

Appealing in Good Faith

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The preamble to the ABA Model Rules of Professional Conduct instructs that “[a]s advocate, a lawyer zealously asserts the client’s position,” but the preamble makes clear that such advocacy must be done “under the rules of the adversary system.” Yet, as every reader has probably experienced, many lawyers bend, break, and ignore our system’s rules under the guise of “zealous advocacy.” Doing so is especially tempting in the context of appeals, where lawyers may have one final chance to secure a win in their case.

Overzealous advocacy leading to sanctionable conduct can occur just as easily in appeals as it does in trials. There is one important difference, however. Appeals, by their very nature, may result in published opinions not only making law contrary to the interests of the lawyer and the client but also potentially embarrassing the attorney as well. It is one thing for an overzealous attorney to be sanctioned \$1,000 by a trial court in connection with a heated abuse of discovery. It is quite another thing to see a published opinion affirming the sanctions award and awarding additional sanctions for a frivolous appeal. If an attorney is caught litigating an appeal in bad faith for an improper purpose or violating court rules, the result can be costly sanctions, an embarrassing public reprimand that can be cited for the rest of the lawyer’s career, or both. The most frequent unethical practices that occur in appeals are filing a frivolous appeal, misrepresenting the law and the facts, and bending or breaking procedural

rules. Easy enough to remember, but knowing these mistakes and tricks will help ensure you do not commit them unintentionally and will help you know when opposing counsel might be trying to pull a fast one.

If you are the appealing party, the first (and most important) question occurs before you even file the notice of appeal: You must decide whether your appeal can be filed in good faith. Specifically, you must consider whether a court would consider your appeal “frivolous” as defined statutorily and in case law. Essentially, this boils down to whether there is a potentially meritorious argument that, given the standard of review, could result in a reversal of the result in the trial court. If an attorney has spent considerable time and energy litigating a case in the trial court only to lose the case in the end, the attorney’s natural instinct may be to keep fighting. But it is crucial to understand that not every case (even the one you poured blood, sweat, and tears into) warrants an appellate challenge. And more importantly, the attorney who tried the case may be so invested in the case as to lose perspective. Hence, an attorney should always consider having a fresh set of eyes evaluate whether to file an appeal, usually an appellate lawyer.

Filing a frivolous appeal can backfire and incur heavy penalties for you and your client. For example, Federal Rule of Appellate Procedure 38 states that if a court of appeals “determines that an appeal is frivolous, it may . . . award just damages and single or



double costs to the appellee.” Similarly, 28 U.S.C. § 1912 permits a court to award damages and up to double costs to the prevailing party when the court affirms the decision below, and courts usually exercise that power only when the appeal was brought in bad faith. Notably, courts can jointly impose these penalties on the client *and* the attorney. That means you and your client can be on the hook for double costs, the appellee’s attorney fees incurred while defending the appeal, and any other damages resulting from the delay caused by the appeal.

Types of Frivolous Appeals

But what constitutes a frivolous appeal? Although every jurisdiction varies in the specifics, two principles are generally true. First, an appeal cannot be filed with the purpose of delaying or vexing the opposing party. Second, an appeal’s argument cannot be wholly without substantive merit.

Dilatory and vexatious appeals. A client may want to file an appeal for reasons other than to change the outcome of a case. For instance, courts can—and often do—stay the case’s judgment pending an appeal, which might mean a delay in paying a large damages award or losing a piece of property. Many jurisdictions have requirements that money judgments must be bonded in order to stay enforcement of the judgment and that the judgment accrues post-judgment interest pending appeal. This may, in some cases, militate against pursuing an appeal solely to cause delay. Other times, clients want to impose the significant expense of an appeal against the opposing party, either to increase settlement leverage or merely to punish the opposing party and drive up their attorney fees. This latter issue may be less of a concern when the prevailing party is entitled by contract or statute to prevailing-party attorney fees.

While it is not bad faith to file an appeal knowing your client might benefit from a delay in the judgment or a stronger settlement position (punishing your opponents is obviously never appropriate), an appeal must be motivated by an independent desire to achieve “a substantively more just result” by winning the case, and not just to “draw out the proceedings” or “add to the costs of resolving” them. *Applewood Landscape & Nursery Co. v. Hollingsworth*, 884 F.2d 1502, 1509 (1st Cir. 1989). Even where the appeal is rooted in a plausible legal claim, a court might determine the appeal was improperly motivated because of a party’s litigation history or the benefits that the party gains from the appeal regardless of the case’s outcome.

For example, a party filed an appeal seeking the right to delay payment on a debt; although she ultimately lost, she effectively achieved her requested remedy because of the delay resulting from the appeal. *Alessandri v. April Indus., Inc.*, 934 F.2d 1, 3 (1st Cir. 1991). Because the appeal achieved “in practice what the law denie[d] it in principle,” the court determined the appeal was made

for improper purposes and awarded double costs and attorney fees to the other party. *Id.*; see *Applewood*, 884 F.2d at 1509 (pointing to appealing party’s excessive litigiousness throughout the case as evidence appeal was filed in bad faith); *Kaynard v. MMIC, Inc.*, 734 F.2d 950, 954 (2d Cir. 1984) (noting appeal appeared to be “a deliberate attempt to thwart the intent of Congress in providing . . . a swift interim remedy to halt unfair labor practices”).

Meritless appeals. An appeal is wholly without merit when it “was destined to fail from the outset.” *Indianapolis Colts v. Mayor & City Council of Balt.*, 775 F.2d 177, 184 (7th Cir. 1985). Another way to put it is that “the results are obvious.” *Maisano v. United States*, 908 F.2d 408, 411 (9th Cir. 1990). One humorous example is *Schiff v. Commissioner of Internal Revenue*, 751 F.2d 116, 117 (2d Cir. 1984), in which the court sanctioned an appealing party for arguing that taxation of wage income was unconstitutional and that the Internal Revenue Service could not penalize him for underpayment of taxes when he, in fact, had made no payment of taxes at all. While not all cases are that extreme, the general principle rings true: An argument (even one subjectively made in good faith) is frivolous when it plainly contradicts “clear law and dispositive authority.” *McEnery v. Merit Sys. Prot. Bd.*, 963 F.2d 1512, 1516–17 (Fed. Cir. 1992).

Whether your appeal is “wholly without merit” will often depend on the case’s standard of review. “[W]here an appeal challenges actions or findings of the district court to which an appellate court gives deference by judging under an abuse of discretion or clearly erroneous standard, the court is more likely to find that the appellant’s arguments are frivolous.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 407 (1990) (citation omitted). In contrast, a court will be less likely to deem your appeal frivolous when the question presented is reviewed *de novo*.

Sanctions can be especially severe for attorneys who file an appeal *knowing* it is meritless. Take *In re Girardi*, 611 F.3d 1027 (9th Cir. 2010), in which a group of prominent attorneys sought to enforce a large monetary judgment from Nicaragua. It was later revealed that the translation of the judgment from Spanish to English contained a mistake and that the named defendant in the case was not subject to the judgment. Although the district court’s order clearly demonstrated why the judgment was incorrect and not enforceable against the named defendant, the plaintiffs’ attorneys opted to appeal. The Ninth Circuit sanctioned the attorneys for continuing to represent that the judgment applied to the defendant, even after it was obvious that such an argument was not true. The court not only publicly reprimanded the attorneys in a published opinion but also imposed sanctions of \$390,000 and suspended two of the attorneys from practicing in the circuit for six months.

That being said, litigants should not let the fear of sanctions intimidate them out of making creative legal arguments. Indeed, the “wholly without merit” standard has a large wrinkle in that

ethics rules generally allow attorneys to make “a good faith argument for an extension, modification or reversal of existing law.” ABA MODEL R. OF PROF’L CONDUCT 3.1. That means you might file an appeal even when the law clearly goes against you. See *McKnight v. Gen. Motors Corp.*, 511 U.S. 659, 660 (1994) (rejecting sanctions even though argument was “foreclosed by Circuit precedent” because the Supreme Court “had not yet ruled” on the question and filing the appeal was “the only way petitioner could preserve the issue pending a possible favorable decision” there).

Further, courts will usually permit unique issues that are not “commonplace” or “previously solved,” even if the argument is weak under current law. *Jaeger v. Canadian Bank of Commerce (Cal.)*, 327 F.2d 743, 746 (9th Cir. 1964); see *Fritz v. Am. Home Shield Corp.*, 751 F.2d 1152, 1155 (11th Cir. 1985) (rejecting sanctions because argument was “novel” and there was “no court decision contrary to plaintiff’s position”). As a general rule, if you want to change the law or make a novel legal argument, you should acknowledge such in your briefs.

Misstating Facts

Another common mistake resulting in sanctions is to misstate the facts in light of the standard of review or try to avoid bringing adverse case law to the court’s attention.

Incorrectly quoting or paraphrasing. Shorter is better when it comes to brief writing, and attorneys possess several tools to shorten a lengthy quotation from another source. They can omit material with an ellipsis, quote just a word or phrase from the source material, or paraphrase the source without quoting at all. They cannot, however, use these tools to make it appear that the source is saying something it is not. Indeed, courts are quick to reprimand attorneys for twisting sources to suit their needs. See, e.g., *ClearCorrect Operating, LLC v. Int’l Trade Comm’n*, 810 F.3d 1283, 1301 (Fed. Cir. 2015) (criticizing a brief because “not only was a key portion of [a] quote omitted, but it was omitted without any indication that there had been a deletion”).

One well-publicized and recent example is *Swinomish Indian Tribal Community v. BNSF Railway Co.*, No. 18-35704, 2019 WL 3074050 (9th Cir. May 22, 2019), in which the Ninth Circuit issued an order against two major law firms representing a railroad company in a dispute over an easement, noting their briefing had misrepresented cited material. For example, their brief paraphrased the easement’s language as saying the company could run “at a minimum” one eastern bound train and one western bound train each day across a railroad track. But the easement actually stated the party could run “only one eastern bound train, and one western bound train” each day. This incorrect paraphrase transformed the easement’s operative language from something contradicting the railroad’s position into something supporting it.

The railroad’s brief also quoted a Supreme Court case as saying, “Though the [land] contract were terminated pursuant to its terms, a certificate [of abandonment or discontinuance] would still be required.” However, the case never dealt with (or even mentioned) a land contract and actually arose from the different legal context of a railway trackage contract; this distinction made the case essentially inapposite to the controversy at hand. Noting these and several other problematic citations, the court ordered that the attorneys explain how the railroad’s briefing candidly represented the underlying law and record. That case remains pending and may well result in another published opinion addressing ethics in handling an appeal.

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Hiding bad facts. Understandably, attorneys want to paint their client and their arguments in the most favorable light possible. For that reason, if the record contains bad facts, lawyers sometimes just skip over them in their brief’s statement of the facts. Others might avoid including unfavorable evidence in the record at all. However, neither of these tactics are appropriate.

Federal Rule of Appellate Procedure 28 requires that the statement of facts “set[] out the facts *relevant* to the issues submitted for review.” Just because facts are not favorable to your client does not mean they are irrelevant to the court’s analysis. Including all relevant information is especially important when a case implicates a deferential standard of review, like the “clear error” and “substantial evidence” standards, which require review of the lower court’s decision in light of the *entire record*. In fact, some jurisdictions will deem an argument waived if it occurs under one of these standards and the briefing does not make reference to all facts material to the issue on appeal. See, e.g., *Foreman & Clark Corp. v. Fallon*, 479 P.2d 362, 366 (Cal. 1971).

Similarly, Federal Rules of Appellate Procedure 10 and 30 and most local court rules specify what materials need to be included in the record on appeal. Not providing a complete record is a good way to annoy your judges and run the risk of sanctions. For example, Judge Easterbrook publicly reprimanded and sanctioned

an attorney who “made it unduly hard for us to access the materials necessary for disposition” by failing to include all of the required information in the brief’s appendices. *United States v. Johnson*, 745 F.3d 227, 230–31 (7th Cir. 2014).

Hiding bad law. Another common ethical pitfall is the failure to disclose adverse legal authority. If, during research, you stumble on case law or other authority that hurts the position you are taking, it may be tempting to move on and just hope the court or opposing counsel do not also find it. However, ABA Model Rule 3.3(a)(2) mandates that a lawyer 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.”

Courts do not regularly enforce this rule with sanctions, in large part because it is so difficult to determine that an attorney “knowingly” failed to disclose the relevant authority. But appellate attorneys should take care to follow this disclosure requirement because courts have sanctioned egregious violations of the rule or, at best, chastised attorneys for failing to properly conduct basic legal research. *See, e.g., Pannell v. McBride*, 306 F.3d 499, 502 n.1 (7th Cir. 2002) (warning state attorney general that continued failure to disclose on-point authority would result in sanctions).

While ABA Model Rule 3.3 mandates only the disclosure of authority that is *controlling* and *directly adverse*, the application of those standards is not always cut-and-dried. For example, in federal diversity cases, controlling authority includes that of both the federal forum and the relevant state court. But when litigating an identical claim in state court, there would be no duty to disclose the federal cases because they would only be persuasive authority. *See J. Michael Medina, Ethical Concerns in Civil Appellate Advocacy*, 43 Sw. L.J. 677, 709–13 (1989) (showing the complexity of the “controlling jurisdiction” limitation with several hypotheticals). Further, authority can be directly adverse “even though the lawyer reasonably believes that the decision is factually distinguishable” or believes that “the court will ultimately conclude that the decision does not control the current case.” *Tyler v. State*, 47 P.3d 1095, 1105–06 (Alaska Ct. App. 2001).

In the event you are unsure whether to disclose a case, it is always better to note the decision and then briefly explain why the case is distinguishable or why the authority is not controlling. Even where the rules do not obligate the disclosure of an authority, strong advocates will engage with negative persuasive decisions and detail why their position is stronger.

Further Errors

Criticizing the court or opposing party. The job of appellate litigators is to explain the error of the lower court’s decision or their opposing counsel’s arguments. But sometimes attorneys overstate such errors and veer into the realm of inflammatory

personal remarks. For example, one attorney filing a rehearing petition accused the panel below of bias against his client and stated the opposing side’s argument was “ridiculous” and “a joke.” *5-H Corp. v. Padovano*, 708 So. 2d 244, 245 (Fla. 1997). The brief also stated that “what is *truly* appalling” is that the court would “buy such nonsense and give credence to such ‘total b— s—.’” *Id.*; *see also In re Koven*, 35 Cal. Rptr. 3d 917, 925 (2005) (holding attorney in contempt for arguing that the appellate court had “fixed” the results of a case and that the court would be “guilty of . . . having committed fraud” if it did not grant a rehearing).

These attacks are not only unprofessional but also strategically unwise and may backfire. The legal community is small, especially among judges, and you never know when the trial judge may be friends or former colleagues with one of the members of your appellate panel. As a general rule, the strongest criticism you should ever make is to state, “The trial court erred because. . . .”

Bending and outright breaking the rules are other ethical mistakes attorneys sometimes make on appeal. Rules are rules, however, and attempting to disregard them will only ultimately hurt your client’s appeal.

Getting under the word or page limit. In an appeal, the written brief is essentially all-important because, by the time of oral argument, most judges have made up their minds about the case. Consequently, some lawyers attempt to gain an advantage by eschewing the court rules governing brief formatting in order to add more space to make their arguments.

Most jurisdictions restrict briefs by a word count, and lawyers sometimes cut their words in a variety of dubious ways. For example, one litigant omitted spaces and inserted slashes in case and record citations (e.g., citing “*Martinez, supra*, 56 Cal.4th/1014” and “1Supp.CT/57,2Supp.CT/492-496”) to save many words over the course of a large brief. *Swigart v. Bruno*, 220 Cal. Rptr. 3d 556, 560 n.2 (2017); *see Pi-Net Int’l, Inc. v. JPMorgan Chase & Co.*, 600 F. App’x 774, 775 (Fed. Cir. 2015) (dismissing an appeal for continued use of improper citations in order to meet word count). Did they think no one would notice?

Another scheme is the excessive use of uncommon abbreviations. For instance, Judge Silberman of the D.C. Circuit criticized litigants for using excessive shorthand, like “HLW” for “high-level radioactive waste” and “abbreviating every conceivable agency and statute involved.” *Nat’l Ass’n of Regulatory Util. Comm’rs v. U.S. Dep’t of Energy*, 680 F.3d 819, 820 n.1 (D.C. Cir. 2012). Not only did the parties appear to have “abandoned any attempt to write in plain English”; the practice risked a breach of the court rules against unfamiliar acronyms. *Id.* Thus, the litigants not only broke the court’s rules but also made their task—prevailing on appeal—harder because they made their positions harder to understand.

Flouting page and word limits will earn you the disdain of judges. And this is hardly new. For instance, in 1596, an English

court imprisoned an attorney for filing a 120-page pleading and made him walk around Westminster Hall with the pleading hanging around his neck. See *Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 641 (2d Cir. 1995) (detailing historical example). In modern times, the rules of appellate procedure and court rules regulate brief formatting and citation style, and to intentionally breach such rules is certainly grounds to dismiss the appeal or order sanctions. If you truly need more space, you can always request that the court permit you to file an oversized brief. Better yet, shorten your argument through editing. Tightening your briefs not only ensures compliance with court rules but also increases the persuasiveness of your advocacy. *United States v. Keplinger*, 776 F.2d 678, 683 n.1 (7th Cir. 1985) (noting overly long briefs make it “far more likely that meritorious arguments will be lost amid the mass of detail”).

Continuing a moot appeal. Sometimes a controversy ends during the litigation of an appeal. The parties may settle, a party might pass away, or the underlying issue may otherwise become moot. Even so, one or both parties may desire that the court resolve the important legal question presented by the case, and it may be tempting to keep the court in the dark and wait for the court’s opinion to issue.

Doing so, however, will undoubtedly frustrate your judges, who have likely spent significant time and resources working on the appeal and preparing an opinion. See *Fusari v. Steinberg*, 419 U.S. 379, 390 (1975) (Burger, C.J., concurring) (“It is disconcerting to this Court to learn of relevant and important developments in a case after the entire Court has come to the Bench to hear arguments.”). More importantly, courts have consistently noted that attorneys have “a continuing duty to inform the Court of any development which may conceivably affect an outcome” in the case. *Id.* at 391; *accord In re Universal Minerals, Inc.*, 755 F.2d 309, 313 (3d Cir. 1985). This is especially important in federal court where mootness is an Article III standing issue that can deprive the court of jurisdiction over the case. *Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. Machen*, 586 F.3d 908, 916 (11th Cir. 2009) (noting “federal subject matter jurisdiction vanishes at the instant the case is mooted”).

That does not mean a controversy’s end will absolutely prevent the court from issuing an opinion. In federal court, you can argue that one of the exceptions to mootness applies, such as that the controversy ended by “voluntary cessation” or that the challenged conduct is “capable of repetition, yet evading review.” And in many states, courts can render an opinion in a mooted case if it presents an issue of substantial public interest. See, e.g., *Bettis v. Marsaglia*, 23 N.E.3d 351, 356 (Ill. 2014); *San Jose Mercury-News v. Municipal Court*, 638 P.2d 655, 656 n.2 (Cal. 1982). Regardless of the jurisdiction, it is always better to argue the case is not moot than to attempt to hide the issue from the judges. And it is good to err on the side of disclosure

and inform the court of any developments that might moot the case. This includes letting the court know that the case could become moot *in the future*, such as when the parties begin settlement negotiations. See *Arden Grp., Inc. v. Burk*, 53 Cal. Rptr. 2d 492, 493 n.1 (1996) (criticizing parties for “wasting our limited resources on this case” when they notified the court of a settlement the day before oral argument, and encouraging parties to notify the court when settlement efforts are pending).

Ghostwriting briefs. An increasingly common practice in appellate law is “ghostwriting” briefs, meaning that an attorney writes a brief but is not listed as counsel. This is usually for a pro se litigant needing assistance drafting a brief. But some appellate specialists also draft briefs that are signed and filed by existing counsel. Ghostwriting is done for a variety of reasons, and many are ethically suspect. For example, ghostwriting for pro se litigants allows the briefs to receive both the leniency usually afforded to unrepresented parties and the benefit of an attorney. Further, anonymity makes it harder for courts to enforce the rules that usually govern client representation, such as prohibitions on filing briefs in other jurisdictions or conflict-of-interest rules.

And yet, many jurisdictions do not ban (and may even encourage) ghostwritten briefs. As long as the drafting attorney does not breach any other ethical rules, some jurisdictions view ghostwriting as a helpful way to increase access to legal expertise and justice. In fact, the ABA’s Standing Committee on Ethics and Professional Responsibility issued an opinion stating, “[a] lawyer may provide legal assistance to litigants appearing before tribunals ‘pro se’ and help them prepare written submissions without disclosing . . . the nature or extent of such assistance.” Formal Op. 07-446 (2007). As always, the best advice is to check your court’s specific rules to see if there is a prohibition and, in cases of doubt, to err on the side of disclosure.

Forum shopping. Federal circuit courts occasionally certify important state law questions to the relevant state’s highest court. This procedure, however, is not an escape valve for cases you think you might lose in federal court. For example, in *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1108 (9th Cir. 2013), the Ninth Circuit rejected a motion to certify offered after oral argument, noting that it viewed the motion as nothing more than an effort to save the case after oral argument went poorly for the moving party. To maintain credibility with the court, contemplate early whether the issue on appeal is worthy of certification and make any motion to certify at the briefing stage or, at least, prior to oral argument. ■