

At Sidebar

SARAH LINDEMANN BUTHE

Ethical Appeal

The feature articles in this issue of *The Federal Lawyer* deal with important ethics topics, ranging from (unintentionally) initiating engagements to ending them through settlement. But none of

the articles addresses the special ethical considerations that inhere in an appeal. Therefore, this column will put the cart before the horse and start with ethics on appeal. Having viewed appellate advocacy from both sides of the bench, previously as an appellate litigator and currently as a career clerk to an appellate judge, I believe that three areas always—and certainly on appeal—warrant particular attention: (1) competence, (2) frivolity, and (3) candor.

Be Competent

American Bar Association Rule of Professional Conduct 1.1¹ states that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”² This rule is crucial on appeal—and throughout the life of an appeal.

The importance of competence begins at the inception of an appeal with time lines for noticing an appeal as set forth in Federal Rule of Appellate Procedure 4. In *Prizevoits v. Indiana Bell Telephone Co.*,³ the Seventh Circuit dismissed an appeal because counsel failed to notice the appeal within the 30 days required by Rule 4 and also failed to show excusable neglect. The Seventh Circuit stated, unforgivingly, that “the rule is crystal clear, the error egregious, the excuses so thin as to leave the lapse not only unexcused but inexplicable.”⁴ Even though an untimely notice of appeal may be the most serious of calendaring errors, appellate counsel should treat every deadline and every date with extreme care. A problem with scheduling and then missing oral argument, for example, might not get an appeal dismissed, but it certainly does not reflect well on counsel’s competence.

Later, during briefing, competence is also crucial as well as more demanding, given the many moving parts of an appellate brief. Federal Rules of Appellate Procedure 28 and 32 and the various circuits’ local rules require quite a bit of effort and attention to detail, setting out requirements for the substance and form of briefs. Rule 28, for example, mandates that an appellant’s brief include not just the obvious—facts and argument—but also, for example, a jurisdictional statement, identifica-

tion of the applicable standard(s) of review, a summary of the argument, and citations to authorities and the record.⁵ Failing to follow the rules can lead to sanctions and even to the dismissal of an appeal.

In *N/S Corp. v. Liberty Mutual Insurance Co.*,⁶ for example, the Ninth Circuit dismissed an appeal because of appellate counsel’s “legion” of appellate rules violations. The offending violations included the following:

- “the standard of review section in the opening brief says nothing about the appellate standard of review and the omission is not corrected elsewhere in the brief”;
- “while the opening brief is replete with assertions of fact and assertions about the record, it contains a mere handful of generalized record citations”;
- “the opening brief exceeds the word limits for proportionally spaced briefs”; and
- “[a]ll of this is aside from lesser (?) matters like rather creative renditions of what actually occurred at the district court and the citation of California case authority which had been depublished many weeks before the brief was filed (and was without precedential value).”⁷

The Ninth Circuit admonished that the appellant “has approached our rules with such insouciance that we cannot overlook its heedlessness[]” and declared that “[e]nough is enough[,]” striking the offending briefs and dismissing the appeal.⁸

So what is the take-away for appellate counsel when it comes to competence? Take your time, plan your attack, and use your resources. First, even though many lawyers work well under the pressure of looming deadlines, hammering out important elements of an appeal the day before they are due may not be the best strategy for putting one’s most competent foot forward. Second, plan your appeal. Think about what belongs in the joint appendix. Consider which arguments are so weak that they detract from your brief. Come up with creative ways to distinguish unhelpful case law. And third, use your resources. The federal courts of appeal provide a great service to the federal bar through free, publicly available resources, such as appellate brief checklists, practitioners’ handbooks, sample briefs, and even videos on how to perfect an appeal.⁹ It behooves all practitioners—especially those who do not appear regularly before the appellate courts and therefore are perhaps less familiar with their particularities—to make full use of those resources.

Do Not Bring Frivolous Appeals

According to ABA Rule of Professional Conduct 3.1, a “lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. . . .”¹⁰ The rule provides an exception for “a good faith argument for an extension, modification or reversal of existing law.”¹¹ And should a court of appeals determine that an appeal is indeed frivolous, Federal Rule of Appellate Procedure 38 expressly empowers the court to “award just damages and single or double costs to the appellee.”¹²

Rule 3.1 begs the question: What does frivolous mean? As the Fifth Circuit has succinctly stated, “[a]n appeal is frivolous if the result is obvious or the arguments of error are wholly without merit.”¹³ Some courts have suggested that sanctions are appropriate only if, in addition to frivolity, bad faith or an improper motive underpins the offending appeal.¹⁴ Most courts, however, have not done so—perhaps because good faith and frivolity seem inherently irreconcilable.

Notably, an appeal may be frivolous even if the underlying lawsuit was not. In *Clark v. Maurer*, for example, Judge Gerald Posner highlighted that “[t]he facts as known to a plaintiff and his counsel by reasonable investigation, and the law as known to them by reasonable research, might make a suit colorable when filed; but when the district court dismisses the suit, the plaintiff and his lawyer must reassess its merits. If, having done so, they are unable to identify any respect in which the court erred but nevertheless appeal, the appeal is groundless and sanctions may be appropriate.”¹⁵ In *Clark*, the plaintiff’s failure to confront a central issue that the district court had flagged was deemed “particularly serious” and warranted the sanction of ordering the plaintiff to pay double costs.¹⁶ Similarly, in *In re Hendix*, the Seventh Circuit held that “by appealing in the face of dispositive contrary authority without making arguments for overruling it, [the appellant] filed a frivolous appeal.”¹⁷

Courts have, understandably, been “reluctant to classify appeals as frivolous, so that novel theories will not be chilled and litigants advancing any claim or defense which has colorable support under existing law or reasonable extensions thereof will not be deterred.”¹⁸ Nevertheless, there is no shortage of appeals that have been found to be frivolous and resulted in sanctions. The take-away: Lawyers must carefully consider whether they should appeal and they should not simply do so automatically.

Be Candid

ABA Rule of Professional Conduct 3.3 states that a “lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; [or] (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the

client and not disclosed by opposing counsel. . . .”¹⁹

Issues related to candor can surface in various aspects of an appeal. For example, candor must underpin the statement of facts included in an appellate brief. Indeed, in 1992, the Eighth Circuit ruled that “[a]ttorneys, as officers of the court, have the responsibility to present the record with accuracy and candor. On those rare occasions when attorneys fail to do so, the self-destruction of their credibility almost inevitably carries with it damage to their client.”²⁰

Mischaracterizations of the law also violate the duty of candor. Those mischaracterizations can take various forms, including misleading usage of brackets and ellipses, failure to acknowledge adverse controlling cases, or even intentional misstatements. In a ruling handed down in 2003, the Seventh Circuit stated that “an intentional misstatement of law before a court is a serious offense that violates Rule 3.3(a) of the Model Rules of Professional Conduct . . . and can lead to sanctions. . . .”²¹ Failure to cite controlling adverse authority fares no better and may warrant the imposition of “sanctions, including monetary sanctions and disbarment from practice in [the] court. . . .”²² In addition, the duty of candor is ongoing, and even legal developments that occur after a briefing has concluded or oral argument has been heard should be brought to the court’s attention through a letter with citations to those supplemental authorities.²³

At the end of the day, by imposing the need for candor—together with the other duties discussed in this column—the appellate courts seek to prevent the transformation of appeals “from an intellectual process aimed at the derivation of the correct legal principle to a carnival of frivolity. . . .”²⁴ The take-away: Appellate counsel must be diligent and forthright with the courts in all aspects and all phases of an appeal. Not only your client’s case but also your own reputation depends on your adherence to this code of ethics. **TFL**

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Endnotes

¹All the states and the District of Columbia have adopted the American Bar Association’s Model Rules of Professional Conduct, previously called the Model Code of Professional Responsibility: State Adoption of the ABA Model Rules of Professional Conduct, available at www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html. “The uniform first step for admission to any federal court is admission to a state court. The federal court is entitled to rely on the attorney’s knowledge of the state code of

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Beth Smith has been an FBA member for 17 years. She has served in every officer position in her San Antonio Chapter, as vice president for the Fifth Circuit, and on various national committees—including the Membership Committee, Chapter Activity Fund, Budget Finance Committee, and the Task Force on Recruiting Judges. She is a member of the national Board of Directors and the Bankruptcy Law and Federal Litigation Sections. She practices in San Antonio and is active in various other bar associations as well as in a state education program.

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Jack and these dedicated, hardworking, and knowledgeable volunteers know what it takes to move this organization successfully into the future, and they have given us the best course to do so. Thank you, Search Committee. **TFL**

Kevin C. Bomchill

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professional conduct applicable in that state court. ..." *In re Snyder*, 472 U.S. 634, 645 n.6 (1985).

²Available at www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html.

³76 F.3d 132 (7th Cir. 1996).

⁴*Id.* at 134.

⁵Fed. R. App. P. 28, 32.

⁶127 F.3d 1145 (9th Cir. 1997).

⁷*Id.* at 1146.

⁸*Id.* Notably, and magnanimously, the Ninth Circuit nevertheless felt compelled to ensure itself that it was not dismissing a meritorious appeal. *Id.* at 1146–47.

⁹See, e.g., *Ten Pointers for an Appeal and Checklist for Briefs*, available at www.ca1.uscourts.gov/?content=rules.htm; *Brief and Appendix Requirements and Brief and Appendix Checklist*, available at www.ca4.uscourts.gov/Practitioner's_Handbook_Guidelines_for_Briefs_&_Other_Papers_and_Brief_Examples, available at www.ca7.uscourts.gov; and videos on how to perfect appeals, available at www.ca9.uscourts.gov/guides/perfecting_your_appeal.php.

¹⁰Available at www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_1_meritorious_claims_contentions.html.

¹¹*Id.*

¹²Fed. R. App. P. 38. See also 28 U.S.C. § 1912 ("Where

a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.").

¹³*Howard v. St. Germain*, 599 F.3d 455, 458 (5th Cir. 2010) (quotation marks and citation omitted).

¹⁴See, e.g., *Ruderer v. Fines*, 614 F.2d 1128 (7th Cir. 1980).

¹⁵824 F.2d 565, 566–67 (7th Cir. 1987).

¹⁶*Id.* at 567.

¹⁷986 F.2d 195, 200 (7th Cir. 1993).

¹⁸*The Hilmon Co. (V.I.) Inc. v. Hyatt Int'l*, 899 F.2d 250, 253 (3d Cir. 1990).

¹⁹Available at www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal.html. The rule contains additional subsections less salient for purposes of this discussion.

²⁰983 F.2d 824, 833 (8th Cir. 1992).

²¹*Monee Nursery & Landscaping Co. v. Int'l Union of Operating Engineers, Local 150, AFL-CIO*, 348 F.3d 671, 678 n.4 (7th Cir. 2003).

²²*Lumaj v. Gonzales*, 462 F.3d 574, 576 n.1 (6th Cir. 2006).

²³Fed. R. App. P. 28(j).

²⁴*United States v. Collins*, 920 F.2d 619, 633 (10th Cir. 1990).