

Reel Appeal II: More Movies, More Ethical Issues

Paper authored by:

Kirsten M. Castañeda

Alexander Dubose Jefferson & Townsend LLP

With contributions from:

Hon. James E. Lockemy

Chief Judge, South Carolina Court of Appeals

Professor Paul Bergman

UCLA School of Law

Mark A. Kressel

Horvitz & Levy LLP

**Appellate Judges Education Institute
Washington, D.C.**

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
I. Introduction	Error! Bookmark not defined.
II. Ethics In Oral Argument	Error! Bookmark not defined.
A. Lawyers' duties of candor to the court.....	1
B. Preparing for oral argument	1
C. Asking and fielding questions from the bench.....	3
D. Having trial counsel at table.....	4
E. The perils of a known or unknown panel.....	4
III. Ethical Relationships Between Lawyers and Judges	5
IV. Ethically Handling Adverse Authority.....	6
V. Ethical Responses to Trial Counsel Malpractice	8
VI. The Intersections of Professional Responsibility and Political Pressure	9
VII. Conclusion.....	10

TABLE OF AUTHORITIES

	<u>Pages</u>
CASES	
<i>Adickes v. Kress & Co.,</i> 398 U.S. 144, 90 S.Ct. 1598 (1970).....	3
<i>Hilland v. Arnold,</i> 856 S.W.2d 240 (Tex. App.—Texarkana 1993, no writ)	7
<i>Jones v. Barnes,</i> 463 U.S. 745, 103 S.Ct. 3308 (1983).....	9
<i>King v. LaMarque,</i> 464 F.3d 963 (9th Cir. 2006)	4
<i>Reyes-Garcia v. Rodriguez & Del Valle, Inc.,</i> 82 F.3d 11 (1st Cir. 1996).....	4
<i>Walker v. State,</i> 579 So.2d 348 (Fla. 1st DCA 1991)	7
RULES	
ABA CODE JUDICIAL CONDUCT 2.15(D)	9
ABA CODE JUDICIAL CONDUCT 2.15(D) cmt. 2	9
ABA MODEL CODE JUDICIAL CONDUCT 1.2	5, 6
ABA MODEL CODE JUDICIAL CONDUCT 2.15(B).....	9
ABA MODEL CODE JUDICIAL CONDUCT 2.2	4
ABA MODEL CODE OF JUDICIAL CONDUCT 2.4(C).....	10
ABA MODEL CODE JUDICIAL CONDUCT 2.9(C).....	3
ABA MODEL CODE JUDICIAL CONDUCT 2.9(C) cmt. 6.....	3
ABA MODEL CODE JUDICIAL CONDUCT 3.1 & cmts. 1, 2.....	5
ABA MODEL CODE JUDICIAL CONDUCT 3.1 cmt. 1.....	10
ABA MODEL CODE JUDICIAL CONDUCT 4.1(A)(2), (3), (4), (7).....	9
ABA MODEL R. PROF. CONDUCT 1.1	1, 2, 4, 5, 8

ABA MODEL R. PROF. CONDUCT 1.1 & 1.4.....	8
ABA MODEL R. PROF. CONDUCT 1.16(a)(1).....	2
ABA MODEL R. PROF. CONDUCT 1.4(a)(2).....	8
ABA MODEL R. PROF. CONDUCT 1.7	8, 9
ABA MODEL R. PROF. CONDUCT 1.7(a)(2).....	8
ABA MODEL R. PROF. CONDUCT 3.3	1
ABA MODEL R. PROF. CONDUCT 3.3(a)(1).....	3
ABA MODEL R. PROF. CONDUCT 3.3(a)(1)-(2).....	1
ABA MODEL R. PROF. CONDUCT 3.3(a)(2).....	6
ABA MODEL R. PROF. CONDUCT 3.3, cmt. 2.....	1, 3
ABA MODEL R. PROF. CONDUCT 3.4(c)	3
ABA MODEL R. PROF. CONDUCT 5.1(b)	2, 4
ABA MODEL R. PROF. CONDUCT 8.2(a)	10
FED. R. CIV. P. 11	6
TEX. R. APP. P. 47.1	9

ETHICS OPINIONS

Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66 (2010).....	6
Fla. Judicial Ethics Advisory Comm., Op. 2009-20 (2009).....	6
Ky. Judiciary, Formal Op. JE-119 (2010).....	6
N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009).....	6
Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011).....	6
Sup. Ct. of Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2010-7 (2010)	6

TREATISES AND LAW REVIEWS

Barry R. Schaller, <i>Ethical Aspects of Political Dilemmas Faced by Appointed Judges</i> , 30 YALE L. & POLICY REV. INTER ALIA 101 (2011).....	9, 10
Beth Thornburg, <i>The Curious Appellate Judge: Ethical Limits on Independent Research</i> , 28 REV. LITIG. 131 (2008)	3

Brian Hull, <i>Why Can't We Be 'Friends'? A Call for a Less Stringent Policy for Judges Using Online Social Networking</i> , 63 Hastings L.J. 595 (2012)	6
Dana Ann Remus, <i>Just Conduct Regulating Bench-Bar Relationships</i> , 30 YALE L. & POLICY REV. 123 (2011).....	5
David H. Tenant, Lauren M. Michals, <i>Mixing Business with Ethics: The Duty to Report Malpractice by Trial Counsel</i> , 20 PROF. LAW. 3 (2010)	8
Joel D. Lieberman, Jamie Arndt, <i>Understanding the Limits of Limiting Instructions</i> , 6 PSYCH., PUB. POLICY, & LAW 677 (Sept. 2000).....	4
Judith S. Kaye, <i>Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts</i> , 25 HOFSTRA L. REV. 703, 715-16 (1997)	10
Mark S. Cady, <i>Curbing Litigation Abuse & Misuse: A Judicial Approach</i> , 36 DRAKE L. REV. 483, 495-98 (1986)	7
Stewart Howard, <i>The Duty to Cite Adverse Authority</i> , 16 J. Legal Prof. 295, 299 (1991).....	7
Thane Rosenbaum, <i>100 Years of Law in the Movies</i> , ABA JOURNAL (Aug. 2015)	1
Wayne Schiess, <i>Ethical Legal Writing</i> , 21 REV. LITIG. 527, 532 (2002)	7
William Hodes, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 3.3:206 (2d ed. 1990).....	7

OTHER LEGAL AUTHORITIES

11 Annals of Cong. 739-40 (1802).....	10
Bryan A. Garner, A Dictionary of Modern Legal Usage 577 (1987)	1
TEX. STDS. APP. CONDUCT <i>Lawyers' Duties to Lawyers</i> ¶2	2

OTHER SOURCES

Stan Lee, David Koepp, <i>Spider-Man</i> (2002).....	10
Stan Lee (writer), Steve Ditko (artist), <i>Amazing Fantasy</i> No. 15 (Aug. 1962)	10
Tom Clancy (novel), Donald Stewart, Steven Zaillian, John Milius (screenplay), <i>Clear and Present Danger</i> (1994)	8

I. Introduction

In real life, ethical issues facing appellate judges and lawyers seldom arise like Debbie Reynolds jumping out of the cake in *Singin' in the Rain*. More often, ethical issues sneak up on an appellate jurist or practitioner, often concealed in the guise of a seemingly innocuous task. Explanations of background facts and circumstances necessary to set the stage for a discussion of specific ethical dilemmas could require hours, but a picture—worth 10,000 words—provides immediate context. And as a recent article in the *ABA Journal* observed, “From Sophocles to Shakespeare, Dostoyevsky to Dickens, John Grisham to Scott Turow, the world's great poets and dramatists, novelists and film directors have been enamored of the legal system for its plotlines and morality tales.” Thane Rosenbaum, *100 Years of Law in the Movies*, ABA JOURNAL at 36 (Aug. 2015).

This paper will discuss a variety of ethical questions appellate judges and lawyers are called upon to answer in the pursuit of justice. In our presentation, the marriage of film clips to the rules of professional responsibility not only enhances the impact of our discussion, but also, in the words of Professor Paul Bergman, reflects the power of popular legal culture to reflect and reinforce viewers’ attitudes about law, lawyers and the legal system. In an age in which the public regularly questions whether lawyers uphold their oath to “honestly demean [themselves] in the practice of law” and whether judges “faithfully execute [their] duties,” understanding both our ethical obligations and the public’s perception of our ethical obligations is essential to our ongoing efforts to preserve the integrity of our system of law.

Tip: In this paper, we largely refer to the ABA Model Rules of Professional Conduct and the ABA Model Code of Judicial Conduct because state

rules/codes largely provide the same or substantially similar requirements. However, please be aware that some state requirements vary from the model. Always check the requirements governing your situation for the correct standards by which your actions will be measured.

II. Ethics in Oral Argument

A. Lawyers’ duties of candor to the court

Model Rule of Professional Conduct 3.3 sets forth a lawyer’s duty of candor toward the tribunal. Among them are the following:

- A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.
- 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.

MODEL R. PROF. CONDUCT 3.3(a)(1)-(2).

These duties are aimed at avoiding conduct that undermines the integrity of the adjudicative process. MODEL R. PROF. CONDUCT 3.3, cmt. 2.

B. Preparing for oral argument

Model Rule of Professional Conduct 1.1 requires a lawyer to provide competent representation to the client. “Competent representation” requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. MODEL R. PROF. CONDUCT 1.1. Rule 1.1 measures the requisite thoroughness and preparation by what is reasonably necessary for the representation, not by artificial constraints placed on a budget by unreasonable or uneducated client expectations.

Although a lawyer may take steps to provide representation as efficiently as possible, there are some tasks that cannot be eliminated in the name of cost savings. Ultimately, if a client insists on constraints that would result in violation of the rules of professional conduct (*e.g.*, the duty to provide competent representation), the lawyer will be required to withdraw. MODEL R. PROF. CONDUCT 1.16(a)(1). Alternatively, if the client's constraints would result in an unreasonable financial burden on the lawyer or would render the representation unreasonably difficult, the lawyer may be faced with the question of whether to withdraw voluntarily. *Id.* 1.16(b)(6), (c). To avoid these situations, it behooves an appellate lawyer to discuss and define with a client at the outset of representation the expected effort—and accompanying expense—necessary to provide competent representation at the various stages of the appeal at hand.

Tip: Discussions with the client about the scope of representation also present a perfect opportunity to educate the client about applicable standards of conduct. In addition to applicable rules of professional responsibility, other standards may set forth the type of conduct expected of advocates by the courts. For instance, in Texas, appellate lawyers are guided by the Texas Lawyers' Creed and the Texas Standards of Appellate Conduct. One example of the Standards is that counsel "will not unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation by opposing counsel." TEX. STDS. APP. CONDUCT *Lawyers' Duties to Lawyers* ¶2. Educating the client that certain requests for extensions of time are routinely requested and granted by appellate courts, and that the standards governing your conduct prohibit you

from unreasonably withholding consent, can forestall situations that might place you in the unenviable position between the Standards' requirements and a client's demands. See also *id. Lawyers' Duties to Clients* ¶5 (requiring counsel to "explain the appellate process to their clients"), ¶9 (requiring counsel to "advise their clients of proper behavior, including that civility and courtesy are expected").

In preparing for oral argument, most appellate lawyers are familiar with the basic "best practices." A thorough review of the record and relevant case law, research to locate any updated case law that may have issued between the briefing and argument, and formulation of answers to potential questions from the bench are all part of our repertoire. However, a lawyer's professional duties in preparing for oral argument do not end at his/her own office door.

When an appellate lawyer is not presenting oral argument, but has direct supervisory authority over the lawyer who is, the supervising lawyer must make reasonable efforts to ensure that the arguing lawyer conforms to the rules of professional conduct. MODEL R. PROF. CONDUCT 5.1(b). In addition, an appellate lawyer who is a partner in a law firm, or who individually or "together with other lawyers" possesses comparable managerial authority in a law firm, must make reasonable efforts to ensure that the firm has implemented measures giving reasonable assurance that all firm lawyers conform to the rules of professional conduct. *Id.* 5.1(a). In a given appeal, assisting a less experienced lawyer (or a lawyer less experienced in the appellate arena) in preparing for oral argument may be not only advisable, but also ethically required. Likewise, an appellate lawyer who is a partner or who possesses comparable managerial authority may need to examine whether his/her firm has established

mechanisms by which less experienced lawyers can learn best appellate practices and obtain assistance from more experienced lawyers at the firm when needed.

On the judicial side, the rise of the Internet has raised questions about its use in preparation for oral argument. Buried in Canon 2's "ex parte communications" rule is the following prohibition: "A judge shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be judicially noticed." MODEL CODE JUDICIAL CONDUCT 2.9(C). This prohibition extends to information available in all forms, including electronic. *Id.* cmt. 6. However, using "judicial notice" as a yardstick measures the propriety of research by theoretically muddled standards in an emerging area of evidence law. *See* Beth Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131 (2008). This ambiguity creates a grey area that leaves much to an individual's interpretation.

Tip: To the extent that a judge or staff attorney is allowed to conduct independent research of any issue, it is possible a lawyer should be allowed to point out the same information from permissible judicial research sources. However, if so, the same standards (*i.e.*, facts properly subject to judicial notice) should apply.

C. Asking and fielding questions from the bench

Lawyers regularly hear from appellate judges that "I wasn't at the trial" or "I didn't come on board until the appeal" is not an acceptable answer to a question at oral argument. Nonetheless, as our film clip shows, sometimes the best answer to a question is (without shifting responsibility to trial counsel) "I don't know." Although making a guess as to law or fact might be tempting as a face-saving option, it carries a substantial risk that

the lawyer will be required to file a post-submission paper correcting what he/she learns, upon return to the office, was a false statement of fact or law made to the tribunal at oral argument. MODEL R. PROF. CONDUCT 3.3(a)(1).

On the flip side, a thorough knowledge of all the surrounding facts—including facts *outside* the record—can raise tricky issues for an appellate lawyer. Ordinarily, appellate review is limited to matters contained in the record. *See, e.g., Adickes v. Kress & Co.*, 398 U.S. 144, 157-58 n. 16, 90 S.Ct. 1598, 1608 n. 16 (1970). Appellate arguments based on demonstrative trial exhibits that were never made part of the record, off-the-record bench conferences, or facts that developed after the trial stage implicate "conduct that undermines the integrity of the adjudicative process." *See* MODEL R. PROF. CONDUCT 3.3, cmt. 2. To the extent that applicable procedural rules define the scope of the appellate record, attempts to work extra-record facts into your presentation clash with the prohibition not to "knowingly disobey an obligation under the rules of a tribunal except an open refusal based on an assertion that no valid obligation exists." MODEL R. PROF. CONDUCT 3.4(c).

But what if a judge on the panel asks a question whose honest answer lies outside the record, or asks directly about extra-record facts? To avoid misleading the tribunal, the best initial response is one alerting the court that the answer is outside the record. This information gives the judge the opportunity to withdraw the question. If the question is not withdrawn, however, this author was unable to locate a portion of the model rules that would prohibit the advocate from providing the answer when the tribunal has posed the question.

In posing the question and seeking answers about facts outside the record, the judge's ethical obligations may be implicated, as well. For instance, a judge must uphold and apply the law, including any case law and

procedural rules limiting appellate review to the scope of the record. MODEL CODE JUDICIAL CONDUCT 2.2. Furthermore, a judge's responsibility to perform all duties of judicial office fairly (*id.*) would seem to prohibit a judge from soliciting or allowing discussion of extra-record facts in one appeal, while forbidding such discussion in other appeals. A necessary component of fairness is the consistent application of procedural rules to all litigants. *See, e.g., King v. LaMarque*, 464 F.3d 963, 966 (9th Cir. 2006); *Reyes-Garcia v. Rodriguez & Del Valle, Inc.*, 82 F.3d 11, 14 (1st Cir. 1996). And although satisfying one's curiosity might seem to be separable from deciding the case, it is incredibly difficult for any human being to disregard a fact from his/her thinking after that fact has been disclosed.

In studying the limits on a decisionmaker's ability to disregard disclosed facts in court proceedings, a researcher has posited that one's ability is limited by one's sense of what is just. Joel D. Lieberman, Jamie Arndt, *Understanding the Limits of Limiting Instructions*, 6 PSYCH., PUB. POLICY, & LAW 677, 701 (Sept. 2000). When a person believes it would be just to consider certain information, but consideration is prohibited by an external source (*e.g.*, a trial judge's limiting instruction, or a judicial code's professional responsibility rule), the clash between the two forces hampers a person's ability to disregard the information. *Id.* Another researcher suggests that the more "emotional" a particular fact is, the more difficult it is for a decisionmaker to suppress consideration of the fact. *Id.* These possible limits on the ability to exclude a known fact from the decisionmaking process have nothing to do with a judge's willpower or character. They have to do with the fact that a judge is human.

D. Having trial counsel at table

A final consideration with regard to oral argument is whether to have trial counsel at the table. One question to ask in making this

decision is whether trial counsel has entered an appearance in the appellate court. Another question is whether the trial lawyer understands that sitting at counsel table does not enable him/her to respond directly to the tribunal. And although trial counsel may be able to provide valuable assistance in locating a page in the record or passing a note reminding the appellate lawyer of a certain fact or argument, the reality is that the pace of oral argument is too fast for meaningful participation by lawyers other than the one presenting argument.

Thus, having trial counsel at one's side during oral argument cannot substitute for the thorough preparation necessary to competently represent the client. *See* MODEL R. PROF. CONDUCT 1.1. Furthermore, the appellate attorney may be considered to have direct supervisory authority over trial counsel at oral argument. This relationship before the tribunal may invoke the requirement that the appellate lawyer make reasonable efforts to ensure that the arguing lawyer conforms to the rules of professional conduct. MODEL R. PROF. CONDUCT 5.1(b).

E. The perils of a known or unknown panel

In many jurisdictions, the panel of appellate judges that will hear oral argument is revealed prior to the day argument is scheduled. An unintended consequence of thoroughly preparing to face the assigned judges is the realization that the assigned judges are quite intimidating. Even if a lawyer has never appeared before an appellate judge, a formidable portrait can be sketched by collecting information from colleagues, court biographies, media articles, CLE papers, and the judge's own opinions. This is when an appellate lawyer must draw upon "skill" to rise above the intimidation factor and present a zealous argument on his/her client's behalf. *See* MODEL R. PROF. CONDUCT 1.1.

In some jurisdictions, the appellate lawyer presenting oral argument does not learn the

identity of the panel until he/she arrives at the courthouse for the argument. In order to provide the “competent representation” required by Rule 1.1, it is imperative for the lawyer to be familiar with the applicable procedures for constituting a panel, disqualification, recusal, and objections to visiting judges. Although all appellate lawyers need to know this information, the lawyer discovering a panel’s makeup immediately before argument will not have time to research these items before springing into action. In preparing a toolbox for argument, an appellate lawyer should ask, *e.g.*:

- How and when must the various objections to the panel be lodged?
- How many judges constitute a panel in this court? May the case be submitted to a panel consisting of fewer-than-usual judges and, if so, under what conditions?
- Do the same procedures govern disqualifications and recusals in this jurisdiction? What grounds require disqualification, and what grounds support recusal?
- What are the consequences of a motion to disqualify or a motion to recuse (*i.e.*, if the challenged judge does not agree, who decides the issue, and how quickly does that happen)? What are the consequences if an appellate judge is disqualified or recused (*e.g.*, proceed with the remaining judges on the panel, appoint a replacement to the panel)?
- What types of judges are qualified to sit as visiting judges on this court?
- By what procedure are visiting judges assigned in this court? How do you obtain information about the procedure by which the judge on your panel was assigned?
- Does the right to object to a visiting judge differ depending on whether the judge retired or left office in some other

way (*e.g.*, lost a contested election, lost a retention election)?

When the panel will not be revealed until the day of argument, consider whether it is advisable to task another lawyer to handle this aspect of the argument. Just as a trial lawyer is better able to prepare for closing arguments when an appellate lawyer handles jury charge issues, an appellate lawyer may be better able to present oral argument when another appellate lawyer handles panel objections. Even if applicable procedures require the lawyer presenting argument also to present any panel objections, having another lawyer on hand to analyze the issues and help formulate the objections may be necessary to provide “competent representation” in a particular case.

III. Ethical Relationships Between Lawyers and Judges

The Model Code of Judicial Conduct recognizes and facilitates a relationship between bench and bar. Judges generally are permitted to take part in bar association activities. *See, e.g.*, MODEL CODE JUDICIAL CONDUCT 3.1 & cmts. 1, 2; *id.* 3.7(A). Judges also generally may accept “ordinary social hospitality” from lawyers. *Id.* 3.13(B)(3). This category includes dinners and receptions at which the sponsoring bar association pays the judge’s expenses, as well as a law firm’s holiday party, open house, or summer picnic. Dana Ann Remus, *Just Conduct Regulating Bench-Bar Relationships*, 30 YALE L. & POLICY REV. 123, 142-43 (2011).

Online friendships may or may not be permitted in any given jurisdiction, based on differing interpretations of Rule 1.2. *See* MODEL CODE JUDICIAL CONDUCT 1.2 (requiring a judge to act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary). For instance, a Florida ethics opinion explains that Facebook friendships between a judge and an attorney who may appear before the judge would violate the Florida Code of Judicial Conduct. Fla. Judicial

Ethics Advisory Comm., Op. 2009-20 (2009). An Oklahoma ethics opinion limits the permissible connections on a judge's social networking account to persons who do not regularly appear, or who are unlikely to appear, before the judge. Okla. Judicial Ethics Advisory Panel, Op. 2011-3 (2011).

New York, on the other hand, has concluded that an online friendship does not endanger impartiality *per se*. N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (2009). But even when a jurisdiction allows online friendships, judges are urged to exercise caution. *E.g.*, Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 5 (2010); Sup. Ct. of Ohio Bd. of Comm'r's on Grievances & Discipline, Op. 2010-7, at 1 (2010). *See also* Brian Hull, *Why Can't We Be 'Friends'? A Call for a Less Stringent Policy for Judges Using Online Social Networking*, 63 Hastings L.J. 595 (2012). And when a social media connection appears before the judge, the judge may need to immediately cease contact (*e.g.*, unfriend or otherwise block the lawyer) on the social networking site. Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66, at 10-11 (2010).

Tip: Be aware that local interpretation of Rule 1.2 may regulate activity beyond the judge's own acts and statements. For example, California judges have an affirmative obligation to check and remove, repudiate, or hide comments made by others that may be distasteful or offensive. Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66, at 4-5 (2010).

As with a determination of whether an in-person friendship casts doubt on a judge's ability to be partial, the question of whether an online friendship implicates Rule 1.2—in jurisdictions where online friendships between judges and lawyers are not forbidden outright— involves consideration of multiple factors. For example, the California Judicial

Ethics Committee considered three main factors to determine whether a judge "interacting with an attorney on a social networking site would create the impression the attorney is in a special position to influence the judge and cast doubt on the judge's ability to be impartial:"

- Whether the social networking site and/or judge's page are used for primarily personal reasons or professional purposes;
- Whether the number of connections is small and select or large and generally open; and
- Whether the lawyer appears frequently before the judge.

Cal. Judges Ass'n, Judicial Ethics Comm., Advisory Op. 66, at 8 (2010).

IV. Ethically Handling Adverse Authority

A lawyer must 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. MODEL R. PROF. CONDUCT 3.3(a)(2). Additional duties may exist through procedural rules. For example, Federal Rule of Civil Procedure 11 requires the attorney signing a filing to certify that, to the best of his/her knowledge, information, and belief "formed after reasonable inquiry" the filing "is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . ." FED. R. CIV. P. 11. Thus, in addition to the "knowing" standard employed by professional responsibility rule, a "reasonable inquiry" standard may govern whether a failure to disclose adverse authority is sanctionable. *See, e.g.*, Mark S. Cady, *Curbing Litigation Abuse & Misuse: A Judicial Approach*, 36 DRAKE L. REV. 483, 495-98 (1986).

"Controlling jurisdiction" and "directly adverse" serve as two boundaries on the professional responsibility obligation. When

determining whether an authority is “controlling,” look beyond the parameters of the court in which the appeal is pending. For example, on a question about the correct interpretation of a federal statute, adverse federal authority may fall within the scope of disclosure even if the appeal is pending in state court. Or, in a diversity case, adverse state court authority can be binding on a federal court. Consider also the relationship between multiple intermediate appellate courts in one forum. They are supposed to apply (and be bound by) one, unified law, even if sometimes they disagree on the proper interpretation.

“Directly adverse” authority goes beyond the classic “white horse” case.¹ In determining whether a particular case should be disclosed, an appellate lawyer might use this practical measure: “the more unhappy a lawyer is that he found an adverse precedent, the clearer it is that he must reveal it.” Geoffrey Hazard, W. William Hodes, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 3.3:206 (2d ed. 1990). Or one might ask: “If I don’t disclose this authority and the justices later find out about it, will they believe they have been misled?” Wayne Schiess, *Ethical Legal Writing*, 21 REV. LITIG. 527, 532 (2002).

The duty to disclose adverse authority does not prohibit appellate lawyers from arguing that earlier precedent should be overturned. *See, e.g., Walker v. State*, 579 So.2d 348, 349 n.1

(Fla. 1st DCA 1991) (noting court’s appreciation for counsel’s compliance with professional responsibility rules in acknowledging directly adverse authority and arguing that earlier precedent should be revisited and overturned). Nor does it prohibit an appellate lawyer from disclosing arguably adverse authority and explaining why it should not apply. However, in making these sorts of arguments, the lawyer should disclose clearly that the adverse authority exists. Stewart Howard, *The Duty to Cite Adverse Authority*, 16 J. Legal Prof. 295, 299 (1991).

Even when disclosure of adverse authority is not technically required, a skilled appellate lawyer will ask him/herself whether dealing with a tough area of law head-on yields strategic advantage. As Jack Ryan advised the President on the question of how to deal with media questions about his relationship with a man discovered to have drug cartel connections: “If a reporter asked if you and Hardin were friends, I’d say ‘good friends.’ If they asked if you were good friends, I’d say ‘lifelong friends.’ Give them no place to go, nothing to report. No story.” Tom Clancy (novel), Donald Stewart, Steven Zaillian, John Milius (screenplay), *Clear and Present Danger* (1994). Avoiding a difficult legal question merely reinforces the perception that it creates a problem for which the advocate has no good answer.

¹ According to Bryan A. Garner, *A Dictionary of Modern Legal Usage* 577 (1987), the term *white horse case* (along with the terms *horse case*, *gray mule case*, *goose case*, *spotted pony case*, and *pony case*) means a reported case with virtually identical facts, which therefore should determine the disposition of the instant case. At least one source reports that this term was coined in Dallas, Texas. According to what is probably an apocryphal story, around the turn of the century a Texas law firm had a case in which a white horse owned by the client’s taxi service reared in the

street, causing an elderly woman to fall and injure herself. The partner handling the case asked a young associate to find a case on point. The associate came back several hours later with a case involving an elderly lady who had fallen in the street after a taxi company’s black horse had reared in front of her. When the associate took this case to the partner, the partner said, “Nice try, son. Now, go find me a white horse case.” *Hilland v. Arnold*, 856 S.W.2d 240, 242 n.1 (Tex. App.—Texarkana 1993, no writ).

V. Ethical Responses to Trial Counsel Malpractice

The “competent representation” required by Rule 1.1 does not necessarily encompass any duty to alert the client to trial counsel malpractice. *See MODEL R. PROF. CONDUCT 1.1.* In an area of the law in which ineffective assistance of counsel provides a ground for reversal, the appellate lawyer’s job necessarily may involve identification and disclosure of trial counsel malpractice. Otherwise, the work performed on appeal may be much different than the analysis required to determine whether trial counsel committed malpractice. David H. Tenant, Lauren M. Michals, *Mixing Business with Ethics: The Duty to Report Malpractice by Trial Counsel*, 20 Prof. Law. 3, 4-5 (2010). Nevertheless, when the scope of representation is defined broadly in an engagement letter, and the appellate lawyer identifies conduct that clearly or reasonably appears to constitute malpractice, Rule 1.1 could impose a duty to report that information to the client.

To the extent that trial counsel malpractice forecloses an argument that otherwise might be available on appeal, an appellate lawyer must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” *MODEL R. PROF. CONDUCT 1.4(a)(2).* To the extent that a fairly neutral discussion under this rule leads the client to ask whether trial counsel’s acts or omissions might constitute malpractice, an appellate lawyer must “promptly comply with reasonable requests for information” and “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” *Id. 1.4(a)(4), (b).*

It is possible to exclude the identification of trial counsel malpractice from the scope of representation. Discussing the matter with the client, and providing in the engagement letter that the scope of representation in the appeal does not include advice regarding legal malpractice claims against other lawyers, could

resolve some of the questions raised by Rules 1.1 and 1.4. For example:

Because our experience is limited to handling appellate matters, [firm] will not, and expressly disclaims any duty to, provide the Client with advice regarding legal-malpractice claims against other lawyers currently representing Client . . . The Client understands that, unless otherwise agreed in writing, [firm] is not undertaking any duty to advise the Client about these matters, and the client should retain separate counsel to address these matters.

Mixing Business with Ethics, 20 Prof. Law. at 6.

The adequacy of this carve-out should be revisited if the trial counsel at issue is a regular referral source for the appellate counsel. In such a situation, Rule 1.7 may come into play. A concurrent conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by a personal interest of the lawyer. *MODEL R. PROF. CONDUCT 1.7(a)(2).* In a “chicken and egg” way, carving out legal malpractice from the representation to avoid a possible conflict may not absolve the appellate lawyer from disclosing the potential conflict. The relationship between the appellate and trial lawyers (*i.e.*, the appellate lawyer’s personal interest) already exists, even if an actual conflict does not. Thus, in order to represent a client under these circumstances, Rule 1.7 may require the appellate lawyer to disclose fully the nature and extent of his/her relationship with the trial counsel and the potential for conflict, and to obtain the client’s waiver of the conflict and consent to the representation. *See id.*

Just as there is a distinction between the appellate lawyer’s analysis and the analysis performed by a lawyer in assessing the viability of a malpractice claim, there is a difference between the judicial holdings necessary to find waiver of an argument and comments on the

adequacy of representation provided by trial counsel. An objection may be waived as part of a valid trial strategy. An issue waived in the trial court may be immaterial if, in winnowing down the issues for appeal, it never would have made the cut. *Cf. Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313 (1983). In other cases, trial counsel malpractice may be clear from the face of the record.

Unless such malpractice is part of an issue on appeal, it is questionable whether a discussion or comment should form any part of the court's opinion. For instance, where a court, by rule or operating procedure, limits its opinions to address only the issues raised and necessary to final disposition of the appeal, trial counsel malpractice may lie outside the opinion's scope. *See, e.g.*, TEX. R. APP. P. 47.1 (providing that a court of appeals "must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal"). However, to the extent the appellate judge knows the trial lawyer has committed a violation of the professional conduct rules that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, the judge is obligated to inform the appropriate authority. MODEL CODE JUDICIAL CONDUCT 2.15(B). Alternatively, if the appellate judge receives information indicating a substantial likelihood that a lawyer has committed a violation of the professional conduct rules, the judge "shall take appropriate action." *Id.* 2.15(D). "Appropriate action" could be reporting the suspected violation to the appropriate authority, but it also could include "communicating directly with the lawyer who may have committed the violation." *Id.* cmt. 2.

VI. The Intersections of Professional Responsibility and Political Pressure

Many judges must strive to uphold their ethical duties while dealing with politics and politicians. Judges who are elected or subject to

reappointment, who aspire to a different or higher bench or office, or who desire to engage in public service beyond the judiciary must deal with additional political considerations and pressures other judges do not. Barry R. Schaller, *Ethical Aspects of Political Dilemmas Faced by Appointed Judges*, 30 YALE L. & POLICY REV. INTER ALIA 101 (2011). The intersections between professional responsibility and political pressures range far beyond the well-traveled byways and can impact even judges who are not required to run for election or to be reappointed.

For example, it is not unusual for a member of a judge's family to be involved in public service, as well. To the extent that a family member runs for office, an appellate judge must walk a line between permissible and impermissible activities regarding the campaign. Except as permitted by law, a judge is not permitted to, *inter alia*, make speeches on behalf of a political organization, publicly endorse or oppose a candidate for any public office, solicit funds for a candidate, or seek endorsements from a political organization. MODEL CODE JUDICIAL CONDUCT 4.1(A)(2), (3), (4), (7). There is no "family exception" to these prohibitions. *Id.* 4.1 cmt. 5.

In addition, the desire to serve the public may prompt an appellate judge to explore opportunities beyond the bench. As the Model Code of Judicial Conduct notes, judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. MODEL CODE JUDICIAL CONDUCT 3.1 cmt. 1. However, certain opportunities, such as private speaking engagements at law firms, may be excluded by applicable rules. Certainly, the Code prohibits some types of speaking or writing. For example, an appellate judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a

matter pending in any court. *Id.* 2.10(A). Even in private, an appellate judge is prohibited from making a statement that might substantially interfere with a fair trial or hearing, or from making remarks that are likely to appear to a reasonable person to demean individuals based on factors such as national origin, age, or socioeconomic status. *Id.* 2.10(A); *id.* 3.1 cmt. 3.

Judges also must be cognizant of their duty not to convey “or permit others to convey” the impression that any person or organization is in a position to influence them. MODEL CODE OF JUDICIAL CONDUCT 2.4(C). And as officers of the court, lawyers should be careful not to equate experience before an appellate judge with an enhanced ability to persuade him/her. MODEL R. PROF. CONDUCT 8.2(a); *see also* Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 715-16 (1997).

VII. Conclusion

As the inimitable Stan Lee has taught us, “With great power comes great responsibility.” E.g., Stan Lee, David Koepp, *Spider-Man* (2002); Stan Lee (writer), Steve Ditko (artist), *Amazing Fantasy* No. 15 (Aug. 1962). The independence of the judicial branch carries with it the responsibility to regulate ourselves. Those lawyers and judges who disregard the rules of professional responsibility and codes of judicial conduct chip away at the public confidence that supports our independence. And our independence, in turn, provides an invaluable service to the public. As John Rutledge, Jr., explained to his colleagues in Congress over 200 years ago:

The Government may be administered with indiscretion and with violence; offices may be bestowed exclusively upon those who have no other merit than that of carrying votes at elections; the commerce of our country may be depressed by nonsensical theories, and

public credit may suffer from bad intentions; but, so long as we may have an independent Judiciary, the great interests of the people will be safe

11 Annals of Cong. 739-40 (1802).