

APPELLATE LAW

The Duty of Candor

By Aaron S. Bayer



Every attorney has an ethical duty of candor to the court. That duty stems not only from the Model Rules of Professional Conduct, but also from the attorney's role as "an officer of the court" who, in Judge Benjamin Cardozo's words, is therefore "like the court itself, an instrument or agency to advance the ends of justice." *Karlin v. Culklin*, 162 N.E. 487, 489-90 (N.Y. 1928). Appellate counsel are obliged to inform the court of any development that may implicate the court's jurisdiction and to disclose authority directly adverse to the arguments the attorney is presenting.

Disclosing developments implicating jurisdiction

The U.S. Supreme Court has emphasized that attorneys have a broad, continuing duty to inform the court of "any development which may conceivably affect the outcome of the litigation," and that any development that could deprive the court of jurisdiction "should be called to the attention of the court *without delay*." *Board of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985) (emphasis in original).

Any facts that "raise a question of mootness," for example, must be called to the court's attention promptly. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997). This includes life events that may affect a party's standing to continue to litigate a case on appeal. While it may be possible to preserve the court's jurisdiction by seeking to intervene new parties, even while on appeal (see Aaron S. Bayer, "Appellate Interven-

tion," NLJ, July 14, 2008, at 13), counsel must timely provide complete and accurate information to the court.

Settlement is the most frequent development implicating jurisdiction. Appellate courts have made it clear that counsel for both parties are duty-bound to "advise a court when settlement is imminent." *Gould v. Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993); see also *In re Cellular 101 Inc.*, 539 F.3d 1150, 1154 (9th Cir. 2008). Counsel cannot satisfy the ethical obligation to apprise the court fully of a settlement merely by "mention[ing] it in passing" in a brief, without elucidating the details and implications. *Douglas v. Donovan*, 704 F.2d 1276, 1279 (D.C. Cir. 1983).

Nor can counsel circumvent the duty to disclose by agreeing with opposing counsel "that the case should proceed to judgment and not be treated as moot." *Arizonans for Official English*, 520 U.S. at 68 n.23. Counsel can, of course, argue to the court that a development does not moot the case, but cannot "promote an advisory opinion by disguising a settlement in order to hide it from the court's consideration." *Douglas*, 704 F.2d at 1280.

Counsel nonetheless sometimes go to great lengths to avoid disclosing a settlement

during an appeal. In *DHX Inc. v. Allianz AGF MAT Ltd.*, 425 F.3d 1169 (9th Cir. 2005), for example, one party agreed to pay the other's attorney fees for continuing to prosecute the appeal despite a complete settlement. Upon learning of the undisclosed details of the arrangement, the court rebuked the parties and counsel for creating a "façade," in which the appellant was paid to "play the part of an aggrieved party," and reminded counsel that "it is not for a court to smoke out who settled with whom," but "the duty of counsel to disclose the essence of the settlement to the court." *Id.* at 1170, 1175 (Beezer, J., concurring).

Appellate courts have repeatedly emphasized that "the obligation to inform the court of a potential settlement is of such critical importance to the maintenance of orderly proceedings and to the prevention of needless delay that a lawyer who fails to fulfill that obligation may be personally subject to sanctions." *In re Cellular 101*, 539 F.3d at 1154; see *Gould*, 11 F.3d at 84. Appellate courts have imposed sanctions, requiring payment of fines and trial court costs, and mandating remedial classes on appellate practice. See, e.g., *Merkle v. Guardianship of Jacoby*, 912 So. 2d 595 (Fla. Dist. Ct. App. 2005); *AIG Hawaii Ins. Co. v. Bateman*, 923 P.2d 395, 401-03 (Hawaii 1996).

Under Model Rule 3.3(a)(2), a lawyer may 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." Each phrase in this rule has been parsed by courts and commentators.

"Legal authority" is not limited to case law—statutes, ordinances, regulations and administrative rulings also fall under this broad umbrella. Disclosure of the latter may be of greater practical importance, especially

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if they would be more difficult for the tribunal to discover on its own. See *Dilallo v. Riding Safely Inc.*, 687 So. 2d 353, 355 (Fla. Dist. Ct. App. 1997) (counsel violated rule by relying on statute but failing to disclose that its effective date made it inapplicable); Geoffrey C. Hazard et al., 2 *The Law of Lawyering* § 29.11 (2007).

What constitutes a “controlling jurisdiction” can be a complicated question. On questions of federal law, U.S. Supreme Court precedent is obviously controlling, as are cases from the federal circuit in which you are litigating. As for state law, regardless of the court you are in, you are obliged to cite directly adverse authority from the jurisdiction whose law the court is applying. In addition, if you are urging the court to adopt or rely upon the law from other jurisdictions (e.g., asking a state court to follow Delaware law on a corporate law issue not adequately developed in your state), the duty of candor requires disclosure of directly adverse authority from those jurisdictions as well. See Hazard § 29.11; J. Michael Medina, “Ethical Concerns in Civil Appellate Advocacy,” 43 Sw. L.J. 677, 709-12 (1989-1990).

Beyond these basic propositions, counsel face greater uncertainty. For example, if your case before the 2d U.S. Circuit Court of Appeals turns on an issue governed by Tennessee law, must you disclose directly adverse 6th Circuit precedent interpreting Tennessee law? Must a directly adverse Pennsylvania Supreme Court decision interpreting federal law be disclosed to the 3d Circuit? See Medina at 714-15. The safer course is to make the disclosure and distinguish the adverse precedent.

The disclosure obligation is not limited to adverse appellate decisions—the rule requires disclosure of any adverse authority “in the controlling jurisdiction,” not just “controlling authority.” See, e.g., *Tyler v. State*, 47 P.3d 1095, 1104 (Alaska Ct. App. 2001); *Douglass v. Delta Air Lines Inc.*, 897 F.2d 1336, 1344 (5th Cir. 1990). This is especially so when you have cited other lower court decisions in your brief. See *Mannheim Video Inc. v. County of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989).

What constitutes “directly adverse” authority is not always clear. American Bar Association Formal Opinion 280 (June 1949)—which is still relevant today—provides a few questions to ask when you find directly adverse authority: “Is the decision which opposing counsel has overlooked one which the

court should clearly consider in deciding a case? Would a reasonable judge properly feel that a lawyer who advanced as the law a proposition adverse to the undisclosed decision was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?” See also ABA Informal Op. No. 84-1505 (March 1984) (reaffirming the applicability of Formal Opinion 280 to the Model Rules).

Hazard puts it simply: “[T]he more unhappy a lawyer is that he found an adverse precedent, the clearer it is that he must reveal it.” Hazard § 29.11.

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disclose adverse
authority and take
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Balancing duty of candor, duty of zealous advocacy

Some courts have squarely held that “a lawyer’s duty of candor to the court must always prevail in any conflict with the duty of zealous advocacy” on a client’s behalf. *HUD v. Cost Control Mktg. & Sales Mgmt. Inc.*, 64 F.3d 920, 925 (4th Cir. 1995). Still, some balance must be struck between the two ethical obligations. Under the Model Rules, “[a] lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authority.” Model Rule 3.3 cmt. 3.

Counsel for an appellee, for example, need not disclose the fact that he could find no case law to support affirmation of a point ruled on by the lower court. See *Medina* at 712. See *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1542 (9th Cir.

1986) (the rules do not impose “a requirement that the lawyer, in addition to advocating the cause of his client, step first into the shoes of opposing counsel to find all potentially contrary authority, and finally into the robes of the judge to decide whether the authority is indeed contrary or whether it is distinguishable”).

Appellate courts can and do impose sanctions for clear failures to disclose directly adverse (particularly dispositive) authority, using Fed. R. App. P. 38 (for filing a frivolous appeal), e.g., *Newhouse v. McCormick & Co.*, 130 F.3d 302, 304-05 (8th Cir. 1997); *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1198 (7th Cir. 1987), or under Fed. R. App. P. 46(c) (for conduct unbecoming of a member of the bar or violating any court rule), e.g., *In re Hendrix*, 986 F.2d 195, 201 (7th Cir. 1993). Sanctions are understandably more likely when the attorney was himself involved in the adverse case he failed to disclose, and therefore clearly had knowledge of it. E.g., *Tyler*, 47 P.3d at 1102.

The risk of sanctions aside, it is strategically wiser to disclose adverse authority and take your best shot at persuading the court not to follow it. In contrast to the “ostrich-like tactic of pretending that potentially dispositive authority against a litigant’s contention does not exist,” *Hill*, 814 F.2d at 1198, candor “takes the wind from an opponent’s sails and instills judicial trust in the quality and completeness of presentation.” Charles W. Wolfram, *Modern Legal Ethics* § 12.8 at 682 (1986). **NLD**