

1978

## Zeal and Frivolity: The Ethical Duty of the Appellate Advocate to Tell the Truth About the Law

H. Richard Uviller

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>

---

### Recommended Citation

Uviller, H. Richard (1978) "Zeal and Frivolity: The Ethical Duty of the Appellate Advocate to Tell the Truth About the Law," *Hofstra Law Review*: Vol. 6: Iss. 3, Article 12.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol6/iss3/12>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact [lawcls@hofstra.edu](mailto:lawcls@hofstra.edu).

## ZEAL AND FRIVOLITY: THE ETHICAL DUTY OF THE APPELLATE ADVOCATE TO TELL THE TRUTH ABOUT THE LAW

*H. Richard Uviller\**

Litigating lawyers, trained by combat and encouraged by fee, need no canonical instruction to pursue a client's cause zealously. Partisan zeal may be our most plentiful legal resource, the inexhaustible energy fueling our adversary machine. And, of course, the ABA Code of Professional Responsibility, endorsing the adversary mode of adjudication, approves of zeal, cautioning only that it not carry the advocate beyond "the bounds of the law"—a term which includes the Disciplinary Rules of the Code.

A good deal has been said (and much of it by Dean Freedman) concerning the bounds of ethics on a lawyer's presentation of facts. I should like here to discuss the obligations of the zealous advocate, and more particularly counsel for the defendant in a criminal case, with regard to his argument of questions of law. Legal issues arise, of course, before and during trial in numerous ways in motions and rulings of all sorts. In the ordinary case, however, while diligent counsel may cite familiar authority or request the application of unquestioned rules, rarely is a legal contention stretched in extensive argument at the trial level. Counsel usually has little opportunity to urge obscure doctrine or build novel theories. Generally, the trial judge is fairly confident of the applicable local law and inclined to follow well-trodden legal pathways. For this reason, though much of what follows might be read in the context of the trial stage, it seems to me that these questions are better explored on the appellate level. Too, I prefer to consider the appeal because of the relatively little attention it has received as a site of ethical problems.

---

\* Professor of Law, Columbia University School of Law. B.A., 1951, Harvard University; LL.B., 1953, Yale University. Professor Uviller was formerly Chief of Appeals Bureau, Office of the District Attorney, New York County, and has briefed and argued cases for defendants.

## DEVELOPMENT OF POINTS ON APPEAL

Assigned or retained, counsel for the defendant on appeal faces a task wholly unlike that of his predecessor at trial. His materials, his orientation, and often his relationship with his client are altogether different. With hardly the sustained and confidential relationship characteristic of trial counsel and his client, who is the primary source of counsel's knowledge of the case, the lawyer on appeal may rarely (if ever) see his client. He does not need or rely on the client's confidential disclosures for the substance of his advocacy. Rather than working with the uncertain information and unknown evidence which concerned trial counsel, the appellate lawyer takes up a written record in a library of written law. His work is confined within the former and governed by the latter. His posture as he surveys his materials is no longer defensive. He must attack. A judgment has been made against the client, fortified by some sort of "presumption of regularity." Upsetting it will require not only initiative but also (although rarely stated thus) will carry a burden of persuasion that it was erroneous or defective in some important respect. Moreover, particularly if the crime was serious and the evidence strong, the "burden" is a heavy one, for appellate courts are understandably reluctant to overturn the conviction labored for below, or to call a dutiful trial judge wrong. The job is especially difficult since the prosecutor and trial judge, throughout their performance, probably anticipated just such an attack and did all they could to insulate their record.

Occasionally, spotting a clear though inadvertant misstep below or seizing on recent and helpful appellate precedent, counsel on appeal can coast to victory with relatively little exertion and no ethical problems. More often, he must try to drive a blunt wedge through an all-but-invisible chink. Finding the most likely chink and forging his implement call for acuity, a fertile imagination, and not infrequently the gift of disguising sophistry. In the zealous effort to devise and shape legal points for his purpose, the appellate lawyer may encounter some ethical questions.

## INSTRUCTION FROM THE CODE: "MAKE NO FALSE STATEMENT."

While the Code of Professional Responsibility does not directly address appellate advocacy, language appears in several places which is highly pertinent. Foremost is the curt injunction of DR 7-102(A)5 that a lawyer shall not "[k]nowingly make a false statement of law or fact." But what is a "false statement of law"?

Purely as a matter of semantics, statements of law may be "false" in a number of ways. Let us consider a few of the many varieties, dividing them for convenience into "direct" and "indirect" or interpretive statements.

#### *Direct Misstatements*

1. "*This is a case of first impression.*" For various reasons, counsel on appeal may feel he can do better by persuading the court that it is writing on a clean slate, unhampered by murky or generally unfavorable prior judicial grapplings. He may wish to stress broad social policy or the equities in the case before the court. To allow his argument freer rein, he simply ignores decisions which, while not controlling, bear on the point in issue and might be influential against his cause. Although the statement lacks precision, it may be taken as a term of art to mean that the point in context has never been addressed. If there is no governing precedent, the statement may pass for true, strictly speaking. But when it is made with the conscious purpose of concealing pertinent language elsewhere, an element of deception is perceptible.

2. "*Authorities are in conflict on the point.*" Such a declaration has much the same slate-wiping function as the previous one. It should be used to begin or conclude a discussion of the authorities said to conflict. But just as pertinence is often a matter of judgment, so conflict is not always clear-cut. Since all cases are different in some respects from all others, and since few judicial opinions are unqualified or unrelated to the factual context of the issue, a discussion of precedent may usually be framed in a way to heighten uncertainty or inconsistency. Thus—particularly in a well-litigated area—skillful counsel can usually juxtapose holdings or quotations in such a way as to make the unfavorable appear to be balanced or modified by another case which draws out some of its sting. Often this is the essence of appellate advocacy, and, insofar as counsel's analysis is probing and imaginative, it must be regarded as useful to the development of law. But there comes a point at which the exercise is perverted: introducing false stress between cases, burying the strong elements of consistency, picking and trimming quotations to serve partisan purposes—in a word, intentionally robbing the literature of such meaning as it can justly claim—this must be counted among the ways that the law can be misrepresented.

3. "*The cases hold X.*" This statement might be deemed false in any of several situations: (a) In fact, no cases hold X, and

perhaps some hold *non-X*. Why a lawyer should make such an erroneous statement, particularly since he will doubtless accompany it with a string of citations to the authorities relied upon, is a mystery. Yet it is a remarkably familiar occurrence to lawyers (adversaries, of course) and appellate judges. Perhaps it is simply the product of haste, incompetence, or wishful thinking. But perhaps the guileful attorney hopes to slip it by a careless opponent and a busy bench. (b) The cases hold something close to *X* or a significantly qualified *X*. This is the art of the paraphrase, a common device of the zealous advocate trying to get a bit more mileage out of a helpful precedent than it is fairly good for. Since courts often enlarge on prior holdings, counsel may claim to be simply pointing the way. But, of course, it is one thing for a court to set new precedent (by disregarding the qualifier for example) and quite another for counsel to tell the court that it has already established the precedent he seeks. (c) The cases contain the proposition *X* in dictum, but not in their "holdings." The distinction between holding and dictum, as every law student comes to realize, is not always apparent and sometimes unduly formalistic. But it is not so empty of meaning that counsel may freely stretch any useful fragment of language into precedent. (d) Some cases indeed hold *X* but others, which counsel ignores, conflict in significant respects.

#### *Indirect or Interpretive Misstatements*

The direct statement of "law," which may involve an implicit element of judgment or interpretation, purports to communicate the state of the applicable or relevant law. The indirect statement avowedly represents an opinion of the writer. It can be "false," therefore, only in the sense that it is insincere. Since statements of this sort are more easily read as "advocacy," greater license for "falsity" may be tolerable. Yet they closely resemble the direct misstatements in their purpose: to misrepresent the lawyer's best judgment on applicable legal doctrine.

1. "*The prosecution's evidence failed to prove the defendant's guilt beyond a reasonable doubt as a matter of law.*" Perhaps this common averment is discounted as more a statement of a position than an opinion. But even positions on appeal should not be advanced *pro forma*, and this one appears to be based on counsel's understanding of the minimal level of proof required by the constitutional standard of "beyond a reasonable doubt."

2. "*This case clearly comes within the rule of A.*" Again, the statement may be read as though preceded by the phrase, "We

contend that . . ." signifying a position taken for advocacy's sake rather than the genuine belief of the advocate. Yet, standing without that signal, it may also be fairly taken as reasoned judgment.

3. "*The unmistakable trend in the law is toward B.*" "Trends" are usually tricky currents to gauge, and few appellate courts would accept this assertion without checking counsel's stated opinion in the matter. But should a lawyer be relieved of the obligation of sincerity by the expectation that he will not be taken at his word?

4. "*Sounder reasoning (or firmer authority) supports the minority view.*" Of course, the "soundness" or "firmness" of virtually anything in law is so patently disputable that it is difficult to brand any statement framed in these terms "false." Still—at least on its face—the statement does parade (and is offered) as the signatory's genuine and detached judgment. And at least in some instances where it is employed, the writer is well aware that it is garbed in false colors.

#### *Subconclusion*

Facing what appears to me to be the inescapable conclusion and, for the moment, putting aside all concessions to and conventions of the adversary modus, all of the foregoing statements and their ilk should be regarded as "false" as the word is used in the Code. A fair definition of a false statement of law, I submit, might be:

A statement regarding the law which is (1) either: (a) demonstrably inaccurate or incomplete in a significant way, or (b) not believed by the declarant to be accurate or complete; or (2) not a true expression of the declarant's best detached opinion in a matter in which his judgment or interpretation is called for; and (3) in either case, is offered for the purpose of misleading the recipient or concealing a contrary belief in the declarant.

It may appear harsh to tax the advocate with dissimulation for, let us say, merely omitting to note an arguably distinguishing element in a case urged as controlling. Is it not, after all, the job of his adversary to identify and argue such features? And if (as so often happens) opposing counsel misses the point, so much the better for our side. Few lawyers believe that the ethical obligation to "truth" requires them to do the work of the adverse party.

There are, naturally, tactical considerations here, as in many other ethical problems. A lawyer would be foolish to stretch the law far out of shape, inviting demolition of his point by opposing

counsel or the court. And risk of discredit doubtless helps to keep many advocates honest. Particularly the Government, or some institutional *amicus*, may wish to preserve a reputation for dispassion by presenting balanced points with scrupulous recognition of counterarguments. But there are many occasions when counsel may want to lead with a clean and forceful thrust, reserving for his reply brief the intricate or "technical" defense of his assertions. Counsel may feel that to anticipate the attempt to distinguish his prime authority would, as a matter of tactics, dilute, confuse, or mire his argument in needless digressions. As a matter of briefcraft, as well as of tactics, the merits of the preference cannot be disputed.

Should the duty of full candor regarding the law overcome an otherwise sound adversarial choice? Is the hope that the damaging element will be overlooked an intention to mislead the court? Is the omission "culpable" on the part of the attorney who advances the assertion? These are not easy questions. And turning again to the formulated standards of responsibility, we will find a measure of tolerance for distortion, although no unequivocal description of the nature or extent of the allowance.

#### BACK TO THE CANONS

Despite the general instruction to tell the truth, the Canons do not demand complete honesty or strict accuracy. The baseline duty on matters of law is stated in DR 7-106(B)(1) as follows:

In presenting a matter to a tribunal, a lawyer shall disclose:

Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.<sup>1</sup>

The affirmative obligation of disclosure is cast in the narrowest terms. Not only is it restricted to authority in the jurisdiction of the argument, but apparently it applies only to decisions of a superior tribunal which are "controlling" on the court to which the argument is addressed. However recent or persuasive, cases in a forum of coequal rank may be ignored entirely. In addition, a lawyer may omit with ethical impunity harmful decisions of a "controlling" court if they are not "directly" adverse. While the term is not self-defining or elsewhere defined, it may be taken to exclude prior decisions arguing against the point in question, but not disposing of it entirely. And, of course, the injunction tolerates omis-

---

1. See also ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-23 (1976).

sion of cases in direct opposition emanating from high courts of other jurisdictions.

Added to the duty of disclosure, DR 1-102(A)(4) abjures "dishonesty, fraud, deceit, or misrepresentation." Standing alone, this phrase might be read to require a fair and accurate rendition of cited authority. But read with the Ethical Considerations, the proper handling of precedent becomes somewhat clouded. EC 7-2 acknowledges that the law is often uncertain, and EC 7-3 suggests that the lawyer serving as advocate should resolve doubts in favor of his client. EC 7-4 goes on to provide:

The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

DR 7-102(A)(2) restates the rule thus:

In his representation of a client, a lawyer shall not:

.....

Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

What all this appears to mean is that, if controlling law in the forum is not clearly and inescapably in conflict with his position, the advocate may (and perhaps should) omit reference to countervailing authority and advance a claim tenable only under a new or altered construction of applicable legal principles. The lawyer should not be deterred in his assertion, or in the strength with which it is advanced, by his own considered judgment that it is without merit, provided only that it is not "frivolous."

Concretely, suppose trial counsel had applied for, and had been denied, a severance on the grounds that he wished to call a codefendant as a witness at the trial. The record shows that counsel had been informed by the codefendant's lawyer that the codefendant would not testify without immunity, and the prosecutor, who must request the conferral of immunity, had stated that he would not do so. Suppose, too, that other states which had considered the problem had consistently ruled that an order of severance must be

predicated on a sound reason and that the mere hope that a codefendant might change his mind and waive his privilege to testify for his alleged confederate is not such a reason. Moreover, authority in the jurisdiction had ruled that a severance should be granted if a defendant can show that his codefendant will testify in his favor. Is it "frivolous" in these circumstances to argue, without mention of neighboring or local authority, that the ruling below deprived the defendant of his constitutional right to produce evidence in his favor? Can counsel assert that "the defendant has an immutable legal right to call as a witness whomever he wishes, and if any witness elects to stand on his privilege, he must do so in the presence of the jury, who may draw such inference as they deem warranted"? Finally, can the lawyer on appeal state that "authority in this state has held that a defendant's purpose to call his codefendant as a witness amounts to sufficient cause for the granting of a severance"? The Code appears to allow the first two of these contentions, and might tolerate the third as well.

The reasoning supporting the position of the Code would probably run something like this:

1. It is extremely difficult to predict the outcome of an appeal or the court's resolution of a point of law. Seemingly barren points on occasion have borne surprising fruit.

2. To keep the law alive and flexible, novel interpretations are helpful. The law is a development in which the untried may be the way of the future, and the previously unsuccessful may have its day.

3. Appellate courts want arguments, even hopeless arguments, strenuously advanced, not judicious judgments and cautious concessions.<sup>2</sup> The court reserves the power to reject the unsound argument or temporize the overstated, and requires no help from counsel in this exercise of judgment. Indeed, misplaced zeal frequently serves to assure the bench that it is on the right course.

There is much to be said for these points; the law would be sorrowfully moribund if appellate attorneys confined their arguments to the safe and supportable. Yet, I would ask, do we measurably detract from the virtues and values of innovative appellate argument by requiring counsel to state fully and fairly the legal obstacles to his point? Should we allow appellant's counsel to carry his burden of proving the legal error below by concealment or conscious dis-

---

2. See *Anders v. California*, 386 U.S. 738, 744-45 (1967).

tortion of relevant "law"? Does the criminal defendant on appeal, like the defendant on trial, enjoy greater license than the prosecution to fight his case by misleading misinterpretation?

I would submit that on appeal, defendant's broad prerogative to try anything, within the generous limits of frivolity, has lapsed. His lawyer should bear a new responsibility to advise the court fully and truly, according to his best professional opinion concerning the state of the law. Having done so, his attack upon or under the prevailing law should be zealously pursued.

#### CONCLUSION AND PROPOSAL

I conclude that the Code of Professional Responsibility is too tolerant of legal artifice. Whatever his cause, a lawyer discussing law implicitly offers a professional opinion. His ethical obligation to the court he addresses is at least as strong as the duty he owes his client in consultation: to give a fair and detached rendition of the law as he understands it. He should disclose and discuss legal considerations however they may cut. While no advocate need make the fullest or most forceful legal argument against himself, no point of law should be advanced without a careful consideration of authorities speaking to it, and without at least enough by way of description to inform the court of the general lay of the legal terrain into which counsel would venture.

If I were writing the Canons, then, I would frame a Disciplinary Rule something like this:

1. In stating or arguing any point of law to a court or other tribunal, a lawyer should:
  - a. disclose fully and accurately any controlling authority or relevant and instructive judicial or legislative expression which, by diligent research, he has been able to discover; and
  - b. take pains to avoid distortion of or misleading statements concerning such matters as trends in the development of law, summaries of or extrapolations from pertinent authorities, the nature or import of conditions, qualifications, and exceptions in relevant doctrines; and
  - c. avoid statements which do not fairly reflect his personal judgment or opinion concerning the soundness or applicability of prior authority.
2. Having faithfully observed the foregoing, the lawyer should advance such arguments, founded in reason, history, or social policy, for or against any application, extension, limitation, or

rejection of any legal proposition as may serve to enhance his client's cause.

Our profession sadly needs its honor refurbished. Frivolity is too broad a limit on zeal. Though the adversary mode requires zealous and imaginative argument, it should not countenance conscious distortion. Particularly when he discusses existing law, the advocate need feel no disloyalty to his client if he expresses his best professional judgment. The interests of zeal neither excuse nor compensate the appellate advocate for the loss of professional dignity in facilitating his contention by ignoring or disguising the legal obstacles to its success.