Professional Responsibility before Reviewing Courts

Glenn K. Seidenfeld

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol25/iss2/3

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
PROFESSIONAL RESPONSIBILITY BEFORE REVIEWING COURTS

Glenn K. Seidenfeld*

The dearth of legal literature concerning appellate court ethics has prompted Justice Seidenfeld to examine the present state of appellate representation. He finds the quality of representation generally satisfactory, but flawed by too many examples of attorney incompetence. To improve the overall quality to an acceptable level, Justice Seidenfeld suggests a three-pronged approach: the creation of new ethical standards addressed to the unique problems of appellate representation, continued court compensation for errors potentially harmful to the client, and increased court authority to impose varying degrees of disciplinary sanctions.

INTRODUCTION

A basic tenet of professional responsibility in all courts is to perform independent professional services with integrity and competence. Unfortunately, standards of performance appropriate to advocacy are too often unobserved by some attorneys practicing before appellate courts. While this relatively small percentage of lawyers seldom engage in the types of misconduct which warrant severe disciplinary action, they unquestionably fail to fulfill their responsibilities to their clients and the judicial system. Consequently, these attorneys seriously damage the effectiveness of reviewing courts. This should be neither overlooked nor tolerated.

Cause for this serious problem rests partially upon the absence of adequate standards to guide the attorney through the distinctive functions comprising the appellate process. General ethical standards for appellate counsel are in broad scope identical with those imposed upon trial attorneys. However, intermediate appellate courts and courts of last resort have obvious differences in function and demand from those of trial courts. Different pro-

* Justice, Illinois Appellate Court, Second District. J.D., University of Michigan Law School.
fessional qualifications are therefore required in terms of knowledge, procedure, scholarship, and argument. Only those qualifications pertaining to trial attorneys have been sufficiently addressed.

The fundamental ethical principles which are to guide all lawyers have been stated in codes of professional responsibility, containing canons, ethical considerations, and disciplinary rules. Certain canons appear to have a more particular bearing upon the responsibilities of a lawyer in litigation. These deal with the adversary system and state the duty to represent a client competently, and zealously within the bounds of the law, and to maintain the integrity and competence of the legal profession. The general concepts contained in the ethical considerations and disciplinary rules derived from these canons are also applicable to all courts. Unfortunately, these general concepts have never been


The canons are "statements of axiomatic norms," expressing general concepts from which the ethical considerations and the disciplinary rules are derived; the ethical considerations are "aspirational" and represent the objectives for which members of the profession should strive; and the disciplinary rules state the minimum level of conduct below which there is cause for disciplinary action. See, ABA Code of Professional Responsibility, Preliminary Statement (1969). The canons adopted by the various bar associations are applicable to members and nonmembers alike. See People v. Gilmore, 345 Ill. 28, 45-46, 177 N.E. 710, 717 (1931).


4. Id. Canon 7.

5. Id. Canon 1. Duties imposed by the remaining canons, including the duty to assist in the improvement of the legal profession, id. Canon 8, may also apply in given litigation situations since there is "no organized inter-relationship of the Canons and they often overlap." Id. at Preface.

6. Id. Canon 7, Ethical Consideration 7-19, Ethical Consideration 7-39, Disciplinary Rule 7-101, Disciplinary Rule 7-102; id. Canon 6, Disciplinary Rule 6-101(A),(1),(2),(3). Furthermore, according to the ABA Code of Professional Responsibility the lawyer must: become and remain proficient in his practice, Ethical Consideration 6-1; concentrate in particular areas of the law, Ethical Consideration 6-2; refuse to accept employment in any area of the law in which he is not competent unless he expects to become qualified by diligent study, Ethical Consideration 6-3; with the consent of his client, engage a competent lawyer who is qualified to associate with him, Ethical Consideration 6-4. The Ethical Consideration that "[a] lawyer should have pride in his professional endeavors and that his obligation to act competently calls for higher motivation than that arising from fear
applied to specific problems of appellate advocacy. Moreover, the specific language contained in the ethical considerations and disciplinary rules is couched primarily in terms relating to trial practice. Therefore, it is seriously questionable whether the Code of Professional Responsibility contains adequate direction to lawyers participating in litigation at the reviewing court level.  

Attorney incompetence engendered by the absence of specific standards is aggravated because the client in an appellate proceeding is often unable to adequately protect his own interests. He is less able to observe and identify inadequate performance in the appellate court than he is in the trial court, where his participation in the litigation process is much more direct.

Court opinions, another possible source of guidance, also have not sufficiently delineated the standards of appellate ethics. There appear to be comparatively few reported cases which refer to a lawyer's appellate responsibilities. This may imply that the

---

7. An inquiry into the body of informal decisions or opinions rendered by the American Bar Association in connection with the canons and rules reveals that a totally inconsequential fraction of them deal with appellate advocacy. On inquiry only two were found: ABA Comm. on Professional Ethics, Informal Decisions C689, (1963) (filing notice of appeal prior to time record could be examined for grounds held not to violate then Canon 30 barring harassment; negotiating for settlement subsequent to filing of notice of appeal held proper); and ABA Comm. on Professional Ethics, Informal Opinion, No. 955 (1967) (right of lawyer to file Anders motion to withdraw after noting that appeal is frivolous, see Anders v. California, 386 U.S. 738 (1967)).

8. But see Matherne v. United States, 391 F.2d 449, 450 (5th Cir. 1968), in which a breach of professional responsibility was reported. The court noted the frequency of such problems on the appellate level.

The Illinois Supreme Court has manifested its own concern in the area of professional responsibility by establishing the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois in 1973. See note 87 infra. While no firm statistics were available categorizing the nature and source of the complaints, the Administrator of the Commission, Carl Rolewick, in a recent telephone conversation, estimated that of the several thousand complaints already received by the Commission, approximately 1-2 percent had come from prison inmates. The majority of the inmates complained of the time their appeal had taken, of the advice given by the public defender or appellate
problem is not of serious dimension. It also may be, however, that either insufficient attention has been paid to appellate ethics, or, since the nature of appellate procedure generally precludes clients from discovering incompetent attorneys, client complaints are seldom registered.

The establishment of specific standards of appellate responsibility will undoubtedly improve professional competence by providing guidelines to appellate conduct. However, a reviewing court must still remain prepared to effectively counter attorney misconduct or incompetence. Imposed upon appellate courts is the responsibility to compensate for the errors of counsel and to discipline violators of professional ethics. Attorneys as well as judges must fully understand their respective responsibilities if the overall quality of appellate representation is to be improved. With those aims in mind, several specific recommendations will be offered.

ATTORNEY RESPONSIBILITY TO BOTH CLIENT AND COURT

While careful attention by the attorney to rules governing appeals will enable him to efficiently pursue an appeal, the rules provide him insufficient guidelines in matters of competency and ethics. The following proposals are suggested ethical considerations for appellate attorneys in need of specific guidelines.

The proposals offered here are addressed to the prevention of certain types of appellate conduct which have either been reported in cases or been otherwise observed by reviewing courts. With nearly each type of conduct, both court and client are defender that they had no grounds for appeal, and of the incompetence of their appointed defender. Mr. Rolewick estimated that 60 percent of all the complaints resulted from a lack of effective communication between counsel and client. Oftentimes, the complaining client simply felt that his attorney was not sufficiently apprising him of the status of the case. The other 40 percent of the complaints were primarily comprised of the following matters: fee disputes, failure to commence legal action subsequent to retainer payment, failure to pursue legal action to conclusion, and allegations of conflict of interest.

9. For purpose of this Article, the terms misconduct and incompetence are distinguishable. Misconduct refers to the type of unethical behavior which warrants severe disciplinary sanctions, including censure, suspension, disbarment, or a civil malpractice suit. Incompetence is less serious. That type of behavior satisfies the minimum standards below which lies cause for severe disciplinary action, but falls short of the quality of representation which the court system and the public have a right to expect.
harmed. The client is unnecessarily placed in jeopardy of losing his case. Moreover, the court is denied the adequate presentation necessary to insure that issues are fully and fairly articulated so that the appropriate decision may be reached and the already overextended judicial facilities not be imposed upon. Included after each proposal are examples of the types of conduct which entered into the determination that the respective guideline is a necessary facet of ethical appellate behavior.

It should be noted that not all the cases cited in this Article represent examples of attorney incompetency. Appellate conduct which may appear to be caused by neglect or error may have actually involved unsettled procedural guidelines, the posture of the appeal due to the prior actions of trial counsel, or the execution of trial strategy. The citations are often merely illustrations of the areas in which professional incompetency may occasionally be found.

PROPOSED ETHICAL CONSIDERATIONS

1. An attorney should not pursue an appeal if he finds that the objectives are frivolous, without merit, or otherwise improper. Similarly where this appeal is not in the best interests of his client the lawyer is bound to clearly advise the client of these views and the basis for them before proceeding.

Of course, there are limits upon the appellate lawyer's duty to "represent a client zealously within the bounds of the law." In fact, it is improper for an attorney to prosecute an appeal which has no proper appellate objective, or where the contentions made by a client are clearly frivolous. This rule applies even where appellant is a criminal defendant, regardless of whether counsel is retained or appointed. The United States Supreme

10. ABA Code of Professional Responsibility, Canon 7.
11. People v. Mattson, 51 Cal.2d 777, 796 n.8, 336 P.2d 937, 951 n.8 (1959). However, the court indicated that as long as private counsel complied with procedural rules, he could brief and argue an appeal which wastes the time and money of the defendant, the court, and the people. It is doubtful that more recent authorities would approve the scope of this language.
13. Wood v. United States, 357 F.2d 425, 428 (10th Cir. 1966), quoting ABA Canons of
Court has outlined the constitutionally mandated procedures for
an appellate counsel convinced that an indigent client’s criminal
case is meritless.\footnote{Anders v. California, 386 U.S. 738 (1967).}
Counsel must apprise the court of his evaluation and request permission to withdraw. The request must be
accompanied by a brief which outlines “anything in the record
that might arguably support the appeal.”\footnote{Id. at 744.}
In an Informal Opinion,\footnote{ABA Standing Comm. on Professional Ethics, Informal Opinion, No. 955 (1967).}
the American Bar Association stated that the same proce-
dure should also apply in civil cases.

Attorneys have been subjected to disciplinary sanctions for
advancing meritless appeals. In one case, an attorney who did not
honestly believe in the merit of his appeal was found guilty of
misconduct for filing the brief.\footnote{Tovar v. State, 39 Ariz. 528, 8 P.2d 247 (1932). See also Gallegos v. Turner, 256 F.
Supp. 670, 674-78 (D. Utah 1966), aff’d 386 F.2d 440 (10th Cir. 1967).}
In another case, \textit{In re Bithoney},\footnote{486 F.2d 319, 325 (1st Cir. 1973). See also text accompanying note 86 infra.}
an attorney had filed nine petitions for review in immigration
cases, some of which were not diligently pursued and none of
which raised any substantial issues. The federal appellate court
found that this attorney had engaged in inappropriate behavior.
In reaching its decision, the court also took into consideration the
fact that the filing of the petitions resulted in automatic stays of
deporation.

2. \textit{He is obliged to first determine the nature of the
judgment appealed and to prepare a notice of appeal
which will give the reviewing court jurisdiction.}

Examples of counsel’s failure to pursue a client’s appeals with
diligence and dispatch can be documented at this early stage of
appellate litigation. A litigant may be deprived of his right to
appeal on the merits when an attorney fails to recognize a final
order of the trial court, and subsequently to appeal from it within

\begin{footnotesize}
\begin{itemize}
\item \footnote{Anders v. California, 386 U.S. 738 (1967).}
\item \footnote{Id. at 744.}
\item \footnote{ABA Standing Comm. on Professional Ethics, Informal Opinion, No. 955 (1967).}
\item \footnote{Tovar v. State, 39 Ariz. 528, 8 P.2d 247 (1932). See also Gallegos v. Turner, 256 F.
Supp. 670, 674-78 (D. Utah 1966), aff’d 386 F.2d 440 (10th Cir. 1967).}
\item \footnote{486 F.2d 319, 325 (1st Cir. 1973). See also text accompanying note 86 infra.}
\end{itemize}
\end{footnotesize}
the statutory time limit. Once the time limit has elapsed, the earlier issues will have become res adjudicata and no longer subject to appellate review. Attorneys have also failed to file the notice of appeal necessary to give jurisdiction to the appellate court. Counsel's inattention in these situations places the client's case in jeopardy, if not totally depriving him of his right to appeal.

3. In cases which require greater urgency because of their emergency nature or where the normal delay in the process will render the issues moot, the appellate lawyer has the duty to move the court to expedite the appeal process whenever practicable.

An attorney should move to expedite an appeal when normal delay before a final adjudication would create a risk of harm to one of the parties or any other person who would be affected by the decision. The responsibility to mitigate harm created by normal appellate delay should be exercised in the following situations: child custody cases, other domestic relations cases, criminal cases in which the defendant is serving a relatively short sentence, and cases where the age or illness of one or more of the parties dictates an expedited decision. Of course, interlocutory appeals should be resolved as quickly as possible to reduce delay in the trial court.

4. In all appeals the lawyer has the duty to proceed expeditiously and to request extensions of time to comply with procedural rules only for conscientious reasons.

Failure of counsel to prosecute an appeal within time limita-

---

22. The appellate court also has the responsibility to try to expedite the appeal process when a case requires greater urgency. This responsibility may involve sustaining counsel's motion to expedite or, when counsel has neglected to make the motion, initiating the action on its own. To effectively counter attorney neglect in this area, the appellate court should adopt operating procedures which will enable the court to identify these types of cases as early in the appellate process as possible.
tions is possibly one of the most common breaches of professional responsibility. A striking example is in People v. Aliwoli,23 in which an attorney obtained three extensions to file a brief and abstract, thereby delaying the appeal process for over a year. The court had designated each extension "final." After the third extension had elapsed, the attorney did not ask for further extensions, took no further action, nor explained these actions for the record.

Failure to file a brief in the appellate court is one of the most serious examples of improper appellate conduct directly affecting the client's interest. When a state's attorney fails to file a brief, it results in the denial of representation to the people.24 Such misconduct places the court in the uncomfortable position of being both judge and advocate, since the injured party is left, in effect, without counsel in an essentially adversary proceeding. This unfortunate practice may even result in a pro forma disposition.25 Courts have noted that such misconduct simply cannot be condoned.26

An attorney may subject himself to disciplinary action if he has

23. 60 Ill.2d 579, 328 N.E.2d 555 (1975). The court noted that the defendant was sentenced on Oct. 14, 1971, a notice of appeal was filed on Oct. 27, 1971, and the record was filed on Aug. 7, 1972. The attorney obtained extensions on Sept. 27, Nov. 15 and Dec. 27, 1972, all designated as "final" extensions. There was no further action and the appeal was dismissed on the appellate court's own motion on April 11, 1973. On July 2, 1974 the state appellate defender, who had succeeded the attorney, moved to reinstate the appeal alleging that the dismissal had not been brought to the defendant's attention. The appellate court denied the motion to reinstate and the supreme court reversed, one justice dissenting. Cf. People v. Brown, 39 Ill.2d 307, 235 N.E.2d 562 (1968).
26. Id. See also Christensen v. Christensen, 31 Ill.App.3d 1041, 1042 n.1, 335 N.E.2d 581, 582 n.1 (2d Dist. 1975). The court stated:
Following the filing of the notice of appeal the defendant moved in this court to stay the judgment pending appeal which we ordered taken with the case and on our motion advanced the case for an early hearing upon a short briefing schedule. The defendant's brief was filed when due. The attorney for the plaintiff appeared on the date set for oral argument without having filed a brief and was denied permission to argue. We express strong disapproval of counsel's failure to file a brief for which no adequate explanation was offered.

However, pro forma dispositions from failure to file a brief not only result from counsel's negligent behavior, but also from the client's failure to initially hire an attorney to pursue the appeal.
accepted the responsibility of perfecting an appeal and he is not in a position to do so. An attorney insufficiently financed cannot properly accept this responsibility. Moreover, an attorney of record should timely move to withdraw from a case when his client is unwilling to pay for preparing and/or filing the brief.

5. **An attorney is obligated to take all steps necessary to insure that a proper record is prepared and that all trial court exhibits necessary to the appeal are included.**

Failure by appellate counsel to prepare a proper record has resulted in both harm to the client and disciplinary action against the attorney. In *People v. Smith* an attorney failed to file a record in a timely fashion after giving notice of appeal. After ordering the record, he did not pay for the preparation of the transcripts. The result was that his client’s appeal was jeopardized and delayed for well over a year. In *Matherne v. United States* the Fifth Circuit Court of Appeals issued an official reprimand to an attorney who had failed to secure transcripts in a timely fashion, to prosecute an appeal in forma pauperis, to respond to an appellate court notice, and to file a timely brief. The court found the attorney guilty of gross negligence, want of diligence and in breach of his duty to both court and client.

An appellate attorney must also file all necessary trial court exhibits. In Illinois, an attorney is required to include in the record presented to the appellate court all the evidence pertinent to the issues on appeal. When counsel fails to include exhibits which are necessary for an understanding of the trial court’s proceedings, the appeal may be dismissed.

6. **The court rules which permit the most economical procedure for abstracting or excerpting from the record shall be followed to the extent that it is within the best interests of the client. The attorney should attempt to agree with adversary counsel to abridge the record so that**

27. ABA Code of Professional Responsibility, Canon 2, Ethical Consideration 2-30.
28. 436 F.2d 1130 (9th Cir. 1970).
29. 391 F.2d 449 (5th Cir. 1968).
it will not include portions unnecessary for the appeal which increase the costs and difficulty of the appellate litigation. Where a court reporter transcript is not available he has the duty to avail his client of any substitute method of presenting the record provided by court rules or case law.

An attorney must file all necessary abstracts or excerpts from the record. Once filed, the abstracts or excerpts must be concise, complete, and objective. Failure to file required abstracts or excerpts from the record could result in a dismissal of the appeal for which counsel will be held responsible.\(^2\) Moreover, failure to abstract or excerpt a relevant portion of the record may preclude predicating error upon that point when raised in the arguments.\(^3\)

An abstract italicizing only testimony favorable to the defendant and flatly misrepresenting the record so that it is misleading will not be tolerated by the courts.\(^4\) Further, an abstract which is substantially a verbatim copy of the entire record is unacceptable if the record is large,\(^5\) or confused and incomplete.\(^6\)

In cases where the record does not contain a report of the proceedings, counsel should file the alternative, a stipulation or a "bystander's report."\(^7\) Failure to take advantage of this alternative may seriously harm a client's case.\(^8\)

7. Where procedure exists to limit the issues of appeal by a conference in the reviewing court, the lawyer should avail himself of this rule whenever practical in the interests of efficiency and economy.

In Illinois, Supreme Court Rule 310 provides for a prehearing

---

conference "to consider the simplification of the issues and any other matters that may aid in the disposition of the appeal." However, the conference can only be initiated at the request of one of the parties. Since the inception of the rule in 1971, pretrial conferences have been seldom requested. If reviewing courts were provided the discretion to initiate the conference, more pretrial conferences would be held to limit the issues before the court. Perhaps more appeals would then be disposed of, or at least expedited.40

8. The appellate lawyer is confined to the record made in the trial court and is obligated to make the most of the record in presenting the appeal. He has the duty, however, to plead his case in brief and argument only within the confines of the record.

Problems also occur when an attorney's statement of facts is replete with arguments or contains factual assertions without appropriate reference to the abstract or record.41 Counsel may also fail in his responsibilities by raising issues in an untimely manner. If an issue is not raised in the original brief but argued for the first time in the reply brief or in a petition for rehearing it is ordinarily considered waived.42 Similarly, an attorney cannot rely upon grounds for relief inconsistent with or in addition to those advanced in the trial court. Such grounds are also generally waived.43

9. The lawyer has a duty to state facts fairly, concisely and completely. All assignment of error should be fairly

40. Positive results from pre-hearing conferences in appellate court were obtained in the New York Supreme Court Appellate Division, Second Department. In an attempt to reduce its large backlog of appeals set for oral argument, the court imposed a pre-argument conference on all such cases. During a four-month period beginning December 1, 1974, settlements were reached in almost 50% of the civil appeals after pre-argument conference. In another 34% of the civil appeals, the attorneys agreed to limit the issues and facts in dispute. The Brief, vol.3, no.4, at 3 (May, 1975) (Newsletter of the Appellate Lawyers Association).
supported and frivolous and immaterial issues carefully avoided.

"It is a minimal requirement to insist that counsel, out of their duty to the court, shall not deliberately make misstatements of fact."\footnote{44} In his dealings with the appellate court, an attorney should always make full disclosures and never seek to mislead it into unnecessary action through artifice or concealment.\footnote{45} The court is entitled to a fair statement of the facts on both sides, not an exaggerated self-serving version or a version omitting material facts.\footnote{46} In an abstract, for instance, an attorney might include only the parts of the evidence favorable to his party's contention and then base his argument upon that misstatement. Clearly, this is grossly improper practice.\footnote{47}

In \textit{Quality Molding Co. v. American National Fire Insurance Co.},\footnote{48} plaintiff's attorney supported his argument with a misquotation from a case. Without indication, he eliminated nineteen words from the quotation, affecting its meaning. While the appellate court found his conduct careless but inadvertant, it indicated that a deliberate misquotation would require strong condemnation.\footnote{49} Undoubtedly, such misconduct ultimately injures the

\begin{footnotes}
\footnote{44} Davis v. Davis, 131 Ill.App.2d 459, 461, 268 N.E.2d 491, 493 (1st Dist. 1971).
\footnote{45} State v. Weinstein, 411 S.W.2d 267, 274 (Mo. App. 1967). \textit{See also In re Schildhaus, 23 App.Div.2d 152, 259 N.Y.S. 2d 631, 634 (Sup. Ct. 1965). There is an increasing tendency of reviewing courts to waive the filing of abstracts or excerpts from the record. This makes it even more imperative that the statement of facts in the briefs be complete and accurate, particularly since there is a single record available to a multiple-judge court.}
\footnote{47} Zechman v. Zechman, 391 Ill. 510, 521, 63 N.E.2d 499, 504 (1945).
\footnote{48} 287 F.2d 313 (7th Cir. 1961).
\footnote{49} \textit{Id.} at 316. However, the court warned:

\begin{quote}
Attorneys whose names are affixed to briefs filed in this court have a heavy responsibility to see to it that quotations from the opinions of other courts as well as other statements therein are completely accurate.
\end{quote}
\end{footnotes}
client, since the court can then no longer rely upon his attorney's statements.⁵⁰

An appellate attorney must also avoid supplementing the record with unsupported factual statements or inferences. In In re Greenberg⁵¹ the respondent's brief represented as fact matters which were at best inferences. The court indicated that although an attorney may draw arguable inferences from the facts of the case, he cannot present them as if they were the facts themselves.⁵²

10. In his brief, an attorney must display competence in appellate advocacy techniques. He must provide the court clearly defined issues, persuasive argument, and citations to all pertinent authorities.

"Reviewing courts are entitled to have the issues clearly defined, [and] to be cited pertinent authorities."⁵³ In particular, when a novel question is presented to the court it should not be forced to make an independent search of authorities.⁵⁴ When an attorney fails to pursue a contention through arguments or citation, there is the danger, particularly when reviewing courts are overburdened, that unfortunate precedents may result.⁵⁵ In pre-

---

⁵⁰ Cooper v. State, 309 N.E.2d 807 (Ind. 1974).
⁵² Id. at 138, 104 A.2d at 49. The court stated: [T]he case should serve as a warning to all that the bar is expected to live up in full measure to its professional obligations in the delicate and difficult process of molding the law of the state insofar as it is embodied in the decisions of the appellate courts to the needs of the time.
⁵³ In re Estate of Kunz, 7 Ill.App.3d 760, 763, 288 N.E.2d 520, 523 (5th Dist. 1972).
⁵⁵ See id. at 107, 147 N.E. at 660. The Illinois Supreme Court commented: The questions presented by this appeal are novel and a decision of them is bound to be far-reaching. Notwithstanding this, we have been compelled to make an independent search of the authorities and have not been aided by properly prepared briefs of counsel. Appellant has filed a brief citing an early case decided by this court where the only question involved was the modification of a decree in personam entered at a former term of court. The brief has not furnished us with any of the authorities from other jurisdictions which deal with the questions before us... If the questions involved in a case are of sufficient importance to justify asking this court to decide them, they are worthy of the careful consideration of counsel presenting them. If the case is not properly presented and the court is not given the benefit of precedents there is danger of a decision being rendered that will not be in harmony with the weight of authority.
senting his argument, counsel is ethically required to disclose any adverse court decisions. However, such decisions may be distinguished or challenged. A reviewing court may, under certain circumstances, justifiably disregard unsubstantiated contentions on the grounds they were not conscientiously presented.

Appellate courts do not hesitate to point out an attorney's poor presentation. In Dortch v. Lugar the Supreme Court of Indiana felt obligated to comment upon the poor quality of the briefs presented for its consideration. It asserted that counsel's appellate duties extend beyond advancing mere assertions, thereby leaving the court with the responsibility of finding the issues and applicable law. Similarly in Frances v. State the Indiana high court criticized the quality of appellant's brief, noting that it lacked cogent argument and citation. The court stated that "meager pro forma compliance with rules of appellate practice represents less than desired performance from appellate counsel." It ordered the attorney to rebrief the cause.

11. When it will aid the proper presentation of the issues on appeal oral argument should be requested and carefully prepared. Statements which are not supported

---

Footnotes:

56. ABA Code of Professional Responsibility, Canon 7, Ethical Consideration 7-23; ABA Comm. on Professional Ethics, Opinions, No. 146 (1935). It is interesting to note that Ethical Consideration 7-23 of the Illinois State Bar Association, Illinois Code of Professional Responsibility, Canon 7 omits the following language of the ABA version of Ethical Consideration 7-23:

Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.

If the omission is not inadvertent, it would appear that the Illinois Code of Professional Responsibility steps back from a proper aspirational approach to professional ethics.
58. 255 Ind. 545, 266 N.E.2d 25 (1971).
59. Id. at 588, 266 N.E.2d at 51. The court commented:

Certainly the obligation of an appellate attorney goes beyond the making of bare assertions, leaving the court to its own devices to ascertain the precise nature of the contentions made and the law, if any, applicable thereto. We have, throughout our consideration of this appeal, indulged in a great deal of patience which we neither consider required on our part nor guaranteed for the future.
60. --- Ind. ---, 305 N.E.2d 883 (1974).
61. Id.
by the record or the law must be avoided. Issues in the brief which are material should not be waived in oral argument nor material points unnecessarily conceded.

Ordinarily, counsel has no duty to the reviewing court or his client to present oral argument unless the court so orders or his client insists. However, while appellate judges disagree as to whether oral argument is useful in every case, an attorney's failure to request oral argument may, under certain circumstances, amount to a failure to represent his client competently. It may also deprive the court of valuable assistance in arriving at a decision.

Oral argument should be requested whenever the written brief proves insufficient for a proper and effective presentation of the case. The brief may be insufficient for many reasons: issues may not be fully developed; dispositive arguments may not be emphasized; controlling authorities may be omitted inadvertently or because they were decided after preparation of the brief; opposing party briefs may raise conflicting claims as to the content of the record; or the importance, complexity, or novelty of the case may require further or different emphasis or a more concise treatment than was presented in the written brief. Professor Karl Llewellyn succinctly described the importance of oral argument. "In oral argument lies counsel's hedge against misdiagnosis and misperformance in the brief, the one last chance of locating a postern missed in the advance survey." The ethical consideration that a lawyer have pride in his professional endeavors and the disciplinary rule that requires adequate preparation and forbids neglect in legal matters bear upon the question of whether to present oral argument in a particular case.

Once oral argument is scheduled, it becomes a matter of professional competence for the attorney to discern the differences in the function of oral argument before intermediate appellate
courts and courts of final review. Arguments presented before final reviewing courts should address broad policy considerations; in contrast, arguments before intermediate courts should stress relevant precedent.

12. **Criticism of appellate court action directed at improvement of the legal system may be warranted. However, it must be expressed in respectful terms and any remedial action pursued through legitimate channels.**

Lawyers have a duty to assist in maintaining the integrity and competence of the legal system. This duty to respect courts is not imposed for the sake of the temporary incumbent judicial officer, but for the maintenance of proper respect for the office itself. Criticism of the court's rulings and conduct in respectful terms and through legitimate channels is not improper; in fact, respectful criticism when warranted may even be an integral part of the attorney's general duty to assist in improving the legal system. However, when an attorney accuses appellate court judges of wilfully, wantonly, and corruptly making false statements and findings in their opinions, he violates his professional

---

67. Judge Shirley M. Hufstedler of the United States Court of Appeals for the Ninth Circuit has highlighted these differences:

Intermediate appellate courts have functions very different from either trial courts or courts of last resort. . . . Broad-gauge policy making is only rarely a part of these courts' institutional concerns. Arguments addressed to these courts are most effective when the advocate can persuade the courts that existing precedent controls, or if it does not, that it need be nudged only a little to reach his conclusion.

Arguments addressed to courts of last resort exercising discretionary review are very different creatures because the function of these courts is to establish overarching precedents and policy for every level of the judicial system below their lofty perches. . . . The concern of these courts is not so much where the law has been as where it should be going. . . .


68. ABA Code of Professional Responsibility, Canon 8, Ethical Consideration 8-4, and Disciplinary Rule 8-102.


70. ABA Code of Professional Responsibility, Canon 8. See also *In re Mason*, 33 Ill.2d 53, 57, 210 N.E.2d 203, 205 (1965); People v. Standidge, 333 Ill. 361, 367-68, 164 N.E. 844, 846 (1928).
"Unjust criticism, insulting language and offensive conduct . . . which tend to bring the courts and the law into disrepute and to destroy public confidence in their integrity cannot be permitted." Even after the legal matter has been decided the attorney must still restrain himself from engaging in "insulting language and offensive conduct toward judges personally for their judicial acts."

JUDICIAL INTERVENTION

Compensating for Attorney Error

The reviewing court has an overriding and primary responsibility to compensate for attorney neglect in appeals. It is true, of course, that an attorney who neglects the interest of his client in a civil appellate matter subjects himself to the risk of a malpractice suit. However, such a suit is not a viable remedy. It appears from the dearth of malpractice suits that either injured clients are unaware of the availability of the remedy or, aware or not, they are precluded by the particular circumstances of their case from pursuing that cause of action. Moreover, as previously noted, the client is not often in as favorable a position to detect negligence of appellate counsel as he is when he participates in the trial. Only the courts maintain the capacity in both civil and criminal matters to vindicate client rights to adequate appellate representation.

A reviewing court ordinarily becomes aware of patent breaches of professional responsibility at some stage in the appellate process. Once aware, the judges are bound whenever possible to protect the rights of the client and, in any event, to protect the public from future cases of improper practice. This duty may involve

72. People v. Metzen, 291 Ill. 55, 58, 125 N.E. 734, 738 (1920). See also In re Mason, 33 Ill. 2d 53, 58, 210 N.E. 2d 203, 206 (1965); In re Meeker, 76 N.M. 354, 414 P.2d 862 (1966); In re Mitchell, 196 Ala. 430, 71 So. 467 (1916).
the exercise of judicial discretion when such discretion is given
the courts through statute, court rules, or legal precedent. In
Illinois, Supreme Court Rules give reviewing courts broad dis-
cretionary powers which, when exercised, may prevent injustice
when counsel has violated procedural rules or otherwise neglected
his case. Included are powers to amend the pleadings and record,
to change parties, to draw inferences of fact, and to grant any
other relief the case may require. The reviewing court may also,
in its discretion, waive the time period specified for both filing the
record, briefs, abstracts, and reply briefs and fulfilling other pro-
cedural duties when prejudice would not result.

There are numerous examples of how reviewing courts can exer-
cise their discretionary powers to compensate for attorney error.
Reinstating a criminal appeal is appropriate where the delay in
filing it is caused by the serious neglect of counsel alone, with no
chargeable complicity by the defendant. The reviewing court
may also either dismiss an appeal or affirm pro forma when ap-
pellant counsel has not substantially complied with the proce-
dural rules. In cases where attorneys fail to raise relevant issues
the court can raise them on its own motion to insure justice. On
its own, the court can question jurisdiction, search the record to
affirm, amend the caption of a complaint, and utilize grounds
and theories not raised by either party to decide the case. In


[The powers to] give any judgment and make any order that ought to have been
given or made, and make any other and further orders and grant any relief,
including a remandment, a partial reversal, the order of a partial new trial, the
entry of a remittitur, or the issuance of execution, that the case may require.

77. See, e.g., Security Bank v. Pollard, 3 Ill.2d 153, 156-57, 119 N.E.2d 777, 778 (1964);
78. People v. Aliwoli, 60 Ill.2d 579, 328 N.E.2d 555 (1975).
83. Reviewing courts are properly reluctant to decide cases on issues which the parties
have not raised, with the attendant risk of legal unpredictability. But there may be
occasions when the court acts sua sponte to avoid what the court perceives as an unjust
(1946) ("if the question that an agreement is void as against public policy is not raised
by a party to the action it is not only proper but necessary that the court sua sponte
addition, the court may employ judicial notice to supply matters lacking in the record. This list is not exhaustive, but illustrative of some ways reviewing courts can compensate for inadequacies of counsel and/or defects in the record.

Disciplining the Attorney

To save the client is not necessarily to forgive the attorney. The attorney is not ordinarily entitled to the benefit of the court’s exercise of discretion. Fortunately, only a small percentage of cases involve acts of misconduct serious enough to warrant harsh disciplinary sanctions.

Flagrant abuse of procedural rules by an appellate attorney, through inaction or negligence, may result in a referral to a disciplinary commission. Failure to perfect a criminal appeal, among
other derelictions, has resulted in an indefinite suspension from
the practice of law. 88 Suspension has also been imposed when an
attorney, among other acts of misconduct, failed to file an appel-
late brief. 89 Failure to file an abstract followed by a failure to
request an extension of time to do so after court order, has re-
sulted in censure for neglect of duty and violation of the canons. 90
Finally, the filing of numerous unsubstantial petitions for review
of an immigration order has led to suspension from bar member-
ship plus the imposition of a fine in the First Circuit Court of
Appeals. 91

Where attorney incompetence falls short of flagrant miscon-
duct, the more common situation, less severe sanctions are war-
ranted. Unfortunately, the Illinois appellate courts are without
effective disciplinary powers in this area. Short of referral to an
inquiry board and subsequent supreme court action, the only
remedy for violation of rules in Illinois has been dismissal or pro
forma disposition of the case. 92 When immaterial matters are in-
corporated in the appellate record, the court also has the power
to tax costs against a party irrespective of the outcome of the

action on complaint, by direction of the court administrator, or on its own initiative. If
there is evidence of unethical or unprofessional conduct, the complaint is channeled to
an inquiry board. The board may vote a complaint against an attorney, after which it is
filed with the Administrator of the Commission. The Administrator prepares the com-
plaint for proceedings before a hearing board. If the hearing board makes a recommenda-
tion to discipline the attorney, such action is reviewed by a review board. The review board
has a certain degree of independent responsibility not unlike an appellate court, and, once
it affirms the hearing board recommendation, it files the recommendation with the Illinois
Supreme Court. The court acts as a final reviewing body. ILL. REV. STAT. ch. 110A, §§751
et seq. (1973). The Commission can recommend disbarment, suspension, or censure. See

89. Florida Bar v. King, 242 So.2d 705 (Fla. 1971).
90. State v. Thompson, 208 N.W.2d 926 (Iowa 1973).
91. In re Bithoney 486 F.2d 319, 325 (1st Cir. 1973).
92. The Illinois appellate courts, however, possess contempt power. "The courts are
vested with an inherent power to punish for contempt as an essential incident to the
maintenance of their authority in the administration and execution of their judicial pow-
ers. . . ." (citation omitted). Stevens v. County of Lake, 24 Ill.App.3d 51, 59, 320 N.E.2d
253, 270 (2d Dist. 1974). This power, though, is seldom exercised by appellate courts, and
is not a viable disciplinary tool. An attorney's conduct may breach standards of profes-
sional responsibility, yet still fall short of legal contempt of court. Cf. Taylor v. Hayes,
418 U.S. 488 (1974). In marked contrast to trial courts, appellate incompetence or miscon-
duct manifests itself in statements made in motions, affidavits, and briefs, rather than in
the presence of the court.
appeal. 93 However, these exercises of court power, including the
to strike the pending pleadings, punish the litigant rather
than the attorney. Understandably, reviewing courts in Illinois
are reluctant to enforce compliance with the rules using these
methods.

The federal appellate court system provides some guidance in
the area of effective disciplinary procedures. The United States
Court of Appeals for the Ninth Circuit has applied Federal
Procedural Rule 46(c) 94 to impose monetary fines ranging from
$100 to $500 upon lawyers who have failed to prosecute a criminal
appeal with due diligence. 95 Similarly, the same court has also
used Rule 46(c) to levy a fine on an attorney for wilful neglect of
duty to the court when he failed to expedite an appeal as
directed and to appear before the court as ordered to offer an
explanation. 96 In another Ninth Circuit decision, the court or-
dered that an attorney, pursuant to his offer, repay defendant’s
parents $800 of his $1,000 collected fee for failing to prosecute
defendant’s criminal appeal with due diligence. 97

It is suggested that a direct authorization of power similar to
Federal Rule 46(c) be issued Illinois reviewing courts to enforce
performance by the appellate lawyer substantially above mini-
mum standards of professional competence. As noted, federal
circuit courts of appeal have applied Rule 46(c) to take “appropriate disciplinary action. . . for conduct unbecoming a member

94. FED. R. APP. P. 46(c). The rule provides inter alia:
   Disciplinary Power of the Court Over Attorneys. A court of appeals may, after
   reasonable notice and an opportunity to show cause to the contrary, and after
   hearing, if requested, take any appropriate action against any attorney who
   practices before it for conduct unbecoming a member of the bar or for failure to
   comply with these rules or any rule of the court (emphasis added).
95. United States v. Pearson, 476 F.2d 996 (9th Cir. 1973); United States v. Carrion,
   475 F.2d 770 (9th Cir. 1973); United States v. Rivera, 473 F.2d 1372 (9th Cir. 1972).
96. United States v. Smith, 436 F.2d 1130 (9th Cir. 1970). In Smith the attorney was
   fined $750 for neglect of duty to his client, $750 for contempt resulting from his neglect of
duty to the court, and $500 for contempt and for his failure to appear in response to a
court order. For a case in which an even harsher penalty was assigned, see People v. Burns,
   164 Colo. 490, 435 P.2d 897 (1968), in which the Supreme Court of Colorado indefinitely
   suspended an attorney from practice for his failure to perfect an appeal in a criminal case,
coupled with other derelictions.
97. In re Silver, 508 F.2d 647 (9th Cir. 1975).
or for failure to comply with these rules or any rule of the court."

8 Its purpose is "to make explicit the power of a court of appeals to impose sanctions less serious than suspension or disbarment for the breach of rules."9 No similarly explicit rule is found in Illinois.10 Therefore, an explicit rule patterned after Federal Rule 46(c) would appear to be a fair and effective tool which would suffice in most instances to discourage uninformed and careless practices in violation of specific court rules.

A rule patterned after Rule 46 could also apply where there is technical compliance with procedural rules, but inadequate preparation and argument of the case. However, before this new sanction could be so imposed, the standards of appellate advocacy must more specifically than before address the differences between trial and appellate advocacy. The appellate lawyer is entitled to clear notice of the standards he is expected to meet before being subjected to sanctions of any kind.

CONCLUSION

Our principal system of adjudication is the adversary system. In that system, the truth, in the sense of relevant facts accurately determined, is vitally important for the rational administration of justice. Too often our adversary techniques conceal or distort the truth rather than promote its discovery. The legal profession should consider and explore appropriate modifications of adversary procedures for the purpose of better determining the truth, and should formulate ethical prescriptions embracing a higher professional duty to seek the truth.101

The most pressing and serious problems of ethics exist at the trial level. But considerable ethical problems also exist regarding

100. Whether Illinois Supreme Court Rule 366(a)(5), ILL.REV.STAT. ch. 110A, §366(a)(5)(1973), granting power to the reviewing court to "make any order . . . that the case may require," would permit sanctions similar to those under Federal Rule 46(c) has been considered. However, it appears to the author that this rule was not intended to provide powers beyond the correction of errors on appeal.
the conduct and practice of lawyers on appeal. It should be recognized that, in a sense, the ethical considerations in appellate actions require even greater court attention because the client is less able than in trial court actions to discover deficiencies in representation and therefore less able to charge them when they do in fact occur. However, the main concern of this Article is not the relatively few instances of exceptional misconduct in the reviewing courts that have resulted in disciplinary action or in civil malpractice suits. Rather, the principal area of concern is with conduct which satisfies minimum standards, but still fails to satisfy standards of representation which the court system and the public have a right to expect. If this expectation cannot be achieved, there is an obvious danger of loss of respect by the public for courts and lawyers.

Judges will be doing a disservice to the judicial system if they feel no obligation to impose higher than minimum standards upon attorneys. The great majority of lawyers practicing before reviewing courts recognize and obey the call of conscience. However, for those few attorneys who do not perform substantially above minimum standards, tools are needed to both enforce compliance with the procedural rules and generally improve the quality of appellate representation. Therefore, as a function of their obligation to further the objectives of law and justice, reviewing courts should lead the way to demand and achieve ethical conduct in the appellate process. First, the professional conduct expected from the appellate lawyers should be more clearly delineated. Second, courts must be given discretion to impose a greater variety of sanctions upon incompetent attorneys. Then, if there are ethical deficiencies short of those which require disciplinary charges, judges will have the opportunity to invoke appropriate procedure, which may include cautionary advice or monetary fines. In more aggravated cases, judges may have the clear obligation to refer the matter to the appropriate disciplinary body for investigation and possible action. The task is not a pleasing one for judges or for lawyers. However, it is a necessary one if public respect for the courts is to be encouraged and maintained.