EC 5-4 to 5-10 (1980).

53. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7-.11 (1983).

54. See Kindregan, *Conflicts of Interests and the Lawyer in Civil Practice*, 10 VAL. U.L. REV. 423 (1976); R. UNDERWOOD & W. FORTUNE, *supra* note 8, §§ 3.4.4, 3.5, 3.6 (discussing lawyer's adverse interest, simultaneous representation, and subsequent representation, respectively).

55. Breger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney*, 62 B.U.L. REV. 1115, 1119 (1982). The phrase "positional conflict" was apparently coined by O'Dea, *The Lawyer-Client Relationship Reconsidered: Methods for Avoiding Conflicts of Interest, Malpractice Liability and Disqualification*, 48 GEO. WASH. L. REV. 693, 701 n.32 (1979). Underwood and Fortune further refined the concept by identifying a particular subtype of positional conflict, the issue conflict, which arises "because two clients have antagonistic interests regarding a legal question in different pending cases." R. UNDERWOOD & W. FORTUNE, *supra* note 8, § 3.4.3, at 84. This Article primarily addresses the issue conflict, while recognizing the potential for issue conflicts even in the absence of different pending cases. Parties may still have identifiable antagonistic legal positions. The decision in *one* pending case may affect a party's legal interest in ways other than direct litigation (i.e., settlement or business strategy). The American Law Institute captions the concept as "[c]oncurrently taking adverse legal positions on behalf of different clients." RESTATEMENT (THIRD) OF THE LAW; THE LAW GOVERNING LAWYERS § 209 comment f (Preliminary Draft No. 4A, 1989) [hereinafter RESTATEMENT].

56. 1 G. HAZARD & W. HODES, *supra* note 17, at 124.

57. There are even competing bar associations: the Association of Trial Lawyers of America for the plaintiff bar, the Defense Research and Trial Lawyer Association for the defendant bar. LAW AND LEGAL INFORMATION DIRECTORY 30, 40 (S. Wasserman & J. O'Brien eds. 1986).

One recent area of polarization, at least in the oil and gas regions of the country, involves litigation on natural gas purchase contracts.⁵⁸ Most firms represent either producers or pipelines exclusively, at least on issues touching upon gas purchase contracts. There is good reason for this polarization. The litigation anatomy of gas contract litigation, particularly its major component, the take-or-pay clause,⁵⁹ does not vary much from case to case. The main controversy surrounds the affirmative defenses the pipeline might raise in justification of its failure to perform the obligations imposed by the take-or-pay clause. These affirmative defenses are generally generic to the entire take-or-pay litigation arena, and the elements of these generic defenses (such as commercial impracticability, public policy, federal preemption) are basically similar, both factually and legally.⁶⁰ Thus, a legal victory, particularly an appellate ruling, as take-or-pay law consists mostly of unpublished district court orders,⁶¹ on one of the generic defenses has import beyond the narrow confines of the particular case at issue. Further, having successfully prevailed (in an unpublished decision) on a motion to strike a generic affirmative defense, for example, the attorney might be ethically obligated to disclose that otherwise obscure decision to a court in a subsequent case where the attorney is representing a pipeline client.⁶² Moreover, an attorney representing both producers and pipelines, who achieves on appeal a producer victory such as in *Golsen v. ONG Western*,⁶³ might have difficulty explaining

58. Historically, gas production was sold at the wellhead to pipeline purchasers under long-term contracts. The long-term gas purchase contracts usually dedicated the producer's gas production exclusively to the pipeline purchaser. See Gilliam, *Gas Sales Contracts in a Changing Market*, 37 INST. ON OIL & GAS L. & TAX'N 6-1 (1986); Johnson, *Natural Gas Contracts*, 34 INST. ON OIL & GAS L. & TAX'N 83 (1983); Turner, *Natural Gas—Impact of Deregulation or Reregulation on Sales Contracts*, 29 ROCKY MTN. MIN. L. INST. 501 (1983). The current gas surplus has led to considerable litigation in the gas-producing states. See Medina, *The Take-or-Pay Wars: A Further Status Report*, 41 OKLA. L. REV. 381 (1988); Medina, McKenzie & Daniel, *Take or Litigate: Enforcing the Plain Meaning of the Take-or-Pay Clause in Natural Gas Contracts*, 40 ARK. L. REV. 185 (1987).

59. The take-or-pay clause of a natural gas contract requires the buyer to purchase a minimum volume of natural gas each year. If the buyer fails to purchase the required volume, the buyer must pay for the gas as if the buyer had actually accepted delivery of the required volume. See 4 H. WILLIAMS, OIL & GAS LAW § 724.5(H) (1985).

60. Medina, McKenzie & Daniel, *supra* note 58, at 210-11; Dzienkowski, *Regulating the Conduct of Oil and Gas Lawyers* 12 (Nov. 1987) (paper delivered to Second Natural Gas Contracts Conference). In *Northwestern Mut. Life Ins. Co. v. ANR Pipeline Co.*, No. H-86-2189 (S.D. Tex. Jan. 16, 1987), ANR sought to disqualify the law firm representing the plaintiffs on the basis that the law firm had previously represented ANR's predecessor in take-or-pay litigation. One of the attorneys representing the plaintiff had extensive prior access to ANR's records. The court declined to disqualify the law firm, noting that take-or-pay litigation involved "a recurring fact pattern which the same defenses are commonly asserted to a standard industry contract."

61. Medina, McKenzie & Daniel, *supra* note 58, at 211.

62. See Dzienkowski, *supra* note 60, at 12. The American Law Institute does not view "[m]erely indirect precedential effect on another client's legal position" as a conflict, but does not address the disclosure obligation the attorney may have to the court. RESTATEMENT, *supra* note 55, § 209 comment f, at 196.

63. 756 P.2d 1209 (Okla. 1988). In *Golsen* the Oklahoma Supreme Court narrowly construed the application of force majeure clauses in take-or-pay contracts. *Id.* at 1212-14. The court also ruled that certain Oklahoma gas conservation statutes and rules did not operate to limit the producer's ability to extract gas from the ground and therefore did not provide a defense to the pipeline. *Id.* at 1214-16. *Golsen* is significant since it is the first expression by

the victory to his pipeline clients.

The only guidance provided by the Model Rules for this conundrum is a short comment paragraph to rule 1.7.⁶⁴ As Professors Hazard and Hodes observe, however, the tension between the antagonistic objectives of the clients might rise to a level sufficient to implicate the values of rule 1.7(b).⁶⁵ Rule 1.7(b) proscribes employment if the representation of that client is substantially limited due to conflicting loyalty to another client.⁶⁶ Thus, in the take-or-pay context, a producer attorney might not be able to accept employment to represent a pipeline because his producer clients might feel betrayed.⁶⁷ Should his producer clients not object, however, the lawyer would be free to represent the pipeline, as it is recognized that lawyers with special expertise can be expected to represent both sides of a legal issue.⁶⁸

the Oklahoma Supreme Court on take-or-pay clauses. See Medina, *supra* note 58, at 401-03, 410-11; Wood, *The Allocation of Risk in Gas Purchase Contracts After Golsen v. ONG W., Inc.*, 13 OKLA. CITY U.L. REV. 503 (1988).

64. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983) provides:

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Not all commentators have accepted the logic for the distinction between trial and appellate proceedings. The mechanical distinction ignores the persuasive value of trial court decisions. See R. UNDERWOOD & W. FORTUNE, *supra* note 8, § 3.4.3; C. WOLFRAM, *supra* note 12, at 355 n.11; Parr, *Attorney Conflicts of Interest in the Area of Natural Resources Law*, 30 ROCKY MTN. MIN. L. INST. § 1.05[4], at n.134 (1984); see also RESTATEMENT, *supra* note 55, § 209 comment f, at 196 (making no distinction between trial and appellate courts).

65. G. HAZARD & W. HODES, *supra* note 17, at 124. Under the American Law Institute analysis, the tension point is reached when a lawyer contemporaneously argues both sides of an unsettled issue of law in the same court on behalf of different clients. RESTATEMENT, *supra* note 55, § 209 comment f, at 196.

66. MODEL RULE 1.7(b) proscribes representation of a client if such representation is "materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983); see Dzienkowski, *supra* note 60, at 13.

67. One legal scholar observed that "the representation might be considered disloyal by clients who, although not directly affected, reasonably believe that a lawyer who benefits from their work should be consistent in his position on issues of interest to them." Parr, *supra* note 64, § 1.05[4], at 1-33; see also G. HAZARD & W. HODES, *supra* note 17, at 124. As Dzienkowski noted, the attorney should counsel both the existing client and the potential client, and make an independent determination on the conflict. Dzienkowski, *supra* note 60, at 13.

68. RESTATEMENT, *supra* note 55, § 209 comment f, illustration 6; 1 G. HAZARD & W. HODES, *supra* note 17, at 148-49; C. WOLFRAM, *supra* note 12, § 7.2.1; Parr, *supra* note 64, § 1.05[4]. See *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 609 (8th Cir. 1977), cert. denied, 436 U.S. 905 (1978); cf. *Estates Theatres, Inc. v. Columbia Pictures Indus., Inc.*, 345 F. Supp. 93, 99 (S.D.N.Y. 1972) (dual representation would be inappropriate). Hazard and Hodes observed:

Although some might say that the spectacle of the same lawyer arguing both sides of the same proposition damages the image of the legal profession, it can also be said that it instead shows the profession at its best. So long as there are non-frivolous legal arguments to be made, lawyers should be proud to acknowledge that as detached professionals they are capable of asserting either side.

1 G. HAZARD & W. HODES, *supra* note 17, at 150. The issue of disqualification, if raised in litigation, is a decision for the court, and consent will not be an absolute assurance that the conflict would be waived by the court. *Kessalhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977); *Greene v. Greene*, 47 N.Y.2d 447, 391 N.E.2d 1355 (1979); 1 R. MALLEN & J. SMITH,

Other examples of possible positional conflicts are: (1) a legal aid office's representation of landlords;⁶⁹ (2) a legal aid office's representation of individual indigents with interests that differ from those of community groups traditionally favored by the office;⁷⁰ (3) a lawyer who represents corporate entities whose business is exploiting natural resources has the opportunity to represent a surface landowner;⁷¹ (4) a lawyer represents banks; a debtor has a dispute with a bank that is not one of the lawyer's clients; the debtor's case presents a good opportunity to narrow the holder in due course rule;⁷² (5) a law firm has an associate who represents a citizen group advocating clean air and opposing strip mining; a coal company wants the firm to serve as general counsel;⁷³ (6) a client labor union wishes to argue for a broad interpretation of a federal law; a corporate client, in another case, wishes to plead for a narrow interpretation of the same federal law;⁷⁴ and (7) a law firm that represents tobacco industry clients and an associate's participation, as part of the firm's pro bono policy, in a Nader-like health group seeking to expand government intervention in general health concerns.⁷⁵

What should a lawyer do when faced with a significant positional conflict? The lawyer should consider the likelihood of the issue being raised in each litigation, the likely impact of a decision in favor of one client on the interests of the positionally opposite client, and the importance of the issue.⁷⁶ The lawyer should counsel the clients, fully disclosing the possible positional conflict, and obtain their consents to representation. Through the use of Model Rule 1.2(c), the attorney might limit representation of one client so as to eliminate the positional conflict.⁷⁷ When the limitation of representation option is unavailable and one client feels strongly that representation of both interests is impossible, the attorney should withdraw from representation of one of the clients.⁷⁸

supra note 11, § 12.13; R. UNDERWOOD & W. FORTUNE, *supra* note 8, § 3.7.2; see RESTATEMENT, *supra* note 55, § 202(1) comment c (discussing nonconsentable conflicts).

69. Breger, *supra* note 55, at 1134.

70. *Id.* For example, the individual indigent wishes to oppose affirmative action in employment.

71. T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 85 (3d ed. 1984); Parr, *supra* note 64, § 1.05[4].

72. 1 G. HAZARD & W. HODES, *supra* note 17, at 147-49.

73. See Legal Ethics Forum, *Dealing With Conflicting Interests Within a Firm*, 67 A.B.A. J. 1692 (1981).

74. 1 G. HAZARD & W. HODES, *supra* note 17, at 142; *cf.* RESTATEMENT, *supra* note 55, § 209 comment f, illustrations 5-6 (lawyer advocating contradictory interpretations of tax rules for different clients).

75. See Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 630 (1985).

76. RESTATEMENT, *supra* note 55, § 209 comment f, illustrations 5-6, at 196 (concluding "whether a conflict exists will require a fact-specific analysis of each situation"); C. WOLFRAM, *supra* note 12, § 7.3.3; Dzienkowski, *supra* note 60, at 11.

77. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(c) (1983) permits an attorney, upon full disclosure and consent of the client, to limit his representation of that client. See *supra* note 49. For example, a law firm heavily involved in representing labor might limit its representation of a corporate client to matters unrelated to labor-management issues. 1 G. HAZARD & W. HODES, *supra* note 17, at 25.

78. See RESTATEMENT, *supra* note 55, § 209 comment f; R. UNDERWOOD & W. FORTUNE, *supra* note 8, §§ 3.4.3, 3.7.1, 3.7.3. The issue then becomes one of serial representation of conflicting interests, governed by MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9

The day has long since passed when a lawyer was viewed as the functional analogue of a taxi driver, whom any client could summon for any trip to any destination within the limits of the law.⁷⁹ Since clients are more possessive of their attorneys' loyalties, positional conflicts, like the more traditional conflicts of interest, must be treated with seriousness by the bar.⁸⁰

III. CANDOR TO THE APPELLATE COURT

The appellate attorney most often faces the twin horns of responsibility to both court and client when grappling with the obligation of candor to the court.⁸¹ This situation represents the most severe tension between the duty to the client and the duty to the court.⁸² The attorney has a dual trust.⁸³ When the two trusts conflict, the duty to the court supersedes the attorney's duty to the client.⁸⁴ The appellate structure provides a number of situations

(1983). In the words of the Oregon Supreme Court, upon the attorney's withdrawal of representation of one client, the conflict would cease to be an "open file" conflict and would become a "closed file" conflict. *In re Brandsness*, 299 Or. 417, 702 P.2d 1098, 1101 (1985); see 1 G. HAZARD & W. HODES, *supra* note 17, at 174-86; C. WOLFRAM, *supra* note 12, § 7.4; Note, *Former-Client Conflicts: The Substantial Relationship Test and the Presumption of Divulgence*, 12 J. LEGAL PROF. 219 (1987); Note, *A Dilemma in Professional Responsibility: The Subsequent Representation Problem*, 50 UMKC L. REV. 165 (1982); Annotation, *Disqualification of Law Firm from Representing Party in Federal Civil Suit Involving Former Client of that Firm*, 56 A.L.R. FED. 189 (1982); Annotation, *Propriety and Effect of Attorney Representing Interest Adverse to That of Former Client*, 52 A.L.R.2D 1243 (1957).

79. 1 G. HAZARD & W. HODES, *supra* note 17, at 124.

80. Positional conflicts are unlikely to be asserted as grounds for disqualification; cases are therefore wanting. See O'Dea, *supra* note 55, at 701 n.32. The lack of case law, however, should not reassure the bar. A positional conflict, especially if undisclosed, could make a client feel that his attorney's vigor in prosecuting his cause was tempered by the interests of the other clients, leading to either malpractice consideration, bar grievance procedures, or simply loss of the client. Dzienkowski, *supra* note 60, at 13; Parr, *supra* note 64, § 1.05[4]. See generally Annotation, *Failure to Communicate with Client as Basis for Disciplinary Action Against Attorney*, 80 A.L.R.3D 1240 (1977) (cases dealing with issue of whether allegations of attorney's failure to communicate are sufficient basis for disciplinary action and what discipline is appropriate).

81. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(a) (1980). Rule 3.3(b) specifically provides that the obligation of candor applies even if disclosure of information otherwise protected by privilege would be required.

82. 1 G. HAZARD & W. HODES, *supra* note 17, at 345.

83. A concise summary of this duty is espoused by one court:

All lawyers admitted to practice undertake a "dual trust": a duty to this Court to observe all appropriate standards of professional conduct and responsibility, and an obligation to their client to advance the client's cause to the best of their ability without allowing any conflicting loyalty or obligation to interfere.

In re Education Law Center, Inc., 86 N.J. 124, 429 A.2d 1051, 1056 (1981); see also *People v. Beattie*, 137 Ill. 553, 27 N.E. 1096 (1891) (attorney disbarred for knowingly allowing client to give false testimony and for wrongfully introducing evidence that would have been inadmissible without client's false testimony); *In re Opinion of the Justices*, 289 Mass. 607, 194 N.E. 313 (1935) (judicial department of government could constitutionally remove disloyal attorneys from the bar).

84. *Steinle v. Warren*, 765 F.2d 95 (7th Cir. 1985); *Cannon v. Loyola Univ.*, 676 F. Supp. 823 (N.D. Ill. 1987); *State v. Kruchten*, 101 Ariz. 186, 417 P.2d 510 (1966); *In re Integration of Neb. State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937); *Fite v. Lee*, 11 Wash. App. 21, 521 P.2d 964 (1974). For example, to avoid fraud on the court, the attorney may disclose confidential communications. *People v. Pickler*, 186 Ill. 64, 57 N.E. 893 (1900) (attorney disbarred for inducing court to allow appeal through posting of appeal bond by people known by

when the appellate lawyer is confronted with choosing between a course of conduct good for the client and a course of conduct true to the court.

A. *Advancing a Moot Appeal*

The client, a manufacturer of widgets, has unsuccessfully litigated a price discount case against one of its retailers. The client's counsel has filed the appropriate papers to perfect the appeal. Briefing has concluded and a decision is expected. The parties then settle. Part of the settlement provides that neither party will disclose to the appellate court the fact of settlement. The client wants a definitive court ruling on the issues presented at trial. The opposing party no longer cares one way or the other. What is the attorney's obligation to the court? The appellate court in question has unequivocally stated that it would not decide moot or fictitious appeals.⁸⁵ Both the Model Code⁸⁶ and the Model Rules direct the attorney not to commit acts fraudulent to the court.⁸⁷

The attorney apparently *does* have an obligation to inform the appellate court of the settlement and seek its determination whether or not the appeal will be dismissed. *Amherst & Clarence Insurance Co. v. Cazenovia Tavern, Inc.*⁸⁸ is very similar to the hypothetical. On appeal, the issue was whether an insurer had an obligation to defend the appellant in an underlying tort action. The underlying action settled. The court rejected any suggestion that the parties could agree to keep a case alive after settlement, stating that attorneys are obliged to keep the court fully informed of all matters pertinent to the appeal and are prohibited from agreeing to keep a moot appeal alive.⁸⁹

Chief Justice Taney stated long ago that the Court should punish attempts

attorney as worthless or fictitious); see 1 G. HAZARD & W. HODES, *supra* note 17, at 345-47; Thurman, *Limits to the Adversary System: Interests that Outweigh Confidentiality*, 5 J. LEGAL PROF. 5 (1980). Professor Freedman would give the attorney-client relationship much more weight. M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 1-8 (1975). Professor Gaetke advances the thesis that despite the broad dicta of the Model Code and the Model Rules, the actual workings and precise formulation of those disciplinary codes accomplish the exact opposite in most cases: the lawyer's obligation to the court is subordinated to his self-interest or the interests of his client. Gaetke, *supra* note 44, at 39; see also *Nix v. Whiteside*, 475 U.S. 157 (1986) (lawyer's conduct of threatening to disclose perjury to court acceptable under sixth amendment); *United States v. Teitler*, 802 F.2d 606 (2d Cir. 1986) (lawyer has duty both to prevent and disclose fraud upon court; in communicating fraud to court lawyer may reveal confidential client information).

85. For a recent discussion of the mootness principle and its underlying policy justifications, see *St. Charles Parish School Bd. v. GAF Corp.*, 512 So. 2d 1165 (La. 1987). See also 13A C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3533 (1984) (§ 3533.10 discusses mootness doctrine on appeal); Greenbaum, *Mootness on Appeal in Federal Courts: A Reexamination of the Consequences of Appellate Disposition*, 17 U.C. DAVIS L. REV. 7 (1983) (discussing when and how mootness applies); Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974) (discussing tension between Supreme Court's desire to decide only those cases where dispute exists and its desire to use mootness to serve other purposes).

86. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7) (1980).

87. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(2) comment (1983) states: "there are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."

88. 59 N.Y.2d 983, 453 N.E.2d 1077, 466 N.Y.S.2d 660 (1983).

89. 453 N.E.2d at 1078. Such agreements are not unique, particularly when one party,

to gain a Court ruling in the absence of a real controversy between litigants.⁹⁰ In *Board of License Commissioners v. Pastore* the Court felt compelled to remind counsel once again of counsel's duty to inform the Court of any development that might affect the outcome of the case.⁹¹ The defendant challenged the revocation of a liquor permit as resulting from evidence discovered during an illegal search. The establishment went out of business. The Court, unaware of this development, granted certiorari and commenced oral argument. During oral argument, the Court learned of the establishment's fate. In dismissing the writ of certiorari as moot the Court tartly observed in its brief per curiam opinion that lawyers must bring such a development to the Court's attention immediately.⁹²

The Louisiana Supreme Court adopted this United States Supreme Court admonition to counsel in *St. Charles Parrish School Board v. GAF Corp.*⁹³ In *GAF* the parties had settled the case, but had stipulated in the settlement that \$10,000 be set aside pending final resolution by the Louisiana Supreme Court. If the state's supreme court affirmed the lower court or refrained from deciding the merits, the school board would get the \$10,000. If the court reversed the lower court, the contractor would retain the \$10,000. An outsider to the settlement informed the court of the settlement after the tribunal had issued its opinion on the merits. On rehearing, the court rejected the argument that the disposition of the \$10,000 prevented application of the mootness doctrine, finding the sum to be an attempt to obtain a decision on an issue settled by the parties.⁹⁴

An ethics opinion of the City Bar Association of New York preceded the Louisiana court's holding.⁹⁵ The opinion instructed that the attorney who

having obtained a favorable settlement, does not care about the impact of a possible adverse precedent for the future, but the other party does.

90. Justice Taney said:

[A]ny attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court.

Lord v. Veazie, 49 U.S. (8 How.) 251, 255 (1849).

91. 469 U.S. 238, 240 (1985).

92. *Id.* The Supreme Court stressed: "When a development after this Court grants certiorari or notes probable jurisdiction could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy, that development should be called to the attention of the Court *without delay.*" *Id.* (emphasis in original).

93. 512 So. 2d 1165, 1173 (La. 1987).

94. *Id.* at 1172-73. The Louisiana Supreme Court described the scheme as "a stake arbitrarily set up in an attempt to have this court continue to litigate what would otherwise be a dead issue." *Id.*

95. N.Y. CITY B.A., Op. 422 (1937), as extracted in O. MARU & R. CLOUGH, *supra* note 37, ¶ 3025; see also *Amherst & Clarence Ins. Co. v. Cazenovia Tavern, Inc.*, 59 N.Y.2d 983, 453 N.E.2d 1077 (1983) (court dismissed action as moot due to settlement agreement); H. DRINKER, *LEGAL ETHICS* 75 (1953) (lawyer may not foist fictitious controversy on court); *cf.* *S & D California Fruit Exch., Inc. v. Gurino*, 783 F.2d 345 (2d Cir. 1986) (attorney sanctioned for not disclosing to appellate court and opposing counsel settlement of case); *Citizen State Bank v. Schneider*, 198 N.J. Super. 518, 487 A.2d 1259, 1260 (Super. Ct. App. Div. 1984) (appellate court acknowledged duty of counsel to inform court promptly of settlement; in this case, counsel delayed notifying court of settlement until day before oral argument scheduled);

had lost the first appeal and had paid the judgment could not appeal to a higher appellate court to get a more authoritative ruling.⁹⁶ The opinion further instructed that the attorneys for the parties may not enter into any agreement to represent the moot case in the higher court.⁹⁷

Sound judicial policy has always favored active controversies with both sides ably represented. A moot case preserved for appeal by agreement might deprive the court of the sharp and adversarial briefing process crucial to appellate decision-making. For example, one party, having achieved a favorable settlement, might have little concern for the ultimate decision of the court. That party might instruct its attorneys to pare down their efforts. The other party, vitally interested in the precedent, would likely go all-out in seeking a favorable decision. The appellate court might be misled into a questionable decision by the disparity of briefing efforts.⁹⁸ One federal court noted the deceitful nature of such an attempt.⁹⁹

B. Statement of Facts and Misquotation

Many appellate rules require that an appellate brief contain a statement of facts.¹⁰⁰ Appellate treatises stress the importance of a well-crafted statement of facts.¹⁰¹ The appellate attorney must give the client the best possible representation, yet comply with the requirement of candor imposed by the courts. As one judge summarized the attorney's obligation:

"It is a minimal requirement to insist that counsel, out of their duty

Annotation, *Participation in Allegedly Collusive or Connived Divorce Proceedings as Subjecting Attorney to Disciplinary Action*, 13 A.L.R.3D 1010 (1967) (cases dealing with disciplinary proceedings against attorneys who participated in allegedly collusive or connived divorce proceedings).

96. N.Y. CITY B.A., Op. 422, *supra* note 95.

97. *Id.*

98. *Cf.* RESTATEMENT, *supra* note 55, § 202 comment b, at 33 (concerning lack of ability of client to consent to the lawyer representing opposing parties in litigation). "An independent ground for prohibiting conflicts in matters before courts and similar tribunals is to assure that such matters are presented vigorously and with fair development of each client's position." *Id.* For similar reasons, courts have placed strict constraints on the validity of "Mary Carter" agreements, in which plaintiff and fewer than all defendants secretly agree to limit the financial liability of the agreeing defendants who nonetheless remain in the case. Such agreements can distort the adversary process. *Lum v. Stinnett*, 87 Nev. 402, 488 P.2d 347 (1971). *See* R. UNDERWOOD & W. FORTUNE, *supra* note 8, § 8.8; Note, *Mary Carter Agreements: The Unsolved Evidentiary Problems in Texas*, 40 BAY. L. REV. 449 (1988); Note, *Mary Carter Agreements: Unfair and Unnecessary*, 32 SW. L.J. 779 (1978); Annotation, *Validity and Effect of Agreement With One Cotortfeasor Setting His Maximum Liability and Providing for Reduction or Extinguishment Thereof Relative to Recovery Against Non-Agreeing Cotortfeasor*, 65 A.L.R.3D 602 (1975).

99. The court stated "[i]t is one thing to argue that a settlement does not moot a particular case; it is quite another to promote an advisory opinion by disguising a settlement in order to hide it from the court's consideration." *Douglas v. Donovan*, 704 F.2d 1276, 1280 (D.C. Cir. 1983).

100. *See, e.g.*, FED. R. APP. P. 28(a); CAL. CT. R. 13; FLA. R. APP. P. 9.210(b)(3); ILL. SUP. CT. R. 341(e)(6); IOWA. R. APP. P. 14(a)(4); MINN. R. CIV. APP. 128.02(1)(c); OKLA. SUP. CT. R. 15.

101. *See, e.g.*, M. HOUTS & W. ROGOSHESKE, ART OF ADVOCACY-APPEALS § 30 (1988); R. LYNN, *supra* note 8, § 9.9; R. MARTINEAU, *supra* note 16, § 11.6; R. STERN, *supra* note 13, § 37.20; F. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS § 23 (1967).

to the court, shall not deliberately make misstatements of facts." In his dealings with the appellate court, an attorney should always make full disclosures and never seek to mislead it into unnecessary action through artifice or concealment. The court is entitled to a fair statement of the facts on both sides, not an exaggerated self-serving version or a version omitting material facts.¹⁰²

Attorneys sometimes run afoul of ethical rules when quoting case law. Attorneys must take care when selecting or editing quotations, which must fairly reflect the case and should not be lifted out of context. As Canon 22 of the old Canons of Professional Ethics¹⁰³ of the American Bar Association provides:

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed.

Courts often express displeasure upon catching on to counsel's games. One court, upon discovering counsel selectively editing a crucial statement of governing law from the New York Court of Appeals, exclaimed, "we do not like some of the tricks of advocacy indulged in by counsel for appellant to lend apparent substance to its position."¹⁰⁴ Perhaps because of the adversarial nature of the system, lawyers sometimes cross the fine line between forcefully presenting the client's case and misleading the court. A few examples demonstrate the point.

102. Seidenfeld, *supra* note 8, at 275 (quoting *Zechman v. Zechman*, 391 Ill. 510, 521, 63 N.W.2d 499, 504 (1945)). An early ethics author stated the point even more forcefully:

An even more flagrant dereliction is presented when counsel garbles, distorts or knowingly misquotes the language of a statute, decision or text-book, and this offense is by no means uncommon. An attorney who stoops to such low artifices not only deserves the severest censure but is positively unworthy to mingle with honest men in the practice of law. A similar infraction of the ethical code occurs where counsel knowingly misquotes the contents of a document, the testimony of a witness or the language or argument of opposing counsel. No honorable attorney will ever be guilty of the foregoing or kindred deceitful practices, and persons resorting thereto should be subjected to discipline.

G. WARVELLE, *ESSAYS IN LEGAL ETHICS* 196-97 (2d ed. 1902).

103. The Canons of Professional Ethics were adopted by the ABA in 1908 and were applied, as amended, until the adoption of the Model Code of Professional Responsibility in 1969. For discussions of the Canons, see H. DRINKER, *MODERN LEGAL ETHICS* (1953); Smith, *The Texas Canons of Ethics Revisited*, 18 BAYLOR L. REV. 183 (1966); Sutton, *Guidelines to Professional Responsibility*, 39 TEX. L. REV. 391 (1961); Wright, *A Study of the Canons of Professional Ethics*, 1 CATH. LAW. 323 (1965); Sutton, *A Re-evaluation of the Canons of Professional Ethics*, 33 TENN. L. REV. 129 (1966). The Canons were adopted largely from earlier canons of the Alabama Bar Association, which in turn were derived from Hoffman's Fifty Resolutions. See Akers, *Hoffman's Fifty Resolutions*, 14 ALA. LAW. 171 (1953); Jones, *The Canons of Professional Ethics: Their Genesis and History*, 7 NOTRE DAME LAW. 483 (1932); Jones, *First Code of Legal Ethics Adopted in the United States*, 8 A.B.A. J. 111 (1922).

104. *Griffin Wellpoint Corp. v. Munro-Langsroth, Inc.*, 269 F.2d 64, 67 (1st. Cir. 1959). Underwood & Fortune identify several categories of candor violations: (1) misrepresentation of what a case holds; (2) distortion of case law or statute law; (3) nondisclosure or misstatement of critical facts, and (4) statements of purported fact unsupported by the record. R. UNDERWOOD & W. FORTUNE, *supra* note 8, § 8.5.

In *McCandless v. Great Atlantic & Pacific Tea Co., Inc.*¹⁰⁵ an attorney appealed an order directing him personally to pay \$1,000 of defendant's attorney's fees. The court of appeals affirmed the district court's finding that the attorney had not litigated in good faith.¹⁰⁶ In support of the district court's finding, the appellate court noted that counsel had misquoted and thus misrepresented a case by omitting a sentence that undercut his position.¹⁰⁷ In *Bankers Trust Co. v. Publicker Industries, Inc.*¹⁰⁸ the court found an appeal frivolous, partially because the appellant had quoted a portion of the jury charge entirely out of context and with a misleading elision.¹⁰⁹ In *Quality Molding Co. v. American National Fire Insurance Co.*¹¹⁰ the court discovered a misstatement. Appellate counsel had omitted a critical passage from a quote and had placed a period in the quote where one in fact did not exist, both of which problems had first appeared in the trial court brief and had been pointed out to trial counsel.¹¹¹ Because appellate counsel had not conducted the trial, the court gave him the benefit of the doubt concerning his knowledge of the misquotation and declined to impose sanctions.¹¹²

Quality Control also illustrates another important point. Attorneys must beware of lifting material from briefs that they have not prepared. Attorneys must at least read the cases to assure themselves that they are cited accurately. Other courts might not be as forgiving as the Seventh Circuit.¹¹³

105. 697 F.2d 198 (7th Cir. 1983).

106. *Id.* at 202.

107. *Id.*

108. 641 F.2d 1361 (2d Cir. 1981).

109. *Id.* at 1366.

110. 287 F.2d 313 (7th Cir. 1961).

111. *Id.* at 316.

112. *Id.* at 315-16; *see also* *Beam v. IPCO Corp.*, 838 F.2d 242, 249 (7th Cir. 1988) (criticizing attorney for misrepresenting concurring opinion of state supreme court as "particularly instructive," when the basis of that concurring opinion was rejected by the majority opinion; court declined, however, to impose sanctions); *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.) (awarding portion of double costs and fees personally against attorney in part for attorney's serious misstatement of governing Illinois law), *cert. denied*, 479 U.S. 851 (1986); *Malhiot v. Southern Cal. Retail Clerks Union*, 735 F.2d 1133, 1138 (9th Cir. 1984) (awarding damages of \$1,500 under 28 U.S.C. § 1927 because briefs contained intentional misstatement of California law); *Siple & Orrock v. Rechnitzer (In re M.B.K., Inc.)*, 92 Bankr. 429, 436 (Bankr. C.D. Cal. 1987) (sanctioning attorney and client \$3,200 for misusing citations); *In re Murray*, 216 Ind. 295, 24 N.E.2d 288, 289 (1939) (suspending attorney from practice before Indiana Supreme Court for modifying transcript without proper approval); *Sobol v. Capital Management Consultants*, 102 Nev. 444, 726 P.2d 335, 337 (1986) (sanctioning attorney \$5,000 in part for citing language in federal case as if from majority when quoted language was from dissent); *In re Huggins*, 168 Okla. 91, 31 P.2d 944, 947 (1934) (disbarring attorney for preparing falsified transcript); *Orleck v. Nemtzow*, 59 R.I. 284, 195 A. 234, 240 (1937) (cautioning attorney about alleged quotation from case, which upon examination "was a combination of disconnected phrases from widely separated parts of that opinion, without indicating intervening omissions"); *Grogen v. State*, 745 S.W.2d 450, 451 (Tex. App.—Houston [1st Dist.] 1988, no writ) (referring attorney who misstated holdings of cases to Texas Disciplinary Review Committee); *Uviller, supra* note 8, at 731-33 (questioning liberal use of conflicting authorities, mislabeling case significance, and misstating holding of case).

113. *E.g.*, *Pravic v. U.S. Industries-Clearing*, 109 F.R.D. 620, 622-23 (E.D. Mich. 1986) (rule 11 sanctions appropriate where attorney relied entirely on inaccurate memorandum prepared by law firm representing co-defendant in state court case; of the two cases cited in memorandum, one was overruled and the other was not on point); *see also* R. LYNN, *supra* note 8, §§ 9.2-.3 (advising attorneys to check others' research).

Selective cropping of the record is also unethical. In *Amstar Corp. v. Envirotech Corp.*¹¹⁴ Envirotech had deleted portions from the prosecution history in order to bolster its claim. The deleted portions totally undermined Envirotech's argument. "Distortion of the record, by deletion of critical language in quoting from the record, reflects a lack of the candor required by the Model Rules of Professional Conduct, Rule 3.3 (1983) . . ."¹¹⁵ The court ordered Envirotech to pay double costs.¹¹⁶

Similarly, in *Frausto v. Legal Aid Society*¹¹⁷ the appellant's attorney had selectively edited the district court's remarks to make it appear that the district court was prejudiced against Mexican-Americans. The Ninth Circuit, in commenting on appellate counsel's performance, set forth the behavior expected of appellate counsel:

It is appellate counsel's professional duty to be scrupulously accurate in referring to the record and the authorities upon which he relies in his presentation to the court in his brief or oral argument. He must not mislead the court by misrepresenting the record. Vigorous representation is admirable, but it does not permit misrepresentation.¹¹⁸

Two particularly blatant examples of cropping illustrate the need for ethical conduct by the attorney. Courts especially need factual candor in emergency or ex parte proceedings, where a detailed examination of the record

114. 730 F.2d 1476 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 924 (1984).

115. 730 F.2d at 1486.

116. *Id.*

117. 563 F.2d 1324 (9th Cir. 1977).

118. *Id.* at 1327 n.8; *see also* *Mays v. Chicago Sun-Times*, 865 F.2d 134, 139-40 (7th Cir. 1989) (sanctioning attorney in part for falsely asserting prior hiring practices had been previously cited by appellate court as disgraceful); *Thornber v. Fort Walton Beach*, 534 So. 2d 754, 755-56 (Fla. Dist. Ct. App. 1988) (publicly reprimanding attorney for attempting to use appellate rule allowing inclusion of matter outside of record created below into record); *Zechman v. Zechman*, 391 Ill. 510, 63 N.E.2d 499, 504 (1945) (criticizing attorney for preparing misleading abstract of record); *Fogel v. Hodes*, 68 Ill. App. 3d 594, 386 N.E.2d 389, 393-94 (1979) (dismissing appeal because defendants, in preparing abstract of record, omitted much of the testimony favorable to plaintiff); *Ashbaugh v. State*, 272 Ind. 557, 400 N.E.2d 767, 772 (1980) (urging care by attorneys in quoting record after important portions of record purported to be quoted omitted material without indication of such omission, resulting in incomplete presentation of the issue); *Lopizzo v. Burke*, 198 N.J. Super. 359, 486 A.2d 1322, 1324 (Super. Ct. App. Div. 1985) (censuring plaintiff's attorney for intentionally omitting from appellate index copies of letters damaging to plaintiff's appeal cited by trial court in its decision); *Texas Comm. on the Interpretation of the Canons of Ethics*, Op. 189 (1959), *published in* 18 BAYLOR L. REV. 283-84 (1966) (improper to misrepresent facts to the court); *N.Y. COUNTY B.A. Op.* 40 (1914), *digested in* O. MARU & R. CLOUGH, *supra* note 37, ¶ 1655 (statements likely to mislead court should be avoided); *cf. In re Murray*, 216 Ind. 295, 24 N.E.2d 288, 289 (1939) (suspended and reprimanded attorney for modifying transcript without proper approval); *In re Huggins*, 168 Okla. 91, 31 P.2d 944, 947 (1934) (disbarred attorney for preparing falsified transcript).

below is impractical.¹¹⁹ In *State v Weinstein*¹²⁰ the realtors sought to prohibit a particular judge from proceeding in a case. The court of appeals had issued a preliminary writ of prohibition. The court had based its decision on realtors' petition, which seemed to establish that the circuit court lacked jurisdiction because of an apparent defective summons served upon the realtors. The parties did not inform the court of appeals at the time of issuance of the preliminary writ that realtors had made a general entry of appearance and a request that the circuit court permit realtors' counsel to examine certain files. After full consideration of the case, the court of appeals discovered the existence of the general appearance. The court then expressed its displeasure at counsel's conduct:

Had we been so informed [of the entry of appearance] our Preliminary Writ of Prohibition would not have been issued and thus the writing of this opinion would have been unnecessary and the consequent delay in the Juvenile Court proceeding would have been avoided We think it was the responsibility and duty of realtors' attorney to give us a frank and complete resume of all the actions he had taken in the Juvenile Court proceeding¹²¹

In *Addison v. Brown*¹²² the court had scheduled criminal defendants for trial. By petition filed with the appellate court a few days before the trial was to have commenced, the defendants sought to prohibit the trial, alleging a violation of the Florida speedy trial rule. The appellate court ordered the state to respond. That order served as a stay of the trial. Upon receiving the state's response, the court learned that defendants had obtained at least three continuances and had waived speedy trial. The appellate court found the breach of professional conduct unintentional.¹²³ The court did, however, remand for assessment of fees against the attorney for the defendants, along with costs incurred by the state in summoning and paying witnesses and veniremen for scheduled trial.¹²⁴ Noting the emergency nature of the relief requested, the court stated:

[T]his [the obligation of candor] is especially important when the relief requested is urgently sought and the time insufficient to allow the opposition to present a response Therefore, where a last minute petition

119. Model Rule 3.3(d) imposes a higher burden on counsel in ex parte proceedings to inform the court fully of all known material facts necessary for an informed decision, whether the facts are adverse or not. See *In re State v. Dear*, 532 So. 2d 902, 904 (La. Ct. App. 1988) (full disclosure required of all relevant facts in an ex parte proceeding); *In re Adoption No. 85365027*, 71 Md. App. 362, 525 A.2d 1081, 1086 (1987); 1 G. HAZARD & W. HODES, *supra* note 17, at 349; cf. *Trigg v. Criminal Court*, 234 Ind. 609, 130 N.E.2d 461, 464 (1955) (counsel perpetuated fraud on Indiana Supreme Court by presenting petition for writ of prohibition containing misrepresentations and referring matter to disciplinary committee). The Model Code is silent on the matter.

120. 411 S.W.2d 267 (Mo. Ct. App. 1967).

121. *Id.* at 274-75. Although *Weinstein* was not an ex parte proceeding, the emergency nature of the preliminary relief probably made any detailed examination of the record below impracticable.

122. 413 So. 2d 1240 (Fla. Dist. Ct. App. 1982), *aff'd per curiam sub nom.* *Lubin v. District Court of Appeal*, 428 So. 2d 663 (Fla. 1983).

123. 413 So. 2d at 1241.

124. *Id.*

is filed it is mandatory that counsel not only act in good faith, but that the petition and the attached appendix accurately and completely reflect all factual matters which may affect this court's decision.¹²⁵

Making false statements not supported by the record below is also unethical. The court will ultimately discover the fraud perpetrated on it; thus such behavior is also poor strategy.¹²⁶ In *In re Chakeres*,¹²⁷ a disciplinary proceeding, the New Mexico Supreme Court publicly censured an attorney for representing to the appellate court at four different times that certain casualty testimony was uncontroverted.¹²⁸ At the proceeding, the attorney acknowledged that the testimony on the casualty issue was inconsistent. In *Loza v. State*¹²⁹ appellant's assertion that he had challenged certain instructions given below troubled the Indiana Supreme Court. Upon reviewing the record, the court found no such challenge.¹³⁰ In *DCD Programs, Ltd. v.*

125. *Id.*

126. *Sigmond v. Brown (In re Boucher)*, 837 F.2d 869 (9th Cir.), *modified*, 850 F.2d 597 (9th Cir. 1988). The court in *Sigmond* observed: "Misrepresentation of the record on appeal is poor strategy. Alert opponents will detect the error. An appellate panel of three judges assisted by a staff of able law clerks will confirm what the opponents point out or will itself uncover the defects." *Id.* at 871. The Indiana Supreme Court reiterated the same point in *Cooper v. State*, 261 Ind. 659, 309 N.E.2d 807 (1974), noting that "[w]hen the Court finds that it can not rely upon the statement of a lawyer, the lawyer has lost his effectiveness with the Court and has therefore, in fact, injured his client." *Id.* at 808; *see also* Medina, *Discretionary Review in the Oklahoma Supreme Court: A Practical Guide to the Exercise of the Court's Certiorari Jurisdiction*, 13 OKLA. CITY U.L. REV. 257, 274 (1988) (recommending attorneys state facts accurately and fairly).

127. 101 N.M. 684, 687 P.2d 741 (1984).

128. 687 P.2d at 742.

129. 263 Ind. 124, 325 N.E.2d 173 (1975).

130. 325 N.E.2d at 179. The *Loza* court commented: "We are greatly disturbed by what appears to be a growing tendency among a number of lawyers to be careless, if not deliberately misleading, in their representations to the Court through their briefs." *Id.*; *see also* *Holcomb v. Colony Bay Coal Co.*, 852 F.2d 792, 797 (4th Cir. 1988) (imposing double costs on attorney for intentionally misstating the record in both briefs and in oral argument); *Borowski v. DePuy, Inc.*, 850 F.2d 297, 304-05 (7th Cir. 1988) (sanctioning attorney for misrepresenting to appellate court filing status of deposition testimony); *Sigmond v. Brown (In re Boucher)*, 837 F.2d 869, 871 (9th Cir.) (suspending attorney for six months as sanction for numerous misrepresentations in appellate brief), *modified*, 850 F.2d 597 (9th Cir. 1988) (revoking suspension on rehearing and instead censoring because of youth and inexperience); *In re Curl*, 803 F.2d 1004, 1007 (9th Cir. 1986) (imposing public admonishment for unintentional mischaracterization that Mexican judgment was entered in client's favor); *Herzfeld & Stern v. Blair*, 769 F.2d 645, 647 (10th Cir. 1985) (imposing fees against appellant's attorney in part for many instances where his references to record were contrary to what was actually found in record); *Optical Eyewear Fashion Int'l Corp. v. Style Cos.*, 760 F.2d 1045, 1052 (9th Cir. 1985) (court, "af-fronted" by counsel's misrepresentation of the facts during oral argument, awarding double costs and fees jointly against attorney and his client); *Medina v. Chase Manhattan Bank*, 737 F.2d 140, 145 (1st Cir. 1984) (holding punitive sanctions appropriate for misstatements and misrepresentations in appellate brief); *In re Mascolo*, 505 F.2d 274, 278 (1st Cir. 1974) (warning attorney brief replete with statements of purported fact not supported by or actually contradicted by record violates Canons of Code of Professional Responsibility); *Hutchins v. Hutchins*, 501 So. 2d 722, 723 (Fla. Dist Ct. App. 1987) (ordering attorneys personally to pay \$300 fee to opposing counsel for misrepresenting facts concerning invocation of fifth amendment privilege); *People ex rel. Morris v. Moutray*, 166 Ill. 630, 47 N.E. 79, 81 (1897) (disbarring attorney for willfully altering bill of exceptions and relying on altered bill of exceptions on appeal); *Cooper v. State*, 261 Ind. 659, 309 N.E.2d 807, 808 (1974) (criticizing attorney for making unwarranted characterization of facts as uncontroverted); *State ex rel. Attorney General v. Harber*, 129 Mo. 271, 31 S.W. 889, 900 (1895) (disbarring attorney for falsifying transcript); *Sobol v. Capital Management Corp.*, 102 Nev. 444, 726 P.2d 335, 337 (1986) (imposing

Leighton,¹³¹ the Ninth Circuit suspended an attorney from practice for two months for negligently misrepresenting the record.¹³² The appeal involved the lower court's denial of a motion for leave to file an amended complaint. The issue centered on whether the district court had given reasons for its denial. Absent specific reasons, the lower court would have abused its discretion in denying the motion. The attorney for the appellee represented on both oral argument and in briefs that the court below had specifically found no just reason for delay. The lower court did not direct that finding, however, to the denial of the motion for leave to amend. Rather, the finding concerned the district court's certification under Federal Rule of Civil Procedure 54(b), which permits an immediate appeal. Finding a violation of ethical rules and citing Federal Rule of Appellate Procedure 46(c),¹³³ the court summarized the appellate counsel's burden: "[C]ounsel's professional duty requires scrupulous accuracy in referring to the record. A court should not have to pour over an extensive record as an alternative to relying on counsel's representations. The court relies on counsel to state clearly, candidly, and accurately the record as it in fact exists."¹³⁴

Counsel must also be careful when stating the facts of the case not to assert inferences as facts. Attorneys may properly assert the inferences, but they may not clothe such inferences in the garb of facts.¹³⁵ In addition, when lifting material from published sources, such as law review articles, counsel should identify the source. The Indiana Supreme Court, after finding that appellate counsel had lifted, without attribution, ten pages of an ALR annotation, observed that "[a] brief is not a document thrown together without either organized thought or intelligent editing on the part of the brief-writer."¹³⁶

sanctions for misrepresenting stipulated fact); *Cornell v. Albuquerque Chem. Co.*, 92 N.M. 121, 584 P.2d 168, 171 (1978) (holding that if counsel makes false statements in brief, he is guilty of misconduct); *Merl v. Merl*, 128 A.D.2d 685, 686, 513 N.Y.S.2d 184, 185 (1987) (admonishing attorney for briefs containing fabricated facts and material); *In re Norton*, 106 Utah 179, 146 P.2d 899, 900-01 (1944) (suspending attorney for intentionally misrepresenting to supreme court exhibit one had been admitted into evidence instead of offered and refused).

131. 846 F.2d 526 (9th Cir. 1988).

132. *Id.* at 528.

133. The rule provides:

A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

FED. R. APP. P. 46(c).

134. 846 F.2d at 528; see also *Mays v. Chicago Sun-Times*, 865 F.2d 134, 139-40 (7th Cir. 1989) (sanctioning attorney \$1,000 under FED. R. APP. P. 46(c) for representing in brief disputed facts as undisputed facts).

135. *In re Greenberg*, 15 N.J. 132, 104 A.2d 46, 47 (1954); see also *In re Kelly*, 808 F.2d 549, 552 (7th Cir. 1986) (making same point concerning facts alleged in a recusal affidavit).

136. *Frith v. State*, 325 N.E.2d 186, 189 (Ind. 1975). In a similar view, an Illinois appellate court observed that "[t]he appellate court is not a depository in which the appellant may dump the burden of argument and research." *Thrall Car Mfg. Co. v. Lindquist*, 145 Ill. App. 3d 712, 495 N.E.2d 1132, 1137 (1986); cf. Comment, *Plagiarism in Legal Scholarship*, 15 U. Tol. L. Rev. 233 (1983) (discussing *In re Lamberis*, 93 Ill. 2d 222, 443 N.E.2d 549 (1982), where an attorney was disbarred for plagiarizing his master's thesis).

C. Disclosure of Adverse Legal Precedent

A more painful dilemma seldom confronts the appellate lawyer. The following hypothetical illustrates the problem: The attorney represents the appellee in a case in the Tenth Circuit Court of Appeals, where Oklahoma substantive law provides the rule of decision. The appellant has already filed a brief, and incredibly, has missed a decision by the Oklahoma Supreme Court that addresses nearly identical issues on similar facts; the case strongly favors the appellant on one of the issues. The appellee's counsel is preparing the answer brief. Does the appellee's attorney disclose the case to the court and the appellant? The answer is: *Yes, the appellee's attorney is ethically compelled to disclose the adverse precedent.*¹³⁷

Although the contours of the obligation have changed somewhat, the basic duty of disclosure of adverse precedent¹³⁸ is longstanding,¹³⁹ if not always followed.¹⁴⁰ In ABA Formal Opinion 146, the ABA Committee of

137. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(B)(1) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (1983). For a general discussion, see 1 G. HAZARD & W. HODES, *supra* note 17, at 352-53; R. UNDERWOOD & W. FORTUNE, *supra* note 8, § 8.5. In addition, local court rules might, independently of the ethical regulations, require disclosure. See, e.g., Scarborough Constructors, Inc. v. Pace Constr. Corp., 685 F. Supp. 1222 (M.D. Fla. 1988) (holding counsel had duty under Local Court Rule 104(c) to bring promptly to the court's attention the existence of any other similar case or proceeding pending before any other court). In stark contrast are both the Model Code's and the Model Rule's omissions of any corresponding duty to disclose adverse facts. See C. WOLFRAM, *supra* note 12, § 12.8; Gaetke, *supra* note 3, at 88-89; Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1057-59 (1975); Freedman, *Arguing the Law in An Adversary System*, 16 GA. L. REV. 833 (1982); Hazard, *Arguing the Law: The Advocate's Duty and Opportunity*, 16 GA. L. REV. 821 (1982); Smith & Metzloff, *The Attorney As Advocate: Arguing the Law*, 16 GA. L. REV. 841 (1982); Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575, 585-86 (1961); Turnstall, *Ethics in Citation: A Plea for Re-Interpretation of a Canon*, 35 A.B.A. J. 5 (1949); Weinstein, *Judicial Notice and the Duty to Disclose Adverse Information*, 51 IOWA L. REV. 807, 808-14 (1966); Comment, *The Duty to Disclose Adverse Cases*, 17 ALA. L. REV. 331 (1965) [hereinafter Comment, *The Duty to Disclose*]; Panel Discussion, *Problems in Litigation*, 31 CANADIAN B. REV. 503, 506-08 (1953); Note, *The Attorney's Duty of Disclosure*, 31 ST. JOHN'S L. REV. 283 (1957) [hereinafter Note, *The Attorney's Duty*].

138. The obligation to cite adverse precedent is not limited to court cases. Indeed, the obligation to refer to ordinances, regulations, and administrative rulings is probably more important to the principles of Model Rule 3.3 as the court is less likely to discover these sorts of authority on its own. 1 G. HAZARD & W. HODES, *supra* note 17, at 353. There is, however, no obligation to cite all the authority in support of your position. *Southern Pac. Transp. Co. v. Public Util. Comm'n*, 716 F.2d 1285, 1291 (9th Cir. 1983), *cert denied*, 466 U.S. 936 (1984).

139. See Weinstein, *supra* note 137, at 810; Comment, *The Duty to Disclose*, *supra* note 137, at 331-33; Note, *The Attorney's Duty*, *supra* note 137, at 291-92.

140. See T. MARVELL, *APPELLATE COURTS AND LAWYERS* 136-37 (1978) (disclosure of damaging adverse authority "not done very often"); Broshnahan & Broshnahan, *The Attorney's Ethical Conduct During Adversary Proceedings*, in *PROFESSIONAL RESPONSIBILITY: A GUIDE FOR LAWYERS* 143, 164 (1978) ("There may be no more neglected or widely ignored ethical obligation in the Code of Professional Responsibility than that requiring an attorney to share his knowledge of the law with the court and his opponent."); Smith & Metzloff, *supra* note 137, at 849 ("Most practitioners have cited material under the existing rule infrequently."); Turnstall, *supra* note 137, at 5 ("I doubt whether there is a day in the year, or a court in the country, in which this ruling [Opinion 146 of the ABA] is not habitually violated."); Comment, *The Duty to Disclose*, *supra* note 137, at 336-67 ("At this time most lawyers do not volunteer adverse decisions to the court, and most attorneys would not feel that they should, except, perhaps, in the one case out of a thousand where the facts, and the law, and the jurisdiction are absolutely in point."). Of course, the fact that other attorneys disre-

Professional Ethics and Grievances ruled that an attorney must advise the court of adverse decisions of which the attorney is aware and opposing counsel is not.¹⁴¹ The attorney may, of course, challenge the decision's soundness.¹⁴² The opinion left many questions unanswered, such as: (1) what level of court decisions must be reported—appellate or trial decisions? (2) from what jurisdiction? (3) how adverse must the case be—i.e., how closely on point?

Opinion 146 prompted much soul-searching in the legal community. A 1949 American Bar Association Journal article¹⁴³ directly challenged the opinion's logic and precedential undergirding.¹⁴⁴ The article focused on the attorney's role as an advocate, rather than as an umpire.¹⁴⁵ Additionally, the article proposed narrowing the duty of disclosure to controlling decisions. The author did not, however, clearly define the term "controlling decision."¹⁴⁶

Shortly thereafter, the ABA Committee reconsidered Opinion 146. In Opinion 280, the Committee reaffirmed the central holding of Opinion 146 and rejected any limitation to controlling authorities.¹⁴⁷ The Committee limited the obligation to directly adverse cases and significantly clarified Opinion 146.¹⁴⁸ The Committee further observed that when attorneys can find no local law, doubts should be resolved in favor of disclosure of out-of-state cases. The Committee noted that a proper determination of whether the attorney should disclose the precedent requires consideration of three

gard a particular ethical rule does not sanction an attorney's disregard. *In re Wetzel*, 143 Ariz. 35, 691 P.2d 1063, 1072-73 (1984), *cert. denied*, 469 U.S. 1213 (1985); *In re Information*, 351 Ill. 206, 184 N.E. 332, 340 (1933); *An Attorney v. State Bar Ass'n*, 481 So. 2d 297, 300 (Miss. 1985); *In re Kamp*, 40 N.J. 588, 194 A.2d 236, 242 (1963); *In re Rothman*, 12 N.J. 528, 97 A.2d 621, 630 (1953); *In re Meck*, 51 Ohio App. 237, 200 N.E. 478, 480 (1935); OKLA. B.A., Op. 23 (1932), *digested in* O. MARU & R. CLOUGH, *supra* note 37, ¶ 3626.

141. ABA Comm. on Professional Ethics and Grievances Formal Op. 146 (1935) [hereinafter ABA Formal Op. 146]. The Committee was construing Canon 22 of the Canons of Professional Ethics, which did not specifically address the point. C. WOLFRAM, *supra* note 12, § 12.8, at n.97.

142. ABA Formal Op. 146, *supra* note 141.

143. Turnstall, *supra* note 137, at 5.

144. *Id.*

145. *Id.* at 6.

146. *Id.* at 7. In discussing the applicability of the British precedents, Turnstall pointed out the unitary feature of the British judicial system, as distinguished from the American dual federal-state system. He was unclear as to whether he viewed the federal court system as one jurisdiction. Furthermore, the article did not resolve the issue of whether "controlling authorities" included lower court cases of the particular jurisdiction, or just decisions of the jurisdiction's court of last resort. Turnstall's argument was explicitly rejected in the influential New Jersey Supreme Court decision of *In re Greenberg*, 15 N.J. 132, 104 A.2d 46, 48-49 (1954).

147. 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.

ABA Comm. on Professional Ethics and Grievances, Formal Op. 280 (1949) [hereinafter ABA Formal Op. 280].

148. Opinion 146 (ABA Formal Op. 146, *supra* note 141) was ambiguous on this point. ABA Formal Opinion 280 analyzed Opinion 146 and concluded that the intention was to limit the disclosure obligation to "directly adverse" decisions.

questions: (1) whether the overlooked decision is one that the court clearly should take into account in deciding the case; (2) whether in failing to disclose the decision the lawyer, in the eyes of a judge, would lack candor and would be viewed as acting unfairly to the court; and (3) whether the judge could consider himself or herself misled by the lawyer.¹⁴⁹

Opinion 280 did not, however, directly address the issues of jurisdiction and court level. Opinion 280's broad disclosure requirement led to criticism, and the Model Code, adopted in 1970, significantly curtailed the disclosure obligation.¹⁵⁰ Disciplinary Rule 7-106(B) required a lawyer to disclose to the court only: "(1) 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."¹⁵¹ No requirement to disclose cases from outside the controlling jurisdiction remained.¹⁵² This duty, although less

149. ABA Formal Op. 280, *supra* note 147, at 260.

150. Pye, *The Role of Counsel in the Suppression of Truth*, DUKE L.J. 921, 939 (1978).

151. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(B) (1980); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-23 (1980) (discussing importance of tribunal being fully informed if it is to make a fair decision):

The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. 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.

152. Freedman, *Arguing the Law in an Adversary System*, 16 GA. L. REV. 833, 835 (1982); Pye, *supra* note 150, at 939; Uviller, *supra* note 8, at 734-35. *But see* Stoddard v. Ling-Temco-Vought, Inc., 513 F. Supp. 314 (C.D. Cal. 1980), *remanded for further consideration sub nom.* Ashland v. Ling-Temco-Vought, Inc., 711 F.2d 1431 (9th Cir. 1983) (criticizing counsel for citing only the one stray case supporting their position while not disclosing the four federal and four state cases to the contrary). In *Stoddard* none of the cases were from the controlling jurisdiction. The court recognized that counsel's action did not violate the letter of the Model Code, but was of the view that the Model Code's spirit was violated. In citing the one outside case counsel made an implied representation, the court felt, that the counsel knew of no adverse authority. The court cited ABA Formal Opinion 280 for its conclusion. *Id.* at 325 n.3. In *Estate of Oskey v. United States*, 695 F. Supp. 422, 425-26 (D. Minn. 1988), the court found that the counsel for the Internal Revenue Service (IRS) had breached his obligation to the court by not disclosing the one case on point, a case from Colorado in which current counsel had also represented the IRS. The court did not inquire as to whether that obligation was limited to cases from the controlling jurisdiction and what the controlling jurisdiction in federal tax cases should include. It may well be that as the cases evolve, courts will impose a broader disclosure obligation on attorneys representing governmental agencies that are frequently in court and which thus create and have access to a substantial amount of unpublished case law. *See* Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeal*, 87 MICH. L. REV. 940, 946-55 (1989) (concluding access to unpublished opinions significant government advantage); Weinstein, *supra* note 137, at 810 (government attorney's special position makes duty to disclose quite clear). The alternative to invoking a higher professional standard for government lawyers could be to use the Freedom of Information Act to obtain unpublished decisions involving the government. *See* United States Dep't of Justice v. Tax Analysts, 57 U.S.L.W. 4925, 4930 (U.S. June 23, 1989) (tax publisher entitled to use Freedom of Information Act to obtain all district court tax opinions received by Justice Department). Of course, should the court inquire of adverse authority outside the controlling jurisdiction, the attorney then has an obligation to reveal those adverse decisions known to him. MODEL RULES OF PROFESSIONAL CONDUCT

onerous, required the attorney to disclose authority that might greatly damage a client's case.¹⁵³ The rule also clarified that the obligation extended to all legal authority, not just to decisions of the jurisdiction's highest court.

After some initial attempts to broaden the disclosure rule,¹⁵⁴ the drafters of the Model Rules elected to abide by the standards set forth in DR 7-106(B)(1).¹⁵⁵ Thus, Model Rule 3.3(a)(3) requires the 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."¹⁵⁶ A recent informal ABA opinion¹⁵⁷ interpreted the disclosure obligation of Model Rule 3.3(a)(3). A trial court had decided an issue of first impression in the state in favor of the plaintiffs. Subsequent to that decision, and while the litigation was still pending, an intermediate appellate court of that state handed down a decision on the issue of first impression. The appellate decision could be reached two ways, one of which was in direct contradiction to the trial court's action. The appellate court did not have direct jurisdiction over the trial court, but its decisions were controlling until the trial court's own intermediate appellate court ruled on the issue. The plaintiffs' counsel learned of the decision and inquired of the Committee whether he could wait until (1) the appellate process had concluded in the other case (i.e., until discretionary review was either granted or denied by the state supreme court) or (2) the defendant's attorney revived the issue. The Committee, after reviewing its earlier Formal Opinions 146 and 280, concluded that the attorney had to disclose the new decision to the trial court; he could not wait until the other case was concluded. The attorney's obligation of candor to the court and the interests of fair administration of justice required prompt notification. After disclosure to the trial court, the plaintiffs' attorney might attack the soundness of the intermediate appellate

Rule 3.3(a)(i) (1983) (requiring attorney not knowingly to make false statement of fact or law); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (1980); see 1 G. HAZARD & W. HODES, *supra* note 17, at 362; cf. *Scarborough Constructors, Inc. v. Pace Constr. Corp.*, 685 F. Supp. 1222, 1224 (M.D. Fla. 1988) (local court rule requiring disclosure of similar cases pending before *any other court* (emphasis in original)).

153. *But see* C. WOLFRAM, *supra* note 12, § 12.8 (challenging merit of rationale for disclosure rule).

154. A draft proposal would have required disclosure of any authority "that would probably have a substantial effect on the determination of a material issue." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1(c) (Discussion Draft 1980). There is some disagreement over the significance of the wording of the draft proposal. Compare Hazard, *supra* note 137, at 827 ("only a small difference was involved") with Freedman, *supra* note 137, at 837 ("proposed model rule 3.1(c) might indeed have imposed a new burden on the advocate") and C. WOLFRAM, *supra* note 12, § 12.8, at n.97 (draft would go further than Model Code of Professional Responsibility). Both Freedman and Hazard agree that the draft proposal would have, at a minimum, required disclosure of some cases from outside the controlling jurisdiction. The proposed draft rule met stiff opposition. See, e.g., Elliot, *The Proposed Model Rules of Professional Conduct: Invention Not Mothered by Necessity?*, 54 CONN. B.J. 265 (1980); Koskoff, *Proposed New Code of Professional Responsibility: 1984 is Now!*, 54 CONN. B.J. 260 (1980).

155. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 210 (1984) ("Paragraph (a)(3) is substantially identical to DR 7-106(B)(1)."); see 1 G. HAZARD & W. HODES, *supra* note 17, at 352; R. LYNN, *supra* note 8, § 3.9; C. WOLFRAM, *supra* note 12, § 12.8; Hazard, *supra* note 137, at 826.

156. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (1983).

157. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1505 (1984).

court decision in order to distinguish the case or to construe the case as not in conflict with the trial court decision.¹⁵⁸

The notion that the purpose of litigation is to promote justice and truth is the philosophical underpinning of the duty to disclose adverse precedent. Other basic concepts hold that litigation is not a game, and that justice is promoted by an obligation to provide the court with all pertinent authority.¹⁵⁹ In appellate practice, the harm caused by a misinformed court can extend beyond the parties. The precedent may affect the disposition of other cases. Many legal scholars, however, object to the disclosure rule on the grounds that it compromises the attorney's duty to a client.¹⁶⁰

The current Model Rule, moreover, contains numerous ambiguities.¹⁶¹ Principal among these are the compass of "directly adverse" decisions and the definition of "controlling jurisdiction." Some authorities have opined that the directly adverse formulation basically reduces the disclosure obligation to nothing.¹⁶² This author disagrees. Although narrow, the rule's disclosure obligation does have substantive meaning. The pain caused by disclosure of the case provides a useful measure of guidance. The more painful the disclosure, the more likely the case falls within the disclosure ethics.¹⁶³ A decision that can be reasonably construed as directly adverse falls within the disclosure rule.¹⁶⁴

158. See also *Seidman v. American Express Co.*, 523 F. Supp. 1107, 1109-10 (E.D. Pa. 1981) (defendant's counsel unsuccessful in distinguishing adverse authority directly conflicting with his oral argument). Contrast the textual fact situation with *Pesta v. CBS, Inc.*, 686 F. Supp. 166, 168 (E.D. Mich. 1988), where the federal court granted summary judgment to defendants in a libel case concerning statements a broadcaster made about a hospital's care. One month later, the Michigan Supreme Court changed the controlling law. *Id.* The defendants were found to not have an obligation to disclose the Michigan decision to the federal court. *Id.* at 171.

159. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-23 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983); 1 G. HAZARD & W. HODES, *supra* note 17, at 352-53; Aronson, *supra* note 3, at 864; 1 Thode, *supra* note 137, at 585-86. Professor Gaetke employs this rationale to urge convincingly a broadening of the disclosure obligation to "when a reasonable lawyer would know that the court should consider the legal authority in making its decision." Gaetke, *supra* note 45, at 88.

160. See generally C. WOLFRAM, *supra* note 12, § 12.8 (disclosure rule would frustrate attorney duty to represent client zealously); Freedman, *supra* note 137, at 833 (adversary system functions well by encouraging each side to seek out materials favorable to own side); Comment, *The Duty To Disclose*, *supra* note 137, at 331 (disclosure rule would infringe upon attorney's loyalty to client). *But see* Weinstein, *supra* note 137, at 807 (favoring duty to disclose).

161. See generally C. WOLFRAM, *supra* note 12, § 12.8 (listing as interpretive issues "controlling jurisdiction," appropriate time for disclosure, and meaning of "directly adverse"); Freedman, *supra* note 137, at 833 (under current rule not necessary to show knowledge authority directly adverse).

162. See Gaetke, *supra* note 84, at 57 (impact significantly less severe as result of directly adverse and controlling jurisdiction limitations); Uviller, *supra* note 8, at 835 (disclosure rule "so narrow as to be wholly ineffectual").

163. 1 G. HAZARD & W. HODES, *supra* note 17, at 353 (recognizing directly adverse limitation caused some problems of interpretation, but arguing for interpretation that protects the court and does not trivialize the rule). Thus, under their view, "the more unhappy a lawyer is that he found an adverse precedent, the clearer it is that he must reveal it." *Id.* at 353.

164. ABA Formal Op. 280, *supra* note 147; ABA Comm. on Ethics and Professional Responsibility, Informal Op. 84-1505 (1984).

Brief analyses of hypothetical scenarios illustrate not only the complexity of the disclosure obligation in the context of the "controlling jurisdiction" limitation¹⁶⁵ but also the almost theological hairsplitting that may be involved in analyzing the rule. This author arbitrarily selected Oklahoma as the illustrative jurisdiction, although many of the following hypotheticals are relevant to all jurisdictions.

1. An Oklahoma court of appeals decision directly adverse to the position you are taking on appeal to the Tenth Circuit, where Oklahoma substantive law governs: Both the Model Code and the Model Rules clearly require disclosure; both ethical directives reject limitations to controlling decisions.¹⁶⁶ Under Oklahoma law, court of appeals decisions do not bind as precedent unless approved for publication by the Oklahoma Supreme Court.¹⁶⁷ Unapproved decisions therefore do not bind federal courts construing Oklahoma law.¹⁶⁸ *Erie* principles, however, suggest that intermediate court decisions, in the absence of state supreme court decisions are and should normally be followed.¹⁶⁹

2. A Tenth Circuit decision construing Oklahoma law directly adverse to a position you are taking on appeal to the Oklahoma Supreme Court:¹⁷⁰ Generally, federal cases construing state law are persuasive, but not binding, on the state court.¹⁷¹ In view of the federal court's role under *Erie* as a proxy for the state court system,¹⁷² or as a trial or an intermediate appellate court,¹⁷³ the better approach would consider federal court decisions construing

165. *But see* 1 G. HAZARD & W. HODES, *supra* note 17, at 353 (defining controlling jurisdiction normally to mean "the same state as the pending case for state law issues, and the same District or Circuit for federal law issues, and, of course, applicable United States Supreme Court decisions in either event"). The authors do not explain why a United States Supreme Court opinion on an issue of state law should be treated as part of the controlling jurisdiction.

166. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-23 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (1983). *But see* Uviller, *supra* note 8, at 734 (interpreting Model Code to be limited to decisions "'controlling' on the court to which the argument is addressed").

167. OKLA. STAT. tit. 20, § 30.5 (1981).

168. *Russell v. Atlas Van Lines*, 411 F. Supp. 111, 113 (E.D. Okla. 1976).

169. *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467 (1940); *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940); *Hill v. Bache, Halsey, Stuart Shields, Inc.*, 790 F.2d 817, 827 (10th Cir. 1986); *Weiss v. United States*, 787 F.2d 518, 525-26 (10th Cir. 1986); 1A MOORE'S FEDERAL PRACTICE pt. 2, ¶ 0.307 (2d ed. 1989); 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4507 (1982); 20 AM. JUR. 2D *Courts* § 210 (1965). *But see* *Graham v. White-Phillips Co.*, 296 U.S. 27, 30-31 (1935) (federal court correct in disregarding Illinois intermediate appellate decision where Illinois statute deprives such decision of binding authority).

170. Although the federal case will most often arise in diversity situations, some federal question cases will also involve the application of governing state law. *See, e.g.*, *Commissioner v. Estate of Bosch*, 387 U.S. 456, 457 (1967) (character of property for federal estate tax purposes); *Cohn v. G.D. Searle & Co.*, 784 F.2d 460, 463 (3d Cir.) (state claim brought under federal court's pendent jurisdiction), *cert. denied*, 479 U.S. 883 (1986); 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 169, § 4515; *Westen & Lehman, Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 313 (1980).

171. 20 AM. JUR. 2D *Courts* § 225 (1965); 21 C.J.S. *Courts* § 205 (1940).

172. 10 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 169, § 4507.

173. *Rhymes v. Branick Mfg. Corp.*, 629 F.2d 409, 410 (5th Cir. 1980); *Farmer v. Travelers Indem. Co.*, 539 F.2d 562, 563 (5th Cir. 1976).

ing the applicable state law as within the controlling jurisdiction.¹⁷⁴ Furthermore, attorneys should attempt to avoid accidental conflicting interpretations of Oklahoma law. Since the Tenth Circuit includes Oklahoma, and since federal appeals from Oklahoma federal district courts will be heard there, a requirement for disclosure of adverse Tenth Circuit authority will promote studied interpretations of Oklahoma law.¹⁷⁵

3. An Oklahoma Supreme Court decision directly adverse to a position you are advocating in the Tenth Circuit; the appeal involves issues in which Oklahoma substantive law provides the rule of decision: Clearly, under the applicable ethical directive, this situation presents the most compelling issues.¹⁷⁶ A decision by the state supreme court on an issue of state law binds the federal court.¹⁷⁷

4. A Fifth Circuit decision construing federal law directly adverse to a position you are advancing in the Tenth Circuit: A Fifth Circuit precedent construing federal law does not bind the Tenth Circuit.¹⁷⁸ Unless one views the federal system as one jurisdiction, a decision by one circuit should not trigger the disclosure obligation.

5. An Oklahoma state trial court decision directly adverse to a position you are advancing in the Tenth Circuit, where Oklahoma substantive law provides the rule of decision: Governing ethical standards require disclosure, particularly when no other applicable Oklahoma law exists. The pertinent legal authority arises in the controlling jurisdiction. The federal court

174. As the Supreme Court once observed, for purposes of diversity jurisdiction, a federal court is, "in effect, only another court of the State." *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945); *see also* *Angel v. Bullington*, 330 U.S. 183, 187 (1947). *But see* *Stewart v. Amerada Hess Corp.*, 604 P.2d 854, 857 (Okla. 1979) ("*Whitaker*, a federal case, lacks the force of 'authority' in that it cannot bind this court").

175. The Second Circuit expanded on the point. In *Factors, Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 280 (2d Cir. 1981), the court faced an unresolved issue of Tennessee law: Does the right of publicity (the exclusive ownership of all rights to the commercial use of a person's name) survive the death of the subject? The existing authority was a Sixth Circuit opinion, *Memphis Dev. Found. v. Factors, Etc., Inc.*, 616 F.2d 956 (6th Cir. 1978), *rev'g* 441 F. Supp. 1323 (W.D. Tenn. 1977). The Sixth Circuit had concluded that the right of publicity did not survive under Tennessee law. The majority accepted the Sixth Circuit's opinion as authoritative and refused to examine the issue independently. 652 F.2d at 283. Judge Mansfield dissented, maintaining that the Second Circuit was in as good a position as the Sixth Circuit to predict the future course of Tennessee law. *Id.* at 284. He would have found the right to survive. Ironically, future events in Tennessee vindicated him. *Elvis Presley Int'l Memorial Found. v. Crowell*, 733 S.W.2d 89, 96 (Tenn. Ct. App. 1987) (holding right of publicity survives death of subject). *See generally* Gibbs, *How Does the Federal Judge Determine What is the Law of the State*, 17 S.C.L. REV. 487 (1965) (discussing choice of law problems after *Erie*).

176. Indeed, even under the more limited disclosure rule advocated by Turnstall, *supra* note 137, this decision would have to be disclosed. *See supra* text accompanying notes 143-146.

177. *Eric R.R. Co. v. Tompkins*, 304 U.S. 64, 65 (1938); 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 169, § 4507; MOORE'S FEDERAL PRACTICE, *supra* note 169, ¶ 0.307[2].

178. *Compare In re Korean Air Lines Disaster*, 829 F.2d 1171, 1173 (D.C. Cir. 1987) and Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 721 (1984) (discussing choice of law in cases where venue transferred) with *Factors, Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 280 (2d Cir. 1981) (finding Sixth Circuit construction of Tennessee law authoritative).

would consider such authority in the determination of state law issues.¹⁷⁹ The federal court would assign weight to the state trial court decision based on the weight state trial court decisions are accorded in Oklahoma.¹⁸⁰

6. A Kansas Supreme Court case construing Oklahoma law in a way directly adverse to the position you are advancing in the Oklahoma Supreme Court: Only a very broad definition of "controlling jurisdiction," that is, all cases construing the governing law, would require disclosure.¹⁸¹

7. A Kansas Supreme Court case construing Kansas statutory law, from which the applicable Oklahoma Law was derived, in a manner directly adverse to the position you are advancing in the Oklahoma Supreme Court: Although somewhat incongruous, the disclosure obligation in this instance is probably greater than when the Kansas court construes Oklahoma law. Oklahoma accords Kansas decisions construing the Kansas statutes from which early Oklahoma statutes were taken "well-nigh conclusive" effect.¹⁸² Oklahoma's deference appears to be a variant of the well-established rule that decisions construing a statute prior to the time another state adopts the statute are particularly persuasive.¹⁸³

8. An unpublished decision of the Oklahoma Supreme Court directly adverse to your position on appeal to the Tenth Circuit in a case where Oklahoma substantive law provides the rule of decision: Oklahoma court rules do not allow citation of such a decision as precedent in an Oklahoma court.¹⁸⁴ No obligation to disclose the case to the federal court should exist. The federal court simply must give the state court decision the same effect as would a state court.¹⁸⁵ Just as the Oklahoma court rules would not have permitted the case to be cited as precedent in the state court, it need not be disclosed to the federal court. The opposing view distinguishes between legal authority and controlling authority. The intent of the Oklahoma rule, however, suggests that the Supreme Court of Oklahoma only wants to see

179. See *Commissioner v. Estate of Bosch*, 387 U.S. 456, 464-65 (1967); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177 (1940); *United States v. Wyoming Nat'l Bank*, 505 F.2d 1064, 1067 (10th Cir. 1974); *Gustin v. Sun Life Assurance Co.*, 154 F.2d 961, 962-63 (6th Cir.), *cert. denied*, 328 U.S. 866 (1946).

180. See MOORE'S FEDERAL PRACTICE, *supra* note 169, ¶ 0.307[2]; 32 AM. JUR. 2D, *Federal Practice and Procedure* § 298 (1965).

181. The case did not arise in Oklahoma, and no disclosure would be required under the view espoused by Hazard and Hodes. 1 G. HAZARD & W. HODES, *supra* note 17, at 353.

182. *Haws v. Luethje*, 503 P.2d 871, 876-77 (Okla. 1972); *Chesmore v. Chesmore*, 484 P.2d 516, 518 (Okla. 1971).

183. 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 52.02 (Sands rev. 4th ed. 1984); 20 AM. JUR. 2D *Courts* § 204 (1965); 21 C.J.S. *Courts* § 205 (1940). One area of widespread application concerns the attorney's obligation to disclose federal cases construing federal procedural rules, from which the state law or rule in question was derived, adversely to the position the attorney is advocating. Thirty-two states, for example, have adopted the Federal Rules of Evidence. See 5 J. WEINSTEIN & M. BURGER, EVIDENCE T-1 (1988 Supp.). Should the attorney be required to divulge adverse federal authority from circuits or districts not within Hazard's & Hodes' definition of "controlling jurisdiction"? What if the state supreme court had stated that federal decisions are presumed to be applicable, under the rationale set forth in Sutherland's book?

184. OKLA. R. CIV. APP. P. 1.2000(B)(E).

185. 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 169, § 4507.

such unpublished cases cited where *res judicata*, collateral estoppel, or law of the case is involved. The Tenth Circuit has a similar but stronger rule.¹⁸⁶

9. A Tenth Circuit decision on federal constitutional law directly adverse to a position you are advancing in the Oklahoma Supreme Court: The Oklahoma Supreme Court finds lower federal court decisions construing federal law persuasive but not binding.¹⁸⁷ The prevention of accidental conflict within the State of Oklahoma on issues of federal law is one basis for requiring disclosure of the Tenth Circuit precedent in Oklahoma. The Oklahoma Supreme Court, however, need not give any more deference to a decision of the Tenth Circuit on a federal issue than to a decision of the Sixth Circuit on the same issue. Attorneys should follow the policy of disclosure in this instance in order to avoid accidental conflicts within the jurisdiction.

10. A New York decision construing a matter of New York law in a manner directly adverse to a position you are advancing in the Oklahoma Supreme Court, where New York substantive law will provide the rule of decision: Prevailing policy requires that disclosure be made. The controlling jurisdiction in this case is not Oklahoma but New York. New York cases would therefore carry authoritative weight.¹⁸⁸

11. A United States Supreme Court decision directly adverse to your position on a federal issue on appeal in the Oklahoma Supreme Court: The rule that applicable decisions of the United States Supreme Court construing federal law bind the Oklahoma Supreme Court¹⁸⁹ mandates disclosure.¹⁹⁰

12. Appellee, on appeal, has failed to find a line of reasoning which would support affirmation of the district court: No rule requires disclosure.¹⁹¹

186. See 10TH CIR. R. 36.3; *cf.* *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 524 (E.D. Cal. 1975) (citing unpublished decision, while not necessarily misconduct, was improper); *Jones v. Commonwealth*, 593 S.W.2d 869, 871 (Ky. Ct. App. 1979) (improper procedure to cite unpublished decision in violation of appellate rule); ARIZ. B.A., Op. 87-14 (1987), *extracted in ABA/BNA, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT* 901:1406 (1980) (cannot cite memorandum opinion in violation of court rule). Compare ABA Comm. on Professional Ethics, Informal Op. C-667 (1963), *reprinted in 1 INFORMAL ETHICS OPINIONS* 249-50 (1975) (proper to cite unreported decision if no contrary court rule). Lower courts are also bound by a higher court's noncitation policy. *Robinson v. Bowen*, 867 F.2d 600, 600 (10th Cir. 1989).

187. *Dority v. Green Country Castings Corp.*, 727 P.2d 1355, 1359 (Okla. 1986); *Phillips v. Williams*, 608 P.2d 1131, 1135 (Okla. 1980), *cert. denied*, 449 U.S. 860 (1989); 20 AM. JUR. 2D *Courts* § 230 (1965); 21 C.J.S. *Courts* § 206 (1940).

188. See Annotation, *Duty of Courts of Following Decisions of Other States on Questions of Common Law or Unwritten Law, in which the Cause of Action Has Its Situs*, 78 A.L.R. 897 (1931); 20 AM. JUR. 2D *Courts* § 206 (1965); 21 C.J.S. *Courts* § 204b (1940); see also *Texaco, Inc. v. Pennzoil, Inc.*, 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1988, writ ref'd n.r.e) (Texas court applying New York law).

189. *Bailess v. Paukune*, 208 Okla. 146, 254 P.2d 349, 351 (1953); *Skelly Oil Co. v. Jackson*, 194 Okla. 183, 148 P.2d 182, 185 (1944); 20 AM. JUR. 2D *Courts* §§ 226-29 (1965); 21 C.J.S. *Courts* § 206 (1940).

190. 1 G. HAZARD & W. HODES, *supra* note 17, at 353.

191. ABA Formal Op. 280, *supra* note 147; *Broshnahan & Broshnahan*, *supra* note 140, at 165. *Haines, Problems of Legal Ethics*, 35 CANADIAN B. REV. 247, 277-78 (1957); *Thode*, *supra* note 137, at 586. Other scenarios are possible. What about disclosing an adverse Oklahoma Supreme Court decision construing federal law to a panel of Tenth Circuit judges? See *Bryant v. Civiletti*, 663 F.2d 286, 292 (D.C. Cir. 1981) (federal circuit not bound by state

Perhaps because of these ambiguities and interpretational difficulties, courts rarely decide cases on the failure of counsel to disclose adverse precedent.¹⁹² In *Jorgensen v. Volusia*,¹⁹³ perhaps the best recent case, the lower court sanctioned the appellants for failure to cite controlling precedent in the federal district court. Appellants had requested a temporary restraining order and preliminary injunction. The dispute centered on the validity of a county ordinance that prohibited nude or semi-nude dancing in establishments selling alcoholic beverages. One of the critical issues concerned whether the state had delegated to the county its powers to regulate the sale and consumption of alcohol under the twenty-first amendment. Delegation would have given the ordinance a presumption of constitutional validity. Without delegation, a stricter standard based on the general power would have governed the ordinance. At the lower court appellants failed to cite the Florida Supreme Court's decision holding that the powers had been delegated, despite the fact that one of appellants participated in that case. The district court awarded sanctions under Federal Rule of Civil Procedure 11, and the court of appeals affirmed.¹⁹⁴

court interpretation of federal law); *Ute Indian Tribe v. Utah*, 521 F. Supp. 1072, 1079 (D. Utah 1981) (federal circuit not bound by state court interpretation of federal law). Disclosure should probably be required, to avoid conflicting interpretations of federal law within the circuit or in Oklahoma. An Oklahoma decision, however, would probably not be required to be disclosed to a panel of the Sixth Circuit, as Oklahoma is not one of the states comprising the Sixth Circuit.

192. C. WOLFRAM, *supra* note 12, § 12.8; Freedman, *supra* note 137, at 837.

193. 846 F.2d 1350, 1351 (11th Cir. 1988), *aff'g* 625 F. Supp. 1543, 1548 (M.D. Fla. 1986).

194. The appellants purported to describe the law to the district court in the hope that the description would guide and inform the court's decision. With apparently studied care, however, they withheld the fact that the long-awaited decision by the Supreme Court of Florida had been handed down. This will not do. The appellants are not redeemed by the fact that opposing counsel *subsequently* cited the controlling precedent. The appellants had a duty to refrain from affirmatively misleading the court as to the state of the law. They were not relieved of this duty by the possibility that opposing counsel might find and cite the controlling precedent, particularly where, as here, a temporary restraining order might have been issued *ex parte*.

846 F.2d at 1352 (emphasis in original); *see also* *Blinderman Constr. Co. v. United States*, 15 Ct. Cl. 121, 123 (1988) (defendant obligated to disclose to Court of Claims controlling adverse precedent from Federal Circuit); *White v. Carlucci*, 862 F.2d 1209, 1213 (5th Cir. 1989) (admonishing attorney for not citing to Fifth Circuit its own controlling precedent on irreparable harm requirement for civil rights injunction; court noting admonished attorney also counsel in earlier case); *Pacific Transp. Co. v. Public Utilities Comm'n*, 716 F.2d 1285, 1291 (9th Cir. 1983) (failure to cite adverse decision contrary to MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(B)(1) (1980)), *cert. denied*, 466 U.S. 936 (1984); *United States v. Burnette-Carter Co.*, 575 F.2d 587, 589 n.4 (6th Cir. 1978) (attorney's duty to cite adverse decision; otherwise violate Model Code DR 7-106(B)(1)); *Katris v. Immigration & Naturalization Serv.*, 562 F.2d 866, 869-70 (2d Cir. 1977) (sanctioning attorney for failing to apprise appellate court of directly controlling authority); *Gill v. Mid-Penn Consumer Discount Co.*, 671 F. Supp. 1021, 1025 (E.D. Pa. 1987) (counsel had duty to bring to court's attention three cases that had rejected identical argument and in which counsel was personally involved); *Braun v. Harris*, [1979-1980 Transfer Binder] *Unempl. Ins. Rep. (CCH)* ¶ 17,070 (E.D. Wis. July 7, 1980) (court requires explanation from Department of Health, Education and Welfare why two controlling decisions were not discussed in department's briefs, suggesting that government lawyers have a greater duty in this respect than private attorneys); *Shaeffer v. State Bar*, 26 Cal. 2d 739, 160 P.2d 825, 829 (1945) (concluding attorney should have cited adverse decision to court and then attempted to distinguish it); *Newberger v. Newberger*, 311 So. 2d 176, 176 (Fla.

A duty exists not only to disclose directly "adverse" decisions in the controlling jurisdiction, but also to disclose the actual precedential validity of the cases the attorney cites to the court. In *Croy v. Skinner*¹⁹⁵ the court noted the attorney's obligation to inform the court of any history subsequent to a case's citation to the court that affects the validity of that citation.¹⁹⁶ In *Skinner* one party cited a federal district court decision from another district that had subsequently been vacated seven months prior to the filing of the brief in which the citation was given. Giving the attorney the benefit of the doubt, the court observed that the attorney should have filed a supplemental brief notifying the court of the subsequent history of the cited case.¹⁹⁷

Although theoretically challenging, the disclosure duty in most instances simply parallels prudent appellate practice. Most often, the prudent attorney will assume that the court will find the adverse decision on its own or that opposing counsel will belatedly discover the precedent and file a supplemental brief. The attorney thus should distinguish the case or attack its reasoning.¹⁹⁸ The course of disclosure installs confidence in the court of the

Dist. Ct. App. 1975) (responsibility of counsel to fully inform court on applicable law; citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-23 (1980)); *Cicio v. New York*, 98 A.D.2d 38, 469 N.Y.S.2d 467, 468 (1983) (city's lawyer failed to cite authorities directly adverse to city's position, although city unsuccessful party in two of these precedents). *And see In re Universal Minerals, Inc.*, 755 F.2d 309, 312-13 (3d Cir. 1985) (dictum obligating counsel to make court aware of recently announced law, even if unfavorable, citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983)); *Plambino v. Bailey*, 757 F.2d 1112, 1131 n.44 (11th Cir. 1985) (court, in dictum, observing counsel apparently violated both Model Rule 3.3 and Model Code DR 7-106(B)(1) by not advising lower court in related cause of action, of holdings by federal district court and Ninth Circuit adverse to his position on virtually identical claims), *reh'g denied*, 763 F.2d 419 (11th Cir.), *cert. denied*, 474 U.S. 1169 (1986); *In re Oximetrix, Inc.*, 748 F.2d 637, 643 (Fed. Cir. 1984) (in passing, court notes counsel's lack of candor in failing to disclose pertinent United States Supreme Court decisions, citing both Model Code and Model Rule disclosure provisions); *Sanchez v. Homestake Mining Co.*, 102 N.M. 473, 697 P.2d 156, 163 (Ct. App. 1985) (counsel failed to cite adverse decision); *Ryan Mortgage Investors, Inc. v. Lehmann*, 544 S.W.2d 456, 462 (Tex. Civ. App.—Beaumont 1976, writ *dism'd*) (inexcusable for counsel not to bring to court's attention case in which attorney was counsel). In *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986), *rev'g* 103 F.R.D. 124 (N.D. Cal. 1984), the Ninth Circuit rejected the use of rule 11 as a sanctioning measure for an attorney's failure to disclose adverse authority. *Id.* at 1541. The court refused to permit rule 11 to be erected as an additional standard for ethical conduct: "We must not interpret Rule 11 to create two ladders for after-the-fact review of asserted unethical conduct: one consisting of sanction procedures, the other consisting of the well-established bar and court ethical procedures." *Id.* at 1542.

195. 410 F. Supp. 117 (N.D. Ga. 1976).

196. *Id.* at 128.

197. *Id.* at 125 n.7. For similar fact situations, see *Hampton v. Long*, 686 F. Supp. 1202, 1205-06 (E.D. Tex. 1988) (admonishing attorney for not bringing to court's attention that principal case relied upon by attorney had been later reversed); *Cimino v. Yale University*, 638 F. Supp. 952, 959 n.7 (D. Conn. 1986) (court, finding case relied upon overruled, yet that fact not brought to court's attention, held "diligent research, which includes Shepardizing cases, is a professional responsibility"); *Clayton v. City of Cape Canaveral*, 354 So. 2d 147, 150 (Fla. Dist. Ct. App. 1978) (attorneys have ethical obligation to be certain that cases cited to the court have not been later overruled); *In re Attorney*, 10 A.D. 491, 42 N.Y.S. 268, 270 (1896) (suspending attorney for two years, in part for failing to inform lower court of adverse unpublished decisions known to him that cast substantial doubt on the reported case attorney was advancing as controlling).

198. 1 G. HAZARD & W. HODES, *supra* note 17, at 353; R. LYNN, *supra* note 8, § 3.9; Freedman, *supra* note 137, at 838; Hazard, *supra* note 137, at 825; Weinstein, *supra* note 137,

thoroughness and integrity of counsel's efforts.¹⁹⁹ Wolfram stated the danger of failing to disclose an adverse precedent: "If nothing else, a court's late discovery that an advocate has failed to confront an adverse authority is likely to produce the impression that the awakened precedent, because suppressed, should be regarded as particularly vicious."²⁰⁰

D. Candor's Limitations

Candor does have its limitations. Courts tolerate relevant criticisms of their opinions.²⁰¹ Attorneys must, however, uphold their professional obligation to be circumspect when requesting rehearing or reconsideration concerning either the attorney's emotional feelings about the decision or the attorney's opinion of the members of the court.²⁰² The same reservation

at 810-11, 813. In *United States v. State Bd. of Equalization*, 450 F. Supp. 1030, 1037 n.6 (N.D. Cal. 1978), the court observed "it is surely an important element of responsible advocacy . . . for a lawyer to give the Court the benefit of his considered judgment as to why apparently controlling authority is inapplicable." See also Reaves, *Lawscope: Misleading Briefs*, 70 A.B.A. J. 41 (1984) (New York City Appellate Court Division rebukes attorneys for filing incomplete briefs).

199. T. MARVELL, *supra* note 140, at 137; C. WOLFRAM, *supra* note 12, § 12.8, at 682; Weinstein, *supra* note 137, at 811.

200. C. WOLFRAM, *supra* note 12, § 12.8.

201. See, e.g., *Phipps v. Medford*, 81 Or. 119, 158 P. 666 (1916) ("Any court worthy of the name will respect such conduct [vigorous presentation of attorney's views] although it may not concur with the argument."). *But cf.* *Rahles v. J. Thompson & Sons Mfg. Co.*, 137 Wis. 506, 119 N.W. 289 (1909) (court not tolerant of rehearing petition scolding court for its earlier opinion).

202. See *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 802 F.2d 217, 219 (7th Cir. 1986) (Flaum, J. concurring) (statement in petition for rehearing that majority drafter seized opportunity to preempt United States Supreme Court and emasculate the Court's rulings, went beyond the bounds of acceptable appellate practice); *In re Hartford Textbook Corp.*, 659 F.2d 299, 302 n.5 (2d Cir. 1981) (attorney observing court had made "so many stupid errors," as constituting "[t]he emasculation of the integrity of the Court and the way it prostitutes the administration [of] justice"); *Vandenbergehe v. Poole*, 163 So. 2d 51, 53 (Fla. Dist. Ct. App. 1964) (petition for rehearing stricken as insulting members of the court); *In re Frerichs*, 238 N.W.2d 764, 765 (Iowa 1976) (attorney who charged Iowa Supreme Court on rehearing with willfully avoiding constitutional issue raised by attorney admonished by the court); *In re Woolley*, 74 Ky. (11 Bush) 95, 102 (1875) (attorney fined for filing brief charging court with carelessness and with overlooking the facts in the case, for creating facts and ignoring others, and for being indifferent to harm caused attorney's client); *Louisiana State Bar Ass'n v. Spencer*, 258 La. 10, 245 So. 2d 374, 379 (1971) (attorney reprimanded for accusing the Supreme Court of attempting to protect the lower court judge and of being dishonest in denying appellant relief requested); *In re Dunn*, 85 Neb. 606, 124 N.W. 120, 122 (1909) (attorney suspended indefinitely for filing fifty-page rehearing brief principally attacking intelligence and integrity of judge who authored the court's opinion); *In re Meeker*, 76 N.M. 354, 414 P.2d 862, 865 (1966) (attorney claimed "legal chicanery" of New Mexico appellate court in petition for certiorari filed in United States Supreme Court, reprimanded), *cert. denied*, 385 U.S. 449 (1967); *In re Robinson*, 48 Wash. 153, 92 P. 929, 931 (1907) (suspending attorney six months for implying in petition for rehearing political cronyism and personal advantage motives for majority); *In re Lambuth*, 18 Wash. 478, 51 P. 1071, 1071 (1898) (statement in petition for rehearing that majority decision could not be more prejudiced or biased "if the court had been under hypnotic suggestion" objectionable, but since attorney withdrew offending language, no sanction); *Casper v. Kalt-Zimmers Mfg. Co.*, 159 Wis. 517, 150 N.W. 1101, 1102 (1915) (statements by winning party's attorney in his brief in opposition to petition for rehearing that equity courts rejoice in finding new ways to destroy rights not favored by court merited sanction of denial of costs and fees on rehearing petition's denial).

applies to characterizations of, or comments regarding, the lower court.²⁰³ As one judge observed, “[y]ou can think it, but you better not say it.”²⁰⁴ Although the first amendment implies that attorneys have some leeway,²⁰⁵ courts will sanction attorneys who have gone beyond the particular court’s conception of appropriate conduct.²⁰⁶

203. Kelly v. Boettcher, 82 F. 794, 795 (8th Cir. 1897) (ordering brief stricken and author removed from case where brief attacked intelligence, integrity, and character of judges below), *further hearing below sub nom.* United States v. Greer, 85 F. 857, 859 (C.C.D. Colo. 1898) (attorney disbarred for such brief); Gregoire v. National Bank, 413 P.2d 27, 37 (Alaska 1966) (attorney reprimanded for accusing trial court of condoning and encouraging alleged unethical conduct of other party and with taking actions designed to avoid a trial on the merits); Wilburn v. Reitman, 54 Ariz. 31, 91 P.2d 865, 867 (1939) (attorney reprimanded for villifying trial court and opposing counsel in appellate briefs); Ramirez v. State Bar, 28 Cal. 2d 402, 619 P.2d 399, 406 (1980) (attorney suspended for one year for alleging in Ninth Circuit briefs that justices of California Court of Appeals for Third District acted unlawfully and illegally and had become parties to theft of property belonging to attorney’s clients); Sonksen v. Legal Serv. Corp., 389 N.W.2d 386, 387 (Iowa 1986) (attorney censured for abusive comments on appeal concerning trial court, opposing lawyers, and their clients); *In re Estes*, 355 Mich. 411, 94 N.W.2d 916, 919 (1959) (attorney suspended for one year for accusing trial court in his appellate briefs of collaboration with opposing party, with overreaching his authority, and for challenging the trial court’s integrity); *In re Glauberman*, 17 N.J. Eq. 384, 152 A. 650, 651 (1930) (accusation in brief that trial court acted as opposing counsel along with other statements warranted striking of brief from record, \$250 fine, and suspension for one year from appearing in appellate court); *In re Rockmole*, 127 A.D. 499, 111 N.Y.S. 879, 881 (1908) (suspending attorney six months for filing affidavit on appeal reflecting upon character of municipal court justice); Northwest S.D. Prod. Credit Ass’n v. Dale, 361 N.W.2d 275, 279 (S.D. 1985) (attorney rebuked for claiming on appeal “[t]he (trial) Court had become obviously more than a judicial body. It had become an advocate for (the) PCA.”); Farmer v. Board of Professional Responsibility, 660 S.W.2d 490, 491 (Tenn.) (attorney suspended for alleging in briefs seeking review of court of appeals decision in Tennessee Supreme Court that court of appeals made “intentionally false finding” and that the case was lies, including lies of the court of appeals) (emphasis in original), *appeal dismissed*, 466 U.S. 946 (1983); Ward v. University of the S., 209 Tenn. 412, 354 S.W.2d 246, 248 (1962) (attorney’s suggestion that evidence “gives the lie” to the trial court’s conclusion considered flagrant violation of professional conduct). *And see In re Minnis*, 56 S. Ct. 504 (1936) (attorney who acknowledges his mistake in filing brief disparaging state supreme court justices not disbarred, but offensive statements in briefs ordered stricken from files); State v. Rhodes, 177 Neb. 650, 131 N.W.2d 118, 120 (1964) (reference to district court as a Kangaroo court in attorney’s answer filed in disciplinary proceeding violates Canons of Professional Ethics).

204. *Vandenbergh v. Poole*, 163 So. 2d 51, 52 (Fla. Dist. Ct. App. 1964) (Rawls, J., concurring). In *Vandenbergh* the petition for rehearing accused the appellate court of either ignoring the law or being “not interested in determining the law.” *Id.* at 51. The same maxim should also be applied to comments concerning opposing counsel or parties. *In re Philbrook*, 105 Cal. 471, 38 P. 884, 885 (1895); *Meeker v. Walraven*, 72 N.M. 107, 380 P.2d 845, 848 (1963); *Youngtob v. Luongo*, 139 Misc. 840, 249 N.Y.S. 415, 416 (1931).

205. For cases rejecting first amendment contentions, see *In re Glenn*, 256 Iowa 1233, 130 N.W.2d 672, 675 (1964); *State v. Nelson*, 210 Kan. 637, 504 P.2d 211, 214 (1972); *In re Frerichs*, 238 N.W.2d 764 (Iowa 1976). For analyses of the law, see C. WOLFRAM, *supra* note 12, § 11.3.2; Note, *In re Erdmann: What Lawyers Can Say About Judges*, 38 ALA. L. REV. 600 (1974); Note, *Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights*, 56 NOTRE DAME L. REV. 489 (1981). One must also distinguish between a lawyer’s conduct as a lawyer and his conduct as a private citizen. See *Polk v. State Bar*, 374 F. Supp. 784, 788 (N.D. Tex. 1974) (when acting in private capacity first amendment protects attorney).

206. See 7 AM. JUR. 2D *Attorneys at Law* § 45 (1980); Note, *The First Amendment and Attorney Discipline for Criticism of the Judiciary: The Lawyer Beware*, 15 N. KY. L. REV. 129, 130 (1988); Annotation, *Licensing and Regulation of Attorneys as Restricted by Rights of Free Speech, Expression, and Association Under First Amendment*, 27 LAW. ED. 2D 953, 963-68 (1971); Annotation, *Attorney’s Criticism of Judicial Acts As Grounds for Disciplinary Action*, 12 A.L.R. 3D 1408, 1408-38 (1967).

IV. CONCLUSION

In the main, the rules of ethical appellate practice derive from common sense, prudence, and public policy.²⁰⁷ The appellate attorney must provide ethical service to his clients and courts in order to maintain the proper functioning of the appellate system.

207. See Drinker, *supra* note 36, at 375 (good statement of attributes of the ethical lawyer).

