Answering to a Higher Authority:

Appellate Professionalism

By Tom Elligett, Judge John Scheb
and Amy Farrior

Much of the emphasis on the need to improve professionalism focuses on trial practice. When a case moves to the appellate tribunal, it triggers a new set of procedural rules, new ethical considerations, and new opportunities for professional–or unprofessional–conduct.

Many ethical rules apply in appellate practice as well as trial practice. For example, candor with the tribunal (such as citing controlling adverse authority), diligence, and competence (a trial lawyer is not always best equipped with the different skills required in appellate practice). Beyond the ethical minimums, professional appellate lawyers should aspire to a higher level of practice.

Counsel should cooperate with each other on non-substantive issues, like submitting a full record for the appeal and reasonable extensions of time. On occasion, counsel may discover that a pleading, evidence, or something else they consider relevant has been omitted by the clerk preparing the appellate record. When opposing counsel recognizes the item was part of the record below, counsel should stipulate to supplementing the record on appeal. Not only is this the professional approach, but fighting may make it appear that counsel seeks to conceal something from the appellate court.

Some cases present time sensitive issues - an incarcerated prisoner's appeal or an appeal on which finalizing an adoption may depend. But in most cases, the professional approach is to agree to an extension. To the extent a client in a non-exigent case may be impatient, counsel can explain that (in most courts) such a request will be granted anyway, so there is no need to appear uncooperative before the court. One Florida appellate court has admonished counsel for opposing, without good cause, reasonable requests for an extension of time to file a brief. *See Florida Appellate Practice Guide*, Third DCA p. 6 (2005 edition).

Perhaps the area presenting the greatest potential pitfalls or chances to shine is the language appellate counsel chooses for written briefs and motions, and for oral argument. Some situations cross the ethical line. *See In re Paulsrude*, 311 Minn. 303, 248 N.W. 2d 747 (1976) (disbarring attorneys for referring to court as "kangaroo court" and judge as a "horse's ass."); *Thomas v. Patton*, 939 So. 2d 139 (Fla. 1st DCA 2006)(awarding attorney's fees against an appellant for raising frivolous arguments, and for using inappropriate phrases in the briefs); *Johnson v. Johnson*, 948 S.W.2d 835 (Tex. App. 1997)(appellate court referring counsel to the State Bar of Texas for maligning the trial judge in the appellate briefs).

Motions for rehearing dashed off in anger or disappointment are fraught with danger. One appellate court struck a petition for rehearing, stating the appellate court "has either ignored the law or is not interested in determining the law." *Vandenberghe v. Poole*, 163 So. 2d 51 (Fla. 2d DCA 1964). One member of the panel would have required the attorney to appear before the court to show cause why he should not be held in contempt. He observed that such a sentiment came within the colloquialism, "You can think it, but you'd better not say it." 163 So. 2d at 52.

As noted, the ethical rules require candor with the court. Professionalism and long term effectiveness also require honesty. This applies both to the facts, and to statutes and judicial decisions, including not lifting words out of context.

There are fewer appellate judges compared to trial judges, but all are likely to recall who has not been candid with them. Once a lawyer has a reputation for not being honest, that lawyer may share the predicament of comedian Lewis Grizzard's friend who ran for a local political office. His friend said "every time I told a lie I got caught, and every time I told the truth no one believed me."

Moving beyond the ethical minimums, the "tone" of the appellate lawyer's language reveals the lawyer's level of professionalism. Counsel should refrain from personal attacks on opposing counsel. Judges say they find it unprofessional for counsel to make disparaging remarks about opposing counsel or the trial court. Appellants should remember that on appeal they are seeking a reversal of a ruling, even when the argument may be based on the conduct of opposing counsel. It is still the ruling declining a mistrial, new trial, etc., that is under review.

Lawyers should choose their words cautiously. Attacking words like "frivolous," "absurd," "ridiculous," and "fatally flawed" are often examples of lazy as well as unprofessional writing. If the brief is well written - describing what happened and citing persuasive authority - the appellate judge should be able to draw the obvious conclusion. When criticizing one counsel for referring to the other side's arguments as "ridiculous," "blatantly illogical," and "silly," the court reminded counsel that "righteous indignation is no substitute for a well-reasoned argument." *Mitchell v. Universal Solutions of North Carolina, Inc.*, 853 N.E.2d 953 (Ind. App. 2006).

There may be instances when a particular word is a term of art, as in the rule of statutory construction that courts will not construe statutes to reach an absurd result; so using "absurd" may be appropriate. There are also instances where a harsh word choice may convey the wrong meaning. For example, an appellant might write that something is a "fundamental error" when he means the ruling was a big mistake that only an inferior intellect could make. But to appellate judges, "fundamental error" means the writer is conceding the point was not preserved for appellate review.

If a writer thinks the opposing counsel has not accurately portrayed the facts or the law, saying counsel "misrepresented" connotes a malicious intent. By using words like "misunderstands," "misreads," or "fails to appreciate," the writer takes the high road. If the judicial reader agrees enough times (or has seen this before from the lawyer), the judge can conclude the obvious.

As with other aspects of our practice, the professional choice is the better choice. Counsel may be tempted to write or speak in a harsher tone if the lawyer or client feels the other side is getting away with things despite corrections in an answer or reply brief. And counsel may be concerned that subtlety may be lost on busy courts. The appellate and trial courts might foster more confidence if they, perhaps subtly in oral argument, convey that they "got it." But in any event, professional lawyers should focus on presenting their points effectively and professionally, and not be lured off-course by an unprofessional opponent's antics.

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practice, respectively. Report 114 also takes the position that a purpose of the Model Rules is to promote uniformity in ethical principles and that that objective has not been achieved on this important subject, impairing the effectiveness of the Model Rules as a unifying model.

Some members of the House of Delegates opposed the screening proposal outright. Others supported one or both of two amendments to the proposal that were floated in the days before the vote. One of those amendments would have limited screening to situations in which the disqualified lawyer was not substantially involved in the prior representation. That would have significantly limited the effect of the proposal. The other amendment to the screening proposal would have added some procedural safeguards for the lateral attorney's applicable former clients.

The screening proposal currently is expected to be taken up again by the House at the ABA Midyear Meeting in Boston in February 2009. Unlike the vote in 2002, the 192-191 vote on August 12, 2008, was to table the screening proposal indefinitely, not to defeat it. While there were not "sub-votes," it appears that many of those who voted to postpone the proposal wanted more time to consider the subject and the proposed amendments to the proposal and were not necessarily opponents of the proposal, and, at the same time, that some who voted not to postpone may simply have wanted to proceed to a final vote and were not necessarily supporters of the proposal.

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Editor's Note: In the last Ethics Column by Francis Pileggi, we neglected to italicize his case citations. That was our error.