# In Indiana Appellate Practice, Good Ethics is Good Advocacy

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## I. Introduction

Stories circulate about bad lawyer behavior in appellate courts – faked citations, tirades against opposing counsel, nasty judicial temperament – but few of the stories originate in Indiana. We have a tradition of bench-bar cooperation and mutual respect, perhaps in part because we have a relatively small group of repeat appellate practitioners.

Because frequent appellate practitioners know one another, because we know the judges, and because we know that we're all likely to see one another again very soon in the next case, we have incentives to be on good behavior. Our reputations are a major part of our stock in trade. Our reputations suffer in the long run if we become known as advocates who will cut corners or who will take extreme and indefensible positions because a client wants a particular argument to be made.

The thesis of this presentation is that following the Rules of Professional Conduct in the appellate arena is perfectly consistent with good advocacy.[1] As explained in detail below, following the ethical precepts in the Rules adds to an advocate's credibility,

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[1] All references by number to rules in this article are to the Indiana Rules of Professional Conduct. Generic references to the Rules of Professional conduct are capitalized ("Rules") and to other rules (e.g. Indiana Appellate Rules) are uncapitalized. The author expresses his appreciation to Anne Ricchiuto, an attorney at Baker & Daniels and former law clerk at the Disciplinary Commission, who provided ideas and comments on this material. Any errors are the author's alone.

fosters an impression of forthrightness, and therefore enhances the advocate's presentation and redounds to the client's benefit.

## II. Follow the Rules.

The Rules tell us we must provide competent representation – with the "knowledge, skill, thoroughness and preparation reasonably necessary." Rule 1.1. Novice lawyers may be competent to do appeals (if they study and work at it), and experienced lawyers may fail to offer competent representation (if they fail to pay adequate attention).

To ensure competent work, a lawyer must gather the necessary knowledge and skill. This comes from study – including reading the appellate rules and relevant precedent – and from studying the literature on appellate practice. Competent representation is facilitated by asking for help – inexperienced practitioners should find mentors who can give them guidance and answer questions. And advocates have to put in the time required to do adequate legal research, write thorough and persuasive briefs, and develop effective oral arguments. These factors, of course, are also the hallmarks of good advocacy. If you don't meet these characteristics of competence, you will not be an effective advocate.

A key part of competent representation is following the applicable rules. Judge Alex Kozinski of the Ninth Circuit illustrated how failure to comply with the rules affects judicial perception. He said that when a lawyer cheats on page limits "[i]t tells the judges that the lawyer is the type of sleaze ball who is willing to cheat on a small procedural rule

and therefore probably will lie about the record or forget to cite controlling authority."[2] This comment reveals the link between following the rule on competence and being persuasive as an advocate.

Failing to follow the rules not only violates the duty to provide competent representation, it also can lead to sanctions and it is very bad for a lawyer's reputation. For example, in *Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004), the court refused to address an issue where the argument was "too poorly developed and improperly expressed to be considered cogent argument as required by the rules of appellate procedure." Similarly, in *Young v. Butts*, 685 N.E.2d 147 (Ind. Ct. App. 1997), counsel misrepresented the record and failed to follow procedural rules by putting argument in statement of the case and failing to provide pinpoint citations. The court deemed the appeal frivolous and in bad faith and sanctioned counsel.

In a Seventh Circuit case, counsel was sanctioned for failing to follow the rules (name calling, failing to cite the record, failing to include mandatory attachments) by an order requiring counsel to pay costs and other party's appellate fees. *Collins v. Educ. Therapy Ctr.*, 1999 WL 430146 (7th Cir. 1999). Competence problems can even occur in putting together the appendix. In *Thomas v. N. Central Roofing*, 795 N.E.2d 1068 (Ind. Ct. App. 2003), counsel put into the appendix only the documents that supported his client's motion for summary judgment, not the evidence put in the record by the opposing party. Not only was counsel chastised by the court, his action was also bad advocacy

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[2] Andrew L. Frey & Roy T. Englert, *How to Write a Good Appellate Brief*, 20 Litigation 6, 7-8 (Winter 1994).

because it left the impression that he was trying to hide something and was not playing by the rules.

Competent representation, which the Rules of Professional Conduct requires, is essential to being a good advocate as well.

**III. Avoid ad hominem.**

Rule 3.5 instructs lawyers not to "engage in conduct intended to disrupt a tribunal." In addressing a claim that a lawyer was disrespectful to a tribunal, a Supreme Court justice wrote that "intemperate language is very poor advocacy, distracting as it does from the points that are sought to be made." *In re Wilkins*, 777 N.E.2d 714, 720 (Ind. 2002) (Boehm, J., dissenting). "A brief is far more helpful to this court, and it advocates far more effectively for the client, when its focus is on the case before the court and not on counsel's opponent." *County Line Towing v. Cincinnati Ins.*, 714 N.E.2d 285, 290-91 (Ind. Ct. App. 1999) (describing brief as containing "petulant grousing" and "hyperbolic barbs"). The commentary to Rule 3.5 reminds us that counsel "can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence and theatrics."

These points go back to the issue of reputation – we lose credibility when we aim our arguments at our opponents themselves rather than at the legal arguments they raise. In a constitutional case not so many years ago in the Indiana Supreme Court, my client prevailed when the court adopted its approach to the relevant state constitutional provision. In his petition for rehearing, the advocate on the other side not only made legal arguments, he also went so far as to assert that the Supreme Court justice who wrote

the opinion had – by ruling as he did – violated his oath to uphold the Constitution and had assisted the legislature in "repealing" the Constitution. These outrageous assertions caused the Court to strike his petition for rehearing in a short opinion published in the West's digest. *Hoovler v. State*, 673 N.E.2d 767 (Ind. 1997).

Personally attacking a judge is not consistent with the rules. Commentary to Professional Conduct Rule 3.5 says that "[r]efraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants." In the oath of attorneys, we swear to "maintain the respect due to courts of justice and judicial officers." In my case, the lawyer violated those Rules.

But he also picked a path guaranteed to fail as advocacy. You don't win by calling the judge corrupt or idiotic. In this case, the ad hominem argument did not even make it to court because the court struck the brief. It's not good ethics, and it certainly isn't good advocacy.

## IV. Pick the best issues.

The Rules tell us we should not make an argument "unless there is a basis in law and in fact for doing so that is not frivolous." Rule 3.1. The Rule sets a minimum standard, and following the Rule is consistent with good appellate advocacy.

Selecting the best issues to argue is the appellate advocate's most important job. And any experienced appellate lawyer or judge will tell you that an advocate who argues too many issues or who mixes good issues with bad issues undercuts her credibility. As Justice Robert H. Jackson wrote, "The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the

number of assigned errors increases."[3] This issue triage can be particularly difficult when a client is pushing an issue because it makes him feel better to see the argument in the brief or hear it argued orally, no matter how many times you explain that the argument hurts his chances of success.

This is another area in which good ethics (following the rule forbidding frivolous argument) is completely consistent with good advocacy (frivolous arguments undercut the advocate's credibility and undermine any good arguments she might make).

Rule 3.1 also says that the kind of argument that is permissible – that is, non-frivolous argument – "includes a good faith argument for an extension, modification or reversal of existing law." Rule 3.1. Does this mean that the pressure is off – doesn't this say that we can make frivolous arguments as long as they are for extending, modifying, or reversing existing law?

Not exactly. What the rule requires, and what is consistent with good advocacy, is to be completely transparent in arguments that advocate extending, modifying, or reversing existing law. Appellate judges will tell you that they are receptive to arguments to change the law, but they recoil from arguments that purport to tell them what existing law is but that actually misrepresent the law. It is both ethical and, at least sometimes, good advocacy to argue in favor of changing the law. But it is vital to be fully open and aboveboard about the fact that you are arguing to change the law.

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[3] Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 37 Cornell L. Q. 1, 5 (1951).

The Rule against frivolous arguments may mandate certain concessions. Occasionally when we prepare a case for appeal we find that one of the issues we really liked in the trial court doesn't stand up to inspection on appeal. We reread the cases and they don't say what we thought they did, or we find that the issue just "won't write." We now have an issue that's at least verging on frivolous, and the Rules tell us we probably should give it up. Sometimes that's difficult, especially when trial counsel won below on the issue.

But giving it up is fully consistent with principles of good advocacy. Holding on to an issue because it was good for us in the trial court stops being good advocacy when the issue doesn't pass the smell test on appeal. The bad issue will weigh down the good issues and will cause the court to doubt the advocate's judgment.

This point has special relevance for prosecutors. Rule 3.8 requires a prosecutor to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." The appellate equivalent to this may be that an appellate prosecutor should "refrain from pressing an argument on appeal that is not supported by authority or the facts of the case." This language is not found in the Rules, but it is my projection of the trial-based language into the appellate arena.

Appellate judges have told me that appellate lawyers for the state in criminal cases gain credibility with the courts when they are willing to concede issues that lack a sufficient legal or factual basis (unless they're frankly aiming to change the law).

## V. Disclose adverse authority.

The Rules couldn't be more clear on this one: a lawyer may not "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse" to what he's arguing. This obligation remains even when the lawyer on the other side doesn't comply with it. Rule 3.3(a)(2). It hardly seems fair. Even if the other lawyer doesn't do his job, we have to do it for him by undercutting our own case with adverse authority.

But following this Rule is completely consistent with good advocacy. If you're a good appellate lawyer, courts have high expectations for your work. When you fail to disclose that adverse authority and the appellate judge finds it, the appellate judge can think only one of two things. One, "that lawyer must be dimmer than I thought if he couldn't find this case; it took my law clerk only about a minute to find it." Or two, and worse, "I'll bet that lawyer found this case, but he didn't disclose it because it hurt him and he thought I'd be too lazy to look for it." You don't want a judge to think either one of those things about you.

## VI. Tell the truth.

Rule 3.3(a) tells us not to make false statements of fact or law to a tribunal and to promptly correct any false statements we inadvertently make. This principle is completely consistent with a key rule of effective advocacy – if an appellate advocate makes an incorrect statement of fact (that is, misrepresents the record) or of law (that is, misrepresents or distorts authority), the advocate's credibility goes out the window. Effective advocacy at the appellate level depends on credibility, and the quickest way to

lose the court's confidence is to be caught exaggerating the facts that support your claim or distorting the authority on which you rely.

A recent Indiana case is a variation on this theme. After ruling against an appellant, the Court of Appeals felt compelled to take the appellant's lawyer to task for what was in essence plagiarism. "[T]he brief's entire 'Argument' section is a near-verbatim replication of a recent Memorandum and Order from the United States District Court for the District of Massachusetts." *Keeney v. State*, 873 N.E.2d 187, 189 (Ind. Ct. App. 2007). In other words, appellate counsel just copied the text of a court decision, unattributed, and used it as her argument. What amounts to stealing one's argument from another source not only may violate the Rules of Professional Conduct (and the Appellate Rules, because it is essentially unattributed authority), it also destroys the advocate's credibility in the case at hand and for a long time to come.

**VII. Talk to your client.**

Rules 1.2 and 1.4 tell us to communicate with our clients. We are to promptly inform clients of developments in their cases; consult with our clients about choices; respond to their requests for information; and abide by their decisions about the objectives of representation.

Effective client communication is key to both good ethics and good advocacy. From the beginning, an effective advocate will counsel her client about how the appellate system works, its advantages and limitations, and the resources that will be required to pursue an effective appeal. The advocate will work with the client to develop attainable goals for the appellate matter.

The advocate will talk the client out of making bad arguments, which may be motivated by the client's desire to vent her anger at the trial court or at the opposing party, because those arguments will not be effective. There is not exactly a Rule of Professional Conduct that addresses vituperative arguments, but those arguments are almost always unlikely to be effective and likely to undermine the credibility of the rest of the arguments. Such an argument may not be frivolous under Rule 3.1, but it is not persuasive.

The advocate should work with the client through the representation to explain the risks and likelihood of success. Doing so is likely to result in a more satisfied client who does not make a complaint to the disciplinary commission.

**VIII. Do pro bono.**

Rule 6.1 tells us that "[a] lawyer should render public interest legal services." This responsibility includes "providing professional services at no fee or at a reduced fee to persons of limited means or to public service or charitable organization representation and the administration of justice," and the commentary to the rule says that "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged." The Indiana State Bar Association has resolved that "all Indiana lawyers have an ethical and a social obligation to provide uncompensated legal assistance to poor persons."

It is our professional obligation to provide legal representation to those who cannot afford legal services. And it is good advocacy. It cannot hurt your reputation

with the courts you practice before if they know that you are donating legal services to a prisoner, a mother seeking child support, or a tenant living in unhealthy housing.

## IX. Conclusion

The Rules are not an impediment to effective advocacy. At least in appellate practice, following the Rules leads to better advocacy.