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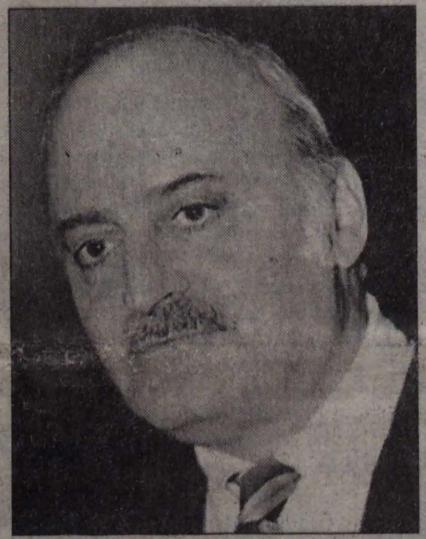
BY BILL ALDEN

A FEDERAL appellate judge has called for a crackdown on attorneys who violate ethical rules during appeals, citing as a prime example of misleading advocacy the effort by independent counsel Kenneth W. Starr to convince the U.S. Supreme Court to do away with the attorney-client privilege after a client dies.



Judge Roger J. Miner

In an unusually pointed speech delivered last Monday at Pace University School of Law, Roger J. Miner of the U.S. Court of Appeals for the Second Circuit said that "far too many nonmeritorious issues are presented to appellate tribunals."

Declaring that there has been a "decline in the attention paid to the ethical rules governing appellate practice," Judge Miner said that circuit judges must do more to "advance the cause of professional responsibility" among appellate lawyers, including fining and suspending attorneys.

In Judge Miner's view, the public's expectation of "Rambo-like litigation" has caused attorneys to more frequently fall short of their "ethical duty of candor" to the appellate court.

Judge Miner is a Reagan appointee and his wife Jacqueline has served as a vice chairman of the New York State Republican Committee. So it was surprising that he singled out Mr. Starr's brief in the privilege case to demonstrate how attorneys mislead courts by omitting pertinent authority.

The judge pointed out that Mr. Starr told the high Court in *Swidler & Berlin v. United States*, 118 S.Ct. 2081, that "the vast majority of judicial decisions" as well as "virtually all leading commentators" have concluded that the attorney-client privilege should not apply when the client is deceased.

"Notwithstanding the testamentary

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exception, the vast majority of judicial decisions say no such thing," explained Judge Miner, 64, who has taken senior status on the circuit court.

"We must not lose sight of the fact that the purpose of our enterprise is justice under law and that anything that moves us away from that purpose, including the nondisclosure of legal precedent, is to be condemned."

Advocacy in Decline

In addition to seeing an increasing lack of candor among appellate lawyers, Judge Miner said that the state of briefing is "depressing" and that "most oral arguments are made by attorneys who 'wing it.'"

The judge, who made it clear that he had not sought the concurrence of his colleagues in making his observations, suggested that there were several steps that judges could take to "encourage and enforce ethical rules."

First, he advocated the more frequent use of Rule 46(c) of the Rules of Appellate Procedure which allows circuit courts to sanction attorneys for "egregious mischaracterizations of the record."

He also noted that those rules authorize courts of appeals to suspend or disbar attorneys from practice in their courts for "conduct unbecoming a member of the bar."

Further, Judge Miner suggested that malpractice actions against appellate counsel who bring unwarranted appeals "might be an option" in enforcing professional responsibility.

In addition to the increased use of sanctions, the judge suggested that there are "kinder, gentler ways" for judges to encourage lawyers to live up to their ethical duties. For example, he said, judges should teach law school courses in appellate ethics and lecture in continuing legal education programs.

History of Speaking Out

Judge Miner's remarks, which were given as the Pace Law School's Philip B. Blank Memorial Lecture, marked at least the third time in recent years that he has commented on controversial subjects.

In May 1994, in a speech at a bar function in Washington, D.C., the judge urged that television coverage be allowed in all proceedings in federal district and appellate courts, including the U.S. Supreme Court (*NYLJ*, May 24).

Two years earlier, in a speech at the American University School of Law, Judge Miner harshly criticized the federal judicial selection process, asserting that "merit has been more or less consigned to the back seat."