

# Appellate Practice and Advocacy

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## Tell the Truth

by Raymond T. (Tom) Elligett, Jr., and Judge John M. Scheb

**T**ell the Truth has been a popular song title several times over—for artists ranging from Otis Redding to Eric Clapton to, most recently, Lee Roy Parnell in the title track of his new album. Parnell's version starts by observing that, as in the story of Rashomon, there are as many sides to a story as there are characters involved. But his poignant lyric then proceeds to urge people to have the strength to be honest with themselves and others by showing their true selves. Good advice in life; essential in appellate practice.

Our profession suffers from charges that lawyers lack candor. This is not a new phenomenon. Long before the movie *Liar Liar*, Mark Twain, in his 1882 essay, "On the Decay of the Art of Lying," bemoans his skill as a liar when compared to a lawyer he refers to as an "educated expert."

While it may be difficult to prove with empirical data, lawyers as a whole are probably more honest than many business people. Lawyers usually appreciate the importance of the truth. Much of the unfounded criticism may stem from a belief that lawyers, by representing their clients, are encouraging lying.

People intelligent enough to think it through realize that, as Parnell's opening lyric suggests, parties and witnesses often have different perceptions of events. The trial lawyer's role is to present the client's side. The trier of fact sorts

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### Appeals are Different

The appellate lawyer faces different issues and a different standard. When the parties reach the appellate court, there is usually no longer room for a dispute in facts. Case law establishes that all facts and inferences must be construed in favor of the party who prevailed before the factfinder, and establishes deferential standards of review by appellate courts.<sup>1</sup>

The appellate practitioner's duty to tell the truth starts with the client. Rule 4-3.1 precludes an attorney from taking a frivolous appeal or advancing a frivolous issue.<sup>2</sup> It permits good faith arguments for an

extension, modification, or reversal of existing law.

Pursuing a frivolous appeal may subject the lawyer and the client to an attorney's fee sanction, and the attorney to discipline.<sup>3</sup> As counsel evaluates the appeal, he or she needs to let the client know if there is no realistic chance of relief on appeal.

### The Truth About the Law

Rule 4-3.3 requires counsel to disclose legal authority in the controlling jurisdiction known to be directly adverse to counsel's client that opposing counsel fails to cite.

In a 1978 opinion, then Judge (now Justice) Anstead admonished counsel for citing two decisions but not citing a later decision that in effect overruled the two cases relied on.<sup>4</sup> By contrast, appellate courts have recognized counsel's candor when counsel acknowledge they are asking the court to overrule a controlling precedent.<sup>5</sup>

The U.S. Court of Appeals for the 11th Circuit rejected what it described as appellants' post hoc efforts to avoid sanctions by arguing they did not cite precedents because counsel interpreted them as not being controlling, and affirmed district court Rule 11 sanctions.<sup>6</sup>

Failing to address the weaknesses in one's own case and the strengths in the other side's case harms an advocate's chances to persuade the court to rule for the advocate's position. While some issues may be clear, the failure to appreciate when an issue is close —

and to deal with it — may reflect a fear of the issue or a superficial analysis.

### **The Whole Truth About the Law**

Telling the truth goes beyond merely citing controlling precedent. It includes fairly portraying the legal authorities cited. Counsel have been criticized or sanctioned for:

- Lifting words out of context;<sup>7</sup>
- Not informing the court the statute counsel relied on had not yet taken effect;<sup>8</sup>
- Falsely stating the appellate court's prior opinion represented a particular position;<sup>9</sup>
- Quoting a minority opinion without informing the court the majority had rejected the position;<sup>10</sup> and
- Quoting the dissent from a case as if it were the holding.<sup>11</sup>

Aside from ethical issues, misrepresenting case law is a bad idea. With at least three appellate judges, their clerks, and opposing counsel scrutinizing a brief, how likely is the

misrepresenter to get away with it?

Untruthful lawyers will find themselves in the position of the late humorist Lewis Grizzard's friend who ran for a local political office. When Grizzard asked how he liked the experience, the friend replied it was awful: Every time he lied he got caught, and every time he told the truth no one believed him.

In his article, *Let Us Be Officers of the Court*, Marvin Aspen, chief judge of the U.S. District Court for the Northern District of Illinois, observes that, just as many lawyers "gossip" about judges, judges discuss lawyers and share stories of unprofessional conduct.<sup>12</sup>

### **The Truth About the Facts**

Just as counsel must portray the law truthfully, so must they accurately describe the facts. Appellate rules require parties to support factual assertions with record references.<sup>13</sup> Appellate courts have stricken briefs and imposed sanctions for failing to make appropriate references to pages of the record

or the transcript on which statements of fact are allegedly based.<sup>14</sup>

Appellate courts have criticized counsel for deleting critical language from the record,<sup>15</sup> omitting material facts,<sup>16</sup> mischaracterizing the appealed decision,<sup>17</sup> and using quotation marks with references to the record where no witness had actually used the quoted words.<sup>18</sup>

As with the law, counsel cannot expect to succeed with factual misrepresentations. As one court summarized:

Misrepresentation of the record on appeal is poor strategy. Alert opponents will detect the error. An appellate panel of three judges assisted by a staff of able law clerks will confirm what the opponents point out or will itself uncover the defects. The vice of misrepresentation is not that it is likely to succeed but that it imposes an extra burden on the court.<sup>19</sup>

The 11th Circuit referred counsel for both parties to the court's disciplinary committee for making misrepresentations in a 1999 decision.<sup>20</sup> The court found both parties' attorneys had engaged in a pattern of conduct designed to mislead and

confuse the court about the regulatory status of two competing drugs.

The 11th Circuit observed that one party had changed its position “after realizing that this Court could not be so easily bamboozled.”<sup>21</sup> Once caught, the court characterized the other party’s professed dismay over the misrepresentations as akin to that of Captain Renault in *Casablanca* who, while collecting his nightly winnings, closes down Rick’s Café because he is “shocked; shocked to find that gambling is going on here!”<sup>22</sup>

### The Truth About New Events

The general rule requires that counsel stick to the record below when presenting the appeal. But there are times when counsel must inform the court of new developments.

This includes informing the tribunal “without delay” of “facts that may raise a question of mootness.”<sup>23</sup> Another appellate court indicated it would routinely advise the disciplinary agency of any instance in which appellate counsel did not notify it that a case had settled in whole or part.<sup>24</sup>

The Second District “strongly” emphasized counsel’s ethical obligation, as an officer of the court, to raise the fundamental issue of lack of subject matter jurisdiction as soon as it becomes apparent, so as to prevent an “unnecessary expenditure of precious client and judicial resources” at both the trial and appellate levels.<sup>25</sup>

Courts emphasize that counsel’s duty to inform exists, even though the new developments, new facts, or recently announced law may be unfavorable.<sup>26</sup>

### The Truth in Motions and Argument

Counsel must be candid in reciting whether opposing counsel consents or opposes a procedural motion for which counsel should consult pursuant to Rule 9.300.<sup>27</sup>

The same considerations that drive the need for truth in the facts and argument of the brief apply

equally at oral argument. Counsel need to be thoroughly familiar with the record and to be candid in response to the court’s questions.

Candor remains mandatory after the appellate court’s decision, when a party files for rehearing. When a party’s motion for rehearing directly conflicted with its prior factual representations to the court, the court struck it as “scurrilous.”<sup>28</sup> Courts have also referred counsel for discipline for unprofessional remarks in rehearing motions.<sup>29</sup>

### The Truth About the Court

When a lawyer loses an appeal, it is natural to be disappointed. But counsel need to be careful not to unfairly criticize the members of the court. Rule 4-8.2(a) proscribes lawyers making false statements concerning the qualifications or integrity of a judge.

Some attorneys have had the poor judgment to include such remarks in rehearing motions. The appellate court struck a petition for rehearing stating that the appellate court “has either ignored the law or is not interested in determining the law.”<sup>30</sup> One member of the panel would have required the attorney to appear before the court to show cause why he should not be held in contempt. He observed that such a sentiment came within the colloquialism, “You can think it, but you’d better not say it.”<sup>31</sup>

The Florida Supreme Court criticized counsel’s use of expletives in his rehearing motion, and his innuendos regarding the district court of appeal’s impartiality. The Supreme Court held that the district court’s referral of the attorney to The Florida Bar for investigation did not require the judges to disqualify themselves in a subsequent related appeal by the attorney.<sup>32</sup>

### The Truth Trumps Advocacy

In his article, Judge Aspen observes: “Any notion that the duty to represent a client trumps obligations of professionalism is, of course, indefensible as a matter of law.”<sup>33</sup> Judge Aspen quotes the 11th Circuit’s admonishment: “All attor-

neys, as ‘officers of the court,’ owe duties of complete candor and primary loyalty to the court before which they practice. An attorney’s duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly. This concept is as old as common law jurisprudence itself.”<sup>34</sup>

The Second District echoed these sentiments, observing: “The law, as a profession, carries with it not only competency requirements but also ethical and professional requirements. As a result, lawyers have an obligation not only to present legally correct arguments but also to present them in a professional manner. Unfortunately, too many lawyers are forgetting their obligation of professionalism.”<sup>35</sup> The court noted the power of trial and appellate courts to refer overzealous or unethical attorneys to The Florida Bar for disciplinary investigation.

### The Truth About Mistakes

Often the law or the record, or both, may be complex in a case. Counsel may make a mistake about a fact or an authority. Should that occur, acknowledge the mistake. One need look no further than the recent cabinet nomination process and the last United States presidency to realize that the price for lying to conceal a mistake is often worse than the penalty for the mistake itself.

### Just Tell the Truth

Lee Roy Parnell’s song concludes with the singer imploring, “Why don’t we just tell the truth?” Otis, Eric, and Lee Roy have it right: In the practice of law, including appellate practice, the best policy is to *Tell the Truth*. □

<sup>1</sup> See, e.g., *Helman v. Seaboard Coast Line R.R. Co.*, 349 So. 2d 1187, 1189 (Fla. 1977) (jury verdict sustained if supported by “any competent evidence”); *Avery Dev. Corp. v. Village by the Sea Condominium Apartments, Inc.*, 567 So. 2d 447, 449 (Fla. 4th D.C.A. 1990) (clearly erroneous or totally without substantial evidentiary support standard for trial court’s fact findings).

<sup>2</sup> References are to The Florida Bar Rules of Professional Conduct.

<sup>3</sup> See FLA. STAT. §§57.105(1), 59.46. The court in *Visoly v. Security Pacific Credit Corp.*, 768 So. 2d 482 (Fla. 3d D.C.A. 2000), awarded fees against both the clients and counsel. See also *Brahmbhatt v. Allstate Indem. Co.*, 655 So. 2d 1264, 1265 (Fla. 4th D.C.A. 1995) (awarding fees for frivolous appeal where appellant's position contrary to controlling Florida Supreme Court decision); *Avemco Ins. Co. v. Tobin*, 711 So. 2d 128, 130 (Fla. 4th D.C.A. 1998) (assessing §57.105 fees solely against the attorneys where it found "the lawyers alone maintained the frivolous position in the litigation, without the knowledge or acquiescence by their client").

<sup>4</sup> See *Clayton v. City of Cape Canaveral*, 354 So. 2d 147, 150 (Fla. 4th D.C.A. 1978).

<sup>5</sup> See *Walker v. State*, 579 So. 2d 348, 349 & n.1 (Fla. 1st D.C.A. 1991).

<sup>6</sup> FED. R. CIV. P. 11. See *Jorgenson v. County of Volusia*, 846 F.2d 1350, 1351-52 (11th Cir. 1988).

<sup>7</sup> See *Coleman v. State*, 215 So. 2d 96, 99 (Fla. 4th D.C.A. 1968).

<sup>8</sup> See *Dilallo v. Riding Safely, Inc.*, 687 So. 2d 353, 354 (Fla. 4th D.C.A. 1997).

<sup>9</sup> See *Mays v. Chicago Sun-Times*, 865 F.2d 134, 139-40 (7th Cir. 1989), cert. denied, *Platt v. United States Court of Appeals for Seventh Circuit*, 493 U.S. 900 (1989).

<sup>10</sup> See *Beam v. IPCO Corp.*, 838 F.2d 242, 249 (7th Cir. 1988).

<sup>11</sup> See *Sobol v. Capital Management Consultants, Inc.*, 726 P.2d 335, 447 (Nev. 1986).

<sup>12</sup> Chief Judge Marvin E. Aspen, *Let Us Be Officers of the Court*, 83 A.B.A. J. 94, 96 (July 1997).

<sup>13</sup> E.g., 11th Cir. R. 28-1(i); FLA. R. APP. P. 9.210(b)(3).

<sup>14</sup> E.g., *Dowell v. Sunmark Indus.*, 521 So. 2d 377, 378-79 (Fla. 2d D.C.A. 1988); *Island Harbor Beach Club, Ltd.*

*v. Department of Natural Resources*, 471 So. 2d 1380, 1381 (Fla. 1st D.C.A. 1985).

<sup>15</sup> See *Amstar Corp. v. Envirotech Corp.*, 730 F.2d 1476, 1486 (Fed. Cir. 1984), cert. denied, 469 U.S. 924 (1984).

<sup>16</sup> See *Hays v. Johnson*, 566 So. 2d 260, 261 (Fla. 5th D.C.A. 1990).

<sup>17</sup> See *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 941 (Fed. Cir. 1990).

<sup>18</sup> See *St. Lucie Harvesting and Care-taking Corp. v. Cervantes*, 639 So. 2d 37, 39 (Fla. 4th D.C.A. 1994).

<sup>19</sup> *In re Disciplinary Action Boucher*, 837 F.2d 869, 871 (9th Cir. 1988).

<sup>20</sup> See *Florida Breckenridge, Inc. v. Solvay Pharmaceuticals, Inc.*, 174 F.3d 1227 (11th Cir. 1999) (opinion withdrawn from bound volume at court's request).

<sup>21</sup> *Id.* at \* 7.

<sup>22</sup> 174 F.3d at \* 8.

<sup>23</sup> *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 (1997).

<sup>24</sup> See *Riesenecker v. Arkansas Best Freight Sys.*, 110 N.M. 451, 796 P.2d 1147 (1990).

<sup>25</sup> *84 Lumber Co. v. Cooper*, 656 So. 2d 1297, 1300 (Fla. 2d D.C.A. 1994).

<sup>26</sup> See *In Re Universal Minerals, Inc.*, 755 F.2d 309 (3d Cir. 1985).

<sup>27</sup> FLA. R. APP. P. 9.300. See *Merritt v. Promo Graphics, Inc.*, 679 So. 2d 1277 (Fla. 5th D.C.A. 1996); *Hilltop Developers, Inc. v. Masterpiece Homes, Inc.*, 455 So. 2d 1155 (Fla. 5th D.C.A. 1984).

<sup>28</sup> *Healy v. Suntrust Serv. Corp.*, 569 So. 2d 458, 461 (Fla. 5th D.C.A. 1990) (per curiam).

<sup>29</sup> E.g., *Banderas v. Advance Petroleum, Inc.*, 716 So. 2d 876 (Fla. 3d D.C.A. 1998); *Patton v. State Department of Health and Rehabilitative Servs.*, 597 So. 2d 302 (Fla. 2d D.C.A. 1991).

<sup>30</sup> *Vandenberghe v. Poole*, 163 So. 2d 51 (Fla. 2d D.C.A. 1964).

<sup>31</sup> *Id.* at 52 (Rawls, John S., J., con-

curring specially).

<sup>32</sup> See *5-H Corporation v. Padovano*, 708 So. 2d 244 (Fla. 1997).

<sup>33</sup> Aspen, *supra* note 12, at 95.

<sup>34</sup> *Id.* (quoting *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536 (11th Cir. 1993)).

<sup>35</sup> *Weiand v. State*, 701 So. 2d 562, 565 (Fla. 2d D.C.A. 1997), *quashed on other grounds*, 732 So.2d 1044 (Fla. 1999).

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