

REPRINTED FROM

# SOUTHWESTERN LAW JOURNAL

ETHICAL CONCERNS IN CIVIL APPELLATE  
ADVOCACY

J. MICHAEL MEDINA

© 1989 by Southern Methodist University



A PUBLICATION OF  
SOUTHERN METHODIST UNIVERSITY SCHOOL OF LAW

# ETHICAL CONCERNS IN CIVIL APPELLATE ADVOCACY\*

by

J. Michael Medina\*\*

"In much of literature the idea of an ethical lawyer is regarded as a contradiction in terms."<sup>1</sup>

"But isn't legal ethics an oxymoron?"<sup>2</sup>

It would seem that only lawyers take legal ethics seriously.<sup>3</sup> A majority of

---

\* As noted in the title, this Article concerns only civil appellate practice. For example, an attorney's duty to refuse to appeal a frivolous case, a duty well-established in the civil appellate practice, is considerably modified in the context of the court-appointed criminal counsel. See *McCoy v. Court of Appeals*, 108 S. Ct. 1895 (1988); *Anders v. California*, 386 U.S. 738 (1967); Note, *Withdrawal of Appointed Counsel from Frivolous Indigent Appeals*, 49 IND. L.J. 740 (1974). Criminal cases will therefore only be used as illustrations when the basic issue would not vary from the civil to the criminal context. The ABA has separately promulgated detailed guidelines for both prosecutors and defense counsel in its STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE (1980). Although the Model Rules of Professional Conduct (Model Rules) have been adopted by a majority of jurisdictions, a substantial number still enforce the Model Code of Professional Responsibility (Model Code). This Article discusses both sets of ethical rules, as officially promulgated by the American Bar Association. In most instances relevant to this Article, the Model Rules and the Model Code provide identical results. Where a divergence exists, the Article so notes.

For literary references to lawyers, see D. MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 1-15 (1973); Joyner, *Law School and Legal Ethics—A Part of the Illness or the Cure?*, 60 OKLA. B.J. 743 (1989). Shakespeare's classic plan of action, "the first thing we do, let's kill all the lawyers," (King Henry VI, act IV, scene ii, line 86), is not alone in its disdain for the legal profession. Ambrose Bierce, in his *DEVIL'S DICTIONARY* 75 (Dover ed. 1958), once defined a lawyer as "one skilled in the circumvention of the law." The great satirist Jonathan Swift, in his *Gulliver's Travels*, caustically noted:

It is likewise to be observed, that this society [of lawyers] hath a peculiar cant and jargon of their own, that no other mortal man can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood . . . .

J. SWIFT, *GULLIVER'S TRAVELS*, pt. 4, ch. 5 (1726).

\*\* B.A. (summa cum laude), Southwestern College Winfield, Kansas; J.D. (with special distinction), University of Oklahoma. Adjunct Professor of Law, University of Tulsa College of Law. The author currently practices with the firm of Holliman, Langholz, Runnels & Dorwart a Professional Corporation, in Tulsa, Oklahoma.

1. G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 1, 1 (1978).

2. Gee & Elkins, *Resistance to Legal Ethics*, 12 J. LEGAL PROF. 29, 29 (1987).

3. The ABA Model Rules have spawned a profusion of articles. See, e.g., Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 WASH. L. REV. 823 (1986); Gaetke, *Why Kentucky Should Adopt the ABA's Model Rules of Professional Conduct*, 74 KY. L.J. 581 (1985-86); Kulhman, *Pennsylvania Considers The A.B.A. Model Rules of Professional Conduct*, 59 TEMP. L.Q. 419 (1986); Stevens, *Wyoming Rules of Professional Conduct: A Comparative Analysis*, 23 LAND & WATER L. REV. 463 (1988); Walter, *An Overview of the Model Rules of Professional Conduct*, 24 WASHBURN L.J. 443 (1985); Note, *Indiana Rules of Professional Conduct: A Comparison with the Old Code*, 21 IND. L. REV. 307 (1988); Note, *Oklahoma's Proposed Rules of Profes-*

the public assumes as a matter of course that most lawyers are unethical, if not outright dishonest.<sup>4</sup> Lawyers do, however, take ethics seriously, although their motives for doing so have been cynically examined.<sup>5</sup> A plethora of legal literature abounds on almost every ethical facet of the legal practice,<sup>6</sup> and extends even to articles about ethics issues surrounding lawyers'

*sional Conduct: Changes That May Affect You*, 23 TULSA L.J. 283 (1987). A useful, but somewhat outdated annotated bibliography of legal ethics resources is VAN SCHAICK, *LEGAL ETHICS: AN ANNOTATED BIBLIOGRAPHY AND RESOURCE GUIDE* (1984). In addition, local bar associations enact supplemental codes, most often concerning trial courtesy and conduct. See Briggs, *El Paso County Bar Association Standards of Professional Courtesy*, 18 COLO. LAW. 212 (1989).

4. For a less than flattering look at various perceptions of the trustworthiness of lawyers, see Luke 11:52 (King James) ("Alas for you experts in the law! For you have taken the key to the door of knowledge but you have not entered it yourselves, and you have kept out those who tried to enter."); Burbank & Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFFOLK U.L. REV. 66, 67 (1974) (poll rating lawyers at bottom of twelve professional groups with respect to trust); Sloviter, *Perceptions of the Legal Profession*, 10 W. NEW ENG. L. REV. 175, 175 (1988) (noting *National Law Journal* poll finding only 5% of those queried rated legal profession most deserving of respect). In 1945, a Mississippi lawyer lamented, "a large number, probably a majority of the people of Mississippi believe, and take for granted, that only a very few lawyers are honest." Stone, *Our Low Estate*, 17 MISS. L.J. 90, 91 (1945). In 1940, a survey by the California State Bar found that while a majority of those questioned rated doctors and dentists highly on issues of ethics and honesty, only about 25% (ethics) and 21% (honesty) of those questioned rated lawyers high in those categories. O. PHILLIPS & P. MCCOY, *CONDUCT OF JUDGES AND LAWYERS* ix (1952); see also Blaustein, *What Do Lawmen Think of Lawyers?*, 38 A.B.A. J. 39 (1952) (polls showing need for better public relations); Sallus, *Professional Image: Can a Good Person Ever Become a Good Lawyer?*, 11 L.A. LAW 30 (1988); Thomforde, *Public Opinion of the Legal Profession: A Necessary Response By the Bar and the Law School*, 41 TENN. L. REV. 503 (1974) (public opinion of lawyers reflects society's feelings toward our entire legal system); Waltz, *The Unpopularity of Lawyers in America*, 25 CLEV. ST. L. REV. 143 (1976) (lighthearted discourse on mockery lawyers subjected to); Comment, *Public and Professional Assessment of the Nebraska Bar*, 55 NEB. L. REV. 57 (1975) (public confidence at all time low); Panel Discussion, *The Public's Impression of Lawyers' Ethics*, 7 U. FLA. L. REV. 439 (1954) (nine scholars and community notables debate public's perception).

5. One legal journalist noted: "The Code of Professional Responsibility, as the Canons of Professional Ethics before it, is a treasure trove of moral platitudes . . . . Virtually none of this inspirational material, however, has anything to do with legal ethics as actually enforced by the courts and bar associations." Schnapper, *The Myth of Legal Ethics*, 63 A.B.A. J. 202, 203 (1978); see also Abel, *Why Does the ABA Promulgate Ethics Rules?*, 59 TEX. L. REV. 639 (1981) (rules for controlling market and legitimizing role of elite attorneys); Andrews, *Non-Lawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577 (1989) (examining rules prohibiting nonattorney ownership or management of law firms and concluding basis for rule is economic self-interest); Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985) (most binding requirements in Model Rules duplicative of existing elements of agency, tort, and contract law); Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985) (ABA Model Rules not rules of ethics).

6. For an analysis of the ethical obligations of attorneys in a variety of situations and specializations, see, e.g., Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355 (1986); Crouch, *The Matter of Bombers: Unfair Tactics and the Problem of Defining Unethical Behavior in Divorce Litigation*, 20 FAM. L.Q. 413 (1986); Durst, *The Tax Lawyer's Professional Responsibility*, 39 U. FLA. L. REV. 1027 (1987); Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions*, 39 VAND. L. REV. 275 (1986); Garcia & Batey, *The Roles of Counsel for the Parent in Child Dependency Proceedings*, 22 GA. L. REV. 1079 (1988); Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 U.C.L.A. L. REV. 811 (1987); Henry, *Ethics in United States Patent Practice*, 62 A.B.A. J. 465 (1976); Johnson, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*, 45 OHIO ST.

support staffs.<sup>7</sup> Yet, in this wealth of ethics literature, one area has been neglected: civil appellate practice. Only a handful of articles devote themselves to this area,<sup>8</sup> a realm with increasing caseloads and lengthening dockets.<sup>9</sup>

Given this dearth of scholarship, this Article examines a selected number of ethics issues in the context of appellate practice. For purposes of this work, the scope of legal ethics is broadly painted. As one New York court defined the term, legal ethics means "the usages and customs among members of the legal profession involving their moral and professional duties toward one another, toward the clients and toward the courts . . ."<sup>10</sup> Research resources in this area are therefore not limited to disciplinary pro-

L.J. 57 (1984); Kershen, *Ethical Issues for Corporate Counsel in Internal Investigations: A Problem Analyzed*, 13 OKLA. U.L. REV. 1 (1988); Koqut, *Professional Responsibility and Representing Older Persons with Diminished Competence*, 67 MICH. B.J. 1118 (1988); Martin, *Professional Responsibility and Probate Practices*, 1975 WIS. L. REV. 911; O'Brien, *Multistate Practice and Conflicting Ethical Obligations*, 16 SETON HALL 678 (1986); Riger, *The Model Rules and Corporate Practice—New Ethics for a Competitive Era*, 17 CONN. L. REV. 729 (1985); Sanford, *Ethical, Statutory and Regulatory Conflicts of Interest in Real Estate Transactions*, 17 ST. MARY'S L.J. 79 (1985); Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988); Snyder, *Ethics and the Settlement of Civil Rights Cases: Can Attorneys Keep Their Virtue and Their Fees?*, 16 N.M.L. REV. 283 (1986); Terry, *Ethical Pitfalls and Malpractice Consequences of Law Firm Breakups*, 61 TEMP. L. REV. 1055 (1988); Underwood, *Legal Ethics and Class Actions: Problems, Tactics and Judicial Responses*, 71 KY. L.J. 787 (1982-1983); Fishman, Book Review, 8 PACÉ L. REV. 303 (1988).

7. See, e.g., Buehring, *Setting Standards for Legal Assistants*, 53 FLA. B.J. 8 (1979); Dunlop, *Ethical Guidelines for Legal Support Staff*, 66 MICH. B.J. 168 (1986); Lehan, *Ethical Considerations of Employing Paralegals in Florida*, 53 FLA. B.J. 14 (1979); Stevenson, *Using Paralegals in the Practice of Law*, 62 ILL. B.J. 432 (1974); Ulrich & Clarke, *Working With Legal Assistants: Professional Responsibility*, 67 A.B.A. J. 992 (1981); Panel, *An Ethical Code for Law Librarianship?*, 62 L. LIBR. J. 409 (1969); see also Buckley, *Law Office Economics and the Associates: Ethical Considerations*, 24 GA. ST. B.J. 136 (1988) (discussing ethical considerations of client billing); Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259 (1985) (guidance for resolving certain ethical problems).

8. R. LYNN, APPELLATE LITIGATION §§ 3.6-10 (1985); R. UNDERWOOD & W. FORTUNE, TRIAL ETHICS §§ 19.1-4 (1988); Aidisert, *The Appellate Bar: Professional Responsibility and Professional Competence—A View from the Jaundiced Eye of One Appellate Judge*, 11 CAP. U.L. REV. 445 (1982); Seidenfeld, *Professional Responsibility Before Reviewing Courts*, 25 DE PAUL L. REV. 264 (1976); Tiedemann, *The Outer Limits of Florida Appellate Advocacy*, 60 FLA. B.J. 11 (1986); Uviller, *Zeal and Frivolity: The Ethical Duty of the Appellate Advocate to Tell the Truth About Law*, 6 HOFSTRA L. REV. 729 (1978); see also Alexander, *The Appellate Court and The Lawyer*, 20 MISS. L.J. 435 (1949) (discussing interaction between judges and lawyers); Clark, *The Lawyer's Duties to the Court*, 7 U. FLA. L. REV. 404 (1954) (describing legal ethics in the courtroom); Harwood, *What I Expect from an Appellate Lawyer*, 25 ALA. LAW. 356 (1964) (judge's ethical guidelines for appellate lawyers).

9. See Carpenter, *Appellate Delay as Catalyst for Change in Virginia*, 23 U. RICH. L. REV. 141 (1988); Marvell, *Appellate Capacity and Caseload Growth*, 17 AKRON L. REV. 43 (1982); Marvell, *Is There an Appeal from the Caseload Deluge?*, 24 JUDGES J. 34 (1985); McCormick, *Appellate Congestion in Iowa: Dimensions and Remedies*, 25 DRAKE L. REV. 133 (1975); Overton, *A Prescription for the Appellate Caseload Explosion*, 12 FLA. ST. U.L. REV. 206 (1984); Peters, *The Problems of Caseload and Delay in the Minnesota Supreme Court—An Introduction to a Symposium*, 7 WM. MITCHELL L. REV. 41 (1981); Talmadge, *Toward a Reduction of Washington Appellate Court Caseloads and More Effective Use of Appellate Court Resources*, 21 GONZ. L. REV. 21 (1985); Project, *The Pennsylvania Project—The Pennsylvania Supreme Court: Perspectives from Within*, 23 VILL. L. REV. 1041 (1977-1978).

10. *Kraushaar v. LaVin*, 181 Misc. 508, 42 N.Y.S.2d 857, 859 (Sup. Ct. Sp. Term, Queens Cty. 1943) (citing BALLENTINE'S LAW DICTIONARY 481 (1st ed. 1930)) (oral statements accusing certain lawyer of unethical behavior slanderous per se).

ceedings, but also include court-imposed sanctions outside the disciplinary process, legal malpractice cases considering ethical norms, cases discussing sanctions for violation of procedural rules, and nonsanction instances where courts express concern over the ethics of an attorney's particular conduct.<sup>11</sup>

Although the issues discussed in this Article are not unique to appellate practice, they often arise in that context. This Article first analyzes various ethical factors involved in the initiation of an appeal. The Article then focuses on positional conflicts, which raise ethical questions for the appellate attorney advocating competing legal positions. Finally, the Article considers specialized elements of the general requirement that the appellate attorney exercise the highest degree of candor with the court. Throughout this analysis, the overarching theme of the Article is the attorney's obligation of integrity to his client and to the court.

### I. INITIATION OF THE APPEAL

The fundamental question an appellate lawyer must consider is whether to initiate the appeal process, either as losing trial counsel or as new counsel brought on board for the appeal. In this day of legal specialization,<sup>12</sup> an attorney inexperienced with the appellate process might be considered negligent or unethical in not referring a case to an attorney who handles appellate work.<sup>13</sup> Failure to follow appellate rules and norms can lead to severe penal-

11. See, e.g., 1 R. MALLIN & J. SMITH, *LEGAL MALPRACTICE* §§ 9.4-.6 (3d ed. 1989) (addressing inherent power, FED. R. CIV. P. 11, and 28 U.S.C. § 1927 respectively); Note, *Liability for Proceeding With Unfounded Litigation*, 33 VAND. L. REV. 743 (1980) [hereinafter Note, *Liability*]; Note, *When is an Attorney Unreasonable and Vexatious?*, 45 WASH. & LEE L. REV. 249 (1988) (analyzing 28 U.S.C. § 1927).

12. See, e.g., 1 R. MALLIN & J. SMITH, *supra* note 11, § 15.4; C. WOLFRAM, *MODERN LEGAL ETHICS* § 5.5 (2d ed. 1986); Kaskoff, *Specialization, Ethics and Advertising*, 7 U. BRIDGEPORT L. REV. 47 (1986); Rollins, *The Coming of Legal Specialization*, 19 U. RICH. L. REV. 479 (1985); Comment, *Specialization: Resulting Standard of Care and Duty to Consult*, 30 BAYLOR L. REV. 729 (1978) [hereinafter Comment, *Specialization*]. But cf. 1 R. MALLIN & J. SMITH, *supra* note 11, § 24.39; R. UNDERWOOD & W. FORTUNE, *supra* note 8, § 19.4 (although appellate work becoming more of specialty, no reported cases holding appellate lawyers to higher standard of care); ABA Comm. on Professional Ethics Informal Ops. 234, 496 (1970), *digested in* O. MARU, *DIGEST OF BAR ASSOCIATION ETHICS OPINIONS* 17 (1970 Supp.) [hereinafter O. MARU (1970 Supp.)] (arguing before United States Supreme Court not specialized legal service within canon 4).

13. *Horne v. Peckham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714, 720 (Ct. App. 1979) (duty to refer complex trust issues to specialist); *In re Hardage*, 713 S.W.2d 503, 505-06 (Mo. 1986) (attorney reprimanded, in part, for accepting a bankruptcy case while not admitted to practice in relevant federal district court); cf. *In re Dempsey*, 632 F. Supp. 908, 920 (N.D. Cal. 1986) (attorney inexperienced and ignorant of federal criminal procedures had duty to associate with knowledgeable counsel or to obtain advice of competent counsel); *Russo v. Griffin*, 147 Vt. 20, 510 A.2d 436, 439 (1986) (court points out the need for attorney to advise clients on referrals to specialists in particular cases); 1 R. MALLIN & J. SMITH, *supra* note 11, § 15.4, at 871 (attorney's duty to inform client his knowledge and experience in a particular field is limited). But cf. McManus, *Malpractice Dangers in Tort Case Referrals*, 24 TRIAL 62, 63 (1988); Owens, *New Counsel on Appeal?*, 15 LITIG. 1 (1989) (analyzes different skills and tactics essential in successful trial and appellate litigation and concludes appellate specialist often necessary); Uviller, *supra* note 8, at 730 (noting differences between criminal trial and appellate practice). The Code, in prohibiting fee-splitting under DR 2-107(A), served to discourage referral to an appellate specialist. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1983) permits fee-splitting if done with full disclosure to, and consent from, the client.

ties. Courts have sanctioned attorneys for filing rambling briefs<sup>14</sup> and for failing to comply with appropriate appellate rules.<sup>15</sup>

Assuming the attorney decides to accept the case, the next issue is whether to take the appeal. Although the many factors to consider in initiating an appeal are covered in depth elsewhere,<sup>16</sup> the following briefly summarizes the factors most pertinent to this Article's focus.

(a) *Is the appeal frivolous?* The Model Rules of Professional Conduct (Model Rules) provide a good faith objective test<sup>17</sup> for determining whether

---

R. UNDERWOOD & W. FORTUNE, *supra* note 8, § 1.6. Failure to follow the applicable appellate rules and customs can lead to sanctions. See Comment, *Specialization*, *supra* note 12, at 729; Comment, *General Practitioners Beware: The Duty to Refer an Estate Planning Client to a Specialist*, 14 CUMB. L. REV. 103 (1984); Note, *Legal Malpractice, Expansion of the Standard of Care: Duty to Refer*, 56 WASH. L. REV. 505 (1981); see also R. LYNN, *supra* note 8, § 3.1 (discussing the growth of appellate practice as a speciality); R. STERN, *APPELLATE PRACTICE IN THE UNITED STATES* § 2.3 (1st. ed 1981) (addressing whether new counsel should be brought in on an appeal).

Of course, an attorney specializing in appellate practice might be held to the higher standard of a specialist. *Weitzel v. Oil Chem. & Atomic Workers*, 667 F.2d 785, 787 (9th Cir. 1982) (NLRB Specialist); *Procanik v. Cillo*, 206 N.J. Super. 270, 502 A.2d 94, 103 (Super Ct. Law Div. 1985) (medical malpractice specialist); *Walker v. Bangs*, 92 Wash. 2d 854, 601 P.2d 1279, 1283 (1979) (trial specialist); cf. *Huettig & Schronn, Inc. v. Landscape Contractors Council*, 582 F. Supp. 1519 (N.D. Cal. 1984) (sanctioning labor law specialists under rule 11, court noted lawyers not merely engaged in general practice, but held themselves out as specialists), *aff'd*, 790 F.2d 1420 (9th Cir. 1986). See generally *Schnidman & Salzler, The Legal Malpractice Dilemma: Will New Standards of Care Place Professional Liability Insurance Beyond Reach of the Specialist?*, 45 U. CINN. L. REV. 541 (1976) (discussing increase in legal malpractice); 1 R. MALLIN & J. SMITH, *supra* note 11, § 15.4 (specialization).

14. See *Olympia Co. v. Celotex Corp.*, 771 F.2d 888 (5th Cir. 1985) (counsel sanctioned for filing rambling briefs and failing to address the issues); *Morse v. Nelson*, 48 Ill. App. 2d 895, 363 N.E.2d 167 (1977) (duty of appellate counsel to provide lucid and persuasive argument rather than obtuse, confusing argument); *Dortch v. Lugar*, 255 Ind. 545, 266 N.E.2d 25 (1971) (duty of appellate counsel to argue issues suitably).

15. See, e.g., *In re Tranakos*, 639 F.2d 492 (9th Cir. 1981) (attorney suspended until he demonstrates knowledge of appellate rules); *Ferguson v. Ferguson*, 504 So. 2d 541 (Fla. Dist. Ct. App. 1987) (attorney publicly reprimanded for failure to follow appellate rules); *Mitchell v. State*, 433 So. 2d 632 (Fla. Dist. Ct. App. 1983) (attorney publicly reprimanded for failing to file appellate briefs and failing to respond to court's show cause order); *Hong v. Kong*, 67 Haw. 15, 675 P.2d 769 (1984) (attorney sanctioned for filing brief in violation of court rules).

16. See M. HOUTS & W. ROGOSHESKE, *ART OF ADVOCACY-APPEAL* §§ 1.01-10 (1981); R. LYNN, *supra* note 8, §§ 6.1-6; R. MARTINEAU, *MODERN APPELLATE PRACTICE* §§ 2.1-6 (1983); R. STERN, *supra* note 13, § 2.2.

17. Compare with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) (1980) (subjective test requiring lawyer not knowingly to advance a claim unwarranted under existing law, unless good faith argument can be made for extension, modification, or overruling of existing law); see 1 G. HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 329-35 (1985); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 comment (1983).

an appeal is frivolous.<sup>18</sup> The literature is voluminous on this issue.<sup>19</sup>

18. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983) provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

No "duty of candor" exists, however, compelling the attorney to label his argument so as to show the court that the argument (1) is supported by existing law, or (2) is contrary to existing law but is supported by a good faith argument for reversal or modification. *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 96 (3d Cir. 1988); *Golden Eagle Distrib. Co. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986), *rev'g on this point* 103 F.R.D. 124 (N.D. Cal. 1984). *Contra Davis v. Aetna Casualty & Sur. Co.*, 696 F. Supp. 634, 636 (N.D. Ga. 1988) (attorney should clearly delineate good faith arguments for extension, modification, or reversal).

19. For a sampling of the literature, see R. UNDERWOOD & W. FORTUNE, *supra* note 8, § 19.2; Kallay, *The Dismissal of Frivolous Appeals by the California Courts of Appeal*, 54 CAL. ST. B.J. 92 (1979); Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 DUKE L.J. 845 (1984); Saunders, *Plying the Erie Waters: Choice of Law in the Deterrence of Frivolous Appeals*, 21 GA. L. REV. 653 (1987); Underwood, *Taking and Pursuing a Case: Some Observations Regarding "Legal Ethics" and Attorney Accountability*, 74 KY. L.J. 173 (1985-1986); Note, *Liability*, *supra* note 11, at 743; Note, *The Lawyer's Duty to Reject Groundless Litigation*, 26 WAYNE L. REV. 1561 (1980).

In branding one appeal frivolous, a Missouri court observed:

We find nothing which points to a good faith belief in the merits of this appeal. The total lack of evidentiary support, the misstatements of the evidence, the apparent failure to research the law and supply authority for the point on appeal, the reference to the incorrect standard of review, and the minimal effort to present a fairly debatable issue convince us that this appeal is frivolous and an attempt to delay the dissolution proceedings or harass the wife.

*Jensen v. Jensen*, 670 S.W.2d 16, 19 (Mo. Ct. App. 1984).

Two examples of frivolous appeals are as follows: (1) the appeal merely invites the appellate court to second-guess the trial court on conflicting evidence; and (2) the law is well settled and no showing is made that it was misapplied. *Booth v. Weiser Irrigation Dist.*, 112 Idaho 684, 735 P.2d 995, 998 (1987); *accord* *Ross v. Ross*, 200 Cal. App. 2d 229, 19 Cal. Rptr. 271 (1962) (appeal frivolous when only argument was weight of evidence and credibility of witnesses). In *In re Solerwitz*, 848 F.2d 1573 (Fed. Cir. 1988), the court, finding counsel worthy of disciplinary action, stated:

[His] conduct in filing and maintaining frivolous appeals having no colorable basis in law or fact has wasted the time and limited resources of this court, has denied availability of the court's resources to deserving litigants, and has constituted flagrant and totally inexcusable abuse of the judicial process.

*Id.* at 1575; *see also In re Cook*, 526 N.E.2d 703 (Ind. 1986) (attorney disbarred in part for bringing appeal in bad faith merely to harass or injure opposing party). Indeed, one useful measuring stick in determining frivolity may well be the amount of care the appellate court has to expend to determine the issue. *Shreveport v. United States Fidelity & Guar. Co.*, 131 La. 933, 60 So. 621, 622 (1913). The most often-used sanction against frivolous appeals is not disciplinary action, but imposition of monetary sanctions against either (or both) attorney and client under 28 U.S.C. § 1927, FED. R. APP. P. 38, and their state counterparts. *Coghlan v. Starkey*, 852 F.2d 806, 807-08 (5th Cir. 1988) (analyzing precedents and policy behind FED. R. APP. P. 38; sanctions merited where result of appeal obvious from a comprehensive and decisive exposition of the law by the court below); *see* Note, *Liability*, *supra* note 11, at 743; Annotation, *What Conduct Constitutes Multiplying Proceedings Unreasonably and Vexatiously so as to Warrant Imposition of Liability on Counsel Under 28 U.S.C. § 1927 for Excess Costs, Expenses, and Attorney's Fees*, 81 A.L.R. FED. 36 (1987); Annotation, *Attorneys' Fees; Obduracy as a Basis for State Court Award*, 49 A.L.R.4TH §§ 13, 14, at 825 (1986); Annotation, *Award of Damages or Costs Under 28 U.S.C. § 1912 or Rule 38 of Federal Rules of Appellate Procedure Against Appellant Who Brings Frivolous Appeal*, 67 A.L.R. FED. 319 (1984); Annotation, *Award of Damages For Dilatory Tactics in Prosecuting Appeal in State Court*, 91 A.L.R.3D 661 (1979); Annotation, *Construction and Application of 28 U.S.C. § 1927 Authorizing Imposition of Liability for Excess Costs on Counsel Who Multiplies the Proceedings Unreasonably and Vexatiously*, 12 A.L.R. FED. 910 (1972). Several states provide the appellate court with au-

