Ethics and Professionalism
By Peter D. Webster

Moderator: Peter Webster, Carlton Fields, PA
Speakers: The Honorable Renatha Francis, Eleventh Jud. Cir. of Fla.
The Honorable Norma Lindsey, Third DCA, Fla.
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Ethics versus professionalism

• Is there a distinction between the two? What are they?

• Ethics and professionalism in appeals in general
  o What do you consider is the most abused appellate procedure?
  o Is there any one unprofessional act that you consider particularly disturbing?
  o Are there reasons other than fear of disciplinary proceedings why attorneys should always endeavor to be candid with the court? Does an attorney who is less than candid risk losing credibility?

Ethical obligations of an attorney to a prospective client in general

• Extent of intake

• Caveats

Ethical obligations of an appellate attorney in explaining the appellate process

• Assessing the merits of an appeal

• Likelihood of success

Trial attorneys with limited appellate experience

• Hypothetical: You are a trial attorney who has just lost a case you think you should have won. You do very few appeals but, without telling your
client about your limited appellate experience, you convince the client to let you handle the appeal. Does this present any potential ethical issues?

Professionalism in motion practice

- Sanctions

- We all know that a significant number of lawsuits are frivolous – that is, clearly lacking in merit. Is it unethical to file a lawsuit that lacks any arguable merit? Is the same true for appeals? Are there other potential adverse consequences that can result from filing a frivolous lawsuit or appeal? Are monetary sanctions potentially available? Against whom can such monetary sanctions be levied? What are some of the considerations that come into play when determining whether sanctions are appropriate for a frivolous lawsuit or appeal?

- Extension requests

Professionalism in briefs

- Hypothetical: In the brief, an attorney refers to one of the trial court’s findings as “baloney,” and calls the trial court’s ruling “cockeyed and absurd,” declaring that it “demonstrated a most startling absence of legal knowledge and irrational decision.” Are such statements appropriate? Are they unprofessional? Are they unethical?

- Hypothetical: You won a case you expected to lose, and the other side appealed. Appellant has filed its initial brief, and it is apparent that the trial court’s decision was just wrong. Is it acceptable to file an answer brief that disputes Appellant’s brief, even though you know Appellant’s brief correctly analyzes the issue?

- Not infrequently, when reading the legal memoranda or briefs, it is simply impossible to reconcile the statements of facts, suggesting that one attorney - or both - has been less than candid regarding material facts. Is such a lack of candor acceptable? Is it unethical?

- Appellant has taken an appeal to the First DCA. The attorney knows that, although the First DCA has not previously addressed the controlling legal issue, the Third DCA did address it, although that opinion is 40 years old. Because the Third’s opinion is adverse to appellant’s position, appellant decides not to mention it in the initial brief. Is this acceptable? Is it
unprofessional? Is it a good idea, even if it is acceptable? Are the answers the same if a memorandum of law in the trial court is involved? Does the answer depend on the appellate district in which the circuit court is located?

- What duties, if any, does an attorney have to disclose other decisions of the circuit court acting in its appellate capacity when prosecuting an appeal from county court? What about conflicting decisions by different panels of circuit judges?

- Hypothetical: In your brief, you cite a Florida Supreme Court opinion, maintaining it is controlling. The opinion reflects that two justices concurred with the writing justice, two others concurred in result only, and the final two dissented. Is the representation acceptable? Is it unethical?

Professionalism in oral advocacy

- How frequently would you say that attorneys who appear before you are not as prepared as they should be? Is that unprofessional? Is it unethical?

- Hypothetical: The day before oral argument, appellee’s attorney files a notice of supplemental authority that has attached 25 cases, totaling 125 pages, all of which had been decided well before the answer brief was filed. Is this acceptable? Is it unprofessional? Is it unethical?

Professionalism in post-opinion motions

- Is it ever appropriate to seek rehearing (or rehearing en banc) following a PCA? Are there different considerations in different types of appeals?

- Hypothetical: You pick up a motion for rehearing filed in a case in which you wrote the opinion, and the first sentence reads: “This appellate court has either ignored the law or is not interested in determining the law.” What, if anything, do you do? Is such a statement acceptable?