Ethical Considerations In Advocacy: What First-Year Legal Writing Students Need to Know

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I. INTRODUCTION

One of the most difficult transitions for first-year legal writing students is shifting from the objective legal writing of syntheses of the law and legal memoranda in their first semester to advocacy writing in motions and appellate briefs in their second semester. Not only does the tone of the writing change but also the purpose and the audience change. As one authoritative text explains, a brief transforms the objective analysis of a memorandum into an adversarial argument to a court. But it also suggests that while the change is important, the basic standards of communication remain the same; the advocacy writer must make his or her arguments clear. "Advocates win most of their points by clarity and straightforwardness—not, as many novice litigators seem to believe, by demonstrating sincerity or outrage, or by laying down an artillery barrage in the hope that the sheer volume of the argument will produce victory."

The new role for the legal writer as an advocate demands candor, honesty and credibility with the court. The advocate must conform to the ethical requirements of the legal profession. The American Bar Association has promulgated both the Model Code of Professional Responsibility which a minority of the states now follow and the Model Rules of Professional Conduct which more than two-thirds of states here adopted. In legal

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2 Id.

3 American Bar Association, Model Rules of Professional Conduct vii-viii (1998 ed. 1997). The ABA House of Delegates adopted the Model Code of Professional Responsibility on August 12, 1969, and subsequently the vast majority of the state and federal jurisdictions adopted it. Following a six-year study and drafting process, on August 2, 1983, the ABA House of Delegates adopted the Model Rules. As of 1997, more than two-thirds of the jurisdictions adopted the new professional standards based on these Model
profession or ethics courses, second and third-year students delve in depth into ethical dilemmas and the professional responsibilities of the lawyer in modern complex society. However, first-year law students must develop a rudimentary understanding of their ethical obligations to the practice of law as they assume the new role as advocates in the adversarial litigation setting.

The Code of Professional Responsibility consists of canons, ethical considerations and disciplinary rules. As explained in the Preliminary Statement to the Model Code, the canons are axiomatic norms which express in general terms the standards of professional conduct expected of lawyers. The ethical considerations ("EC"), aspirational in nature, represent the objectives toward which lawyers should strive and provide guidance in many specific situations. The mandatory disciplinary rules ("DR") state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. In contrast, the Model Rules consist solely of rules.

II. PROBLEMS OF CANDOR

Canon One directs: "A lawyer should assist in maintaining the integrity and competence of the legal profession." Implementing this norm, DR-102(A)(4) prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and DR-102(A)(5) prohibits an attorney from engaging in conduct that is prejudicial to the administration of justice. Model Rule 1.1 directs: "A lawyer shall provide competent representation to a client." But the Model Rules directly address candor toward the courts. Rule 3.3 mandates that

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

Rules.

4 AMERICAN BAR ASSOCIATION, COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 162 (1997).
5 Id. at 165.
6 Id. at 166.
7 ABA, supra note 3, at 11.
(3) 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; or

(4) offer evidence that the lawyer know to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.\(^8\)

The advocate can violate the requirement of candor in at least five ways: not disclosing or misstating facts, stating purported facts unsupported by the record, distorting case law, failing to update a brief when case law changes, and distorting quotations.

A. Nondisclosure or Misstatement of Facts

At both the trial level and the appellate level, an advocate must exercise scrupulous care in stating the facts of the case. The Supreme Court of New Mexico held an attorney who filed a brief to the state appellate court which contained false, misleading, inaccurate and improper statements of fact violated both DR-102(A)(4) and DR-102(A)(5).\(^9\) In his appellate brief, the attorney misrepresented at four different places that the testimony of causality was "uncontroverted," "undisputed," and "uncontradicted" when in reality at the trial the testimony of one of the two witnesses concerning causality was inconsistent.\(^10\) The New Mexico Supreme Court public censured the attorney for making false, misleading and inaccurate statements in a brief to the court of appeals, fined the attorney one thousand dollars, and ordered the public censure be published in the State Bar of New Mexico News and Views and the New Mexico Reports.\(^11\) One justice dissented stating he would suspend the attorney from the practice of law for thirty days.\(^12\)

An attorney who took over an appellate case when it reached the Supreme Court of New Jersey failed to examine the trial transcript but instead relied on the statement of facts from the brief filed with the state's intermediate appellate court.\(^13\) As

\(^8\) Id. at 62-63.
\(^9\) In re Chakeres, 687 P.2d 741 (N.M. 1984).
\(^10\) Id. at 741-742.
\(^11\) Id. at 742.
\(^12\) Id.
\(^13\) In re Greenberg, 104 A.2d 46, 47 (N.J. 1954).
a result of this dangerous shortcut in effort, the attorney found himself before the Supreme Court of New Jersey responding to an order to show cause “why he should not be disciplined for a misrepresentation of fact in the presentation of the cause of his client, censurable as in disregard to his professional duty to his client and to the Court.” Finding that the attorney acted in good faith, the Supreme Court did not discipline him. The Court did sternly warn that when

there are no facts on which to predicate a statement or from which he may reason or argue, he [an attorney] makes such false statements of facts or false inferences from such non-existing facts at his peril. The failure of his adversary to discover his mistake here or below is no excuse for what may turn out to be an imposition on the court, even if it can be attributed merely to carelessness and lack of thoroughness in the preparation of the appeal. The facts of a case are or should be peculiarly within the knowledge of the counsel who are arguing the appeal and there is great likelihood of error by the court and of consequent injustice to the parties, if counsel do not adequately present the true facts of the case.15

The message is clear. Each advocate, regardless of when he or she entered the litigation, has an ethical responsibility to present a true and accurate statement of the facts to the court.

B. Statements of Purported Facts Unsupported by the Record

Interrelated with the problem of a misstatement of facts is the ethical violation of the over-zealous advocate who argues purported facts which simply are not supported by the record. The Supreme Court of Indiana has directed that while a lawyer should zealously plead his client’s case, “the court is entitled to a fair statement of the facts from attorneys on both sides, not an exaggerated, self-serving version of the facts or an omission of crucial facts.” The court chastised the defense attorney in a murder appeal, noting that no one who had read the trial transcript could in good faith say the evidence was “uncontroverted” that the defendant-appellant fired a gun in self-defense.17 The

14 Id.
15 Id. at 48.
16 Cooper v. State, 309 N.E.2d 807, 808 (Ind. 1974).
17 Id. at 808.
court explained that when it "can not rely upon the statement of a lawyer, the lawyer has lost effectiveness with the Court and has therefore, in fact, injured his client."\textsuperscript{18}

The Ninth Circuit Court of Appeals echoed the view of the Supreme Court of Indiana. In an employment discrimination case, the Ninth Circuit found that transcript references demonstrated that several of the appellant's assertions of fact were absolutely untrue and fabricated from misstatements of the record and taking statements out of context.\textsuperscript{19} The Ninth Circuit instructed:

\begin{quote}
[i]t is appellate counsel's professional duty to be scrupulously accurate in referring to the record and the authorities upon which he relies in his presentation to the court in his brief or oral argument. He must not mislead the court by misrepresenting the record. Vigorous representation is admirable, but it does not permit misrepresentation.\textsuperscript{20}
\end{quote}

Attorneys who misrepresent the record on appeal have been disciplined by the courts even when the attorney asserts it was his first appeal in federal court, he never intentionally attempted to make false representations or to mislead the court, but he had merely neglected to review the record carefully.\textsuperscript{21} In a federal securities case the Ninth Circuit suspended an appellee's attorney for two-months from practice before the court for misrepresenting the record on appeal.\textsuperscript{22} The attorney erroneously stated that the district court had not provided its rationale for denying appellants' motion to amend. This misrepresentation by the attorney went to the heart of the appeal.\textsuperscript{23} In disciplining the attorney, the Ninth Circuit explained the court is not required to find intentional conduct in order to discipline an attorney. Lack of diligence which impairs the deliberations of the court is sufficient conduct warranting disciplinary action.\textsuperscript{24}

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\textsuperscript{18} Id.
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\textsuperscript{19} Frausto v. Legal Aid Society of San Diego, 563 F.2d 1324, 1327, n.8 (9th Cir. 1977).
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\textsuperscript{20} Id.
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\textsuperscript{21} DCD Programs, Ltd. v. Leighton, 846 F.2d 526, 528 (9th Cir. 1988).
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\textsuperscript{22} Id. at 528.
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\textsuperscript{23} Id. at 527.
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\textsuperscript{24} Id. at 528.
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C. Distortion of Case Law

In addition to ethical violations involving nondisclosure of facts, misstatements of facts and allegation of purported facts not supported by the record, the advocate who misstates or distorts the law faces serious consequences. The courts do not always rely on disciplinary actions to address offending attorneys but may instead assess costs and impose sanctions. The First Circuit expressed its disdain for the actions of appellate counsel who in a breach of contract case failed to state accurately the rule on waiver and the requirement for consideration.\footnote{25 Griffin Wellpoint Corp. v. Munro-Langstroth, Inc., 269 F.2d 64 (1st Cir. 1959).} Commenting that the appeal was obviously frivolous and expressing its dislike for some of the "tricks of advocacy indulged in by counsel," the court ordered double costs on the appeal to be recovered by the appellee.\footnote{26 Id. at 67-68.}

In an action for fraud, negligence and breach of contract involving an allegedly defective computer system, the Northern District Court of California imposed monetary sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure against the law firm of the defendant.\footnote{27 Golden Eagle Distributing Corp. v. Burroughs Corp., 103 F.R.D. 124, 127, 129 (N.D. Cal. 1984), rev'd, 801 F.2d 1521 (9th Cir. 1986).} In his memorandum in support of the defendant's motion based on the statute of limitations, the attorney led the court to believe that an argument was supported by existing law when it was not.\footnote{28 Id. at 127, 129.} The district court instructed:

The duty of candor is a necessary corollary of the certification required by Rule 11. A court has a right to expect that counsel will state the controlling law fairly and fully; indeed, unless that is done the court cannot perform its task properly. A lawyer must not misstate the law, fail to disclose adverse authority (not disclosed by his opponent), or omit facts critical to the application of the rule of law relied on.\footnote{29 Id. at 127.}

The court further explained that "it is as badly misled by an argument purporting to reflect existing law when such law does not exist as by a failure to disclose adverse authority."\footnote{30 Id. at 128.}
court noted that Rule 11 sanctions were appropriate regardless of whether the offending attorneys acted in good faith.\textsuperscript{31} The sanctions were subsequently reversed by the Ninth District Court of Appeals instructing that Rule 11 does not impose the risk of sanctions in the event that a trial court decides that a lawyer was wrong as to his decision that cases were dissimilar thus leading to his failure to cite adverse authority.\textsuperscript{32}

In an appeal concerning a wrongful discharge claim, the Seventh Circuit Court of Appeals considered imposing sanctions against an appellant for misrepresentations of controlling law.\textsuperscript{33} The court noted that "sanctions were available under Rule 38 of the Federal Rules of Appellate Procedure, which penalizes 'frivolous' appeals under 28 U.S.C. § 1912, which deals with 'unnecessary delay' or under 28 U.S.C. § 1927, which authorizes sanctions for 'unreasonably and vexatiously' multiplying proceedings."\textsuperscript{34} While declining to impose sanctions, the court was troubled by appellant's counsel's apparent attempt to mislead the court as to the holding in the most recent decision of the Wisconsin Supreme Court addressing the public policy exception to Wisconsin's employment at will doctrine.\textsuperscript{35} The court did reiterate "that lawyers owe a duty of candor to the tribunal."\textsuperscript{36} The court stated: "[c]ounsel for appellant would be well advised to observe that violations of this duty can lead to sanctions even more severe than payment of an opponent’s fees and costs."\textsuperscript{37}

D. Duty to Update

Closely related to the problem of distortion of case law is the advocate's on-going duty to update his or her brief when relevant case law changes. As the Northern District Court of Georgia has advised, advocates have a duty to file supplemental memorandum when a case which constitutes an essential part of a party's argument has been reversed on appeal.\textsuperscript{38} Thus, the advocate must not only relate the cases accurately at the time of

\textsuperscript{31} Id.
\textsuperscript{32} Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531, 1542 (9th Cir. 1986).
\textsuperscript{33} Beam v. IPCO Corp., 838 F.2d 242 (7th Cir. 1988).
\textsuperscript{34} Id.
\textsuperscript{35} Id. at 248-249.
\textsuperscript{36} Id. at 249.
\textsuperscript{37} Id.
filing the initial brief but must also stay abreast of the status of cases on which the advocate relies and affirmatively advise the court of any changes pending the resolution of the case before the court.

E. Distortion of Quotations

Lawyers have gotten themselves in trouble by failing to exercise adequate care in accurately quoting from the cases on which they base their arguments. The Seventh Circuit Court of Appeals has instructed that “[a]ttorneys whose names are affixed to briefs filed in this Court have a heavy responsibility to see to it that quotations from the opinion of other courts as well as other statements therein are completely accurate.”39 The Seventh Circuit also considered counsel’s omission of a key sentence as one indicator of the attorney’s bad faith when it upheld sanctions against the attorney.40

Because the brief of a patent infringer misstated the law and distorted a quotation, the Federal Circuit Court of Appeals ordered the infringer to pay the patentee an amount double the patentee’s costs on appeal.41 In assessing the costs the court pronounced:

Distortion of the record, by deletion of critical language in quoting from the record, reflects a lack of candor required by the Model Rules of Professional Conduct, Rule 3.3 (1983), wastes the time of the court and of opposing counsel, and imposes unnecessary costs on the parties and on fellow citizens whose taxes support this court and its staff. A quotation containing deletions that so clearly distort the meaning and relevance of the quotation as to render it misleading will not in this court be encouraged by acquiescence.42

Because the good advocate writes multiple drafts of his or her brief, the possibility of unintentionally altering a quote is high. Thus before any brief is filed, its author should return to

40 McCandless v. The Great Atl. and Pac. Tea Co., 697 F.2d 198, 201-202 (7th Cir. 1983).
42 Id.
the actual cases used and with a partner proofread out loud each quote in order to detect potential distortions or omissions.

III. ASSERTION OF CLAIMS AND DEFENSES

Pursuant to Canon 7, EC 7-23, and DR 7-101, an attorney owes a duty to his or her client to argue the case vigorously. In carrying out this duty, the attorney will often argue for creative extension of existing law or replacement of existing law with the new rules or interpretations. Fundamental principles of professional responsibility, however, impose some limits on this advocacy. For example, Rule 11 of the Ohio Rules of Civil Procedure requires every attorney to certify that to the best of his or her knowledge there is good ground to support the pleading he or she files and provides for sanctions for frivolous filings. The purpose of Rule 11 is to discourage claims or defenses that are intended solely to harass the opponents, to delay the proceedings or to discourage claims that reflect irresponsibly lax investigation.

Further Disciplinary Rule 7-102(A)(2) provides that in his or her representation of a client, a lawyer shall not knowingly advance a claim or defense that is unwarranted under existing law, except that he or she may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law. Similarly, Model Rule 3.1 requires that 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.

As an advocate, an attorney does not have the duty to argue the opponent's case or even to present the balanced analysis appropriate for an office legal memorandum. Nonetheless, every attorney is not only an advocate but also an officer of the court and has a general duty of candor and fairness to the court and to other lawyers. Within this framework, the Model Code of Professional Responsibility specifically requires every advocate to

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43 ABA, supra note 4, at 217-232.
44 Ohio R. Civ. P. 11.
45 Id.
46 ABA, supra note 4, at 226.
47 47 ABA, supra note 3, at 61.
48 CHARLES R. CALLEROS, LEGAL METHOD AND WRITING, 259 (2d ed. 1994).
disclose significant authority adverse to the advocate's argument.

Disciplinary Rule 7-106(B) on Trial Conduct mandates:

(B) In presenting a matter to a tribunal, a lawyer shall disclose: (1) legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.  

This rule is extremely tricky as it depends in large part on the interpretation of the "directly adverse" language. The language could arguably be interpreted to require an attorney to disclose even clearly distinguishable adverse authority that nonetheless offered importance guidance to the court through analogy, dictum or general reasoning. In contrast, a narrow interpretation may require an attorney to disclose only authority that is squarely on point.

Arizona State University law professor Charles R. Calleros, suggests that the most sensible approach to disclosure is one that maintains the attorney's credibility as an advocate. Calleros posits if adverse authority within the forum jurisdiction is sufficiently analogous that the court would consider it in deciding a case, the judge or the judge's law clerk will likely discover the authority sometime before the end of the proceedings, even if it has escaped the notice of opposing counsel. An attorney can minimize the impact of such adverse authority by acknowledging it early in the proceedings and distinguishing or discrediting it.

In practice the likelihood of the trial judge discovering the authority sometime before the end of the proceeding varies dramatically among the trial courts. Certainly in federal district court with the court's strong staff of law clerks, discovery of relevant authority is most likely inevitable. However, in state court it is somewhat appalling to discover how little law some trial judges know and how much they underutilize the few law clerks they employ. While an advocate should never base his or her decision regarding disclosure of adverse authority on the likelihood

49 ABA, supra note 4, at 228. Similarly Model Rule 3.3(a) (3) specifies that a lawyer shall not knowingly "fail to disclose to the tribunal in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." ABA, supra note 3, at 62-63.

50 CALLEROS, supra note 48, at 255.

51 Id.

52 Id.
that the trial judge will not find it, the advocate should be aware of the realities of law practice as well as the ideals taught in law school textbooks and classes.

In 1982, Geoffrey C. Hazard, Jr., Baker Professor of Law at Yale University addressed "Arguing the Law: The Advocate's Duty and Opportunity" at the John A. Sibley Lecture in Law delivered at the University of Georgia. Hazard observed that many lawyers think an advocate should cite only favorable authority and cite adverse authority only when there is no practical way to avoid doing so. Hazard explained that each side cites authority going its way and then leaves it to the court to figure out which line of cases to follow. Hazard perceived this practice to be followed in the trial courts all the time, in the intermediate appellate courts most of the time and even often in the Supreme Court.

Hazard speculated that lawyers who are writing briefs that ignore adverse authority have calculated the risks in doing so. The risk of violating the disciplinary rule is low because the opposing side will normally cite directly supportive authority. Further Hazard suggested even if the offending counsel is caught, counsel has determined that the court probably will not make much of it because the disciplinary rule is at variance with the prevailing practice. Other commentators have suggested advocates' failure to cite adverse precedent may stem from inexperience, neglect or incompetence.

Hazard noted that having to cite adverse authority means having to think why and how particular cases can be distinguished or neutralized; this requires in-depth thinking and takes time and money. Hazard concluded that the failure to give adverse authority serious and respectful attention results in bad briefs. The weight of an advocate's argumentative position can be properly gauged only by reference to what can be set

54 Id. at 827-828.
55 Id. at 828.
56 Id.
57 Id.
58 Id.
59 Id.
61 Hazard, supra note 53, at 828.
62 Id.
against it.\textsuperscript{63} Thus briefs that expound only favorable case law deal merely with the surface of the controversy before the court.\textsuperscript{64}

Hazard advised that because the court’s task is to acknowledge and to resolve competing considerations, the effective advocate should anticipate the court’s task and help in its performance.\textsuperscript{65} An advocate must recognize conflict in authorities and demonstrate to the court how that conflict can be resolved in such a way that his or her client prevails.\textsuperscript{66} An advocate should isolate the opposing party’s strengths that can be conceded, while adhering to a prevailing position.\textsuperscript{67} An advocate’s strongest position may be one that is positionally moderate.\textsuperscript{68} Generally courts do not want to adopt new, difficult or controversial positions.\textsuperscript{69} An advocate who addresses adverse authority and who assumes a moderate position can effectively argue that his or her requested result is the natural application or extension of law.

Advocates who calculate the risk of getting caught for violating the disciplinary rule requiring disclosure of adverse authority to be low may have miscalculated. Courts will impose serious sanctions when they determine an attorney deliberately intended not to cite controlling adverse precedent.\textsuperscript{70} The Eleventh Circuit upheld the district court’s imposition of Rule 11 sanctions against appellants’ attorneys for failing to cite adverse controlling precedent in a memorandum filed in support of an application for injunctive relief which challenged the validity of a county ordinance prohibiting nude dancing at businesses that serve alcohol.\textsuperscript{71} In their brief the appellants cited a number of cases describing the limits of the exercise of the general police power but failed to advise the court of a controlling Florida Supreme Court decision that “required the validity of the ordinance be judged in light of the powers retained under the Twenty-First Amendment rather than the general police

\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id. at 830.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Id. at 830-831.
\textsuperscript{69} ARMSTRONG AND TERRELL, supra note 1, at 10-7.
\textsuperscript{70} Howard, supra note 60, at 296.
\textsuperscript{71} Jorgenson v. County of Volusia, 846 F.2d 1350, 1351 (11th Cir. 1988).
The court noted that the appellants were not redeemed by the fact that opposing counsel subsequently cited the controlling precedent. The court instructed that "[t]he appellants had a duty to refrain from affirmatively misleading the court as to the state of the law. They were not relieved of this duty by the possibility that opposing counsel might find and cite the controlling precedent...."

In a particularly egregious case of lazy lawyering, the Court of Appeals of Texas warned appellate counsel that it would not tolerate counsel's failure to inform the court of controlling adverse precedent. The State had filed a motion to strike the appellant's brief in the appeal of an obscenity conviction. The State correctly indicated that counsel for the appellant had filed identical briefs in numerous similar obscenity appeals before the court and one of those appeals resulted in a published opinion dispositive of the current appeal. Not only did appellant's counsel fail to distinguish that published opinion, he failed to mention it in his brief. The review court expressed its disdain for counsel's "fill-in-the-blanks" briefs, found his practice to violate the Texas Code of Professional Responsibility, notified counsel that the court would report any future violations of this type to the State Bar of Texas for appropriate disciplinary action, and warned counsel that the court may find him in contempt.

Because the penalties for failing to disclose controlling adverse authority are real, the new advocate must fully understand the requirements of the disciplinary rule. Again, the disclosure rules contained in Disciplinary Rule 7-106(B) and Model Rule 3.3(a)(3) mandate the lawyer shall disclose authority in the controlling jurisdiction known to him or her to be directly adverse to the position of his or her client and which is not disclosed by opposing counsel. The "controlling jurisdiction" reference appears to exclude completely authority from other than the forum jurisdiction, even if it is squarely on point. Thus, when preparing an advocacy motion or brief, the advocate must be clear as to what courts are included in the controlling juris-

72 Id. at 1352.
73 Id.
74 Id.
76 Id. at 235.
77 Id.
78 ABA, supra note 4, at 228; ABA supra note 3 at 62-63.
79 CALLEROS, supra note 48, at 256.
diction. The advocate must ask which court of appeals would re-
view the trial court’s decision.

In some circumstances broader disclosure than required by
the specific ethical rule may be necessary for the advocate to
maintain credibility with the trial court. Professor Calleros
suggests, if the question before the court is so novel that no au-
thority within the forum jurisdiction addresses it, and if adverse
authority from another jurisdiction would be particularly per-
suasive, then the court might expect disclosure of the nonbind-
ing adverse authority.

If an adverse authority is not from the controlling jurisdictic-
on or does not address a novel issue or is not particularly per-
suasive from another jurisdiction, the advocate need not address
it unless the other party relies on it or the court raises a ques-
tion that encompasses it. In an opening brief, such as the sup-
porting brief for a motion for summary judgment or a motion to
dismiss the indictment, an advocate need not waste time by dis-
tinguishing marginally analogous adverse case law or by criticiz-
ing poorly reasoned persuasive authority on which the opposing
counsel is unlikely to rely. Instead, the advocate should concen-
trate on affirmatively presenting his or her own arguments and
supporting authority. The advocate should attack only the most
obvious adverse authority. Then the advocate can wait to see on
what authority the opposing authority relies in the answering
brief, and attack that adverse authority in a reply brief, pro-
vided the rules permit a reply brief. Of course, if at a hearing on
the motion the court asks the advocate broadly about adverse
precedent, the advocate should make such frank disclosure as
the question seems to warrant.

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80 Id.
81 Id.
82 Id.
83 Id.
84 Id.