VOLUME 43, NO. 2 OCTOBER 1989

REPRINTED FROM

SOUTHWESTERN LAW JOURNAL

ETHICAL CONCERNS IN CIVIL APPELLATE ADVOCACY

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A PUBLICATION OF

SOUTHERN METHODIST UNIVERSITY SCHOOL OF LAW

ETHICAL CONCERNS IN CIVIL APPELLATE ADVOCACY*

by

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"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

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* 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 Negotation 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-

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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 briefs[14] 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 test[17] for determining whether

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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. MALLEN & 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]

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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

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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* Daggs, 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 1465[38] 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

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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. MALLEN & 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. MALLEN & 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).