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Appellate Ethics: Truth, Criticism, and Consequences

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I. INTRODUCTION

"'Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or law supported its decision).'"[1] The Indiana Supreme Court in *In re Wilkins*, better known as *Wilkins I*, suspended veteran appellate advocate Michael A. Wilkins from practice for allowing that language—which the Indiana Supreme Court labeled a "scurrilous and intemperate attack on the integrity" of the Indiana Court of Appeals[2]—to appear in a footnote of a brief.[3] The court reasoned that Wilkins violated Indiana Rule of Professional Conduct 8.2(a), which provides in pertinent part that a lawyer "'shall not make a statement that the lawyer knows to be false or with reckless disregard as to the truth or falsity concerning the qualifications or integrity of a judge.'"[4]

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1. *In re* Wilkins, 777 N.E.2d 714, 715-16 (Ind. 2002) (*Wilkins I*) (quoting Brief in Support of Appellant's Petition to Transfer, n.2).

2. *Id.* at 716 (quoting Mich. Mut. Ins. Co. v. Sports, Inc., 706 N.E.2d 555, 555 (Ind. 1999)).

3. *Id.* at 719.

4. *Id.* at 716 n.2 (quoting IND. R. PROF'L CONDUCT 8.2(a) (West 2003)).

The court later reduced Wilkins's suspension to a public reprimand in a case referred to here as *Wilkins II*.[5] Even so, the court declined to retreat from its finding that Wilkins violated Rule 8.2(a).[6] In holding firm, the court observed that, although lawyers are free to criticize judges, "they are not free to make recklessly false claims about a judge's integrity."[7]

Wilkins I and *Wilkins II* may represent extreme judicial hubris, or they might illustrate only that judges can overreact. Maybe the Indiana Supreme Court simply lost all patience with seriously flawed briefing; if so, it would neither be the first time that had happened,[8] nor would the Indiana Supreme Court be the first to find an ethical violation in a lawyer's poorly written advocacy.[9] In *In re Shepperson*,[10] for example, the Vermont Supreme Court suspended a lawyer who "disserved his clients by preparing inadequate and incomprehensible legal briefs."[11] As the court explained:

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5. *In re* Wilkins, 782 N.E.2d 985 (Ind. 2003) (*Wilkins II*). In an intervening decision, Justice Robert D. Rucker, who was a judge on the court of appeals when the subject appeal was decided and who voted to discipline Wilkins as part of the 3-2 majority in *Wilkins I*, recused himself in response to a motion by Wilkins. *In re* Wilkins, 780 N.E.2d 842, 848 (Ind. 2003) (Rucker, J.). A discussion regarding that decision, which perhaps ought to be denominated *Wilkins II* in place of the later decision reducing Wilkins's sanction, is beyond the scope of this Article.

6. *Wilkins II*, 782 N.E.2d at 986.

7. *Id.*

8. *See, e.g.*, *In re* McClellan, 754 N.E.2d 500, 501-02 (Ind. 2001) (admonishing and reprimanding a lawyer who, in a case in which the Indiana Court of Appeals had rejected his argument that plaintiff's counsel had broken a promise not to seek a default judgment against his client, wrote in a petition for rehearing: "Sadly, the Ramifications of the Court's Decision Reads [sic] Like A Bad Lawyer Joke . . . 'When It Is Okay For A Lawyer To Lie? When His Lips Are Moving To An Insurance Adjuster'"); Frith v. State, 325 N.E.2d 186, 188-89 (Ind. 1975) ("To place all this conglomeration of uncited material in a Brief is an imposition on the Court. . . . A brief is not to be a document thrown together without either organized thought or intelligent editing on the part of the brief-writer. Inadequate briefing is not, as any thoughtful lawyer knows, helpful to either a lawyer's client or to the Court.").

9. *See, e.g.*, *In re* Hawkins, 52 N.W.2d 770, 771 (Minn. 1993) (finding that a lawyer violated his duty to provide competent representation, and stating that "[p]ublic confidence in the legal system is shaken . . . when a lawyer's correspondence and legal documents are so filled with spelling, grammatical, and typographical errors that they are virtually incomprehensible").

10. 674 A.2d 1273 (Vt. 1996).

11. *Id.* at 1274.

> [B]etween 1985 and 1992 respondent repeatedly submitted legal briefs to this Court that were generally incomprehensible, made arguments without explaining the claimed legal errors, presented no substantial legal structure to the arguments, and devoted large portions of the narrative to irrelevant philosophical rhetoric. The briefs contained numerous citation errors that made identification of the cases difficult, cited cases for irrelevant or incomprehensible reasons, made legal arguments without citation to authority, and inaccurately represented the law contained in the cited cases.[12]

It also is possible that *Wilkins I* and *Wilkins II*, though by any measure unwise decisions,[13] simply illustrate that the ethical bounds of zealous advocacy constrain appellate practitioners just as they do trial lawyers. The fact that the Indiana Supreme Court poorly drew the ethical lines in the case before it does not change this basic lesson. Appellate advocates, who perhaps think themselves removed from the ethical dilemmas that surface in the relatively rough-and-tumble world of trial practice, must be sensitive to their professional duties.[14]

This Article examines the principal professional responsibility issues confronting appellate lawyers, thus focusing on lawyers' duty of candor and on their criticism of courts and authority. In doing so, the Article primarily examines lawyers' obligations under the American Bar Association's (ABA) Model Rules of Professional Conduct,[15] with some limited discussion of the

12. *Id.*

13. *See infra* notes 176-229 and the accompanying text. *Wilkins I* began drawing scholarly criticism shortly after it was issued. *See, e.g.*, Alan Dershowitz, *A Speech Code for Lawyers?*, JD JUNGLE, Feb.-Mar. 2003, at 26, 26 (describing *Wilkins I* as a "Stalinist decision"); Steven Lubet, *Tempest in a Petition for Transfer*, LEGAL TIMES, Dec. 2, 2002, at 35 (noting that the decision "[took] judicial hubris to a new extreme"); Adam Liptak, *Indiana Court Bars Lawyer for Criticizing an Opinion*, N.Y. TIMES, Nov. 3, 2002, at 31 (quoting Professor Monroe Freedman as saying that the judges in the majority opinion reacted "more like petty bureaucrats than the highest judicial officers in the state").

14. *See generally* Narda Pierce, *Selected Appellate Ethics Issues*, PROF'L LAW., May-June 2001, at 147 (discussing in cursory fashion several professional responsibility issues confronting appellate advocates).

15. MODEL RULES OF PROF'L CONDUCT (2003) [hereinafter 2003 MODEL RULES].

Model Code of Professional Responsibility.[16] Of course, the ABA substantially amended a number of the Model Rules as part of its Ethics 2000 initiative.[17] Whether individual states will adopt some or all of the amendments is yet to be determined.[18] Accordingly, this Article discusses both the applicable Model Rules as they have been adopted in most jurisdictions,[19] as well as the Ethics 2000 changes, to the extent appropriate.

There certainly is no shortage of case law to discuss, regardless of whether the issue is appellate lawyers' lack of candor or the poison pens with which they write their briefs. In *AIG Hawai'i Insurance Co. v. Bateman*,[20] for example, the lawyers charged with misconduct concealed a settlement agreement so that the Hawaii Supreme Court would render the advisory opinion they desperately desired.[21] And Michael Wilkins's conduct in *Wilkins I* pales in comparison to the conduct of the lawyer in *Office of Disciplinary Counsel v. Gardner*.[22] The lawyer in that case submitted a motion declaring, among other inflammatory statements, that the Ohio Court of Appeals had "issued an opinion so 'result driven' that 'any fair-minded judge' would have been 'ashamed to attach his/her name' to it."[23] For good measure, he added that the panel "did not give 'a damn about how wrong, disingenuous, and biased'" its opinion was.[24] Hell has no fury like an appellate advocate who loses a case he thinks he should have won.[25]

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16. MODEL CODE OF PROF'L RESPONSIBILITY (1980) [hereinafter MODEL CODE].

17. ABA, REPORT OF THE COMM'N ON EVALUATION OF THE RULES OF PROF'L CONDUCT (2000) [hereinafter ABA REPORT].

18. *See generally* Mark Hansen, *Hot Off the Press*, A.B.A. J., June 2002, at 37, 37-38 (explaining briefly the state adoption process and noting that "[it] could prove to be at least as lengthy and difficult as it was for the ABA").

19. *See* MODEL RULES OF PROF'L CONDUCT (2001) [hereinafter 2001 MODEL RULES].

20. 923 P.2d 395 (Haw. 1996).

21. *See infra* notes 67-74 and accompanying text (discussing *Bateman*).

22. 793 N.E.2d 425 (Ohio 2003).

23. *Id.* at 427 (quoting motion).

24. *Id.* (quoting motion).

25. *See infra* notes 250-71 and accompanying text (discussing *Gardner*).

II. LAWYERS' DUTY OF CANDOR

Model Rule 3.3, entitled "Candor Toward the Tribunal," contains two rules of obvious importance to appellate lawyers.[26] These are Rule 3.3(a)(1), which, as enacted in most states, provides that a lawyer shall not knowingly "make a false statement of material fact or law to a tribunal,"[27] and Rule 3.3(a)(3), which states: "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."[28] These duties "continue to the conclusion of the proceeding[] and apply even if compliance requires disclosure of client confidences."[29]

All attorneys must be truthful at all times.[30] The duty of candor requires even more of them.[31] "Candor" in this context "'means to treat a subject with fairness, impartiality, and to be outspoken, frank, and veracious, and is synonymous with other terms describing morality.'"[32]

A lawyer's duty of candor is critical. As the court in *United States v. Shaffer Equipment Co.*[33] explained:

> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence,

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26. 2001 MODEL RULES, *supra* note 19, R. 3.3.

27. 2001 MODEL RULES, *supra* note 19, R. 3.3(a)(1).

28. 2001 MODEL RULES, *supra* note 19, R. 3.3(a)(3).

29. 2001 MODEL RULES, *supra* note 19, R. 3.3(b); *see, e.g.*, Cleveland Hair Clinic, Inc. v. Puig, 200 F.3d 1063, 1067 (7th Cir. 2000) (explaining that a lawyer's "duty to protect client confidentiality does not come before the duty to be honest with the court").

30. Kalil's Case, 773 A.2d 647, 648 (N.H. 2001).

31. *See In re* Wilka, 638 N.W.2d 245, 249 (S.D. 2001) (stating that a lawyer's duty of candor goes beyond simply telling a portion of the truth; it requires lawyers to be "fully honest and forthright").

32. *In re* Dorothy, 605 N.W.2d 493, 509 (S.D. 2000) (quoting Joiner v. Joiner, 87 S.W.2d 903, 905 (Tex. Civ. App.—Dallas 1935), *rev'd*, Joiner v. Joiner, 112 S.W.2d 1049 (Tex. 1938)).

33. 11 F.3d 450 (4th Cir. 1993).

> precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.[34]

Indeed, lawyers may owe to tribunals a duty of candor that is broader than the duty that the ethics rules impose.[35] This broader, general duty of candor derives from a lawyer's larger duty to protect the integrity of the judicial process.[36] A court may therefore sanction a lawyer for a dishonest act that does not violate the more restrictive provisions of Rule 3.3.[37]

Rule 3.3(a)(1) often overlaps with other ethics rules. Chief among these is Rule 8.4(c), which states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[38] Consistent with the lawyers' duty of candor as it is generally understood and as used in Rule 8.4(c), the word "dishonesty" goes beyond fraud, deceit, and outright lying. Under Rule 8.4(c), "dishonesty" includes any conduct demonstrating a lack of "'fairness and straightforwardness'" or a "'lack of honesty, probity or integrity in principle.'"[39] Therefore, the threshold for what constitutes "dishonesty" under Rule 8.4(c) is lower than lawyers might expect. A lawyer who breaches the duty of candor under Rule 3.3(a)(1) violates Rule 8.4(c), as well.[40] In

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34. *Id.* at 457.

35. *Id.* at 458.

36. *Id.* (citing Chambers v. NASCO, Inc., 501 U.S. 32 (1991), Tiverton Bd. of License Comm'rs v. Pastore, 469 U.S. 238 (1985), and Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)).

37. *See id.* at 458-63 (outlining the broader general duty of good faith and candor).

38. 2001 MODEL RULES, *supra* note 19, R. 8.4(c).

39. People v. Katz, 58 P.3d 1176, 1189-90 (Colo. 2002) (quoting *In re* Shorter, 570 A.2d 760, 767-68 (D.C. 1990)).

40. *See, e.g.*, *In re* Alcorn, 41 P.3d 600, 611-12 (Ariz. 2002) (holding that lawyers who misled judge and thus perpetrated a sham trial violated Rules 3.3(a)(1) and 8.4(c)); *In re* Fee, 898 P.2d 975, 980 (Ariz. 1995) (censuring lawyers

who were not candid with settlement judge for violating rules 3.3(a)(1) and 8.4(c)); *In re* Hansen, 877 P.2d 802, 804-06 (Ariz. 1994) (censuring lawyer under Rules 3.3(a)(1), 8.4(a), 8.4(c), and 8.4(d) for lying to court about reason for witness's absence); *In re* Cardwell, 50 P.3d 897, 898-901 (Colo. 2002) (using Rules 3.3(a)(1) and 8.4(c), among others, to suspend lawyer who lied to judge); People v. Reed, 955 P.2d 65, 67-68 (Colo. 1998) (invoking Rules 3.3(a)(1), 8.4(c), and 8.4(d) to suspend lawyer for forging another lawyer's signature on court documents and signing documents for the other lawyer without indicating that he was signing in representative capacity); People v. Casey, 948 P.2d 1014, 1016-18 (Colo. 1997) (finding violation of Rules 3.3(a)(1), 3.3(a)(2), and 8.4(c) when suspending lawyer who lied about his client's identity); *In re* Hull, 767 A.2d 197, 199-202 (Del. 2001) (suspending lawyer under Rules 3.3(a)(1) and 8.4(c) for lying in bankruptcy pleadings); *In re* Corizzi, 803 A.2d 438, 439-43 (D.C. 2002) (relying on Rules 3.3(a)(1) and 8.4(c) to disbar lawyer who lied to court about date he formed attorney-client relationship); *In re* Uchendu, 812 A.2d 933, 938-40 (D.C. 2002) (finding that lawyer who falsely signed probate-court documents and who falsely notarized his signatures for clients violated Rules 3.3(a), 8.4 (c), and 8.4(d)); Fla. Bar v. Hmielewski, 702 So. 2d 218, 221 (Fla. 1997) (suspending lawyer under Rules 3.3(a)(1), 3.3(a)(2), and 8.4(c) for dishonesty in discovery); AIG Haw. Ins. Co. v. Bateman, 923 P.2d 395, 402 (Haw. 1996) (holding that lawyers' failure to disclose settlement to appellate court violated Rules 3.3(a)(1) and 8.4(c)); *In re* Williams, 893 P.2d 202, 207-08 (Idaho 1995) (invoking Rules 3.3(a)(1) and 8.4(c) to disbar lawyer who lied to bankruptcy judge); *In re* Richards, 755 N.E.2d 601, 602-05 (Ind. 2001) (disbarring lawyer under Rules 3.3(a)(1), 8.4(c), and 8.4(d) for lying in affidavits and to the court); *In re* Benson, 69 P.3d 544, 547-48 (Kan. 2003) (finding that lawyer who made false statements to courts about settlements violated Rules 3.3(a) and 8.4(c)); *In re* Wagle, 60 P.3d 920, 928 (Kan. 2003) (concluding that lawyer who made false disclosures to bankruptcy court regarding compensation owed to him by debtor clients violated Rules 3.3, 8.4(c), and 8.4(d)): Attorney Grievance Comm'n of Md. v. White, 731 A.2d 447, 456-57 (Md. 1999) (finding that lawyer who lied in deposition and to judge violated Rules 3.3(a)(1), 8.4(c), and 8.4(d)); *In re* Wentzell, 656 N.W.2d 402, 408-09 (Minn. 2003) (suspending lawyer who made numerous inconsistent, false, and inaccurate statements in bankruptcy case for his violation of Rules 3.3(a)(1), 8.4(c), and 8.4(d), among others); Miss. Bar v. Mathis, 620 So. 2d 1213, 1219-22 (Miss. 1993) (using Rules 3.3(a)(1), 8.4(c), and 8.4(a), among others to suspend lawyer who lied to judge about autopsy); *In re* Carey, 89 S.W.3d 477, 497-502 (Mo. 2002) (holding that lawyers who submitted false discovery responses violated Rules 3.3(a)(1), 8.4(c), and 8.4(d)); Kalil's Case, 773 A.2d 647, 648-49 (N.H. 2001) (relying on Rules 3.3(a)(1) and 8.4(c) to suspend lawyer for lying to judge); State *ex rel.* Okla. Bar Ass'n v. Allder, 48 P.3d 794, 795-97 (Okla. 2002) (censuring lawyer for violating Rules 3.3(a)(1) and 8.4(c) by his failure to make required disclosures in bankruptcy filings); *In re* Devine, 550 S.E.2d 308, 310 (S.C. 2001) (finding that lawyer who lied about client's desire to withdraw appeal violated Rules 3.3(a)(1), 8.4(c), and 8.4(d)); *In re* Wilka, 638 N.W.2d 245, 247-50 (S.D. 2001) (finding violation of Rules 3.3(a)(1), 8.4(c), and 8.4(d), and censuring lawyer who used incomplete report during hearing and gave misleading responses to judge's questions); *In re* Smith, 872 P.2d 447, 448-50 (Utah 1994) (suspending lawyer who

addition, a tribunal might discipline a lawyer who lies for violating Rule 8.4(c) without ever mentioning Rule 3.3(a)(1).[41] A Rule 3.3(a)(1) violation also implicates Rule 8.4(d), which prohibits conduct that is prejudicial to the administration of justice,[42] because a lawyer's dishonesty may cause the public to lose confidence in lawyers and the judicial system as a whole.[43] In sum, lawyers' duty of candor springs from many sources, and its breach is easily punished for the same reason.

A. False Statements of Material Fact or Law

To violate Rule 3.3(a)(1), a lawyer must *knowingly* make a false statement of material fact or law.[44] A lawyer cannot violate Rule 3.3(a)(1) through mere negligence;[45] however, in some jurisdictions, reckless conduct may satisfy the rule's knowledge requirement.[46] A lawyer recklessly makes a false statement when the lawyer turns a blind eye to the obvious, ignores that which he has

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forged signatures on acceptance of service and waiver documents for violating Rules 3.3(a)(1), 8.4(c), and 8.4(d)).

41. *See, e.g.*, *In re* Balsamo, 780 A.2d 255, 257, 261-62 (D.C. 2001) (relying solely on Rules 8.4(c) and 8.4(d) in suspending lawyer who lied to court about word count in brief and about reasons for late filing of brief); *In re* Franco, 66 P.3d 805, 810 (Kan. 2003) (finding that lawyer violated Rule 8.4(c) when he dishonestly led court to believe that he was admitted to practice in Kansas when he was not); *In re* Long, 755 A.2d 828, 830-32 (R.I. 2000) (suspending lawyer under Rules 8.4(c) and (d) for lying to judge to obtain continuance).

42. 2001 MODEL RULES, *supra* note 19, R. 8.4(d) ("It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.").

43. Attorney Grievance Comm'n of Md. v. Richardson, 712 A.2d 525, 532 (Md. 1998).

44. The same generally is true when a lawyer's false statement is alleged to violate Rules 8.4(c) and (d). *See, e.g.*, Fla. Bar v. Mogil, 763 So. 2d 303, 309-11 (Fla. 2000) (stating that a Rule 8.4(c) violation requires that the false statement be intentional, i.e., deliberate and knowing); Attorney Grievance Comm'n of Md. v. Jaseb, 773 A.2d 516, 522-23 (Md. 2001) (observing that a false statement must be intentional to violate Rule 8.4(d); however, also demonstrating that some jurisdictions hold that lawyers may violate Rule 8.4(c) by way of "misstatements made with reckless disregard for the truth or falsity thereof"). *But see* Office of Disciplinary Counsel v. Surrick, 749 A.2d 441, 445 (Pa. 2000) (showing that at least one court has held that a lawyer may negligently violate Rule 8.4(d)); *In re* Barstow, 817 So. 2d 1123, 1127-29 (La. 2002) (punishing attorney based on finding of negligent conduct).

45. *In re* Cardwell, 50 P.3d 897, 901 n.5 (Colo. 2002).

46. *Id.* (citing *In re* Egbune, 971 P.2d 1065, 1069 (Colo. 1999)).

a duty to see, or declares as fact something he knows nothing about.[47]

Although it may be difficult for courts or disciplinary authorities to determine whether a lawyer knowingly made a false statement,[48] and lawyers accused of lying generally receive the benefit of the doubt,[49] it is wrong to assume that courts are unwilling to discipline lawyers for a perceived lack of candor. It is generally the case in matters of professional responsibility that a lawyer's knowledge "may be inferred from the circumstances,"[50] and that certainly is true when weighing a lawyer's alleged breach of the duty of candor.[51] Lawyers must have a reasonable basis for believing all statements they make to courts, whether in writing, in court, or in chambers.[52]

Rule 3.3(a)(1) proscribes "false" statements of material fact or law.[53] In a profession that insists on precise language, the rule's use of the word "false" begs an obvious question: can a lawyer make

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47. *See* Office of Disciplinary Counsel v. Price, 732 A.2d 599, 604 (Pa. 1999) (quoting Office of Disciplinary Counsel v. Anonymous Attorney A, 714 A.2d 402, 407 (Pa. 1998)).

48. *See, e.g.*, Hendrix v. Winter, 16 S.W.3d 272, 273-74 (Ark. Ct. App. 2000). In that case, the appellate court observed that the parties' diametrically opposed positions, supported by their respective attorneys' affidavits, gave the court "good reason to be concerned about what appears to be a violation by the attorney for one of the parties of Rule 3.3(a)(1)." *Id.* Despite being unable to resolve the disputed fact issue, the court referred the matter to the state disciplinary authority. *Id.* at 274.

49. *See, e.g.*, Texas-Ohio Gas, Inc. v. Mecom, 28 S.W.3d 129, 145-46 (Tex. App.—Texarkana 2000, no pet.) (recognizing the possibility that statements in appellate brief were not made in bad faith, and therefore declining to sanction lawyers); Sherman v. State, 12 S.W.3d 489, 493 (Tex. App.—Dallas 1999, no pet.) ("[g]iving appellant's attorney the benefit of the doubt" in connection with false statements in notice of appeal).

50. 2001 MODEL RULES, *supra* note 19, Preamble, Scope & Terminology (discussing the words "knowingly," "known," and "knows" in Terminology [5]).

51. *See, e.g.*, Daniels v. Alexander, 818 A.2d 106, 113 (Conn. App. Ct. 2003) (concluding that trial court could find, based on circumstantial evidence, that the lawyer knowingly made a false statement).

52. *See* Forum v. Boca Burger, Inc., 788 So. 2d 1055, 1062 (Fla. Dist. Ct. App. 2001) (stating that "[t]he heart of all legal ethics is in the lawyer's duty of candor to a tribunal"); Kalil's Case, 773 A.2d 647, 648 (N.H. 2001) (stating that "it is the responsibility of every attorney at all times to be truthful"); Office of Disciplinary Counsel v. Duffield, 644 A.2d 1186, 1193 (Pa. 1994) (stating that "a license to practice law requires allegiance and fidelity to truth").

53. 2001 MODEL RULES, *supra* note 19, R. 3.3(a)(1).

a *misleading* statement of fact or law without violating the duty of candor? There are, of course, differences between false statements and those that are misleading. "False and untrue mean contrary to fact; 'misleading' suggests something literally correct, but likely to direct the listener away from the truth."[54]

Any differences between "false" and "misleading" statements are irrelevant for Rule 3.3(a)(1) purposes.[55] A lawyer who deliberately misleads a court violates Rule 3.3(a)(1), even if the statement at issue is literally true and therefore not "false." The prohibition of misleading statements, in addition to outright lies, inheres in the rule even if this prohibition is not expressly stated, and it certainly is consistent with the spirit of the rule.[56] And, even were that not the proper construction of the rule, a lawyer still would be subject to discipline for misleading statements under Rule 8.4(c), which prohibits all forms of dishonesty and deceit.[57]

To violate Rule 3.3(a)(1) as it is now constituted in most states, a lawyer must knowingly make a false statement of *material* fact or law.[58] A fact or proposition of law is "material" if it would affect a tribunal's decision-making process,[59] or if it is "significant" or "essential."[60] Whether a false statement is material necessarily depends on the facts of the particular case, but a court is sure to

54. United States v. Kojayan, 8 F.3d 1315, 1322 (9th Cir. 1993).

55. *See, e.g.*, *Daniels*, 818 A.2d at 110-111 (stating that, when questioned by the trial court, a lawyer "was obligated to respond to the inquiry completely and not in a misleading manner," and holding that the trial court reasonably could have concluded that the lawyer's misleading response was "an affirmative misrepresentation"); *In re* Kalal, 643 N.W.2d 466, 471-75 (Wis. 2002) (disciplining lawyer who lied in oral argument and who also gave "knowingly misleading" answers to court's questions).

56. *See* Texas-Ohio Gas, Inc. v. Mecom, 28 S.W.3d 129, 145 (Tex. App.—Texarkana 2000, no pet.) (discussing lawyers' alleged misrepresentations in an appellate brief and observing the following: "Attorneys owe to the courts duties of scrupulous honesty, forthrightness, and the highest degree of ethical conduct. Inherent in this high standard . . . is compliance with *both the spirit and express terms* of the rules of conduct." (emphasis added)).

57. *See* 2001 MODEL RULES, *supra* note 19, R. 8.4(c) (stating that it is "professional misconduct" for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

58. Some states have eliminated the materiality requirement from their versions of Rule 3.3(a)(1). *See, e.g.*, *In re* Edwardson, 647 N.W.2d 126, 132 (N.D. 2002); State *ex rel.* Okla. Bar Ass'n v. Johnston, 863 P.2d 1136, 1143-44 & n.24 (Okla. 1993).

59. *See, e.g.*, Daniels v. Alexander, 818 A.2d 106, 112 (Conn. App. Ct. 2003).

60. BLACK'S LAW DICTIONARY 991 (7th ed. 1999).

deem material any false statement about the issues being litigated. Even immaterial false statements, however, may be punishable under Rule 8.4(c), which has no materiality requirement.[61]

Because Rule 3.3(a)(1) speaks of a false *statement* of material fact or law, it would seem that a violation of the rule requires an affirmative misstatement; lawyers who mislead courts by their silence or by omissions would seem not to violate Rule 3.3(a)(1). Courts have held, however, that a lawyer's failure to make a necessary disclosure "is tantamount to an affirmative misrepresentation."[62] Courts routinely employ Rule 3.3(a)(1) and equivalent rules to discipline lawyers who have misled courts through their silence.[63] Furthermore, a lawyer's failure to make a necessary disclosure may violate Rules 8.4(c) and (d), neither of which requires a "statement."[64] A lawyer's silence is not golden if it misleads a court, as *AIG Hawai'i Insurance Co. v. Bateman* demonstrates.

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61. 2001 MODEL RULES, *supra* note 19, R. 8.4(c).

62. *In re* Alcorn, 41 P.3d 600, 611 (Ariz. 2002); *see also* Di Sabatino v. State Bar, 606 P.2d 765, 767 (Cal. 1980) ("It is settled that concealment of material facts is just as misleading as explicit false statements, and accordingly, is misconduct calling for discipline."); AIG Haw. Ins. Co. v. Bateman, 923 P.2d 395, 402 (Haw. 1996) ("The failure to make disclosure of a material fact to a tribunal is the equivalent of affirmative misrepresentation.").

63. *See, e.g.*, *In re Alcorn*, 41 P.3d at 611-12 (disciplining lawyers for failing to reveal secret settlement agreement that produced a sham trial); *In re* Fee, 989 P.2d 975, 979-80 (Ariz. 1995) (holding that lawyers violated Rule 3.3(a)(1) by not disclosing separate settlement agreement to judge conducting settlement conference); *Bateman*, 923 P.2d at 402 (holding that lawyers violated Rule 3.3(a)(1) by not revealing settlement on appeal); *In re* Malmin, 895 P.2d 1217, 1220 (Idaho 1995) (holding that lawyer's failure to disclose stipulated agreement violated duty of candor to the tribunal; "the lawyer's silence misled the magistrate judge and deprived the magistrate judge of facts necessary to make an informed and fair decision").

64. *See, e.g.*, *In re Alcorn*, 41 P.3d at 611-12 (finding that lawyers violated Rule 8.4(c) in addition to Rule 3.3(a)(1)); *In re Fee*, 989 P.2d at 980 (holding that lawyers violated Rules 3.3(a)(1) and 8.4(c)); Statewide Grievance Committee v. Egbarin, 767 A.2d 732, 737-39 (Conn. App. Ct. 2001) (holding that lawyer who did not reveal to court that he had not paid his taxes violated Connecticut equivalent of Rule 8.4(c)); *Bateman*, 923 P.2d at 402-03 (referring lawyers for discipline based on possible violations of Rules 3.3(a)(1) and 8.4(c)); *see also* People v. Katz, 58 P.3d 1176, 1190 (Colo. 2002) (stating that a Rule 8.4(c) violation "can be predicated upon either an act or an omission").

Bateman stemmed from an earlier declaratory judgment action, *Vincente*.[65] The parties in *Vincente*, including AIG, the appellant in *Bateman*, settled the declaratory judgment action. They did not reveal the settlement, however, but instead proceeded on appeal because *Vincente* involved insurance coverage issues of first impression that AIG wanted resolved.[66] Both AIG's lawyers and Vincente's lawyers briefed the case; neither side revealed the settlement, which, of course, rendered the appeal moot.[67] After the Hawaii Supreme Court in *Vincente* issued an opinion favorable to AIG and remanded the case to the trial court to enter summary judgment in AIG's favor, the insurer moved to rescind the parties' settlement agreement as having been premised on a mutual mistake of law.[68] The trial court denied AIG's recission motion, and the appeal that produced the *Bateman* decision followed.[69]

The *Bateman* court was unimpressed by AIG's prosecution of an appeal that should have been moot to essentially obtain an advisory opinion.[70] The court was most disturbed, however, by the conduct of the attorneys on both sides in concealing the settlement agreement so that the *Vincente* appeal could proceed. Discussing the lawyers' perceived misconduct, the *Bateman* court observed that "[t]he failure to make disclosure of a material fact to a tribunal is the equivalent of affirmative misrepresentation."[71]

There was no question that the parties' settlement in *Vincente* was a material fact. By not revealing the settlement, the lawyers misled the supreme court into entering an opinion.[72] Under the circumstances, the lawyers' failure to reveal the settlement "was tantamount to affirmative misrepresentation."[73] The lawyers' conduct thus appeared to violate Rules 3.3(a)(1) and 8.4(c), and the

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65. AIG Haw. Ins. Co. v. Vincente, 891 P.2d 1041 (Haw. 1995).

66. *See Bateman*, 923 P.2d at 397-98 (explaining that Vincente's lawyers failed to disclose the May 1992 prior settlement, but that once disclosed, AIG was not entitled to rescind the prior settlement).

67. *Id.* at 398.

68. *Id.*

69. *Id.* at 398.

70. *See id.* at 400-01 (stating that the purpose of judicial tribunals is to determine real controversies between parties that have a legal interest in the matter).

71. *Bateman*, 923 P.2d at 402.

72. *Id.*

73. *Id.*

court referred the matter to state disciplinary authorities for possible prosecution.[74]

Lawyers simply cannot file briefs or pleadings that contain allegations or statements that they know to be false,[75] nor can they misrepresent material facts or law in appearances before tribunals.[76] In *Schlafly v. Schlafly*, for example, the court castigated the appellant's lawyers for "blatant misrepresentation and mischaracterization of the facts" in their briefing, declaring their conduct "inexcusable."[77] Interestingly, despite a lengthy condemnation of the lawyers' breach of the duty of candor and the hardships posed by their unprofessional conduct,[78] the court did not punish the lawyers or refer them for discipline. The court instead sanctioned the appellant by ordering him to pay all costs of the appeal.[79] In *In re Kalal*, the Wisconsin Supreme Court publicly reprimanded a lawyer who lied and also gave "knowingly misleading" answers to the Justices' questions during oral argument.[80]

When it comes to briefing, misrepresentation of the record, as in *Schlafly*, is not the only professional responsibility problem to surface. Lawyers occasionally ghostwrite briefs for ostensibly pro se litigants, which constitutes misrepresentation to the court in which the brief is filed.[81] Plagiarism is also a problem, as are lawyers'

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74. *Id.*

75. *See, e.g.*, People v. Roose, 44 P.3d 266, 271 (Colo. 2002) (holding that lawyers who misrepresented facts in a notice of appeal violated Rules 3.3(a)(1) and 8.4(c)); *In re* Balsamo, 780 A.2d 255, 261-62 (D.C. 2001) (suspending lawyer who lied in pleadings and briefs for violating Rules 8.4(c) and 8.4(d)); Sierra Glass & Mirror v. Viking Indus., Inc., 808 P.2d 512, 516-17 (Nev. 1991) (referring for discipline lawyers who knowingly made a false statement of material fact in brief and did not retract offending statement); Schlafly v. Schlafly, 33 S.W.3d 863, 872-74 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (criticizing a lawyer for mischaracterizing and misrepresenting facts in record on appeal); Weiland v. Paulin, 655 N.W.2d 204, 210-12 (Wis. Ct. App. 2002) (declaring appeal frivolous and imposing sanctions where a lawyer misrepresented a trial court's rulings, failing to fulfill the duty of candor under Rule 3.3(a)(1)).

76. *See, e.g.*, *In re* Kalal, 643 N.W.2d 466, 468-74 (Wis. 2002) (reprimanding lawyer who misrepresented facts during appellate oral argument for violating Rule 3.3(a)(1)).

77. *Schlafly*, 33 S.W.3d at 874.

78. *Id.* at 872-74.

79. *Id.* at 874.

80. 643 N.W.2d at 472-74.

81. Duran v. Carris, 238 F.3d 1268, 1272 (10th Cir. 2001).

misrepresentation of case holdings, selective quotations of authority, and the use of ellipses to wrongly alter the meaning or import of authority or documents in the record.[82] Although it is a trial court opinion, *Northwestern National Insurance Co. v. Guthrie*[83] is illustrative.

Northwestern National was an insurance coverage dispute concerning an insurer's duty to defend its insureds. In Illinois, it is the general rule that an insurer's duty to defend is determined by the allegations in the complaint against the insured.[84] There is, however, an exception to the general rule, which states that, in the context of a declaratory judgment action, an insurer may challenge the existence of a duty to defend by showing that actions for which the insured is sued fall within a policy exclusion. In *Northwestern National*, a declaratory judgment action, the exception to the general rule was the key issue.[85]

In arguing for reconsideration of the court's order denying their motion for judgment on the pleadings, the defendants recited in their memorandum the line of cases establishing the general rule. Defense counsel neglected, however, to discuss the critical exception to the general rule, which struck the court "as something more than mere oversight."[86] For example, counsel quoted a lengthy passage

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82. *See, e.g.*, Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1357 (Fed. Cir. 2003) (sanctioning a lawyer who, "in quoting from and citing published opinions, . . . distorted what the opinions stated by leaving out significant portions of the citations or cropping one of them, and failed to show that she and not the court has supplied the emphasis in one of them"); Amstar Corp. v. Envirotech Corp., 730 F.2d 1476, 1486 (Fed. Cir. 1984) ("Distortion of the record, by deletion of critical language in quoting from the record, reflects a lack of the candor required by . . . Rule 3.3 . . . ."); Frith v. State, 325 N.E.2d 186, 188 (Ind. 1975) (calling attention to the fact that the appellant's attorney "filled his Brief with plagiarized material"); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Lane, 642 N.W.2d 296, 299-302 (Iowa 2002) (suspending a lawyer who plagiarized a treatise in a post-trial brief); Federated Mut. Ins. Co. v. Anderson, 920 P.2d 97, 103-04 (Mont. 1996) (sanctioning an insurer whose attorney attempted to mislead a court by altering a holding by use of ellipses); Sobol v. Capital Mgmt. Consultants, Inc., 726 P.2d 335, 337 (Nev. 1986) (quoting case as though quoted language was the court's holding when, in fact, the quote came from the dissent); Comm. on Legal Ethics of the W. Va. State Bar v. Farber, 408 S.E.2d 274, 280-81 (W. Va. 1991) (suspending lawyer who, among other things, misrepresented a paraphrase as a block quotation).

83. No. 90 C 04050, 1990 WL 205945 (N.D. Ill. Dec. 3, 1990).

84. *Id.* at *1.

85. *Id.*

86. *Id.*

from a case that expressed the general rule, but "[t]he *very next sentence*, explaining the exception to the rule in the declaratory-judgment context, [was] not disclosed by counsel."[87] Nor did counsel mention the exception to the general rule anywhere else in the memorandum. This failure to disclose relevant authority, the court observed, bordered "perilously close to a violation of the legal profession's ethical canons."[88]

If the offending lawyers were relieved that their conduct came only "perilously close" to being unethical instead of crossing the line, the *Northwestern National* court vanquished any good feelings when it continued. In a stinging rebuke, the court stated that it would assume that the attorneys' failure to reveal the authority at issue was "the result of sloppy research and writing," rather than an attempt to mislead it.[89] The court then directed the head of the litigation department at the defense counsel's law firm to write to the court in response to the court's concern.[90]

Finally, a lawyer who learns that a brief submitted on behalf of his client contains a false statement of material fact or law may be required to retract the offending statement.[91] It is no defense that the lawyer's adversary should have objected to the false statement but failed to do so. "A fraud remains a fraud even when the perpetrator does not get caught."[92]

1. Rule 3.3(a)(1): Ethics 2000 Changes

The ABA's Commission on Evaluation of the Rules of Professional Conduct, better known as the "Ethics 2000 Commission," recommended that Model Rule 3.3(a)(1) be amended.[93] The ABA adopted the Commission's recommendations, and the 2003 version of the rule provides that 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

87. *Id.*

88. *Northwestern Nat'l*, 1990 WL 205945, at *2.

89. *Id.*

90. *Id.*

91. *See, e.g.*, Sierra Glass & Mirror v. Viking Indus., Inc., 808 P.2d 512, 516-17 (Nev. 1991) (imposing sanctions where counsel failed to correct its brief after a misstatement was bought to its attention).

92. *Id.* at 516.

93. *See* ABA REPORT, *supra* note 17, at 72-76.

the tribunal by the lawyer."[94] The new rule thus forbids a lawyer from making any knowingly false statement of fact or law to a tribunal, material or not, while requiring a lawyer to correct a knowingly false statement that he has previously made, if it is material. The new version of Rule 3.3(a)(1) does not require a lawyer to correct a false statement made by another lawyer, leaving that situation as a Rule 8.4(c) matter. The changes to Rule 3.3(a)(1) are intended to conform it to Model Rule 3.3(a)(3),[95] which addresses the offering of evidence that a lawyer knows to be false and a lawyer's duty to take related remedial measures.[96]

The revisions to Rule 3.3(a)(1) are unremarkable. Some states had eliminated the materiality requirement from their versions of the rule well before the Ethics 2000 Commission made its recommendations,[97] and lawyers always have been subject to professional discipline under Rules 8.4(c) and (d) for false statements of law or fact that are not material.[98] Courts have long held that lawyers have a duty to correct material misstatements of fact or law for which they or their clients are responsible.[99] Accordingly, the 2003 version of Model Rule 3.3(a)(1) simply captures existing practices and trends in the states.

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94. 2003 MODEL RULES, *supra* note 15, R. 3.3(a)(1).

95. Margaret Colgate Love, *The Revised ABA* Model Rules of Professional Conduct: *Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 464 (2002).

96. The 2003 version of Rule 3.3(a)(3) provides that a lawyer "shall not knowingly . . . offer evidence that the lawyer knows to be false." 2003 MODEL RULES, *supra* note 15, R. 3.3(a)(3). With respect to remedial measures, the rule states: "If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer knows of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." 2003 MODEL RULES, *supra* note 15, R. 3.3(a)(3).

97. *See, e.g.*, *In re* Edwardson, 647 N.W.2d 126, 132 (N.D. 2002) (holding that failure to respond to a complaint constitutes a violation of the rule); State *ex rel.* Okla. Bar Ass'n v. Johnston, 863 P.2d 1136, 1143-44 (Okla. 1993) (noting that Oklahoma intentionally excluded the word "material" from its version of Rule 3.3(a)(1) and stating that, under the Oklahoma rule, "any incorrect statement of law or fact made to a tribunal by a lawyer having actual knowledge of its falsity, no matter how insignificant, is grounds for discipline").

98. 2001 MODEL RULES, *supra* note 19, R. 8.4(c)-(d).

99. *See, e.g.*, Sierra Glass & Mirror v. Viking Indus., Inc., 808 P.2d 512, 516-17 (Nev. 1991) (discussing false statement of material fact in appellate brief and Nevada's equivalent of Rule 3.3(a)(1)).

2. Candor and the Model Code

Lawyers in states adhering to the Model Code may be disciplined for a lack of candor under: (1) DR 7-102(A)(5), which provides that a lawyer shall not "[k]nowingly make a false statement of law or fact;"[100] (2) DR 1-102(A)(4), which states that it is misconduct for a lawyer to engage in conduct involving "dishonesty, fraud, deceit, or misrepresentation;"[101] (3) DR 1-102(A)(5), which provides that a lawyer must not "engage in conduct that is prejudicial to the administration of justice;"[102] and (4) DR 1-102(A)(6), which states that a lawyer shall not engage in "any other conduct that adversely reflects on his fitness to practice law."[103] DR 7-102(A)(5) obviously differs from the version of Rule 3.3(a)(1) now in effect in most states in that it does not require a material false statement for a violation, but it tracks the 2003 version of the rule spawned by Ethics 2000.[104] DR 1-102(A)(4) and DR 1-102(A)(5) are indistinguishable from Rules 8.4(c) and (d). Thus, cases interpreting Rules 8.4(c) and (d) are persuasive authority in Model Code states, and vice versa.

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100. MODEL CODE, *supra* note 16, DR 7-102(A)(5); *see, e.g.*, *In re* Davenport, 49 P.3d 91, 100 (Or. 2002) (suspending lawyer who lied under oath in bankruptcy proceeding).

101. MODEL CODE, *supra* note 16, DR 1-102(A)(4); *see, e.g.*, *In re* Fischer, 684 N.E.2d 197, 198 (Ind. 1997) (discussing lawyer's alteration of documents); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Daggett, 653 N.W.2d 377, 380 (Iowa 2002) (finding that lawyer violated DR 1-102(A)(4) by lying to trial court about having filed application to reinstate client's appeal; lawyer had prepared application but had not filed it); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Grotewald, 642 N.W.2d 288, 293 (Iowa 2002) (finding that lawyer violated DR 1-102(A)(4) and (A)(5) by "his casual, reckless disregard for the truth"); Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Lane, 642 N.W.2d 296, 299-302 (Iowa 2002) (relying on DR 1-102(A)(4) to suspend lawyer who plagiarized a treatise in a post-trial brief); *In re Davenport*, 49 P.3d at 97-100 (suspending lawyer who lied under oath in bankruptcy proceeding); *In re* Benett, 14 P.3d 66, 70 (Or. 2000) (holding that "misrepresentation," as used in the Oregon provision that is identical to DR 1-102(A)(4), "includes misrepresentation by nondisclosure;" stating, therefore, that a lawyer's "failure to correct a false impression created by nondisclosure of a material fact" also constitutes misrepresentation under the rule).

102. MODEL CODE, *supra* note 16, DR 1-102(A)(5); *see, e.g.*, *In re* Gustafson, 41 P.3d 1063, 1074-75 (Or. 2002) (holding that lawyer who lied in juvenile-court proceeding violated DR 1-102(A)(5)).

103. MODEL CODE, *supra* note 16, DR 1-102(A)(6).

104. MODEL CODE, *supra* note 16, DR 7-102(A)(5).

105. Dike v. People, 30 P.3d 197, 201 (Colo. 2001).

106. 2001 MODEL RULES, *supra* note 19, R. 3.3(a)(3).

107. MODEL CODE, *supra* note 16, DR 7-106(B)(1) ("In presenting a matter to a tribunal, a lawyer shall disclose . . . [l]egal 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." (footnotes omitted)).

108. *See, e.g.*, Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 355 (Fla. Dist. Ct. App. 1997) (holding that lawyer defending stable in suit arising out of horseback-riding accident had duty to disclose that the statute immunizing stable from liability did not become effective until after the accident); Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc., 464 N.W.2d 551, 554, 556-58 (Minn. Ct. App. 1991) (involving lawyer's failure to disclose applicable statute), *aff'd in part, rev'd in part on other grounds*, 482 N.W.2d 771 (Minn. 1992).

109. *See, e.g.*, United States v. Crumpton, 23 F. Supp. 2d 1218, 1219 (D. Colo. 1998) (failing to disclose case from same federal-judicial district); Massey v. Prince George's County, 907 F. Supp. 138, 141-43 (D. Md. 1995) (failing to disclose case from same federal-judicial circuit); Time Warner Entm't Co. v. Does #1-2, 876 F. Supp. 407, 415 (E.D.N.Y. 1994) (failing to disclose applicable provision of federal statute and case from same federal-judicial circuit); *In re* Thonert, 733 N.E.2d 932, 933-34 (Ind. 2000) (reprimanding lawyer for failing to disclose directly adverse Indiana Supreme Court authority).

110. *See, e.g.*, State v. Somerlot, 544 S.E.2d 52, 54 n.2 (W. Va. 2000) (criticizing lawyers for omitting any discussion of a key Supreme Court decision that controlled an important issue in the case and that the lower court relied upon in its holding).

A lawyer's duty to reveal directly adverse case law is not limited to appellate decisions.[111] A lawyer may be required to cite trial court decisions.[112] A lawyer may be required to disclose a lower-court opinion even if it is on appeal, so long as the applicable law provides that the decision has value as precedent pending appeal.[113] Lawyers also may be required to disclose unpublished decisions,[114] although they are not required to disclose decisions to which citation is prohibited.[115]

Of course, a lawyer must reveal directly adverse authority in the controlling jurisdiction only if it is "not disclosed by opposing counsel."[116] A lawyer who knows of such authority may not, however, omit the authority from his opening brief or some other initial pleading in the hope that his opponent will thereafter find and cite it.[117] A lawyer has "a duty to refrain from affirmatively misleading [a] court as to the state of the law."[118] An adversary's subsequent citation of the subject authority does not cure a lawyer's breach of this duty.[119]

A lawyer is required to disclose only "directly adverse" authority in the controlling jurisdiction.[120] Authority should be considered directly adverse if the court would reasonably view it as

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111. *See* Douglass v. Delta Air Lines, Inc., 897 F.2d 1336, 1344 (5th Cir. 1990) (dismissing the argument that a decision is irrelevant because it came out of a district court).

112. *Id.* at 1344 (discussing U.S. district court decisions); *Crumpton*, 23 F. Supp. 2d at 1219 (same); Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533, 538-40 (W.D. Pa. 2001) (same).

113. *See Douglass*, 897 F.2d at 1344 (holding that federal cases turning on state substantive law in wrongful-death cases must be presented to reviewing courts even if they were not appealed to a higher court).

114. *See* Piambino v. Bailey, 757 F.2d 1112, 1131 & n.44 (11th Cir. 1985) (noting that counsel failed to advise the court that, a month earlier, a U.S. district court had dismissed with prejudice a suit that counsel had brought containing the same claim).

115. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 111 cmt. d, reporter's note (2000) (stating that requirement to disclose does not apply to decisions that have been prohibited for use in citations).

116. 2001 MODEL RULES, *supra* note 19, R. 3.3(a)(2).

117. Jorgenson v. County of Volusia, 846 F.2d 1350, 1352 (11th Cir. 1988).

118. *Id.*

119. *Id.*

120. 2001 MODEL RULES, *supra* note 19, R. 3.3(a)(3); MODEL CODE, *supra* note 16, DR 7-106(B)(1).

important,[121] or if the court would reasonably feel as though the lawyer misled it by advancing a position contrary to the authority.[122] Either way, authority may be "directly adverse," even though the lawyer reasonably believes that it is factually distinguishable or that the court will otherwise determine that it does not govern the current case.[123] *Tyler v. State* is an illustrative case.

Tyler was a criminal case. The defendant, David Tyler, was convicted of a felony for driving while intoxicated (DWI).[124] The issue on appeal was the treatment of two prior DWI offenses, which affected Tyler's status as a repeat offender and thus whether he should have been convicted of a felony, rather than a misdemeanor.[125] Tyler's attorney, Eugene Cyrus, did not in his briefing reveal as being directly adverse an Alaska Supreme Court case, *McGhee v. State*,[126] which "addressed this very issue in a slightly different setting."[127] The State's attorney did not cite *McGhee* as directly adverse authority either; the appellate court located it through its own research. Cyrus could not claim, however, that he was unaware of *McGhee*, for he had represented McGhee in the supreme court.[128]

Cyrus explained that he had not cited *McGhee* because he believed that it did not control the outcome of Tyler's case. He contended that *McGhee* was factually distinguishable, and that the court was wrong to rely on *McGhee* to find against Tyler because of the different contexts in which the cases arose.[129] Among other

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121. *See* RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 24-2, at 470 (2002-03) (quoting ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 280 (1949)).

122. *See, e.g.*, Forum v. Boca Burger, Inc., 788 So. 2d 1055, 1058-63 (Fla. Dist. Ct. App. 2001) (awarding attorney's fees to plaintiff where defense counsel misled the trial court regarding procedural rules).

123. Tyler v. State, 47 P.3d 1095, 1105-06 (Alaska Ct. App. 2001); *see also Jorgenson*, 846 F.2d at 1352 (noting that "attorneys are legitimately entitled to press their own interpretations of precedent, including interpretations which render particular cases inapplicable," but rejecting as nothing more than "post hoc efforts to evade the imposition of sanctions" the attorneys' arguments that they did not cite directly adverse authority in the controlling jurisdiction because the cases were inapposite).

124. *Tyler*, 47 P.3d at 1097.

125. *Id.* at 1097-99.

126. 951 P.2d 1215 (Alaska 1998).

127. *Tyler*, 47 P.3d at 1099.

128. *Id.* at 1102.

129. *Id.* at 1102-03.

things, Cyrus pointed to a trial court order in another case in which the judge had agreed that *McGhee* did not control the disposition of a case like Tyler's. Thus, because "reasonable attorneys and judges could disagree on . . . whether *McGhee* was controlling authority in Tyler's case," Rule 3.3(a)(1) did not require him to reveal it.[130] In short, Cyrus argued that he was required to reveal only "controlling authority."[131]

The *Tyler* court rejected Cyrus's arguments, correctly explaining that a lawyer has a duty to disclose directly adverse authority in the "controlling jurisdiction," not "controlling authority."[132] Because the Alaska Supreme Court decided *McGhee*, the case clearly constituted authority in the controlling jurisdiction. The question thus became whether *McGhee* could be considered "directly adverse." The court determined that it could, stating:

> [A] court decision can be "directly adverse" to a lawyer's position even though the lawyer reasonably believes that the decision is factually distinguishable from the current case or the lawyer reasonably believes that, for some other reason, the court will ultimately conclude that the decision does not control the current case.[133]

The court next turned to the issue of whether Cyrus knew that *McGhee* was directly adverse authority, such knowledge being necessary to find a Rule 3.3(a)(3) violation.[134] As the court explained:

> We recognize that advocacy invariably includes a process of separating wheat from chaff, of deciding which arguments and legal authorities are important to a case. Moreover, as we stated earlier, an attorney's ethical duties must not be judged in hindsight. When an attorney consciously decides not to cite a court decision or a statute, the attorney's choice should not—and does not—become a violation

130. *Id.* at 1104.
131. *Id.*
132. *Tyler*, 47 P.3d at 1104.
133. *Id.* at 1105-06.
134. *Id.* at 1107.

> of Professional Conduct Rule 3.3(a)(3) simply because the court later concludes that the omitted decision or statute is directly adverse to the attorney's position. Rather, an attorney violates Rule 3.3(a)(3) only if the *attorney knew* that the omitted legal authority was directly adverse to the attorney's position.[135]

Cyrus did not claim ignorance of *McGhee's* potential importance to Tyler's appeal. He contended instead that he was not required to disclose *McGhee* because he honestly believed that it was factually distinguishable and, thus, should not have controlled the court's decision.[136] The *Tyler* court rejected this argument as well.[137] Cyrus was obligated to call *McGhee* to the court's attention, even if he reasonably believed that it was inapposite.[138]

The *Tyler* court concluded that Cyrus violated Rule 3.3(a)(3).[139] Because Cyrus did not act in bad faith in failing to cite *McGhee*, the court merely fined him $250.[140] Remarkably, Cyrus then petitioned the court for rehearing.

In his petition for rehearing, Cyrus pointed out that he *did* cite *McGhee* in his opening brief; however, he cited the case for an unrelated point of law.[141] The court rejected this argument, stating that Cyrus's citation to *McGhee* on an unrelated point might be an "interesting coincidence," but it was irrelevant to the decision to fine him.[142] Cyrus's late revelation that he had in fact cited *McGhee* suggested that he always knew that his citation to the case for an unrelated point did not provide a defense to his alleged Rule 3.3(a)(3) violation.[143] The *Tyler* court thus denied his petition for rehearing.

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135. *Id.* at 1107.
136. *Id.* at 1112.
137. *Tyler*, 47 P.3d at 1112 ("When an attorney knows of a decision that is 'directly adverse' . . . , and when opposing counsel fails to cite that decision, Rule 3.3(a)(3) requires the attorney to reveal the decision even though one could reasonably argue that it does not control the case at hand.").
138. *Id.* at 1108.
139. *Id.* at 1109.
140. *Id.* at 1110.
141. *Id.* at 1111.
142. *Tyler*, 47 P.3d at 1111.
143. *Id.*

From a practitioner's perspective, perhaps the most surprising aspect of *Tyler* is the court's conclusion that Cyrus violated Rule 3.3(a)(3), even though he cited *McGhee* on an unrelated point in his opening brief. Many lawyers would consider mere citation to the case to be "disclosure" for purposes of the rule.[144] Isn't the court obligated to read the case for itself once it is cited? After all, an advocate is only obligated to disclose directly adverse authority; he is not required to engage in a "disinterested exposition of the law."[145]

The *Tyler* court was correct. A lawyer's citation to directly adverse authority for a proposition different than that on which the authority is adverse will not satisfy his duty under Rule 3.3(a)(3). Courts rely on counsel to supply most legal argument.[146] Conscientious though judges and their law clerks may be, it is unreasonable to rely on them to scour every cited case for issues or points relevant to the dispute at hand.[147] Moreover, requiring courts to read all cases as if they are potentially relevant to all of the issues mentioned in the brief or document at issue leads to the unnecessary expenditure of judicial resources.[148] Requiring courts to ferret out directly adverse authority delays the resolution of all disputes by increasing their workloads. It also causes other problems. As the *Tyler* court explained:

> When a lawyer practicing before us fails to disclose a decision . . . that is directly adverse to the lawyer's position, the lawyer's conduct will, at the very best,

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144. The support for this statement is admittedly anecdotal, inasmuch as I am a practicing lawyer, and I base it on my discussions with other practicing lawyers.

145. 2001 MODEL RULES, *supra* note 19, R. 3.3 cmt. 4.

146. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 29.11, at 29-16 (3d ed. 2001); *see also* David R. Cohen, *Writing Winning Briefs*, LITIG., Summer 2000, at 46, 48 ("Judges rarely can do as much work on the case as the parties can. Judges must rely on the briefs.").

147. 2 HAZARD & HODES, *supra* note 146, § 29.11, at 29-16.

148. *See* Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533, 539 (W.D. Pa. 2001) (stating that the disclosure of adverse authority "may save considerable time and effort in the court's own analysis"); Tyler v. State, 47 P.3d 1095, 1108 (Alaska Ct. App. 2001) (discussing the "unneeded expenditure of judicial resources" caused by lawyers' failure to disclose directly adverse authority in the controlling jurisdiction); Schlafly v. Schlafly, 33 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (discussing the burden placed on appellate court staffs when counsel misrepresent the facts on which their arguments are based).

> merely result in an unneeded expenditure of judicial resources—the time spent by judges or law clerks in tracking down the adverse authority. At worst, we will not find the adverse authority and we will issue a decision that fails to take account of it, leading to confusion in the law and possibly unfair outcomes for the litigants involved. This potential damage is compounded by the fact that our decision, if published, will be binding in future cases.[149]

Another situation worth considering occurs when the language in a case that appears to render the decision directly adverse is, in the lawyer's view, dictum.[150] In that situation, must the lawyer disclose the case to the court? The answer to this question is "yes."[151] Whether the troubling language truly is dictum is a question for the court, not the lawyer. The lawyer must reveal the case notwithstanding his belief about its significance. After doing so, he should explain why the unfavorable language is dictum and argue that the court should ignore the case.

As a practical matter, Rule 3.3(a)(3) should seldom have to be invoked. For advocates, credibility with courts is essential.[152] Failing to reveal adverse authority destroys judicial trust. It is also possible that a lawyer's failure to reveal directly adverse authority will enhance that authority in the court's eyes, for if it was inapposite

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149. *Tyler*, 47 P.3d at 1108 (footnote omitted).

150. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 274 (2d ed. 1995) ("Dictum" refers to "a nonbinding, incidental opinion on a point of law given by a judge in the course of a written opinion delivered in support of a judgment"); *see also* Sarnoff v. Am. Home Prods. Corp., 798 F.2d 1075, 1084 (7th Cir. 1986) ("A dictum is a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that being peripheral, may not have received the full and careful consideration of the court that uttered it.").

151. *See* Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1358 (Fed. Cir. 2003) (criticizing the Department of Justice for defending a lawyer's dishonest briefing by arguing that the lawyer's misrepresentation of a statement in a Supreme Court opinion concerned an issue that was "not important"); Shaeffer v. State Bar of Cal., 160 P.2d 825, 829 (Cal. 1945) (stating that a lawyer "should in all fairness" reveal a case even though he considered the declaration at issue to be dictum, but declining to impose discipline because it did not appear that the lawyer intended to mislead the court).

152. *See* Cohen, *supra* note 146, at 48 (urging appellate advocates to cultivate credibility with judges before whom they appear).

or erroneously decided, the lawyer surely would have revealed it. Accordingly, good advocates freely reveal directly adverse authority in the jurisdiction, accompanied by arguments criticizing or distinguishing it.[153] Doing so diminishes the opponent's argument on the point, builds credibility with the court, and may even favorably influence the court's decision.[154]

What if there is no authority on point in the controlling jurisdiction, but there is directly adverse authority in another jurisdiction? Must a lawyer who knows of such authority cite it even though it is not in the controlling jurisdiction? Rule 3.3(a)(3) does not require disclosure in this situation, and disclosure here would seem to undermine an advocate's duty to competently represent his client. "A lawyer, after all, is hired by an interested party to represent that party's interests. The lawyer is engaged in advocacy, not a seminar discussion."[155] Although it is true that a comment to Rule 3.3 provides that a lawyer "must recognize the existence of pertinent legal authorities,"[156] in this situation the comment is inconsistent with the rule itself. When a rule and its comment are inconsistent, the clear terms of the rule must control.

If, on the other hand, a lawyer cites authority from outside the controlling jurisdiction because there is no authority on point in the jurisdiction, some courts reason that he is also required to reveal directly adverse authority from outside the controlling jurisdiction.[157] Courts advocating such an obligation posit that Rule

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153. *See* Paul R. Michel, *Effective Appellate Advocacy*, LITIG., Summer 1998, at 19, 23 (telling appellate advocates that, from a judge's perspective, they should "[c]onfront applicable adverse authority expressly and early"); *see, e.g.*, Williams v. State, 74 S.W.3d 902, 905 (Tex. App.—Fort Worth 2002, pet. granted) ("Showing high ethical standards, appellant's counsel on appeal acknowledges the existence of controlling case authority directly contrary to his arguments."), *rev'd on other grounds*, 116 S.W.3d 788 (Tex. Crim. App. 2003).

154. *See* Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533, 539-40 (W.D. Pa. 2001) (explaining that, by disclosing adverse authority, an attorney builds credibility with the court and may favorably influence the outcome of the case).

155. ROTUNDA, *supra* note 121, § 24-2, at 470.

156. 2003 MODEL RULES, *supra* note 15, R. 3.3 cmt. 4.

157. *See* Mannheim Video, Inc. v. County of Cook, 884 F.2d 1043, 1047 (7th Cir. 1989) (stating that lawyer should have cited directly adverse decisions by intermediate state courts); Plant v. Doe, 19 F. Supp. 2d 1316, 1318-19 (S.D. Fla. 1998) (explaining that counsel should have cited adverse authority from other federal district courts); Rural Water Sys. No.1 v. City of Sioux Center, 967 F. Supp. 1483, 1498 n.2 (N.D. Iowa 1997) (stating that counsel should have cited adverse authority from other federal appellate courts).

3.3(a)(3) only establishes a minimum standard of conduct; a lawyer's general duty of candor requires more.[158] Moreover, a lawyer's selective citation of authorities from other jurisdictions arguably represents an attempt to deceive the court,[159] thus implicating Rules 8.4(c) and (d).[160] Analogizing to tort law, it is possible that a lawyer may be held to assume a duty to reveal directly adverse authority from outside the controlling jurisdiction, if he cites favorable authority from outside the jurisdiction.[161]

Although it may be possible for a lawyer to assume a duty to reveal directly adverse authority from outside the controlling jurisdiction, courts should recognize such a duty sparingly, such as when the lawyer participated in the case (or cases) not revealed[162] or when the lawyer is appearing in ex parte proceedings.[163] At some point, the routine upward deviation from established ethics rules renders those rules meaningless. Even a lawyer's broad duty of candor as an officer of the court must have reasonable limits to accommodate the lawyer's duties to his client as an advocate.

If a duty to reveal directly adverse authority from outside the controlling jurisdiction is imposed, it should be imposed as a corollary of rules other than Rule 3.3(a)(3), because the language of

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158. *See, e.g.*, *Rural Water*, 967 F. Supp. at 1498 n.2 (stating that "basic notions of professionalism" demand something more than mere compliance with ethics rules regarding the disclosure of directly adverse authority in the controlling jurisdiction).

159. *See Mannheim Video*, 884 F.2d at 1047 (calling the selective citation of such authorities "a poor example of an attorney conforming to his duties as an officer of the court"); *Rural Water*, 967 F. Supp. at 1498 n.2 (saying that the selective citation of authorities from outside the controlling jurisdiction "smacks of concealment").

160. *See* 2001 MODEL RULES, *supra* note 19, R. 8.4(c) (stating that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); 2001 MODEL RULES, *supra* note 19, R. 8.4(d) (stating that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice").

161. *See Mannheim Video*, 884 F.2d at 1047 (describing a lawyer's failure to reveal nondispositive authority from intermediate state appellate court as "an exercise in gall" when he had cited intermediate appellate court decisions from other states to support his position, in addition to citing federal district court decisions from outside the Seventh Circuit, but declining to reverse the district judge's decision not to impose sanctions).

162. *See Rural Water*, 967 F. Supp. at 1498 n.2 (stating that noncontrolling authority should be cited if it is on point and known to counsel).

163. *See* Plant v. Doe, 19 F. Supp. 2d 1316, 1318-19 (S.D. Fla. 1998) (involving an ex parte motion seeking injunctive relief).

that rule in no way supports it. Depending on the facts, Rules 8.4(c) and (d) are better authority on which to premise such a duty.[164] Of course, and again, basic principles of effective advocacy ought to significantly restrict opportunities for courts to criticize or punish a lawyer for breaching an assumed duty of disclosure. A lawyer who cites favorable authority from outside the controlling jurisdiction ought to presume that his adversary also will research outside the jurisdiction, and will thus discover that which he would have the court ignore. Beating an adversary to the punch by disclosing and distinguishing or by criticizing directly adverse authority from other jurisdictions in this situation is strategically wise, and it is a sure way to avoid allegations of professional misconduct.

III. LAWYERS' CRITICISM OF COURTS

Lawyers generally are respectful of courts out of both altruism and self-interest.[165] But, for lawyers, litigation is a competitive endeavor, and advocates naturally are disappointed by decisions that go against them.[166] This disappointment occasionally causes them to unfairly criticize courts that they think wrongly decided a case, and thus run afoul of ethics rules. Model Rule 8.2(d) provides:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.[167]

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164. *See In re* Uchendu, 812 A.2d 933, 940-41 (D.C. 2002) (noting the breadth of Rule 8.4(d) and explaining that a lawyer's conduct may violate Rule 8.4(d) even if it does not actually affect a court's decision-making process but merely has the potential to do so).

165. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 11.3.1, at 600 (1986).

166. *Id.*

167. 2001 MODEL RULES, *supra* note 19, R. 8.2(a).

Similarly, DR 8-102(B) provides that a lawyer "shall not knowingly make false accusations against a judge or other adjudicatory officer."[168]

These rules obviously have First Amendment implications.[169] That said, "a lawyer's speech may be limited more than that of a lay person."[170] Although lawyers do not surrender their right to free speech upon admission to the bar, they must temper their criticisms of courts in accordance with professional standards.[171] The First Amendment generally does not exempt a lawyer from discipline for intemperate speech in court[172] or for inappropriate statements in pleadings or briefs.[173] In most jurisdictions, a lawyer's false statements about a court, made knowingly or with reckless disregard for the truth, simply do not enjoy constitutional protection.[174] The problem is that courts sometimes seem willing to discipline lawyers who criticize judges for the tone of the criticism rather than for its likely effect on public

168. MODEL CODE, *supra* note 16, DR 8-102(B).

169. *See In re* Green, 11 P.3d 1078, 1083-87 (Colo. 2000) (discussing at length the application of the First Amendment to lawyer's claim that trial judge was racist and the standard to be applied to lawyer's conduct); *In re* Disciplinary Action Against Graham, 453 N.W.2d 313, 319-23 (Minn. 1990) (discussing First Amendment implications of attorneys' criticism of judges, appropriate standard to be applied, and Rule 8.2(a)); *see also* ROTUNDA, *supra* note 121, § 53-1.1, at 755 (discussing Rule 8.2(a) and its First Amendment implications).

170. *In re* Gershater, 17 P.3d 929, 936 (Kan. 2001).

171. Burton v. Statewide Grievance Comm., No. CV000505715S, 2002 WL 1009843, at *5 (Conn. Super. Ct. Apr. 24, 2002); *see also In re* Arnold, 56 P.3d 259, 267-68 (Kan. 2002) (quoting *In re* Johnson, 729 P.2d 1175 (Kan. 1986)) (stating that lawyers must use appropriate restraints when criticizing a judge). *But see In re Green*, 11 P.3d at 1083-87 (holding that lawyer's claim that trial judge was racist and therefore biased against him was protected by the First Amendment under N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)).

172. *In re* Coe, 903 S.W.2d 916, 917 (Mo. 1995); *In re* Garaas, 652 N.W.2d 918, 925 (N.D. 2002).

173. *See, e.g.*, Ky. Bar Ass'n v. Waller, 929 S.W.2d 181, 181-83 (Ky. 1996) (rejecting First Amendment argument and suspending lawyer who opined in a pleading that a new judge assigned to a case was "much better than that lying incompetent ass-hole it replaced [assuming that the new judge had] graduated from the eighth grade").

174. *See In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995) (citing Garrison v. Louisiana, 379 U.S. 64, 75 (1964) for the proposition that knowingly false statements do not fall under the protective mantle of the Constitution).

perceptions or its actual falsity.[175] *In re Wilkins*,[176] referred to here as *Wilkins I*, is a case in point.

Indiana lawyer Michael Wilkins represented Michigan Mutual Insurance Company as local counsel in an appeal of an adverse verdict.[177] The Indiana Court of Appeals affirmed the trial court's verdict and award. Wilkins believed that the court of appeals had misstated material facts and had ignored or misapplied controlling precedent such that transfer to the Indiana Supreme Court might be available.[178] Transfer to the supreme court is available under Indiana rules of appellate procedure when an "'opinion or memorandum decision of the Court of Appeals erroneously and materially misstates the record.'"[179]

The insurer's Michigan counsel prepared a petition for transfer and an accompanying draft brief and forwarded them to Wilkins. Wilkins edited the brief draft provided by Michigan counsel, toning down the tenor of the brief.[180] He then signed and filed the petition and brief. The brief contained the following statement:

> The Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point. Clearly, such a decision should be reviewed by the Indiana Supreme Court. Not only does it work an injustice on appellant Michigan Mutual Insurance Company, it establishes dangerous precedent in several areas of the law. This will undoubtedly create additional problems in future cases.[181]

This passage was footnoted as follows: "Indeed, the opinion is so factually and legally inaccurate that one is left to wonder

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175. *See* WOLFRAM, *supra* note 165, § 11.3, at 601-02.
176. 777 N.E.2d 714 (Ind. 2002) (*Wilkins I*).
177. *Id.* at 714.
178. *Id.* at 715.
179. *Id.* at 716 (quoting former IND. R. APP. P. 11(b)(2)(f) (1999)).
180. *Id.* at 715.
181. *Wilkins I*, 777 N.E.2d at 716 (quoting Brief in Support of Appellant's Petition to Transfer).

whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or law supported its decision)."[182]

Although Wilkins did not actually author the quoted text or the footnote, by signing the brief he became jointly responsible for them under Indiana disciplinary rules.[183]

The Indiana Supreme Court denied Michigan Mutual's petition for transfer and ordered that the supporting brief be stricken as "a 'scurrilous and intemperate attack on the integrity'" of the lower appellate court.[184] After the supreme court denied transfer, Wilkins contacted the Chief Judge of the Indiana Court of Appeals and the Chief Justice of the Indiana Supreme Court to schedule meetings with them to offer personal apologies for the content of the brief. Before Wilkins was able to speak personally with either jurist, he received notice that the Indiana Supreme Court Disciplinary Commission had instituted proceedings against him. Wilkins then wrote to the Chief Judge and Chief Justice, respectively, "offering to apologize in person and to acknowledge that the footnote was 'overly-aggressive and inappropriate and never should have made its way into [the] Brief.'"[185]

Indiana disciplinary authorities charged Wilkins with violating Indiana Rule of Professional Conduct 8.2(a), which, like Model Rule 8.2(a), prohibits a lawyer from making statements that he "'knows to be false or with reckless disregard as to the truth or falsity concerning the qualifications or integrity of a judge.'"[186] In Wilkins's case, the "judge" was the three-judge court of appeals panel from whose opinion his client sought transfer.[187]

In his disciplinary hearing, Wilkins contended that a contract that was cited to the court of appeals in the record, as well as the testimony of two trial witnesses, supported the contention that the court of appeals had misstated the record and the facts. He also cited case law, which he contended that the court of appeals had

182. *Id.* (quoting Brief in Support of Appellant's Petition to Transfer, n.2).

183. *Id.* at 715.

184. *Id.* at 716 (quoting Mich. Mut. Ins. Co. v. Sports, Inc., 706 N.E.2d 555, 555 (Ind. 1999)).

185. *Id.*

186. *Wilkins I*, 77 N.E.2d at 715 n.2 (quoting IND. R. PROF'L CONDUCT 8.2(a) (West 2003)).

187. *Id.* at 716.

ignored.[188] The Indiana Supreme Court determined that the challenged language in the body of the brief, while "heavy-handed," roughly paraphrased the bases for transfer expressed in the Indiana rules of appellate procedure.[189] Thus, that language was not grounds for discipline. The comments about the court of appeals in the footnote, however, were "not even colorably appropriate."[190] Again, that footnote read: "'Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or law supported its decision).'"[191]

The comments in the footnote were "not even colorably appropriate" because they suggested that the judges on the court of appeals panel may have been motivated "by something other than the proper administration of justice" in deciding the underlying case.[192] In fact, the footnote suggested that the court of appeals judges were driven to decide as they did by "unethical motivations."[193]

The court in *Wilkins I* began its analysis by noting that Rule 8.2(a) is concerned with preserving public confidence in the administration of justice,[194] referring to one of its earlier decisions in which it had observed that "unwarranted public suggestion" by an attorney that a judge "is motivated by criminal purpose and considerations" weakens and erodes public confidence in the judicial system.[195] The court found that Wilkins had no evidence to support his contentions in the footnote.[196]

> Without evidence, such statements should not be made anywhere. With evidence, they should be made to the Judicial Qualifications Commission. . . . In this case, the state's interest in preserving the public's confidence in the judicial system and the overall

188. *Id.*
189. *Id.* at 717.
190. *Id.*
191. *Wilkins I*, 77 N.E.2d at 716 (quoting Brief in Support of Appellant's Petition to Transfer, n.2).
192. *Id.* at 717.
193. *Id.*
194. *Id.* at 717.
195. *Id.* (citing *In re* Garringer, 626 N.E.2d 809, 813 (Ind. 1994)).
196. *In re* Wilkins, 777 N.E.2d 714, 717 (Ind. 2002) (*Wilkins I*).

> administration of justice far outweighed any need for [Wilkins] to air his unsubstantiated concerns in an improper forum for such statements.[197]

Wilkins argued that the statements in the footnote "were merely 'a critique of the Opinion in a format used throughout the bench, bar and journals.'"[198] The supreme court faulted Wilkins for not citing authority to support this argument.[199] Beyond that, the court stated:

> Our current rules of appellate procedure dictate the boundaries of acceptable appellate practice. For example, App. R. 46(A)(8)(a) requires that arguments on appeal must be supported by cogent reasoning, citations to authorities, statutes or the record. A statement used in a document filed before the appellate courts that contains an assertion the lawyer knows to be false or made with reckless disregard as to the truth or falsity concerning the qualifications or integrity of a judge is neither a "format" contemplated by our appellate rules nor allowed by our *Rules of Professional Conduct*.[200]

Having determined that Wilkins had violated Rule 8.2(a) by way of the intemperate footnote, the court addressed the issue of an appropriate sanction. The court considered as aggravating factors Wilkins's continuing belief that the court of appeals had erred (even though he regretted his choice of language in criticizing its opinion) and his decision to defend himself against the charge of misconduct.[201] As the *Wilkins I* court explained:

> Although the parties submitted a written stipulation regarding the respondent's remorse for his actions, the hearing officer found that the respondent's testimony "belied his belief that this disciplinary action stems merely from a poor choice of words." The

197. *Id.* at 717-18 (citation omitted).
198. *Id.* at 718.
199. *Id.*
200. *Id.*
201. *Wilkins I*, 777 N.E.2d at 718.

> respondent's stated remorse related only to his feelings of personal embarrassment and public humiliation as the result of this Court's order striking the offending brief. In essence, the respondent averred that, although he might use different language, he believes in the substance of the language contained in the footnote. That he chose to contest this matter through all procedures available under the Admission and Discipline Rules further underscores our conclusion that his remorse only attaches to the fact his statements were not without consequence, notwithstanding his earlier attempts personally to apologize to members of the appellate bench.[202]

The *Wilkins I* court concluded that Wilkins had "alleged deliberately unethical conduct on the part of the Court of Appeals."[203] Accordingly, and because Wilkins was not sufficiently remorseful, the court suspended him for thirty days.[204]

Wilkins I was a 3-2 decision, and the dissent was vigorous. In the dissent's view, the footnote was "tasteless" and "poor advocacy," but it was not a basis for discipline.[205] Nothing about the footnote suggested that the court of appeals harbored criminal motives and, for that matter, it was not all that harsh in its criticism. In the dissent's view:

> Although footnote 2 certainly is understood to challenge the intellectual integrity of the opinion, I do not believe it suggests any motive other than deciding the case in favor of the party the court determined should prevail. It certainly does not suggest criminal motives. In this respect, it seems to me no different from the attacks many lawyers and nonprofessionals have launched on many court decisions, including such notable ones as *Bush v. Gore* and *Brown v. Board of Education*. I cannot see how this footnote differs from the charges occasionally leveled by judges at other judges. For example, Justice Scalia

202. *Id.* at 719.
203. *Id.*
204. *Id.*
205. *Id.* at 719-20 (Boehm, J., dissenting).

> recently contended in *Atkins v. Virginia*, 536 U.S. 304, [338], 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (Scalia, J., dissenting) that "[s]eldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members." *See also Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (Scalia, J., concurring) (stating that assertions by Justice O'Connor were "irrational" and "cannot be taken seriously").[206]

Finally, the dissent reasoned, the court should be "very cautious in imposing discipline for lawyers' acts that question the actions or processes of courts but do not affect client interests."[207] Under the circumstances, and given the supreme court's unique and often conflicting roles when deciding a lawyer discipline case involving criticism of the judiciary, there was no basis upon which to discipline Wilkins.[208]

Wilkins I was wrongly decided. To be sure, the language with which the court took issue was poor advocacy.[209] Both the passage in the body of the brief and the footnote were more likely to make the court defensive than they were to persuade it to accept transfer. All veteran advocates know that judges protect their brethren.[210] Wilkins obviously did not go far enough in "toning down" Michigan Mutual's brief. That does not necessarily mean, however, that his decision to spare the red ink when it came time to edit the offending footnote gave rise to a Rule 8.2(a) violation.

At the outset, it was unreasonable for the supreme court to equate the footnote with a suggestion that the court of appeals was

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206. *Wilkins I*, 777 N.E.2d at 720.

207. *Id.*

208. *Id.* at 720-21.

209. *See* Prudential Ballard Realty Co. v. Weatherly, 792 So. 2d 1045, 1060 (Ala. 2000) ("By couching . . . argument in the form of a written temper tantrum, an attorney can detract from the merits of the argument and do his or her client irreparable harm by failing to maintain the required level of professionalism."); Lubet, *supra* note 13, at 35 (describing the language in the footnote in *Wilkins I* as poor advocacy because it was "more likely to annoy than persuade"); Michel, *supra* note 153, at 23 (stating the perspective of a sitting federal appellate judge that appellate courts "respond well to attorneys who attack errors, but not to those who attack persons").

210. Wayne Schiess, *Ethical Legal Writing*, 21 REV. LITIG. 527, 543 (2002).

motivated by a criminal purpose,[211] and to state that the footnote effectively accused the court of appeals judges of having "unethical motivations."[212] The footnote is susceptible to several benign interpretations. For example, the court of appeals might have been determined to find for the appellee because it thought such a result just.[213] Perhaps the court of appeals disregarded the facts and law that Wilkins thought compelled a contrary result because it did not appreciate their significance. Maybe the court simply did not understand the issues. In any event, these innocent interpretations, while providing no basis for discipline, might be grounds for reversal.[214]

As for the issue of falsity, the *Wilkins I* court dealt with it by framing the issues the way it wanted, declaring the footnote to suggest unethical conduct by the court of appeals.[215] Having done that, it could easily find that Wilkins made the statements with reckless disregard for their truth or falsity.[216] Although truth would be an absolute defense, it was impossible for Wilkins to prove. Never mind that nowhere in the brief did Wilkins actually accuse the court of appeals of corrupt or unethical behavior. Holding the sole power to characterize Wilkins's claims, and, further, serving as judge and jury, the Indiana Supreme Court deprived Wilkins of the ability to defend himself and then declared that he had not met his burden.

The *Wilkins I* court's approach to punishing Wilkins also was remarkable. Although Wilkins tried to apologize to the supreme court and to the court of appeals before being charged with misconduct and always expressed remorse, that was not sufficient. Rather, he was supposed to change his mind and declare that, in hindsight, the court of appeals was right after all.[217] Or, as one scholar observed, "it was not sufficient for him to retract the offending statement; he had to purge his mind of the offending

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211. *In re* Wilkins, 777 N.E.2d 714, 717 (Ind. 2002) (*Wilkins I*) (citing *In re* Garringer, 626 N.E.2d 809, 813 (Ind. 1994)) (stating that the integrity of the judicial system is at stake when an officer of the court has criminal intent).

212. *Id.*

213. *See* Lubet, *supra* note 13, at 37 (discussing various plausible interpretations of the footnote).

214. Lubet, *supra* note 13, at 37.

215. *Wilkins I*, 777 N.E.2d at 717.

216. *Id.*

217. *See Wilkins I*, 777 N.E.2d at 719 (faulting Wilkins for believing "in the substance of the language contained in the footnote").

thoughts as well."[218] Worse still, Wilkins supposedly deserved a sanction harsher than his professional record arguably warranted because he contested the charges against him.[219] That reasoning ought to offend any observer's sense of due process. Or perhaps it is just a quirk of Indiana law that a lawyer whose professional livelihood is threatened does not have the right to defend himself.

It is ironic that the Indiana Supreme Court seemed determined to find an ethics violation and then said whatever was necessary to reach that conclusion, regardless of whether the facts or law supported that decision. The court did this, not because it was corrupt or unethical, or because it was motivated by anything other than the proper administration of justice; it surely was none of those things. In *Wilkins I*, the court lost its way because it forgot that judges "should hesitate to insulate themselves from the slings and arrows that they insist other public officials face."[220]

Apparently stung by immediate public criticism of its decision,[221] the Indiana Supreme Court was presented the opportunity to correct its many missteps. Wilkins sought reconsideration of both the application of the First Amendment to the offending language in Michigan Mutual's brief and of the sanction imposed.[222] In *Wilkins II*, the court acknowledged that it erred in *Wilkins I*, without really doing so.

In *Wilkins II*, the court stubbornly adhered to its earlier position that Wilkins had violated Rule 8.2(a) by way of the troublesome footnote.[223] While noting that "important interests of judicial administration require considerable latitude regarding the content of assertions in judicial pleadings, motions and briefs," the court reasoned that these considerations are limited by Rule 8.2(a).[224] The court stated:

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218. Lubet, *supra* note 13, at 37.

219. *See Wilkins I*, 777 N.E.2d at 719 (criticizing Wilkins for choosing to contest the charges against him "through all procedures available" under Indiana disciplinary rules).

220. The quoted language comes from *In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)).

221. *See In re* Wilkins, 780 N.E.2d 842, 846 (Ind. 2003) (Rucker, J.) (noting press accounts of decision in *Wilkins I* and particularly Justice Rucker's participation in the decision).

222. *Wilkins II*, 782 N.E.2d at 985-86.

223. *Id.* at 986.

224. *Id.* at 986 n.1.

> The language of footnote 2 does not merely argue that the Court of Appeals decision is factually or legally inaccurate. Such would be permissible advocacy. The footnote goes further and ascribes bias and favoritism to the judges authoring and concurring in the majority opinion of the Court of Appeals, and it implies that these judges manufactured a false rationale in an attempt to justify their pre-conceived desired outcome. These aspersions transgress the wide latitude given appellate argument, and they clearly impugn the integrity of a judge in violation of Professional Conduct Rule 8.2(a).[225]

The court thus declined to reconsider its holding that Wilkins was guilty of violating Rule 8.2(a).[226] Interestingly, the court did not discuss alternative interpretations of the footnote. Rather than explaining why its sinister interpretation of the footnote was the correct one, it avoided the issue. The court presumably did this either because Wilkins's attorneys did not raise the possibility of benign interpretations in seeking reconsideration or because to discuss alternative interpretations would be too obvious a confession of error.

The court in *Wilkins II* did, however, reduce Wilkins's discipline from a suspension to the public reprimand effectively imposed through the publication of the *Wilkins I* decision.[227] The court based its decision to scold Wilkins rather than suspend him on renewed consideration of his "outstanding and exemplary" professional record and reputation and on the fact that the offending footnote was actually written not by Wilkins but by his Michigan co-counsel.[228] Of course, the court considered these same factors in *Wilkins I* and nonetheless concluded that Wilkins should be suspended.[229] Why the change on reconsideration? The obvious answer is that by lessening Wilkins's punishment, the supreme court practically could erase the harm caused by its earlier decision without admitting its fundamental error, all the while upholding the perceived honor of the court of appeals.

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225. *Id.*
226. *Id.*
227. *Wilkins II*, 782 N.E.2d at 987.
228. *Id.*
229. *In re* Wilkins, 777 N.E.2d 714, 715, 718-19 (Ind. 2002)(*Wilkins I*).

Although the court in *Wilkins II* moved in the right direction by reducing Wilkins's punishment to a public reprimand, it did not go far enough. Rather than punishing Wilkins, the court should have been satisfied with the rebuke it issued in denying Michigan Mutual's petition for transfer.[230] That sufficiently warned other lawyers against the sort of adversarial excess that gripped Wilkins and his Michigan co-counsel. Alternatively, in its opinion denying Michigan Mutual's petition for rehearing, the supreme court could have sternly cautioned Wilkins that the offending footnote could be read to imply unethical behavior by the court of appeals in violation of Rule 8.2(a) and warned him against such irresponsible argument in the future; indeed, courts routinely take this approach.[231] By its own excess, the Indiana Supreme Court invited criticism rather than support for the principles that Rule 8.2(a) is intended to serve. *Wilkins I* and *Wilkins II* are therefore unsatisfactory all around.

Ramirez v. State Bar of California[232] is a more representative case when it comes to lawyers being disciplined for criticizing a court. The lawyer charged with misconduct in that case, Glenn Ramirez, filed a reply brief in the United States Court of Appeals for the Ninth Circuit in a case involving the foreclosure of security interests in his clients' farm property, equipment, and livestock. In his reply brief, Ramirez asserted that three state court judges who had decided a related case involving the same issues had acted "illegally" and "unlawfully" in reversing a trial-court judgment for his clients.[233] He also argued that the judges had "become parties to the theft" of his clients' property and that they had entered into an "invidious alliance" with the foreclosing creditor.[234] In a subsequent petition for certiorari, he inferred that the state court

230. Mich. Mut. Ins. Co. v. Sports, Inc., 706 N.E.2d 555, 555 (Ind. 1999) ("As a scurrilous and intemperate attack on the integrity of the Court of Appeals, this sentence [in the footnote] is unacceptable, and the Brief in Support of Appellant's Petition to Transfer is hereby stricken.").

231. *See, e.g.*, Cathey v. State, 60 P.3d 192, 197 (Alaska Ct. App. 2002) (discussing appellate lawyer's obligations under Rule 8.2(a) in connection with allegations of misconduct by prosecutor and stating that "[w]e urge [appellate counsel] to carefully consider before making similar unfounded charges in the future").

232. 619 P.2d 399 (Cal. 1980).

233. *Id.* at 400-01.

234. *Id.* at 401.

judges had falsified the record in their case and further stated that their "'unblemished' judicial records were 'undeserved.'"[235]

Arguing against discipline, Ramirez contended that the First Amendment protected his statements.[236] The California Supreme Court easily rejected this argument, concluding that Ramirez made his statements with reckless disregard for the truth, and thus they were not constitutionally protected.[237] Ramirez also argued that his statements were excusable because they were the product of "zealous but proper representation of his clients' interests."[238] The court rejected this argument as well, noting that Ramirez's perceived duty of zealous advocacy did not excuse "the breach of his duties as an attorney."[239]

The court ultimately suspended Ramirez from practice for one year.[240] In doing so, it reasoned that Ramirez had to be punished "if for no other reason than the protection of the public and preservation of respect for the courts and the legal profession."[241]

The lawyer whose conduct was at issue in *In re Garaas*,[242] Jonathan Garaas, got himself in trouble when arguing a case in a North Dakota trial court upon remand from the North Dakota Supreme Court. In one of his many inappropriate trial court arguments,[243] Garaas argued that in the precipitating appeal the supreme court had "falsely represented the issues in the prior appeal."[244]

In resisting discipline, Garaas argued that his comments enjoyed First Amendment protection and that his conduct, "while perhaps at times impolite," was not unethical because it was "merely zealous representation of his client."[245] The North Dakota Supreme Court was unpersuaded. With respect to Garaas's comments about the court, the supreme court stated:

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235. *Id.* (footnote omitted).
236. *Id.* at 403.
237. *Ramirez*, 619 P.2d at 404.
238. *Id.* at 405 (footnote omitted).
239. *Id.* at 405-06.
240. *Id.* at 406.
241. *Id.*
242. 652 N.W.2d 918 (N.D. 2002).
243. The trial judge involved described Garaas's behavior as "defiant," "obstructionist," and "threatening." *Id.* at 922.
244. *Id.* at 921.
245. *Id.* at 925-26.

> While a lawyer is certainly free to register his disagreement with a court's ruling, he must do so without showing disrespect to the court. Garaas's statement that this court made a "false representation" carries a connotation of intentional wrongful conduct. We conclude Garaas's statement crossed the line beyond criticism to disrespectful assertion of wrongdoing . . . .[246]

The court held that Garaas's comments about it violated North Dakota Rule of Professional Conduct 8.4(e),[247] which, when read in conjunction with a North Dakota statute, obligates lawyers to maintain respect for courts of justice and judicial officers.[248] Garaas received a public reprimand and was ordered to pay the costs of his disciplinary proceeding as a sanction for his misconduct.[249]

Perhaps the most recent case in which an appellate advocate was disciplined for intemperance is *Office of Disciplinary Counsel v. Gardner*.[250] The lawyer in that case, Mark Gardner, had been practicing for about eight years when he lost a case in the Ohio Court of Appeals.[251] In a motion for reconsideration that alternatively sought certification to the Ohio Supreme Court, Gardner accused the appellate panel that heard the case of being dishonest and ignorant of the law.[252] He declared the panel's decision "so 'result driven' that 'any fair-minded judge' would have been 'ashamed to attach his/her name' to it."[253] He added that the court "did not give 'a damn about how wrong, disingenuous, and biased its opinion [was].'"[254]

Gardner further accused the panel of distorting the truth and of having done so grossly and maliciously.[255] That was not enough, though. He went on to write:

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246. *Id.* at 927.

247. *In re Garaas*, 652 N.W.2d at 927.

248. *See id.* at 923-24 (concluding that an attorney may be sanctioned for failing to maintain respect for the court); N.D. R. PROF'L CONDUCT 8.4 (listing actions that amount to professional misconduct).

249. *In re Garaas*, 652 N.W.2d at 927.

250. 793 N.E.2d 425 (Ohio 2003).

251. *Id.* at 426.

252. *Id.* at 427.

253. *Id.* (quoting motion for reconsideration).

254. *Id.* (quoting motion for reconsideration).

255. *Gardner*, 793 N.E.2d at 427 (quoting motion for reconsideration).

> Wouldn't it be nice if this panel had the basic decency and honesty to write and acknowledge these simple unquestionable truths in its opinion? Would writing an opinion that actually reflected the truth be that hard? Must this panel's desire to achieve a particular result upholding a wrongful conviction of a man who was unquestionably guilty of an uncharged offense—necessarily justify its own corruption of the law and truth? Doesn't an oath to uphold and follow the law mean anything to this panel?
>
> Is that claim that 'We are a nation of laws, not men' have any meaning after reading the panel's decision? Can't this panel have the decency to actually address—rather than to ignore—the cases cited by [the client] which demonstrate beyond any doubt that he was convicted of an offense he was never charged with having violated?
>
> In this case, beyond the ignored concepts of the law and truth, lies that of policy. As a policy matter, is this court really encouraging all officers in the Eighth District to charge a generic statute—or Chapter or Title—and not the particular offense they are accusing a citizen of violating? In the name of God, WHY? What is so difficult with a police officer doing his job in an intelligent manner? Why must this panel bend over backwards and ignore well established law just to encourage law officers to be slovenly and careless? In *State v. Homan* (2000), 89 Ohio St. 3d 421 [732 N.E.2d 952], didn't the Ohio Supreme Court just state that officers actually have to follow the rules strictly? Doesn't that mean anything to this panel?[256]

The Ohio disciplinary authorities charged Gardner with violating DR 9-106(c)(6) (engaging in undignified or discourteous conduct which is degrading to a tribunal) and DR 8-102(b)

256. *Id.* at 427-28 (quoting motion for reconsideration).

(knowingly making a false accusation about a judge).[257] Facing suspension for his conduct, Gardner took his case to the Supreme Court of Ohio.[258]

Gardner argued that his criticism of the Court of Appeals was protected speech under the First Amendment and the Ohio Constitution.[259] The Ohio Supreme Court disagreed. Gardner's statements were factual assertions of the lower court's corruption and bias.[260] They were not "rhetorical hyperbole" or "imaginative expression;" nor were they "loosely definable" or "variously interpretable" as criticism of the law as applied by the panel.[261] Had they been any of those things they would have qualified as protected speech. Because they were not, however, Gardner could be disciplined for the remarks.[262]

The *Gardner* court next turned to the knowledge element of Ohio DR 8-102(B), which provides that a lawyer shall not "knowingly make false accusations against a judge or other adjudicatory officer."[263] Gardner argued that this prohibition required the disciplinary board to prove that his accusations of bias and corruption were false and that he subjectively knew that they were false.[264] Although noting that a few jurisdictions had adopted a subjective standard as Gardner urged,[265] the Ohio Supreme Court opted to follow the majority approach and to apply an objective standard.[266] Under an objective standard, attorneys may exercise their rights to free speech and make statements supported by reasonable factual bases even if they turn out to be mistaken.[267] Lawyers may, however, be sanctioned for making accusations of judicial misconduct that a reasonable attorney would believe to be false.[268]

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257. *Id.* at 428.

258. *Id.* at 426. The Ohio Board of Commissioners on Grievances and Discipline recommended that Gardner be suspended from practice for six months. *Id.* at 428.

259. *Id.*

260. *Gardner*, 793 N.E.2d at 428.

261. *Id.* at 430-31.

262. *Id.*

263. *Id.* at 431; OHIO CODE PROF'L RESP. DR 8-102.

264. *Gardner*, 793 N.E.2d at 431.

265. *Id.* (citing Alabama, Colorado, Oklahoma, and Tennessee cases).

266. *Id.* at 432.

267. *Id.*

268. *Id.*

Gardner conceded that he did not inquire into the court of appeals panel's integrity before attacking it and that he ignored his partner's advice not to accuse the panel of bias and corruption. Consequently, the supreme court easily concluded that Gardner had shown a reckless disregard for the truth by his remarks.[269] Moreover, the court could find no evidence of bias or corruption in its own examination of the record.[270] The court concluded that Gardner had violated DR 7-106(C)(6) and DR 8-102(B), and suspended him from practice for six months.[271]

Wilkins I, *Wilkins II*, *Ramirez*, *In re Garaas*, *Gardner*, and cases like them make clear that lawyers should think very carefully before criticizing judges. Absent a legitimate factual basis capable of proof at the time of allegation, a lawyer should never accuse a judge of bias or prejudice against his client,[272] charge a judge with corruption or abuse of office,[273] challenge a judge's impartiality,[274] accuse a judge of lying,[275] allege that a judge is guilty of criminal conduct,[276] claim that a judge's decision is politically motivated,[277] suggest that a judge suffers from a mental disability or personality disorder,[278] accuse a judge of being in cahoots with an adversary to

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269. *Gardner*, 793 N.E.2d at 432-33.

270. *Id.* at 432.

271. *Id.* at 433.

272. *See, e.g.*, People v. Thomas, 925 P.2d 1081, 1083 (Colo. 1996) (censuring lawyer through Rule 8.2(a) for publicly accusing judge of bias); Office of Disciplinary Counsel v. West, 706 N.E.2d 760, 761 (Ohio 1999) (suspending lawyer under DR 8-102(B) for accusing judge of receiving kickbacks from bankruptcy trustee).

273. *See, e.g.*, Ky. Bar Ass'n v. Prewitt, 4 S.W.2d 142, 143-44 (Ky. 1999) (suspending lawyer for violating Rule 8.2(a)).

274. *See, e.g.*, State *ex rel.* Special Counsel for Discipline of the Neb. Supreme Court v. Sivick, 648 N.W.2d 315, 318 (Neb. 2002) (reprimanding lawyer for violating DR 8-102(B)).

275. *See, e.g.*, Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Ronwin, 557 N.W.2d 515, 521-23 (Iowa 1997) (disbarring lawyer under DR 8-102(B)).

276. *See, e.g.*, *id.* (disbarring lawyer for violating DR 8-102(B) and other rules); *In re* Mordkofsky, 649 N.Y.S.2d 71, 72-73 (App. Div. 1996) (disbarring lawyer for violating DR 8-102(B) and other rules); Comm. on Legal Ethics of the W. Va. State Bar v. Farber, 408 S.E.2d 274, 280-86 (W. Va. 1991) (suspending lawyer for violating DR 8-102(B)).

277. *See, e.g.*, Idaho State Bar v. Topp, 925 P.2d 1113, 1114-17 (Idaho 1996) (reprimanding lawyer for violating Rule 8.2(a)).

278. *See, e.g.*, *In re* Shearin, 765 A.2d 930, 933, 937-38 (Del. 2000) (finding that lawyer who, among other things, stated that a judge "'suffered a progressive

shape the outcome of a case,[279] or suggest that a judge is capable of being unfairly or improperly influenced.[280] It might seem ridiculous to have to suggest that lawyers generally should not attack the integrity or qualifications of courts or judges; however, the number of cases in which lawyers have been disciplined for allowing their zeal or disappointment to overcome their good judgment amply demonstrates the need to call attention to a lawyer's duties under Rule 8.2(a) and DR 8-102(B). At the very least, a lawyer who falsely or recklessly remarks about the qualifications or integrity of a court in a brief risks having his brief stricken in whole or part,[281] surely hurting his client's case as a result.

Although some lawyers' criticisms of courts clearly are beyond the pale, one might ask how far a lawyer can go in criticizing a court that renders a decision with which he disagrees. Returning for a moment to *Wilkins I*, it appears that Wilkins meant to suggest that the court of appeals had engaged in result-oriented reasoning.[282] To critique an opinion as being result-oriented was, Wilkins contended, an approach employed "'throughout the bench, bar, and journals.'"[283] Justice Boehm, coming to Wilkins's defense in his dissent in *Wilkins I*, contended that the offending footnote was no harsher than the criticism that Justice Scalia has directed at other members of the Supreme Court in published opinions.[284] Both of these defenses merit discussion.

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mental disability' which caused him to 'exhibit mood swings and injudicious conduct, including hostility to litigants and court personnel,'" violated Rule 8.2(a)).

279. *See, e.g.*, Lawyer Disciplinary Bd. v. Turgeon, 557 S.E.2d 235, 242-45 (W. Va. 2000) (suspending lawyer for two years for violating Rule 8.2(a)).

280. *See, e.g.*, Prudential Ballard Realty Co. v. Weatherly, 792 So. 2d 1045, 1060, 1067-68 (Ala. 2000) (involving elected state supreme-court judges and suggestion by appellate lawyer that judges who depend on campaign contributions were willing to sell "favorable decisions to the highest bidder"); *In re* Howard, 912 S.W.2d 61, 63-64 (Mo. 1995) (suspending lawyer for violating Rule 8.2(a), among others).

281. *See, e.g.*, Henry v. Eberhard, 832 S.W.2d 467, 474 (Ark. 1992) (striking six pages of appellants' brief for "inflammatory and disrespectful" remarks about trial court); McLemore v. Elliot, 614 S.W.2d 226, 227 (Ark. 1981) (striking appellant's brief in its entirety for "intemperate and distasteful language" directed at trial court).

282. *In re* Wilkins, 777 N.E.2d 714, 716 (Ind. 2002) (*Wilkins I*).

283. *Id.* at 718 (quoting Wilkins's brief in his disciplinary case).

284. *Id.* at 720 (Boehm, J., dissenting).

With respect to the first, it is true that commentators and scholars often criticize decisions as being result-oriented in law review articles and other media.[285] That does not mean, however, that an attorney in a pending case can similarly chastise the court. As two noted ethics scholars explain:

> Rule 8.2(a) does not differentiate between statements made in or out of court, or by lawyers connected or unconnected to a particular proceeding. However, those factors are relevant to both the First Amendment issue and to concerns about actual disruption or actual interference with the administration of justice. Plainly, an uninvolved lawyer (such as a law professor or a television commentator) who attacks a judge or a court decision in a public forum should not be subject to more restrictions than would an ordinary citizen merely because she happens to be a lawyer. In such situations, recklessly false statements of fact may still be punished, but "disrespectful" or even outrageous statements of opinion may not.[286]

Lawyers involved in a pending case operate in a more restrictive environment than do detached lawyers because involved lawyers' criticisms and mischaracterizations are more likely to disrupt the proceedings or impair the fair administration of justice.[287] In short, comments that might be appropriate in a law review or bar journal article are not necessarily appropriate when made in an appellate brief.

As for the second defense to Wilkins's conduct, and with all due respect to Justice Boehm for his laudable dissent in *Wilkins I*, judges' criticism of other judges is no measure of appropriate conduct for lawyers acting as advocates. The fact that judges may accuse their colleagues of tortured logic or reasoning or even allow

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285. *See, e.g.*, Douglas R. Richmond, *The Rude Question of Standing in Attorney Disqualification Disputes*, 25 AM. J. TRIAL ADVOC. 17, 45 (2001) (asserting that the decision in Kevlik v. Goldstein, 724 F.2d 844 (1st Cir. 1984) "exemplifies tortured, result-oriented reasoning").

286. 2 HAZARD & HODES, *supra* note 146, § 63.3, at 63-65.

287. 2 HAZARD & HODES, *supra* note 146, § 63.3, at 63-65.

"legalized larceny," does not mean that lawyers can do likewise.[288] The Code of Judicial Conduct[289] does not include prohibitions like those found in Rule 8.2(a) and DR 8-102(B). Lawyers and judges live and work by different rules. Beyond that, and as the *Wilkins II* court recognized, "occasional retorts to uncivil dialogue" are inappropriate, no matter who the speaker may be.[290]

Further considering the *Wilkins I* and *Wilkins II* decisions, what might Wilkins have written about the court of appeals opinion without violating Rule 8.2(a)? He surely could have written: "Indeed, the opinion is so factually and legally inaccurate that one is left to wonder how the court of appeals could have found as it did." Alternatively, he might have said: "Indeed, one is left to wonder how the court of appeals could find for the appellee given the facts in the record and contrary controlling case law." He could have branded the opinion "incoherent."[291] He could have similarly criticized the decision as being "incomprehensible" or "wrongheaded." Finally, Wilkins might have written: "The court of appeals' apparent determination to find for appellee Sports, Inc., although perhaps justified by reasoning or logic known to the court, is not supported by the facts in the record or law to which the court should have looked."

All of these alternatives are poor advocacy, even if relegated to a footnote. Like the offending footnote, they add no value to the appellant's argument, and they all run the risk of irritating the court. Just as Wilkins should have deleted the footnote in Michigan Mutual's brief, so too is there no need for replacement language. Even good advocates, however, occasionally make mistakes. Pointed criticism of a court's reasoning or harsh comments about the basis for a court's decision, if tactically unwise, ought rarely be

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288. United States v. McCoy, 313 F.3d 561, 568 (D.C. Cir. 2002) (Henderson, J., dissenting) (writing that "the majority tortures the Rule [at issue] until it confesses"); *In re* Los Angeles County Pioneer Soc'y, 257 P.2d 1, 14 (Cal. 1953) (Carter, J., dissenting on pet. for reh'g) ("The record in this case presents one of the most outrageous examples of legalized larceny which has come under my observation.").

289. CODE OF JUDICIAL CONDUCT Canon 3 (1985).

290. *In re* Wilkins, 782 N.E.2d 985, 987 (Ind. 2003) (*Wilkins II*).

291. *In re* Green, 11 P.3d 1078, 1084 (Colo. 2000) (stating that "if an attorney criticizes a judge's ruling by saying it was 'incoherent,' he may not be sanctioned").

declared unethical. Rule 8.2(a) and DR 8-102(B) are not shields for "thin-skinned and imperious judges."[292]

IV. CONCLUSION

Appellate advocates must appreciate and understand their ethical obligations. Zealous advocacy does not excuse lawyers' ignorance of their professional responsibilities in appellate courts any more than it does in trial courts. Lawyers briefing and arguing appeals must be candid in their dealings with courts. This means that they must avoid false and misleading statements of fact and law, and must not mislead through silence when they ought to speak. The duty of candor also compels lawyers to disclose authority in the controlling jurisdiction that is directly adverse to their clients' position, even if they believe it to be factually distinguishable or decided in error.

Beyond honoring their duty of candor, appellate lawyers must curb their zeal when criticizing courts and authority. Although it is true that a party cannot appeal from a decision without criticizing it, advocates must be careful about how far they go in their criticism. Ethics rules forbid lawyers from knowingly or recklessly making false statements about judges' integrity or qualifications.

Wilkins I and *Wilkins II* have tested the bounds of Model Rule 8.2(a). Did Michael Wilkins cross the line in criticizing the Indiana Court of Appeals, or did the Indiana Supreme Court reveal its thin skin when it disciplined him? The answer to that question probably depends on the respondent's perspective, although the Indiana Supreme Court's skin clearly is not as thick as it should be, and the decisions are unsatisfactory for many reasons.

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292. 2 HAZARD & HODES, *supra* note 146, § 63.3, at 63-65 (discussing Rule 8.2(a)).