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Lecture

Professional Responsibility in Appellate Practice: A View From the Bench

Honorable Roger J. Miner*

During my thirteen years of service as a United States Court of Appeals Judge, I have witnessed a general deterioration in the quality of appellate advocacy. This deterioration has been accompanied by, and is in large part attributable to, a decline in the attention paid to the rules of ethical conduct governing appellate practice. It is my intention in this Lecture to identify the rules of professional responsibility that have been most disregarded by the appellate bar in recent years, to describe how these rules have been violated, and to suggest methods that would encourage and enforce adherence to ethical standards in appellate practice. My discussion of these matters will center on the duty of professional competence and the role of appellate judges in overseeing compliance by the Bar with the governing ethical standards. I shall also argue for an extension of certain of these standards.

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What follows, of course, are my own thoughts and observations. I have not sought the concurrence of any of my colleagues or any other appellate judges. Also, my references to the Code of Professional Responsibility will be to the Code adopted by the four New York Appellate Divisions and presently in force in this state.¹ The local rules of my court, which hears appeals from all the United States District Courts in New York, Connecticut and Vermont and reviews certain administrative rulings, establish a disciplinary committee. The committee is charged to deal with misconduct "in respect to any professional matter before this court that allegedly violates the rules of professional conduct or responsibility in effect in the state or other jurisdiction where the attorney maintains his or her principal office."² I must confess that as Chairman of our Rules Committee I was partially responsible for this multilateral concept of an ethical code. I am happy to note, however, that the Judicial Conference of the United States is considering rules of attorney conduct that would apply to all the federal courts in the nation.³ In any event, I think that the New York Rules are representative enough for my purposes here.

Ethical considerations first come into play for the appellate lawyer in the decision on whether to undertake representation on appeal. This is often a difficult question for the attorney. The Code prohibits unwarranted appeals,⁴ and frivolous appeals are sanctionable under the Federal Rules of Appellate Procedure.⁵ On the other hand, the Code requires diligent and zealous prosecution of arguably meritorious appeals.⁶ My own view on this issue is that far too many frivolous appeals and far too many non-meritorious issues are presented to appellate tribunals.

1. See N.Y. CODE OF PROFESSIONAL RESPONSIBILITY, N.Y. COMP. CODES R. & REGS. tit. 22, § 1200, introduction (1992) [hereinafter N.Y. CODE OF PROFESSIONAL RESPONSIBILITY].

2. 2D CIR. R. 46(h)(2).

3. See Hal R. Leiberan & Ronald C. Minkoff, *Federal Judicial Conference Considers New Rules of Attorney Conduct*, N.Y. L. J., Oct. 14, 1998, at 1, 6.

4. See N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2).

5. See FED. R. APP. P. 38.

6. See N.Y. CODE OF PROFESSIONAL RESPONSIBILITY Canon 7.

An examination of the volume of *Anders*⁷ briefs filings supports my view. It will be recalled that in *Anders v. California* the Supreme Court recognized that, in appropriate circumstances, assigned counsel for indigent appellants in criminal cases may withdraw from representation. Certain requirements were established in connection with the withdrawal process: counsel must conduct a conscientious examination leading to his or her opinion that the case is wholly frivolous; the request to withdraw must be accompanied by a brief that refers to any arguable basis for appeal in the record; and the appellate court itself must determine that there are no issues worthy of appeal.⁸

Of the 850 criminal appeals filed in the Second Circuit Court of Appeals in 1997,⁹ eighty-two were accompanied by *Anders* briefs.¹⁰ A few of these applications were rejected by the court, as they are each year.¹¹ These rejections have resulted in some cases in the denial of legal fees for the authors of the deficient briefs and the appointment of substitute counsel.¹² However, the *Anders* applications are granted in the vast majority of cases, leading to summary affirmance of convictions in criminal appeals totally without merit.¹³

If appointed counsel for indigent appellants presenting *Anders* briefs and the appellate courts that examine these briefs can undertake searching examinations of the record and find no basis for appeal in a substantial number of cases, how many meritless appeals must there be in civil and criminal cases in which appellants are represented by retained counsel? From where I sit, the answer is "plenty," and this is to say nothing of the criminal appeals presented by court-appointed attorneys who should have filed *Anders* briefs but did not. Pressing ap-

7. *Anders v. California*, 386 U.S. 738 (1967).

8. *See id.* at 744.

9. 1997 2D CIR. ANN. REP. Table 1 (for year ending September 30, 1997).

10. *See* Memorandum from Eileen Shapiro, Senior Staff Attorney, United States Court of Appeals for the Second Circuit, to Judge Roger J. Miner 2 (October 16, 1998) (on file with author).

11. *See* Deborah Pines, *Court Denies Payment To Lawyer Filing Sloppy Briefs*, N.Y. L. J., May 18, 1993, at 1.

12. *See, e.g.*, *United States v. Zuluaga*, 981 F.2d 74, 75 (2d Cir. 1992) (per curiam).

13. *See* Deborah Pines, *Circuit Sees Rise in Volume of Anders Briefs*, N.Y. L. J., Oct. 8, 1992, at 1.

peals that have no merit in these times of limited appellate court resources and burgeoning caseloads is especially irresponsible, for it delays the disposition of meritorious cases and issues.

Why do attorneys go forward with appeals they know they cannot win? I can suggest several reasons, none of which contributes to the good reputation of the legal profession. Some attorneys pursue these appeals out of the desire to demonstrate to the client that they are willing to fight to the end; some fear that another lawyer may take the case on appeal if they do not and the client thereby will be lost; some think it is necessary to appeal in order to avoid malpractice claims or, in criminal cases, to be accused of ineffective assistance; some are guided solely by their client's wishes; and some, most unfortunately, are interested only in the billable hours involved.

The Code prohibition against advancing claims unwarranted under existing law carries exceptions for claims that "can be supported by good faith argument(s) for an extension, modification, or reversal of existing law."¹⁴ The exception is an important one. Without it, *Brown v. Board of Education*¹⁵ would never have been brought to the Supreme Court. We must take care, however, not to let the exception swallow the rule, especially in cases where a change in existing law might diminish individual rights. I am particularly concerned in this respect with some public prosecutors and government lawyers who have a tendency to "push the envelope." We are all aware of the special duty of prosecutors to protect the innocent¹⁶ but sometimes the ethical duty of zealousness turns into overzealousness and thus overcomes considerations of duties to the adversary, to the court and to the public. When I was a trial judge, it was my custom to conclude my instructions to the jury in criminal cases with this well-known aphorism: "Ladies and Gentlemen, the question here is not whether the government wins or loses in this case. The government always wins when justice is done." Very often in our pre-charge conferences, the prosecuting attorneys would say: "Judge, do you really have to give that one?" Sometimes, the prosecutor's desire to win

14. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2).

15. 347 U.S. 483 (1954).

16. See N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2).

causes him or her to lose sight of the need to see that justice is done.

I think that the Code of Professional Responsibility should be taken beyond its present wishy-washy admonition and should specifically caution government lawyers to exercise especial care when arguing for the elimination of an established right. I think that the prosecution of appeals that seek to overturn long-standing privileges that the citizenry has come to know, cherish and rely upon should be characterized and condemned as overzealousness. To seek to shift an appellate court into activist mode for the purpose of shattering well-grounded precedent without a particularly compelling reason is to ignore the special concern that prosecutors must have to see that justice is done and the rights of the public protected.

In a celebrated case, the Supreme Court recently was called upon to decide whether the attorney-client privilege survives the death of the client.¹⁷ The decision was one of several necessitated by the activities of the Independent Counsel appointed to investigate various matters involving the President of the United States. This case arose out of an investigation of the dismissal of employees from the White House Travel Office. Deputy White House Counsel Vincent Foster consulted with an attorney in private practice, James Hamilton, in regard to the investigation. Hamilton took several pages of notes during a 2-hour meeting with Foster and marked them "Privileged." Foster committed suicide nine days later, and the notes taken by Hamilton were the subject of a grand jury subpoena issued at the instance of the Independent Counsel. A motion brought by Hamilton and his law firm to quash that subpoena ultimately brought the issue of survival of the attorney-client privilege to the Supreme Court. The district court quashed the subpoena, the Independent Counsel appealed, the Circuit reversed,¹⁸ certiorari was granted,¹⁹ and the Supreme Court reversed the Circuit court.

According to Rule 501 of the Federal Rules of Evidence, the scope of any privilege is to be determined by "the principles of the common law . . . as interpreted by the courts . . . in the light

17. See *Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998).

18. See *In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997).

19. See *Swidler & Berlin v. United States*, 118 S. Ct. 1358 (1998).

of reason and experience." The Court had no difficulty in finding that

[t]he great body of . . . caselaw supports, either by holding or considered dicta, the position that the privilege does survive in a case such as the present one. Given the language of Rule 501, at the very least the burden is on the Independent Counsel to show that "reason and experience" require a departure from this rule.²⁰

Of course, the Independent Counsel made no such showing, contending only that the attorney-client privilege should not apply in any case where the client is deceased and the information sought is somehow relevant to a criminal proceeding. No particularized need was demonstrated, and no special circumstances were described. Indeed, no effort was made to justify this incursion into the entrenched privilege of attorney-client communication. There certainly was no presentation regarding reason and experience as justification for departure from the established common law principle. The Supreme Court articulated that principle as follows: "It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client in a case such as this."²¹

The only support that the Independent Counsel could muster for his argument was scholarly criticism and the testamentary exception. In rejecting the views of the scholarly critics, the Court noted that "even these critics clearly recognize that established law supports the continuation of the privilege and that a contrary rule would be a modification of common law."²² My own general view of scholarly criticism is that it provides great food for thought but I am usually glad it does not represent controlling law. Also, I recognize that it is rare for academics to extol the status quo. As to the testamentary exception, it seems to me that its limited purpose — to carry out the intent of the testator — is very much in the interest of the client. In other matters, it may very well not be in the client's interest for the lawyer to reveal confidences imparted to him during the client's lifetime. Referring to an 1897 case²³ wherein it had

20. *Swidler & Berlin*, 118 S. Ct. at 2085.

21. *Id.* at 2087.

22. *Id.* at 2086.

23. *See id.* at 2085 (discussing *Glover v. Patten*, 165 U.S. 394, 406-08 (1897)).

"recogniz[ed] the testamentary exception" but "expressly assumed that the privilege continues after the individual's death,"²⁴ the Court saw no reason to depart from precedent.

It seems to me that the question of the post-mortem survival of the attorney-client privilege generated more concern in the general public than any other question presented to the Supreme Court in recent years. A number of my non-lawyer friends sought me out to ask how I thought the Supreme Court would decide. What secrets they had imparted to counsel I do not know, but their concern was palpable. A number of lawyers and law students who discussed the question with me expressed fear that a decision favorable to the Independent Counsel might foretell the end of the attorney-client privilege entirely. However, the Supreme Court came to the rescue and there was a large sigh of relief in the land.

How did it come to pass that the question was raised at all? Partially, at least, it was due to the largely unbridled authority of the Independent Counsel that was so aptly described by Justice Scalia in his lone but prescient dissent in *Morrison v. Olson*.²⁵ I do not perceive that a United States Attorney would seek to appeal in the first instance or that the Solicitor General would authorize an appeal in a matter such as this. The ancient privilege invoked is just too important to all Americans, who take it as an article of faith that lawyers are bound by the Code to preserve their confidences and secrets even as to matters not covered by the attorney-client privilege. And the Code does so provide.²⁶ An attorney faced with a decision whether to appeal must be concerned with the rules of ethical conduct, and must recognize that the Code sometimes requires that employment be declined.

I turn now to the ethical duty of candor to the appellate court. It should go without saying that counsel must not misrepresent the facts or the law when arguing an appeal.²⁷ I could say that no panel I have ever served on has been subject to such misrepresentations. I could say that, but it would not be true. It certainly is rare, since counsel fully understand that a viola-

24. *Id.*

25. 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

26. See N.Y. Code of Professional Responsibility Canon 4.

27. See N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(a)(5).

tion of this rule is not only sanctionable but may be fatal to an appeal. More problematical for some, but not for me, is the rule requiring the citation of adverse authority.

The Code that I have been tracking in this Lecture provides that "[i]n presenting a matter to a tribunal, a lawyer shall disclose . . . [c]ontrolling legal authority known to the lawyer to be directly adverse to the position of the client and which is not disclosed by opposing counsel."²⁸ The American Bar Association Model Rules of Professional Conduct puts it just a bit differently: "A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."²⁹ Although one refers to controlling authority and the other refers to authority in the controlling jurisdiction, I think that the result is the same: The duty to the tribunal supersedes the duty to the client in connection with the disclosure of adverse authority.

Many lawyers are not happy with this rule of conduct. Their contention is that duty to client is primary and that they should have no obligation to bring forward anything that may work to the benefit of the other side.³⁰ Professor Monroe Freedman, one of my predecessors as Philip Blank Memorial Lecturer, agrees. He has written "that the best and most appropriate assurance that adverse authorities and arguments will come out is the adversary system itself."³¹ I must say that I strongly disagree. No matter how enamored we are of the adversary system as the great engine in the search for truth, we must recognize its limitations and cabin it with as many rules as are necessary to maintain as even a playing field as possible. These rules must include certain responsibilities to the appellate tribunal.

Not all attorneys are equal in skill, and there is no reason to permit the stronger to play the hidden ball trick with the weaker. I had hoped that we were moving away from the any-

28. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(b)(1).

29. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (1995).

30. See Joanne Pitulla, *Courts Are Getting Tough With Lawyers Who Forget to Cite Adverse Authority*, A.B.A. J., Aug. 1993, at 97.

31. Monroe H. Freedman, *Arguing The Law in an Adversary System*, 16 GA. L. REV. 833, 838 (1982).

thing-goes-for-a-client mindset of the adversary system. I think that an overly adversarial system is what has led the legal profession into such a sorry state that rules of civility are specifically required.³² The public has come to expect Rambo-type litigation because that is what lawyers have led them to expect. The trend must be reversed! We must not lose sight of the fact that the purpose of our enterprise is justice under the law and that anything that moves us away from that purpose, including the non-disclosure of legal precedent, is to be condemned.³³

My own view is that candor to the tribunal should require even more than the Rule requires. I think that a lawyer should cite pertinent authority from other jurisdictions to help the court in its labors, even if the adversary fails to do so. I also think that there is no reason to say that it is wrong only for the lawyer to omit the citation of contrary authority known to him or her. With modern computer research techniques, precedent cases are easily knowable to all lawyers. Beyond all this, it may very well be counterproductive to one's case to omit the citation of authority, whatever its source. Even Professor Freedman agrees that "it is tactically desirable for the lawyer to cite and refute uncited authorities that are arguably adverse."³⁴ Obviously, a lawyer cannot argue to distinguish, modify or overrule an adverse precedent not mentioned in the brief but discovered by the court on its own.

Unfortunately, there are a number of reported cases that take lawyers to task for omitting pertinent authority.³⁵ As for myself, I become very cross, to put it delicately, with lawyers who try to mislead me in this way. In one case argued before us, a party who had lost in another circuit on the same issue presented to us failed to cite the other circuit's decision. The panel was not pleased. Concluding my observations on the duty

32. See A.B.A. LIT., GUIDELINES FOR LITIGATION CONDUCT, 1998 A.B.A. Lit. Sec. Pub. 1; *Standards for Civility in Professional Conduct*, FED. BAR ASS'N PROF'L ETHICS COMM. (1998).

33. See Christopher W. Deering, *Candor Toward The Tribunal: Should An Attorney Sacrifice Truth and Integrity For The Sake Of The Client?*, 31 SUFFOLK U. L. REV. 59, 88-90 (1997).

34. Freedman, *supra* note 31, at 838.

35. See, e.g., Eric J. Magnuson, *Ethical Issues on Appeal*, 19 WM. MITCHELL L. REV. 659, 672-79 (1993); J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 SW. L.J. 677, 704-15 (1989).

of candor, I refer once again to the case involving the post-mortem survival of the attorney-client privilege. In his brief to the Supreme Court, the Independent Counsel writes in the first sentence of his Summary of Argument: "The court of appeals, *the vast majority of judicial decisions*, virtually all leading commentators, and the American Law Institute have properly concluded that the attorney-client privilege should not apply when the client is deceased."³⁶ Notwithstanding the testamentary exception, the vast majority of judicial decisions say no such thing.

It is not enough to be zealous in advancing a client's cause. The Code specifies that "[a] lawyer should represent a client competently."³⁷ Among other things, lawyers are prohibited by the Code from handling legal matters "without preparation adequate in the circumstances."³⁸ I have become alarmed in recent years by the increase in the number of briefs and oral arguments that appear to be lacking in adequate preparation on the law and on the facts. A few months ago, during oral argument, I asked an assistant state attorney general a factual question related to the procedural history of the case he was arguing for the appellee. He answered, somewhat belligerently, "I don't know the answer to that question; I was not the trial counsel." I suppose he thought that lack of knowledge of the facts is justified if appellate counsel is different from trial counsel. When pressed on the question, he reluctantly agreed to furnish the information in a Rule 28(j) letter.³⁹ The letter arrived after we had issued an order favoring the appellant.

Even more depressing is the state of briefing and written argument on the law. For example, it is surprising how often parties fail to raise the issue of subject matter jurisdiction. I remember a case not long ago when we pressed the jurisdictional question during oral argument, and both counsel insisted on arguing the merits of the appeal. They wanted to have the case decided and did not want to be bothered with the issue of

36. Petitioner's Brief at 8, *Swidler & Berlin*, 118 S. Ct. 2081 (No. 97-1192).

37. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY Canon 6.

38. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(2).

39. Rule 28(j) permits a party to advise the court of pertinent and significant authorities that come to the attention of a party after the party's brief has been filed or after oral argument but before decision. *See* FED. R. APP. P. 28(j).

jurisdiction. They just did not get the point, although they may have grasped it when the appeal was dismissed, *sua sponte*, for lack of subject matter jurisdiction. There are a number of decisions on the books dealing with just this sort of dismissal.⁴⁰ The Federal Rules of Appellate Procedure require that briefs contain a statement of subject matter and appellate jurisdiction.⁴¹ I think that often very little thought is given to the importance of this provision.

The Federal Rules of Appellate Procedure also require that briefs "include for each issue a concise statement of the applicable standard of review."⁴² The competent attorney will ponder long and hard over the standard of review applicable to the issues raised. The more restrictive the standard of review, the less chance there is for reversal on appeal. Accordingly, it is in the appellate attorney's interest to argue for a standard that is most favorable to his or her case. And yet we see, time after time, counsel struggling unsuccessfully to overcome such standard of review barriers as abuse of discretion in matters of law and clearly erroneous in matters of fact. On innumerable occasions, we have stopped counsel for appellant during oral argument and asked whether findings of fact are under attack. Instead of getting the point that he or she is now in difficulty and should proceed to another point, counsel inevitably presses forward with unwinnable arguments regarding the weight of the evidence.⁴³ Basic competence dictates close familiarity with the standards of review. If those standards cannot be met, counsel should heed the advice of Professor Hazard: "If the legal question is not genuinely arguable, the case should not be there at all."⁴⁴ This admonition is along the lines of the same point that I made earlier: The first ethical consideration for an attorney is whether to take an appeal at all.

Most oral arguments are made by attorneys who "wing it." The lack of preparation is apparent in these arguments. Counsel often seem to be taken by surprise at a question from the

40. See, e.g., *Kahn v. Chase Manhattan Bank, N.A.*, 91 F.3d 385, 387 (2d Cir. 1996); *United States v. Johnson*, 801 F.2d 597, 601 (2d Cir. 1986).

41. See FED. R. APP. P. 28(a)(2), (b).

42. FED. R. APP. P. 28(a)(6).

43. See FED. R. CIV. P. 52(a).

44. Geoffrey C. Hazard, Jr., *Arguing the Law: The Advocate's Duty and Opportunity*, 16 GA. L. REV. 821, 829 (1982).

court. A frequent response is "I'll get to that" by attorneys who never do. An attorney once responded to my question this way: "Why do you ask that question, Judge?" A frequent answer to a question from the court is: "That is not this case." The questioner generally knows that the question assumes facts not in the case, but may be testing the basis of counsel's theory and its applicability to future cases. A properly prepared attorney is ready to distinguish the facts and the law in the question from those in his or her case.

I think that the waiver of oral argument demonstrates a lack of professional competence. Although the situation may change, my court allows oral argument to all who ask for it, except for incarcerated pro se litigants. As a practitioner at the appellate bar, I would never waive oral argument. Although its importance has been downplayed in recent times, oral argument presents an unparalleled opportunity to discuss the case with the court, to get an idea of how the judges are thinking, to in effect participate in the judges' conference and, what I consider most fascinating, to hear the judges think out loud and debate the merits among themselves through the medium of counsel. Many articles have been written about how attorneys should conduct oral argument,⁴⁵ but it seems to me that most attorneys who argue before us never have read any of them.

While competence in oral argument is greatly to be desired, competence in the techniques of brief writing, including issue delineation, is even more desirable. This is because we have the briefs in hand before, during and after oral argument, and the impressions they convey are longer-lasting than oral argument. Many articles also have been written on brief writing,⁴⁶ but these are in the main also ignored. All too often, we see briefs that are poorly organized, that wander off the point being made, that make too many points, that have too many citations and quotations, that are deficient in the citation of authority and that are highly repetitive. The purpose of a brief, like the purpose of oral argument, is to persuade. Unfortunately, too many briefs fail to deliver.

45. See, e.g., Roger J. Miner, *The Don'ts of Oral Argument*, in A.B.A. SEC. PUB. APPELLATE PRACTICE MANUAL 263 (Priscilla A. Schwab, ed. 1992)

46. See Roger J. Miner, *The "Do's" of Appellate Briefwriting*, 3 SCRIBES J. OF LEGAL WRITING 19 (1992).

A recent decision in the Seventh Circuit assures me that I am not the only appellate judge constrained to read bad briefs written by lawyers lacking in competence. After indicating that the brief failed to demonstrate a knowledge of the difference between subject matter jurisdiction and personal jurisdiction, the court proceeded to address the nonjurisdictional contentions as follows: "The first problem with all of these nonjurisdictional contentions is that [the appellant], in some eleven pages of 'argument,' cites not a single case or statute to support his position."⁴⁷

The court cited one of its earlier cases involving a six-page brief without any citations in which the panel stated as follows: "It is not enough for an appellant in his brief to raise issues; they must be pressed in a professionally responsible fashion."⁴⁸ It would seem to be a simple thing for lawyers to heed the provision of Appellate Procedure Rule 28(a)(6). The Rule provides simply that "[t]he argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on." Appellees must comply with similar requirements.⁴⁹

Appellate counsel even have trouble with *Anders* briefs, where they are required only to demonstrate that there is no basis for appeal. In a case that arose after *Anders*, the Supreme Court was confronted with a situation in which a state appellate court found an *Anders* brief inadequate but allowed counsel to withdraw anyway.⁵⁰ On the basis of its own, thorough examination of the record, the state tribunal identified several arguable errors and reversed on one count. The Supreme Court thought that competent counsel should have been appointed and faulted the appellate court for failure to do so.⁵¹ In the Second Circuit Court of Appeals, a dozen *Anders* briefs have been rejected so far this year.⁵²

47. *Linc Fin. Corp. v. Onwuteaka*, 129 F.3d 917, 921 (7th Cir. 1997).

48. *Id.* (quoting *Pearce v. Sullivan*, 871 F.2d 61, 64 (7th Cir. 1989)).

49. See FED. R. APP. P. 28(b).

50. See *Penson v. Ohio*, 488 U.S. 75 (1988).

51. See *id.* at 83.

52. See Memorandum from Eileen Shapiro, Senior Staff Attorney, United States Court of Appeals for the Second Circuit, to Judge Roger J. Miner 1 (October 28, 1998) (on file with author).

There is no reason why counsel should demonstrate incompetence in appellate practice. All counsel have the basic tools to do the job for their clients. My view on this matter is that the competence culprit is usually lack of preparation. Procrastination is the hallmark of many attorneys, and the result of procrastination is diminution in the time for preparation. Poor performance inevitably results under these circumstances. When my students come to my classes unprepared, I always give the same admonition: "An unprepared student becomes an unprepared lawyer, and that works to the detriment of client, court and justice system."

I would hold appellate attorneys to a high degree of competence. I would hope that their briefs and oral arguments would meet a higher standard than we have seen in recent years. All concerned, including the profession, would benefit greatly. It seems to me that we leave too much "wiggle room" in the competence area. I agree with Professor Griffin in her criticism of the application to appellate counsel of the rule announced in *Strickland v. Washington*.⁵³ In *Strickland*, the Supreme Court established a two-pronged test to be applied when a defendant claims ineffective assistance of trial counsel in a criminal case. The defendant must show that his counsel's performance "fell below an objective standard of reasonableness"⁵⁴ and that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."⁵⁵ According to the Court, the objective standard for reasonable performance is "prevailing professional norms."⁵⁶ Circuit courts have applied the *Strickland* test to issues of effective assistance of appellate counsel.⁵⁷

Professor Griffin has written that there is no justification for the second prong of *Strickland* — the need to show that but for counsel's errors the result would be different — in identifying ineffective appellate counsel.⁵⁸ Most persuasive to me is her

53. 466 U.S. 668 (1994).

54. *Id.* at 688.

55. *Id.* at 694.

56. *Id.* at 688.

57. *See, e.g.*, *Jameson v. Coughlin*, 22 F.3d 427 (2d Cir. 1994); *Mayo v. Henderson*, 13 F.3d 528 (2d Cir. 1994).

58. *See* Lissa Griffin, *The Right to Effective Assistance of Appellate Counsel*, 97 VA. L. REV. 1, 5 (1994).

statement that “[t]he presence of an actual prejudice requirement distorts the evaluation of performance so that the standard is no longer . . . ‘reasonable competence.’”⁵⁹ The professional duty of competence alone should dictate that one whose conduct is below “prevailing professional norms” — a low enough standard in today’s world of appellate practice — does not provide effective assistance to his or her client.

I could go on and on describing briefs and oral arguments that fall below professional norms, but time does not permit such a wide-ranging discussion of incompetent performances. Deputy Solicitor General Lawrence Wallace, who has argued more cases before the Supreme Court than any other lawyer in recent times, has said: “If you can’t answer the question, ‘what are the strongest points to be made for the other side?’ you’re not really prepared to argue the case.”⁶⁰ I say that too many appellate lawyers cannot describe the strongest point on *either* side. That is why the lack of competence is the number one problem in appellate practice today, and that is why I agree with my colleague, Judge Aldisert, that competent representation should be the very first rule of professional responsibility.⁶¹

The Code tells us that “a lawyer should assist in maintaining the integrity and competence of the legal profession.”⁶² This is an admonition not to be taken lightly by appellate practitioners. Maintaining the integrity of the legal profession requires lawyers to refrain from dishonest and improper conduct and to report the misconduct of others.⁶³ It requires complete honesty to the appellate tribunal. To me, maintaining the integrity of the legal profession also requires that lawyers adhere to ethical and moral principles in their dealings with each other. It requires lawyers to cooperate in such matters as adjournments, waivers of procedural formalities and similar items with which the client should not be concerned. In my practice days, a client once “read me the riot act” for agreeing to adjourn the argument

59. *Id.* at 48.

60. *Taking It To The Top: Modern-day Court Record Set*, A.B.A. J., Feb. 1998, at 14.

61. See Ruggero J. Aldisert, *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).

62. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY CANON 1.

63. See N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-101, 1-102, 1-103.

of an appeal when a colleague had a personal matter to attend to. My response was that this was my area of responsibility and did not involve any prejudice to his cause. I am not sure the client understood, but he did not fire me.

In the United States Courts of Appeals, as in many state appellate courts, the parties file an appendix containing those parts of the record that are considered pertinent to the appeal.⁶⁴ The Federal Rules of Appellate Procedure state as follows: "The parties are encouraged to agree as to the contents of the appendix."⁶⁵ More and more, we are seeing parties unable to agree on a joint appendix. As a result, there is a separate appendix filed by each party and a concomitant necessity for judges to flip back and forth between two separate submissions. This negates the purpose of the Federal Rule. When counsel refuse to cooperate, additional burdens are imposed upon the court. For example, there is no reason why a court must consider a motion to adjourn in a case where the reason to do so is compelling. Wasting the time of the court and the adversary violates the Rule requiring lawyers to maintain the integrity of the profession.

A profession lacking in collegiality is a profession lacking in integrity. Lawyers are engaged in a joint enterprise, a fact that is often overlooked in the modern practice of law. Lawyers are responsible for each other, and what one does reflects on all.⁶⁶ When I see briefs that seek sanctions against other lawyers for bringing or defending appeals that are clearly meritorious, when I see unfounded accusations of conflict of interest littering the record, when I hear arguments in which attorneys spend their allotted time in criticizing each other rather than in arguing the merits, I worry about the integrity of the legal profession.

Of course, the profession has improved in many ways since I started to practice law some forty years ago. These improvements have not extended to the collegiality of the Bar, however. As a young lawyer in my father's office, I was taught that there would be no charge to a lawyer who came to us for advice or assistance, that the widows and children of deceased lawyers

64. See FED. R. APP. P. 30(a).

65. FED. R. APP. P. 30(b).

66. See Roger J. Miner, *From The Bench: The Fault Is In Ourselves*, 1 NY LITIGATOR 4, 6-7 (1995).

were also entitled to services without fee, that attendance at Bar meetings was mandatory and, horror of horrors, that the Bar Association's minimum fee schedule must be adhered to. The passing of the minimum fee schedule may have been a good thing, but the passing of other indicia of collegiality may be a real loss. Ten years ago, I wrote an article entitled "Lawyers Owe One Another."⁶⁷ In the article, I detailed the neglect of the duties of honesty, fair dealing, cooperation and civility owed to lawyers by each other. I find little improvement in these areas over the last decade. The reputation of the Bar has suffered accordingly.

In the discharge of the duty to maintain the competence of the Bar as regards appellate practice, it seems to me that the Bar should take a greater interest in educational programs devoted to appellate practice. Although some Bar Associations sponsor courses in appellate practice from time to time, I think there is a great need for more programs of that kind. Mandatory Continuing Legal Education has been adopted in most states,⁶⁸ and New York recently was added to the list.⁶⁹ I am hoping that a number of MCLE courses will be devoted to appellate practice as New York develops its program. Seasoned appellate lawyers should teach law school courses on the handling of appeals. The widening gulf that has grown between practitioner and law school teacher makes it especially important that lawyers-to-be get a good grounding in the professional responsibilities that surround appellate practice.⁷⁰

Lawyers may assist in maintaining the professional competence of the Bar in other ways. In olden times, lawyers helped each other by reviewing briefs and listening to proposed oral arguments, and I am not referring here to lawyers in the same firm. In my younger day, I clerked for a short time at a one-person law firm located in a large office building in downtown Brooklyn. My employer often would send me down the hall to

67. Roger J. Miner, *Lawyers Owe One Another*, NAT'L L. J., Dec. 19, 1988, at 13.

68. See Lisa A. Grigg, *The Mandatory Continuing Legal Education (MCLE) Debate: Is it Improving Lawyer Competence or Just Busy Work?*, 12 BYU J. PUB. L. 417, 417 n.1 (1998).

69. See N.Y. CT. RULES § 1500 *et seq.* (McKinney 1999).

70. See Roger J. Miner, *A Profession at Risk*, 26 INT'L SOC'Y OF BARRISTERS Q. 333 (1991).

talk to some of the older lawyers in other offices about briefs we were preparing and to secure their advice. They were happy to take the time to help a young lawyer. They saw it as helping to maintain the competence of the profession. In those days, young lawyers were welcomed to the Bar and helped by older members in all phases of practice.

I am given to understand that that is not the case today. I am sure that in large law firms and government offices lawyers read and comment on appellate briefs prepared by other lawyers who are not working on the particular appeal and provide moot courts for appellate arguments. Thus is professional competence in appellate practice maintained. Lawyers in different firms who have no positional conflicts can also help in this way.

It is also important for appellate lawyers to heed the professional duty of assisting and improving the legal system.⁷¹ Nothing pains me more than to hear a lawyer complain about some court procedure just to vent some steam. We are always willing in our court to listen to suggestions for improvement from the Bar. We welcome such suggestions. Several Bar Associations have committees that regularly submit reports on various defects that they perceive to exist in our system. Each is given careful consideration. Indeed, we are required, before making any changes in our local rules of practice, to solicit public comment.⁷²

Whether as an individual or as a member of an organized Bar, we expect that lawyers who engage in appellate practice will communicate their concerns to us. Just recently, the Federal Courts Committee of the Association of the Bar of the City of New York presented us with a report suggesting changes in our summary order procedures.⁷³ That report, like all others submitted to us by lawyers or groups of lawyers will receive close consideration. All courts encourage the performance of the duty to assist in improving the legal system and I, for one,

71. See N.Y. CODE OF PROFESSIONAL RESPONSIBILITY Canon 8.

72. See FED. R. APP. P. 47(a)(1).

73. See Federal Courts Comm., *The Ass'n of the Bar of the City of New York, REPORT ON THE CITATION OF SUMMARY ORDERS* (1998).

think that the lawyers are not critical enough of the courts before which they practice.⁷⁴

It seems to me that appellate judges do not do enough to advance the cause of professional responsibility in appellate practice. I do not know how many robing room conversations I have had with colleagues when they (or I) have made such comments as, "that was a terrible argument" or "the brief made no sense" or "counsel missed the controlling case" or "the facts were not correctly represented to us" or "the statutory interpretation urged upon us was totally without support." Despite the frequency of these comments, it is a rare case in which we sanction even those who take frivolous appeals.⁷⁵

Rule 38 of the Federal Rules of Appellate Procedure allows us to "award just damages and single or double costs to the appellee" if we determine that an appeal is frivolous. Rule 38 sanctions are sometimes assessed against both attorney and client, because, as we say, "attorney and client are in the best position between them to determine who caused [the] appeal to be taken."⁷⁶ Such sanctions are to be applied where an appeal "is totally lacking in merit, framed with no relevant supporting law, conclusory in nature and utterly unsupported by the evidence."⁷⁷ Appeals that are meritless but not frivolous do not qualify for the sanctions.⁷⁸ Perhaps that is putting too fine a point on it, because appeals that are totally lacking in merit are by definition frivolous.

Aside from the occasional sanction of a lawyer for taking a frivolous appeal, appellate judges generally ignore violations of ethical norms.⁷⁹ By doing so, they are in great part responsible for the problems of which they complain. Appellate judges have a positive obligation to monitor, encourage and enforce adher-

74. See Roger J. Miner, *The Duty to Criticize the Courts*, 71 JUDICATURE 134 (1987).

75. See, e.g., *Bartel Dental Books Co. v. Schultz*, 786 F.2d 486 (2d Cir. 1986).

76. *United States v. Potamkin Cadillac Corp.*, 689 F.2d 379, 382 (2d Cir. 1982).

77. *Id.* at 381.

78. See *JC's East, Inc. v. Traub*, 92 F.3d 26, 26 (2d Cir. 1996) (per curiam).

79. See Susan P. Koniak, *The Law Between The Bar And The State*, 70 N.C. L. REV. 1389, 1413 (1992).

ence to standards of professional responsibility.⁸⁰ They should not shirk that obligation because it is so important to our system of justice.

There are many methods by which appellate judges can encourage and enforce ethical rules. For example, the Tenth Circuit recently invoked Rule 46(c) of the Rules of Appellate Procedure to sanction an attorney for what the court described as "egregious mischaracterizations of the record."⁸¹ Rule 46(c) allows a court of appeals to "take any appropriate disciplinary 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." Unfortunately, my court has not made use of this Rule 46(c) for many years. The presentation of an appeal without competent briefing or argument and the failure to cite known and adverse precedent, in violation of the Code, certainly can be characterized as conduct unbecoming a member of the bar, and may even violate rules of the court.

The Federal Rules of Appellate Procedure also authorize courts of appeals to suspend or disbar attorneys from practice in their courts for "conduct unbecoming a member of the bar."⁸² We have a local rule setting forth procedures for disbarment or suspension,⁸³ but it is seldom invoked for misconduct in our court. We merely track disciplinary actions taken by state courts and rubber stamp their decisions. A committee has been established in our court to which we may refer accusations of misconduct for investigation, hearing and report.⁸⁴ I have yet to serve on a panel that has referred any business to that committee. In one recent case, a panel of our court did direct the clerk to forward to state grievance committees for appropriate action an order affirming a district court sanction order that noted prior sanctions and admonitions to counsel for unprofessional conduct in our court.⁸⁵

80. See Jerome J. Shestack, *Advancing Professionalism Needs Judicial Help*, A.B.A. J., Apr. 1998, at 8.

81. *James v. Grand Lake Mental Health Center*, No. 97-5157, 1998 WL 664315, at *10 (10th Cir. Sept. 24, 1998).

82. FED. R. APP. PROC. 46(h).

83. See 2D CIR. R. 46(h).

84. See 2D CIR. R. 46(h)(2).

85. See *Kramer v. Arms*, No. 96-7448, 1997 WL 85830, at *2 (2d Cir. Feb 27, 1997).

From time to time, judges hint in their opinions that a malpractice action against appellate counsel might be an option. A malpractice action generally is not a good way to enforce professional responsibility in appellate practice because a successful suit requires proof that the underlying appeal would have been successful.⁸⁶ An interesting malpractice action now pending arises out of a claim that counsel made a mess out of his argument before the United States Supreme Court.⁸⁷ The vote in the Supreme Court was 5-4,⁸⁸ but counsel for the plaintiff in the malpractice case will have a difficult time proving that a good argument would have changed the swing vote. I wonder whether the plaintiff will call any Justices as witnesses. If a litigant can require the President to be a witness, why not a Justice of the Supreme Court?

I think that some of the disciplinary sanctions that can be used for Code enforcement ought to be applied to supervisory lawyers. The Code that I have been referring to imposes upon lawyers who supervise other lawyers responsibility for ethical violations if the supervisor "knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."⁸⁹ Adherence to the Code is a collective responsibility, and those who manage lawyers in large law offices, private or governmental, should be responsible for keeping the faith of professional responsibility. According to a recent article in the American Bar Association Journal, New York is "the only state to have a set of disciplinary rules explicitly governing law firm conduct" and is "likely to remain the only state."⁹⁰ The fact that many law firms throughout the land oppose provisions for supervisory responsibility reflects discredit upon the profession.

I think that there are kinder, gentler ways for appellate judges to encourage lawyers to perform their professional responsibilities, and I strongly urge my colleagues to pursue these

86. See RICHARD H. UNDERWOOD & WILLIAM H. FORTUNE, TRIAL ETHICS § 19.4, at 555-56 (1988).

87. See Tony Mauro, *Calling A Bad Day In Court Malpractice?*, LEGAL TIMES, July 20, 1998, at 7.

88. See *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997).

89. N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-104(A)(2).

90. Mark Hansen, *Taking a Firm Hand in Discipline*, A.B.A. J., Sept. 1998, at 24.

ways. Appellate judges should take a greater interest in law school education in appellate practice. They should teach law school courses in appellate practice and ethics. They should lecture on these subjects and take part as teachers in continuing legal education programs. They should attend Bar Association meetings and interact with lawyers who practice in their courts. Bar Association social occasions present excellent opportunities for judges and lawyers to meet.⁹¹ The large Bar Associations in New York City, such as the Federal Bar Council and the Association of the Bar, present judges with these opportunities, and judges frequently attend their events. I think that perhaps there has been too much interaction with the large Bar Associations. Appellate judges should save some time to get around to smaller Bar groups for educational as well as social events.

My experience has been that appellate lawyers are anxious to talk to appellate judges. Judges should use such discussions to talk about ethical standards and the importance of adhering to them. I think that it is important for appellate judges to compliment lawyers on good arguments and good briefs. We do this but not often enough. These compliments show our recognition of the lawyer's compliance with Code requirements of competence. I think we should include such remarks in our published opinions on a regular basis, as we should include remarks that are critical of lawyer conduct. We should also note in writing those situations where a lawyer has gone out of his or her way to extend courtesies to opposing counsel and where adverse authority has been cited. I have said many times in the past that we are all in this together. This is best exemplified by a long-standing tradition of the United States Court of Appeals for the Fourth Circuit in Richmond, Virginia. Following oral argument there, the judges come down from the bench and shake hands with counsel.⁹² It seems to me that the closer the relationship between appellate judge and appellate lawyer, the greater will be lawyer awareness of the Rules of ethical conduct required in appellate practice. Appellate judges have an important duty here. Judicial ethics compel the performance of a great number of other duties as well. But that is a Lecture for another day.

91. See RICHARDSON R. LYNN, *APPELLATE LITIGATION* § 3.10, at 76 (1985).

92. See Louis H. Pollak, *Professional Attitude*, A.B.A. J., Aug. 1998, at 67.