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Ethical Issues on Appeal

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ETHICAL ISSUES ON APPEAL

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I. INTRODUCTION

Appellate practice has developed into an increasingly specialized area of the law. Today’s appellate practitioner requires finely tuned skills in order to convey the client’s arguments in a persuasive manner. An appellate attorney must navigate through the sometimes complicated appellate rules and must do so without neglecting ethical obligations both to the court and to the client.

Legal ethics has been defined as “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.”

The advent of an appeal can raise new ethical issues. For example, while a case may have had merit when it was initiated in the district court, the record presented on appeal may not

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provide a good faith basis for appeal. In such a case, an appeal would be frivolous.

A lawyer who accepts a case has an obligation to see the matter through to its completion—that is, not only through trial but also through appeal. On the other hand, appellate lawyers have an ethical and legal duty to prosecute only meritorious appeals and to refrain from pursuing appellate remedies where the only purpose is to delay the finality of the lower court's determination.

While the same ethical rules apply to lawyers in district court, the issues presented by these rules often have a far different impact in the appellate courts. Yet, relatively few published articles provide guidance concerning ethical issues that affect appellate practice.

This article explores the parameters of ethical issues in the context of civil appeals. Part I.A discusses the responsibilities of appellate counsel to ensure their competence. Part I.B analyzes unmeritorious appeals. Part I.C discusses conflicts of interest on appeal. Parts I.D and E approach issues of candor and demeanor that arise between an attorney and the court. Overall, this article seeks to sensitize appellate lawyers and judges to ethical considerations on appeal.

A. The Duty of Competence—or—Don't Take the Differences Between Trial and Appellate Courts Lightly

When an appeal is filed, a lawyer begins, in a sense, a new ball game with new rules and a new audience. The demands made on counsel are more strict, both procedurally and substantively. The Minnesota Rules of Professional Conduct impose on all lawyers—including the appellate lawyer—the duty


3. J. Michael Medina, Ethical Concerns in Civil Appellate Advocacy, 43 Sw. L.J. 677 (1989); Raymond T. Elligett, Jr., Ethics of Appellate Practice, For the Defense (Defense Research Institute, September 1991); Raymond T. Elligett, Jr., Appellate Ethics, 63 Fla. B.J. 46 (May, 1989).
of competent representation. Competent representation—in any court—"requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."\(^5\)

Appellate practice is technical. Many preconditions to appellate review of issues may not be immediately apparent from a casual reading of the Rules of Civil Appellate Procedure. For example, the rules of appellate procedure provide that, on appeal from judgment, the appellate court may review any order affecting the judgment.\(^6\) Yet, the Minnesota Supreme Court has held that a motion for a new trial must be brought before an attorney may assert errors on appeal.\(^7\) A new trial motion, not specifically alleging any error, does not preserve any issues for appeal.\(^8\) Likewise, a legal argument asserted on appeal, without citation of authority, will not be considered by the appellate court.\(^9\)

Even rules that appear straightforward are sometimes troublesome. For example, the Minnesota Rules of Civil Appellate

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A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

*Id.*

5. *Id.* The comment to Rule 1.1 specifically acknowledges that competence is measured with reference to "a particular matter" and not in general terms. The relative complexity and specialized nature of the matter, the amount of time and study that the lawyer can devote, and the lawyer's own general experience are factors that bear on competence. While a lawyer does not have to be a "certified" specialist in appellate practice, as defined by the Internal Rules of the State Board of Legal Certification Rule 101(d), the lawyer must ensure his or her own competence in appellate law and procedure. **Minnesota Rules of Professional Conduct** Rule 1.1 cmt. (1985).

6. **Minn. R. Civ. App.** P. 103.04 (emphasis added).

7. Sauter v. Wasemiller, 389 N.W.2d 200, 202 (Minn. 1986).

8. Waldner v. Peterson, 447 N.W.2d 217, 219 (Minn. Ct. App. 1989). In Waldner, the court noted that the purpose of a motion for a new trial is to allow the trial court a chance to correct its errors without subjecting the parties to the appellate process. *Id.* Thus, "[a] motion which does not adequately identify alleged errors does not alert the trial court to those errors which, if corrected, could alleviate the need for an appeal." Therefore, such a motion must be affirmed on appeal. *Id.* (citing Amatuzio v. Amatuzio, 431 N.W.2d 588, 589 (Minn. Ct. App. 1988), review denied, (Minn. July 27, 1989)).

Procedure provide that a notice of appeal is deemed served upon mailing. However, a notice of appeal mailed to an incorrect address in an urban area is not deemed "timely." The intended party, to whom the notice of appeal was improperly mailed, will be dismissed from the appeal.

Unlike the trial court, where pleadings are oftentimes liberally amended in the interest of justice, the Rules of Civil Appellate Procedure do not authorize amendments to notices of appeal. Thus, a notice of appeal, otherwise timely filed, which erroneously recites that the appeal is from an "order for judgment" rather than from a "judgment" will be dismissed. Likewise, a notice of appeal that fails to list individually all of the entities taking the appeal but simply refers to the first party and all others with the phrase "et al." is only effective as to the party actually named. "Et" and "al." have not properly appealed.

Appellate courts react sternly to errors in handling an appeal. In Swenson v. City of Fifty Lakes, the Minnesota Court of Appeals dismissed an appeal that was improperly taken from an order for judgment rather than from the judgment. In addition, the court noted a "careless failure" to comply with the Rules of Civil Appellate Procedure by appellant's counsel. The court of appeals imposed sanctions on appellant's counsel.

10. MINN. R. CIV. APP. P. 125.03.
12. Hansing, 433 N.W.2d at 442.
13. MINN. R. CIV. P. 15.01.
18. Id. at 759. "An order for judgment is not appealable." Graupmann v. Rental Equipment & Sales Co., 425 N.W.2d 861 (Minn. Ct. App. 1988) (citing MINN. R. CIV. APP. P. 103.03)).
19. Swenson, 439 N.W.2d at 758.
20. Id.
Further, in *Lund v. Corporate Air, Inc.*, petitioners counsel failed to establish a compelling reason for discretionary review. In the court's view, the petitioner's counsel did not disclose the denial of a substantially similar motion for summary judgment and failed to disclose the past procedural history relevant to the court's determination. The court held that the actions of petitioner's counsel warranted the imposition of sanctions.

Oftentimes, it is as dangerous not to file an appeal as to file one prematurely. Once the time to appeal the original judgment has expired, an issue decided in an original judgment and not affected by a later amendment may not be raised on appeal from an amended judgment. Failure to appeal from a partial judgment, certified as final by the trial court, is equally fatal to any subsequent appeal if not filed in the requisite time period.

Likewise, special proceedings differ from ordinary civil appeals. While a motion for new trial is essential to raise issues of trial procedure in civil actions, such a motion is not appropriate in the garden variety special proceeding. In most special proceedings, a motion for a new trial is ineffective because appeal must be taken from the original order of the special proceeding—not from a denial of a new trial motion.

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22. *Id.* at 459.
23. *Id.*
24. *Id.* at 460.
27. The term special proceeding refers to any civil remedy which is not an ordinary action. The special proceeding adjudicates a "substantive right with decisive finality separate and apart from any final judgment entered or to be entered in such action upon the merits." *Chapman v. Dorsey*, 230 Minn. 279, 283, 41 N.W.2d 438, 440 (1950).
28. Huso v. Huso, 465 N.W.2d 719, 721 (Minn. Ct. App. 1991) (holding that a post-decree divorce proceeding was a special proceeding which had not been the subject of expressed legislative intent to proceed as in other civil cases. Thus, an order denying motion for new trial is not appealable). *See also* Tonkaway Ltd. Partnership v. McLain, 433 N.W.2d 443, 444 (Minn. Ct. App. 1988).
29. *See, e.g.*, Huso, 465 N.W.2d at 721. *But see* Schiltz v. City of Duluth, 449 N.W.2d 439 (Minn. 1990). In *Schiltz*, the Minnesota Supreme Court reversed the court of appeals' holding that a motion of a new trial in a mandamus proceeding is
dition, a motion for a new trial does not extend the time to file an appeal of the original order of the special proceeding. Thus, while counsel pursues an unappealable motion for new trial, the time period for appeal from the special proceeding may expire.

An attorney who is unaware of the technical rules of appellate practice may not meet the standard of competency as defined by Rule 1.1 of the Minnesota Rules of Professional Conduct. In other words, an attorney cannot assume competence at the appellate level based merely upon competence in the trial court. However, an attorney may gain an understanding of the technicalities of appellate practice through study of case law and other secondary authority. Thus, the competent appellate attorney can meet the standard set forth under Rule 1.1.

B. Whether to Appeal—or—Filing an Appeal Is Not a Conditioned Reflex

Any discussion of appeals and ethics must begin with the fundamental issue of whether to undertake an appeal. The filing of an appeal should never be a conditioned reflex. A lawyer must give thoughtful consideration to whether sufficient grounds for an appeal exist before filing. Filing an appeal simply to "preserve" the client's rights is inappropriate. When an unauthorized and unappealable. Citing MINN. STAT. § 586.08 (1988), the supreme court stated that a mandamus proceeding is treated in the same manner as any civil action. Therefore, a motion of a new trial in a mandamus proceeding is appealable pursuant to MINN. R. CIV. APP. P. 103.03(d). Schlitz, 449 N.W.2d at 440-41.

In general, where the legislature has indicated that a special proceeding shall be treated the same as any other civil action, an order granting or denying a motion for a new trial is properly appealable. Huso, 465 N.W.2d at 721.

30. See MINNESOTA RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1985). "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Id.

attorney submits signed notice of appeal, the attorney has certified that the appeal is meritorious.\textsuperscript{32}

While the rules of ethics provide an objective test to determine a good faith appeal,\textsuperscript{33} the conclusion that an appeal is frivolous is seldom an easy one for counsel to make. A number of commentators have discussed the problems of frivolous appeals.\textsuperscript{34} These authors have noted the potential conflict between the obligation of the lawyer to represent his or her client diligently\textsuperscript{35} and the obligation of the lawyer to present only meritorious claims and contentions to the court.\textsuperscript{36}

Courts are reluctant to classify appeals as frivolous. To do so might chill novel theories and discourage litigants from advancing any claim or defense having colorable support under existing law or reasonable extensions of the law.\textsuperscript{37} Obviously,

\textsuperscript{32} See Nielsen v. Braland, 264 Minn. 481, 481, 119 N.W.2d 737, 739 (Minn. 1963) (holding that, where appeal clearly has no merit, it is frivolous and will be dismissed).

\textsuperscript{33} Uselman v. Uselman, 464 N.W.2d 130, 143 (Minn. 1990) (citing Kale v. Combined Ins. Co., 861 F.2d 746, 759 (1st Cir. 1988)).

\textsuperscript{34} E.g., David A. Davis, The Frivolous Appeal Reconsidered, 26 CRIM. LAW BULL. 305 (1990); Charles Pengilly, Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal, 9 CRIM. JUST.J. 45 (1986).

\textsuperscript{35} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1985); MINNESOTA RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1985). Both rules state: "A lawyer shall act with reasonable diligence and promptness in representing a client." Id. Because the Minnesota Rules and the ABA Model Rules are substantially similar, further references will be only to the Minnesota Rules. Any significant differences between a cited Minnesota Rule and its ABA Model Rule counterpart will be noted.

\textsuperscript{36} MINNESOTA RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1985). Rule 3.1 states:

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. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Id.

\textsuperscript{37} See generally Dabrowski v. Dabrowski, 477 N.W.2d 761, 766 (Minn. Ct. App. 1991) (stating that the issues raised on appeal were not frivolous but denying an award of attorney fees); Phillips Klein Cos. v. Tiffany Partnership, 474 N.W.2d 370, 374 (Minn. Ct. App. 1991) (holding that appellants did not act in bad faith in bringing three separate appeals due to respondents' request that the trial court enter final judgment after each individual order); Ganyo v. Engen, 446 N.W.2d 683, 687 (Minn. Ct. App. 1989) (holding appeal had merit and therefore was not frivolous); Graupmann v. Rental Equip. & Sales Co., 438 N.W.2d 711, 713 (Minn. Ct. App. 1989) (pointing out that, although court ruled against appellant, appeal was not frivolous); National Farmers Union Property & Cas. Co. v. Fuel Recovery Co., 432 N.W.2d 788, 792 (Minn. Ct. App. 1988), review denied, (Minn. Feb. 10, 1989) (finding...
not every losing appeal is frivolous, and both the courts and the Rules of Professional Conduct recognize the need for arguments advocating a modification or reversal of existing law.\textsuperscript{38} As one court noted, "the line between a frivolous appeal and one which simply has no merit is fine."\textsuperscript{39}

Courts have articulated various standards to define a frivolous appeal. Some courts deem an appeal "frivolous" where the appeal is "utterly without merit"\textsuperscript{40} or without "colorable arguments raised in support."\textsuperscript{41} Other courts hold that "attorneys have an affirmative obligation to research the law and determine if the claim on appeal is utterly without merit and frivolous."\textsuperscript{42} Thus, if counsel ignores or fails in this obligation to the client, counsel does so at his own peril and may be personally liable to satisfy an award of damages for delay.\textsuperscript{43} One court awarded over $25,000 in fees and costs against the appellant's counsel for failure to discharge this obligation.\textsuperscript{44} Nu-
merous other decisions have reported similar concerns and sanctions.\textsuperscript{45}

Usually courts find an appeal frivolous where the appeal brief fails to identify any arguable error in the district court’s decision and fails to confront or to contest the dispositive finding. A good example of a frivolous appeal is found in \textit{Clark v. Maurer}.\textsuperscript{46} In \textit{Clark}, the plaintiffs were among twenty-four Chicago garbagemen fired for bribing a city timekeeper to show them as working when they were not.\textsuperscript{47} The city announced the firing in a press release that described the garbagemen’s conduct but did not name them.\textsuperscript{48} The press release was published in the \textit{Chicago Tribune}, again without identifying the malefactors.\textsuperscript{49}

The plaintiffs claimed that the firing deprived them of their occupational liberty by stigmatizing them as unfit for future employment.\textsuperscript{50} In addition, the complaint failed to allege the charges were false and, indeed, appeared to concede their essential truth.\textsuperscript{51} The complaint did not even succeed in alleging actionable defamation.\textsuperscript{52} The court dismissed the motion for failure to state a claim upon which relief could be granted.\textsuperscript{53} The Seventh Circuit affirmed, holding that the mere fact the employees were never publicly named required dismissal of the complaint.\textsuperscript{54}

Further, the Seventh Circuit concluded that the only substantial issue raised on appeal was the defendant’s request for attorney’s fees and double costs\textsuperscript{55} for being forced to respond

\textsuperscript{45} See, e.g., Forêt v. Southern Farm Bureau Life Ins. Co., 918 F.2d 534, 539 (5th Cir. 1990) (awarding sua sponte, a sanction of attorney’s fees in a frivolous appeal); Pillsbury Co. v. Midland Enter. Inc., 904 F.2d 317, 318 (5th Cir.), \textit{cert. denied}, 498 U.S. 983 (1990) (affirming award of double costs for filing of frivolous appeal); Smith v. Pennsylvania Bd., 574 A.2d 558 (Pa. 1990) (sanctioning attorney for appealing a ruling where an appeal was not permitted pursuant to rules); Knect Bros. v. Ames Const., 404 N.W.2d 859 (Minn. Ct. App. 1987) (finding appellant’s further pursuit of its defense to be frivolous and awarding attorney’s fees on appeal pursuant to Minnesota law).

\textsuperscript{46} 824 F.2d 565 (7th Cir. 1987).

\textsuperscript{47} \textit{Id.} at 566.

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} \textit{Id.} at 566.

\textsuperscript{51} Clark v. Maurer, 824 F.2d 565, 566 (7th Cir. 1987).

\textsuperscript{52} \textit{Id.}

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{Id.} at 566. Defendant’s request was pursuant to \textit{Fed. R. Civ. P.} 38.
to a frivolous appeal. The court noted that an appeal can be frivolous, even though the underlying suit is not. The Seventh Circuit explained:

The 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.

In awarding sanctions, the Seventh Circuit noted the failure of the appellant's brief to confront the issue of whether liability existed where the names of the garbagemen had not been released. The court was particularly disturbed because the district court "flagged" this issue. The only authority cited by the appellant's brief was a district court decision that never discussed the significance of Seventh Circuit authority directly on point.

The Clark decision also illustrates the difficulty of determining whether an appeal is frivolous, even by members of the same panel hearing the case. In Clark, Judge Cudahy dissented from the court's conclusion that the appeal was frivolous. Judge Cudahy recognized that the "lawsuit is thin and the appeal perhaps even thinner." However, given the fact that another district court reached the opposite result in a related complaint with identical facts, Judge Cudahy refused to find the appeal frivolous. He concluded that "[t]here may be a thin line between appellate incompetency and appellate frivolity, but I cannot persuade myself that the defects here, whatever they may be, fall on the side of frivolity."

While the United States Supreme Court has held that Rule 11 of the Federal Rules of Civil Procedure does not apply to

56. Clark v. Maurer, 824 F.2d 565, 566 (7th Cir. 1987).
57. Id. at 566-67.
58. Id. (per curiam)(citing Morris v. Jenkins, 819 F.2d 678, 681-82 (7th Cir. 1987)).
59. Id. at 567.
60. Id.
61. Clark v. Maurer, 824 F.2d 565, 567 (7th Cir. 1987).
62. Id.
63. Id.
64. Id.
appellate proceedings, Rule 38 of the Federal Rules of Appellate Procedure authorizes awards of appellate expenses for frivolous appeals. Minnesota's counterpart to Rule 38 of the Federal Rules of Appellate Procedure is Rule 138 of the Minnesota Rules of Civil Appellate Procedure. Unlike the federal rule, a Minnesota court may award damages under Rule 138 if the court determines that the appeal was taken merely for delay. An appeal that lacks merit is not enough to trigger an award of damages under Rule 138. However, additional sanctions may be imposed where an appeal is frivolous under section 549.21 of the Minnesota Statutes. In an unpublished opinion, the Minnesota Court of Appeals held that the party seeking sanctions on appeal has the burden of proving that the other party knowingly asserted a frivolous claim.

If the attorney determines that an appeal is frivolous, the attorney must inform the client. Courts have often quoted Elihu Root's comment that "[a]bout half the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop." The decision to file an appeal belongs to the client and not the lawyer. The Rules of Professional Conduct impose an ethical obligation to fully inform the client on all

67. MINN. R. Civ. App. P. 138 (1983). Rule 138 states: "If an appeal delays proceedings on the judgment of the trial court and appears to have been taken merely for delay, the appellate court may award just damages and single or double costs to the respondent." Id.
69. See id.
72. Id. at *3 (citing Uselman v. Uselman, 464 N.W.2d 130, 140 (Minn. 1990). Uselman was later superseded by MINN. STAT. § 549.21 (1990).
pects of the case and to obtain the client's knowing consent to the action.\textsuperscript{74} If the client insists on filing a frivolous appeal, the attorney must decline or withdraw from representation.\textsuperscript{75} In such a situation, a primary consideration for the attorney is the client's objective in pursuing the appeal. The attorney must determine if the client seeks to press a meritorious issue, to harass the winning party, or to delay the execution of judgment. Pursuing an appeal purely for delaying resolution of the litigation constitutes an improper motive under Rule 138 of the Minnesota Rules of Civil Appellate Procedure.\textsuperscript{76} Even though a legal and factual basis for bringing the appeal, the Minnesota Rules of Professional Conduct require an attorney to "make reasonable efforts to expedite litigation consistent with the interests of the client."\textsuperscript{77}

C. Conflicts of Interest—or—You Can’t Win Both Sides of the Same Issue

Minnesota Rules of Professional Conduct Rule 1.7 governs direct conflicts of interest.\textsuperscript{78} An attorney must evaluate the potential for conflicts prior to litigation. If a different firm han-
dles the appeal, a conflict may arise; therefore, the appellate lawyer must also conduct a conflicts check. In this regard, there is little difference between the considerations that guide the conduct of a trial lawyer and the appellate lawyer.

A unique concern in appellate practice is positional conflict. Consider the hypothetical posed by the lawyer who orally argues successive cases to the appellate court. In one case, the lawyer argues on behalf of the insured that a pollution exclusion is ambiguous. In a subsequent case, the lawyer represents the insurer and argues the clause is clear and unambiguous. Such an obvious conflict is rare because appellate courts are far smaller than general trial courts and because the appellate courts are more attuned to the decisional consistency of their cases. The positions advocated by particular lawyers and law firms are more likely to be scrutinized on a comparative basis at the appellate level.

When faced with a potential positional conflict, the lawyer must consider the likelihood of the identical issue being raised in each case, the likely impact of a decision in favor of one client on the position of the other client, and the significance of the issue. Prior to advancing a position different than that of another client, the lawyer should first determine whether the differing positions fall within Rule 1.7(b) of the Minnesota Rules of Professional Conduct. 79 If the differing positions do fall within the scope of Rule 1.7(b), the lawyer must, before proceeding, determine that his appellate representation will not adversely affect the client if the lawyer advocates a differing view. The lawyer then must obtain the client's consent after consultation. 80

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(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation . . . .

Id.

It is difficult to see how a client could consent to a positional conflict when the decision in another case might result in a controlling decision contrary to the position of the client.

D. Candor—or—At Best Incompetent, At Worst Deceptive

An appellate attorney undertakes many conflicting duties. For example, an appellate attorney's loyalties are divided between the duty of candor owed to the court and the duty of zealous representation owed to the client. Where these duties conflict, "the duty to the court is paramount, even to the interests of his client."\(^{81}\)

Rule 3.3 of the Minnesota Rules of Professional Conduct addresses the duty of candor towards a tribunal.\(^{82}\) One common situation that tests the application of rule 3.3 involves cases that settle after the oral arguments but before the court has issued an opinion. For other reasons, one side may still want a definitive ruling, and the other side no longer cares if an opinion is issued. Regardless of counsel's motive, courts have unequivocally refused to decide moot or fictitious appeals.\(^{83}\) Attorneys, therefore, have an obligation to inform the appellate court of a settlement.\(^{84}\) "It is one thing to argue that set-

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   - (a) A lawyer shall not knowingly:
     1. make a false statement of fact to a tribunal;
     2. fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
     3. fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
     4. offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
   - (b) The duties stated in paragraph (a) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
   - (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
   - (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

83. Barnes v. Macken, 252 Minn. 412, 416, 90 N.W.2d 222, 226 (1958) (holding that policeman's appeal would be dismissed as moot because it was impossible for the court to grant effectual relief); Obermoller v. Federal Land Bank, 409 N.W.2d 229, 230-31 (Minn. Ct. App. 1987), review denied, (Minn. Sept. 18, 1987) (citing Barnes, 252 Minn. at 416, 90 N.W.2d at 226).
84. Amherst & Clarence Ins. Co. v. Cazenovia Tavern, Inc., 453 N.E.2d 1077, 1078 (N.Y. 1983). The court addressed the attorney's obligation by stating that [a]ny agreement or understanding the parties may have reached not to disclose to our Court the fact or circumstances of such settlement, relating as the settlement does to the continuing viability of the appeal, will be disre-
tlement 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.”

Rule 3.3 of the Minnesota Rules of Professional Conduct requires a lawyer to disclose legal authority in the controlling jurisdiction that he knows to be directly adverse to the client, but which is not disclosed by opposing counsel. This is probably the most agonizing situation faced by any appellate lawyer. The diligent attorney who performs more exhaustive research than his opposing counsel often discovers such adverse authority. The diligent attorney may feel particularly galled by the compulsion to provide the benefit of this research to an opponent who has not made the same effort.

Yet, the appellate lawyer may take comfort in the fact that the court probably would have found the adverse decision on its own, and the court will, by the attorney’s disclosure, appreciate the attorney’s thoroughness and integrity. Moreover, by being the first to discuss potentially damaging authority, the appellate attorney can minimize the impact of the authority by qualifying it or distinguishing it on the facts or legal context.

For example, in *McVicar v. Standard Insulations, Inc.*, the defendants obtained summary judgment on the basis of a recent Mississippi Supreme Court decision. While the case was on appeal in the federal court, the Mississippi Supreme Court issued a new opinion that was favorable to the appellant. The appellant overlooked the new decision. The appellees, however, cited the new opinion leading to the reversal of summary judgment in appellant’s favor.

Many attorneys question how far the disclosure obligation

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85. Douglas v. Donovan, 704 F.2d 1276, 1280 (D.C. Cir. 1983). In *Donovan*, the court did not learn about the parties’ settlement until the plaintiff’s counsel accidentally mentioned it during his conclusion at oral argument. *Id.* at 1279.


87. 824 F.2d 920 (11th Cir. 1987).

88. *Id.*


90. *Id.*

91. *Id.*
extends. Does the obligation only include trial court decisions? If no local law exists, must the attorney disclose adverse out-of-state cases? How closely on point must the case be to require disclosure? The ABA Committee on Professional Ethics and Grievances concluded that the proper determination of whether the attorney must disclose precedent requires that the attorney consider three questions:

1. whether the overlooked decisions are ones that the court clearly should take into account in deciding the case;
2. whether in failing to disclose the decisions the lawyer, in the eyes of the court, would lack candor and would be viewed as acting unfairly; and
3. whether the court would consider itself misled by the lawyer.92

The Committee’s opinion is much more broad than the Minnesota Rules of Professional Conduct, which only require disclosure of “directly adverse” decisions in the “controlling jurisdiction.”93 Nonetheless, the ABA opinion is useful because courts have viewed the disclosure requirement as broader than that stated in the Rules of Professional Conduct. In Estate of Oskey v. United States,94 the Minnesota federal district court found that the counsel for the IRS had breached its obligation to the court by not disclosing one case on point from Colorado. The court did not inquire whether the obligation of candor was limited to cases from the controlling jurisdiction or even what the controlling jurisdiction should be in federal tax cases.95

The Minnesota Court of Appeals has held that the duty to disclose also applies to controlling statutory authority. In Dorso Trailer Sales v. American Body & Trailer, Inc.,96 the respondent (Polar) terminated Dorso’s distributorship contract and, as required by the contract, gave ninety days notice.97 Subse-

95. Id. at 425. The court also noted that the IRS counsel breached his duty to “represent the best interests of the taxpayers.” Id. at 425. See also Ashland v. Ling-Temco-Vought, Inc., 711 F.2d 1431 (9th Cir. 1983) (criticizing counsel for citing only one case supporting their position and for not disclosing four federal and four state cases to the contrary).
97. Id. at 413.
quently, Dorso brought a breach of contract action against Polar. The trial court held that, under the common law, the agreement could only be terminated for cause. A jury found that Polar had not been terminated for cause. The court entered judgment for Dorso, and Polar appealed. The court of appeals reversed, concluding termination for cause was not necessary.

Dorso’s counsel subsequently learned that Minnesota Statute Chapter 80E required good cause to terminate a franchise agreement. Dorso moved for relief from the judgment on the ground that a fraud had been committed on the court. Polar’s former trial counsel admitted knowledge of Chapter 80E but never disclosed this information to Dorso or to the courts. Polar’s attorney asserted that he did not have an ethical obligation to disclose because, in his opinion, Chapter 80E would be unconstitutional as applied to the case. The court rejected this argument and vacated the judgment. Another round of appeals ensued.

Polar argued that an attorney’s ethical obligation to disclose directly adverse legal authority did not impose the obligation to suggest unpressed claims or theories. Rather, Polar contended, Dorso’s breach of contract claim was independent from its claim under Chapter 80E. The court of appeals disagreed, noting Polar’s primary argument on appeal was that

98. Id. at 414.
99. Id.
100. Id.
102. Id. at 415.
104. Id. at 772. MINN. R. CIV. P. Rule 60.02 authorizes relief from a judgment (a) for mistake, inadvertence, surprise or excusable neglect; (c) for fraud; and (f) for any other reason justifying relief from the operation of the judgment.
105. Dorso, 482 N.W.2d at 772.
106. Id. Polar’s attorney also based nondisclosure on the ground that Dorso’s counsel had not pleaded Chapter 80E as a theory of recovery. Id.
107. Id. at 772-73. The trial court referred to the Polar counsel’s error as a “serious mistake in judgment” but rejected a finding of fraud. Id.
109. Id. at 557.
Minnesota law did not require good cause for termination of the franchise agreement.\(^\text{110}\) The Minnesota Court of Appeals then addressed whether the Polar counsel's violation of his duty to disclose warranted vacating the judgment.\(^\text{111}\) The court of appeals recognized another court's holding that "neglecting to acknowledge" authority contrary to its position did not support vacating the judgment and, at most, gave rise to a breach of ethics.\(^\text{112}\) However, the court of appeals distinguished \textit{Dorso Trailer} because, in addition to failing to disclose the existence of the statute, Polar affirmatively misrepresented the law to the courts.\(^\text{113}\) Therefore, the court of appeals held that vacating the judgment was not warranted.\(^\text{114}\)

The Minnesota Supreme Court reversed, concluding that the district court lacked subject matter jurisdiction to vacate a satisfied judgment.\(^\text{115}\) In a footnote, the supreme court stated that the Lawyer's Board of Professional Responsibility—not the court—was the proper forum for dealing with allegations of attorney misconduct.\(^\text{116}\)

The duty of candor is continuing in nature, and counsel is required to inform the court of any new development that may conceivably affect the outcome of the litigation.\(^\text{117}\) In \textit{Board of License Commissioners v. Pastore},\(^\text{118}\) the United States Supreme Court granted certiorari to consider whether the Fourth Amendment Exclusionary Rule applied in a civil liquor license revocation proceeding.\(^\text{119}\) After issuing the writ, the Court considered briefs on the merits and scheduled oral argument.\(^\text{120}\) At oral argument, counsel informed the Court that the entity requesting the license had gone out of business, thus

\(^{110}\) \textit{Id.}
\(^{111}\) \textit{Id.} Polar's argument was that, even if the disclosure duty had been violated, the violation was not sufficient to warrant vacating the judgment. \textit{Id.} at 557.
\(^{113}\) \textit{Id.} at 558.
\(^{114}\) \textit{Id.} at 559.
\(^{115}\) \textit{Id.} at 773 n.2.
\(^{117}\) \textit{469 U.S. 238 (1985)}.
\(^{118}\) \textit{Id.} at 238.
\(^{119}\) \textit{Id.}
making the case moot.\textsuperscript{121} In dismissing the writ of certiorari as moot, the Court noted that counsel is required to inform the Court, without delay, of any development which could have the effect of depriving the court of jurisdiction.\textsuperscript{122}

Violations of candor toward the tribunal include nondisclosure or misstatement of a material fact, misrepresentation of what a case holds, distortion of the law, and statements of purported fact not supported by the record. Candor to the court requires fairly portraying the record. In \textit{Lund v. Corporate Air, Inc.},\textsuperscript{123} the Minnesota Court of Appeals determined that the lack of candor in the petition for discretionary review justified the imposition of sanctions.\textsuperscript{124} The court noted that Corporate Air's counsel failed to disclose that a substantially similar motion for summary judgment had been denied by another judge eight months prior. Additionally, counsel failed to disclose the trial court's specific refusal to certify the question presented by the second motion as important and doubtful. According to the appellate court, the trial court's determination that immediate appellate review was not warranted was germane to the court of appeals' inquiry of whether "the interest of justice" would be served by extending discretionary review.\textsuperscript{125} The court stated:

Corporate Air asserts that "this case involves an unusual issue of first impression in Minnesota." The petition did not discuss relevant case law, which holds that a binding election of remedies does not generally occur until workers' compensation benefits are actively pursued to a determinative conclusion, benefits are accepted, and the adversary is injured thereby.\textsuperscript{126}

Appellate rules require parties to support factual assertions

\textsuperscript{121} \textit{Id.} at 239.  
\textsuperscript{122} \textit{Id.} at 240. \textit{See also In re Universal Minerals, Inc.,} 755 F.2d 309, 312 (3d Cir. 1985) (indicating that "[w]hen counsel receives a request for information from this court, common courtesy would dictate that the request be at the least acknowledged.").  
\textsuperscript{124} \textit{Id.} at 459.  
\textsuperscript{125} \textit{Id.}  
\textsuperscript{126} \textit{Id.} at 459-60 (citing Kohler v. State Farm Mut. Auto. Ins. Co., 416 N.W.2d 469 (Minn. Ct. App. 1987). The court ordered Corporate Air's counsel to pay sanctions in the amount of $500. \textit{Id.} at 460. It should be noted that the supreme court reversed the imposition of monetary sanctions in \textit{Lund} and referred the matter over to the Board of Professional Responsibility. Order (Minn. June 21, 1989).
with references to the record. Appellate courts have imposed sanctions and stricken briefs for failure to abide by the rules, even where the court does not find intentional misconduct. In DCD Programs, Ltd. v. Leighton, the court indicated that attorneys have a professional duty that requires "scrupulous accuracy" in referring to the record. The court noted that it should not have to scrutinize an extensive record as an alternative to relying on representations made by counsel. "The court relies on counsel to state clearly, candidly, and accurately the record as it in fact exists."

Appellate lawyers must also be careful when quoting case law or quoting from the record. Quotations must fairly reflect the case and should not be lifted out of context. In Amstar Corp. v. Envirotech Corp., counsel distorted the record by deleting critical language when quoting from the record. The court found that Envirotech's brief relied on a reverse statement of the law of infringement, ignored the numerous and unanimous contrary authorities called to its attention by Amstar's main brief, distorted a quotation, and presented an estoppel argument based on that distortion. The court thus ordered Envirotech to pay Amstar double its costs on the appeal.

The appellate record is limited to those items presented to the trial court. Items contained in an appendix or references in a brief to materials not presented to the trial court are thus not part of the record and are subject to a motion to strike by the opposing party. In addition, both the counsel and the parties are subject to sanctions for including materials in the appellate brief or appendix that were not of record in the

127. 846 F.2d 526 (9th Cir. 1988).
128. Id. at 528.
129. Id.
130. 730 F.2d 1476 (Fed. Cir. 1984).
131. Id. at 1486.
132. Id.
133. Id.
134. See MINN. R. CIV. APP. P. 110.01. "The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Id.
135. See Kise v. Product Design & Eng'g Inc., 453 N.W.2d 561, 566 (Minn. Ct. App. 1990) (granting motion to strike exhibits that were not part of the record received by the trial court); see also Mitterhauser v. Mitterhauser, 399 N.W.2d 664, 667 (Minn. Ct. App. 1987) (striking documents from appeal that were not submitted to the trial court).
However, an appellate court has the inherent power to look beyond the record of the trial court where "the orderly administration of justice commends it." Evidence appropriate for appellate admission is generally uncontroverted or conclusive and, consequently, is not submitted as a basis to reverse factual findings made by the trial court.

The obligation of candor applies throughout the appellate process, including oral argument and petitions for rehearing. For example, during oral argument, appellant's counsel argued that the judgment against his client was erroneous because his client testified, "I applied the brakes, but the brakes failed." Upon questioning by the court, it became apparent that the client had actually testified, "I applied the brakes, but the brakes failed to stop the car before the impact." Such distortion of the record can result in the imposition of sanctions. Such allegations of the record diminish the lawyer's credibility and damages the client's cause.

E. Demeanor—or—You Can Think It, but You Better Not Say It

Appellate courts have censured and sanctioned counsel for disparaging the trial court, opposing counsel, and the other parties. As one judge stated, "[y]ou can think it, but you better not say it." In Allen v. Seidman, the court criticized counsel for writing the word "WRONG" beside several of the district judge's findings and submitting this as part of the appendix. The court noted that "[t]his is indecorous and unprofessional
conduct, which we have noticed in other cases and remark publicly today in the hope it will not recur."  

In In re Paulsrude, the Minnesota Supreme Court disbarred an attorney for, among other things, referring to the court as a "kangaroo court" and the judge as a "horse's ass." One court struck a petition for rehearing because the petition contained the statement that the "[a]ppellate court has either ignored the law or is not interested in determining the law."  

Counsel also has an obligation to be courteous to opposing lawyers and opposing parties. In Sonksen v. Legal Services Corp., counsel made racial slurs, called the opposing parties "ignorant psychopaths," and referred to their counsel as "willfully perverse." The comments resulted in censure of counsel by the Iowa Supreme Court. In Columbus Bar Ass'n v. Riebel, an attorney was disciplined for writing and rubber-stamping obscenities on correspondence to opposing counsel. While courts do tolerate relevant criticism, candor does have its limitations and courts will sanction attorneys who have gone beyond the court's idea of appropriate conduct.

II. Conclusion

In many ways the practice of appellate law is no different than practice in any other court. However, the requirements of procedural rules are undeniably more rigidly enforced. Consequently, appellate practice is often more demanding, particularly for the unschooled.

Lawyers must be competent. They must fully advise their clients on both the substantive and procedural aspects of their

146. Id.
147. 311 Minn. 303, 248 N.W.2d 747 (1976).
148. Id. at 748.
149. Vandenbergh v. Poole, 163 So. 2d 51, 51 (Fla. Dist. Ct. App. 1964). The court found the language to be "contemptuous and impudent." Id. The court then declared that it is not part of an attorney's job to use language in papers filed with the court that is insulting to the members of the panel who heard the case. Id.
150. 389 N.W.2d 386, 389 (Iowa 1986).
151. Id. at 389.
152. Id.
153. 432 N.E.2d 165 (Ohio 1982). The intent of the Code of Professional Responsibility is that lawyers should be "cognizant of the necessity for good manners, courtesy and discourse, both to the client and other practitioners, as being part of our professional ethics." Id. at 167.
154. Id.
case. Appellate lawyers must be aware of all the rules and the judicial gloss placed on those rules by the courts.

More importantly, the appellate lawyer must be candid and forthright at all times not only with clients but also with the court and opposing counsel. Just as an appeal is the distillation of complex facts and legal issues narrowed down to a few brief pages and a handful of spoken words, the lawyer's conduct on appeal is often subject to closer scrutiny and more exacting measure than in the trial court.

The rules of ethical appellate practice are grounded in common sense. Adherence to these rules is essential to maintain the proper functioning of the appellate system.