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Practical and Ethical Considerations in Confessing Error on Appeal

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A new client calls and hires you to uphold on appeal the splendid order its trial counsel obtained in its favor. You eagerly read the order but quickly realize, to your horror, that the trial judge got it wrong. What should you do?

First and foremost, make absolutely certain that the ruling is indeed erroneous and there is no available opportunity for zealous, but entirely professional, advocacy. The last thing you want is an appellate decision saying you waived a colorable argument by abandoning the ruling as supposed error, whereas the ruling was not in fact erroneous. Moreover, you may have to defend any confession before the appellate court.

Particularly in the criminal context, "a confession [of error] does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed." *Young v. United States*, 315 U.S. 257, 258–59 (1942). Nor is a court bound by a stipulation on a question of law. *E.g.*, *Koch v. U.S. Dep't of Interior*, 47 F.3d 1015, 1018 (10th Cir. 1995).

Thus, be forewarned that the appellate court may independently review the issue to determine whether the ruling is indeed erroneous, as suggested in the appellee's confession of error. In *Georges v. United States*, 262 F.2d 426 (5th Cir. 1959), Circuit Judges Tuttle, Jones, and Wisdom did exactly that.

There, after being misadvised about the maximum sentencing consequences of his guilty plea, the defendant moved to withdraw it. The trial court denied the motion after a hearing. On appeal, the Assistant U.S. Attorney who represented the government at the hearing filed a "well prepared and persuasive brief" arguing for affirmance. *Id.* at 429.

After the brief was filed, however, the attorney, acting on orders from the Solicitor General of the United States, filed a confession of error reciting that opposition to the appeal was dropped based on the specific facts of the case and the erroneous underlying advice. *Id.* Nonetheless, the Fifth Circuit affirmed the order denying the motion to withdraw the plea, concluding it was implicit in that order that the trial court made findings different from those on which the confession of error was based and that the trial court had not abused its discretion in making those findings. *See id.* at 431–32.

It is not just criminal cases in which the appellate court scrutinizes a confession of error to be sure that reversal truly is warranted. One of our partners had a civil appeal in which he was unable to convince the client until the eve of oral argument that a confession of error should be filed. He filed the confession and assumed oral argument would be canceled as a result. It was not. Luckily, he checked the docket that morning, realized it had not been canceled, and rushed to the courthouse.

When the case was called, the appellate court asked several questions to assure itself that there was true error and to confirm the scope of the confession. Only then did the court issue its reversal of the order on appeal. So, do not take the filing of a confession of error as necessarily ending the appeal, and be sure it is in fact well taken!

But what if you have determined that there simply is no doubt at all that the trial court just got it dead wrong—at your trial counsel's urging—and you have no good-faith argument to support it on appeal? For example, the order contravenes a recent, now-controlling precedent in your jurisdiction that is directly on point. You have confirmed the state of the law, and there is simply no doubt that the court's stated reason for its ruling cannot stand under the existing law in your jurisdiction.

What then? Obviously, you must tell your client and describe the available options. In doing so, consider whether you have an obligation to opine on whether trial counsel committed malpractice in advising the legally incorrect argument. That question should be outside the scope of your representation, which was presumably limited by your engagement letter to handling the appeal of the order. *See, e.g.*, *Hartz v. Farrugia*, No. 06-3164, 2009 WL 901767, at *5 (E.D. La. Mar. 31, 2009), *aff'd*, 360 F. App'x 541 (5th Cir. 2010).

You must, on the other hand, disclose the constraints on you in defending the appeal that has been or will be filed from the trial court's order. You should explain that it is necessary to confess error with respect to the specific ruling on appeal. The client may decide to fire you, but you must alert your client to the problem and advise your client about the options available under the circumstances. Those options differ depending on the procedural posture of the case—whether the order is already final and a notice of appeal filed.

Begin by determining whether there are any alternative grounds to reach the same result that the trial court did. If there are, and no appeal has yet been filed, consider the possibility of confessing error to the trial court itself, telling the court it reached the right result, just on the wrong rationale. You will gain enormous credibility with the judge, who will appreciate being saved from an embarrassing reversal.

If the case is already on appeal, determine whether the trial record contains alternative grounds that can, under your jurisdiction's precedents, be considered by the appellate court as a basis to affirm the order as being right for any reason. If such grounds exist but were not raised below, you may be able to ask the appellate court to relinquish jurisdiction for the purpose of allowing the trial court to consider and pass on the alternative grounds while vacating the existing order on appeal.

Also, consider whether there is a good-faith argument that the controlling decision is wrong and should be overturned. For example, is there an intervening United States Supreme Court precedent or a subsequently enacted statute that shows the controlling decision should no longer be followed? Such an argument generally must be preserved at the trial level, even though that court itself may be bound by the existing law. Again, you may wish to ask the appellate court to relinquish jurisdiction to allow your client to advance this argument.

But what if there is nothing you can come up with to get your client to the same wonderful result as the present order? You must consider your professional obligations and duty of candor to the court.

It should be noted at the outset that different constraints may apply to lawyers representing defendants in criminal appeals. For example, if appointed counsel cannot find a nonfrivolous basis for appeal, it should request the court's permission to withdraw but must accompany that request with "a brief referring to anything in the record that might arguably support the appeal." *Anders v. California*, 386 U.S. 738, 744 (1967). In that circumstance, the appellate court will independently review the arguable bases, along with any raised by the defendant, to determine whether they would be frivolous if raised. *See, e.g.*, *United States v. Broches*, 261 F. App'x 897, 899 (7th Cir. 2008).

Public officials have a broad interest in assuring that courts reach the right result, not just the result that puts a *W* in the government's column. The United States Solicitor General is known and respected for confessing error by the lower court in his appellate briefs. This mark of integrity goes with the office, but it is a good one for all lawyers.

Indeed, the Model Rules require no less. Subsection (a) of Model Rule of Professional Conduct 3.3, Candor Toward the Tribunal, provides in relevant part as follows:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) 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.

Further, subsection (c) states that the duties in this rule "continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by" the confidentiality rule. Note the last requirement especially: It is no excuse that the trial is over by the time you take over and discover the error. You still must fix it.

What if the client does not want to confess error and wants you to try anything to hold on to its wonderful order? If there is a

good-faith argument, a lawyer has an obligation to be a zealous advocate in pursuit of his or her client's interests. *See, e.g.*, *Thompson v. Duke*, 940 F.2d 192, 195–96 (7th Cir. 1991). But, even then, the lawyer's duty of candor to the court requires disclosure of the contrary precedent to the court. You can, of course, withdraw as counsel if the client persists in instructing you not to do so. But you cannot stay in the case *and* not disclose the adverse precedent.

In *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 572 (Fla. 2005), the Supreme Court of Florida observed that "the basic principle that a lawyer's duty to his calling and to the administration of justice *far outweighs*—and must outweigh—even his obligation to his client." (emphasis added; internal quotation marks omitted). In emphasizing the ethical obligation of counsel to file a confession of error where necessary, the court declared that this is not an act of "throwing in the towel" but rather "the quintessentially *professional* act of admitting defeat when there is no chance of victory, or when victory will have been obtained at the price of integrity and truth." *Id.* at 571.

The court adopted the district court's soaring words to explain:

> The heart of all legal ethics is in the lawyer's duty of candor to a tribunal. It is an exacting duty with an imposing burden. Unlike many provisions of the disciplinary rules, which rely on the court or an opposing lawyer for their invocation, the duty of candor depends on self-regulation; every lawyer must spontaneously disclose contrary authority to a tribunal. It is counter-intuitive, cutting against the lawyer's principal role as an advocate. It also operates most inconveniently—that is, when victory seems within grasp. But it is precisely because of these things that the duty is so necessary.

Id. at 573 (internal quotation marks omitted).

And why would you not want to disclose the precedent? The other side or the court itself may well find it. Then you run the risk of a published appellate decision, forever in the books, telling the world you breached your professional obligations as a lawyer. You may even be sanctioned, with fees assessed against you personally.

In *Lieberman v. Lieberman*, No. 4D14-509, 2014 WL 6674733, at *1 (Fla. 4th Dist. Ct. App. Nov. 26, 2014) (per curiam), the court found that appellate counsel had defended a patently erroneously order, "transform[ing] this 'simple' matter into an unnecessary and protracted controversy by the failure of [counsel] to acknowledge clear and unambiguous controlling law directly adverse to his client's position." The court awarded appellate attorney fees as a sanction because counsel "should have confessed error" and the
"[f]ailure to do so was a self-evident violation of counsel's duty." *Id.* at *2. The court referred to counsel by name throughout the opinion.

Moreover, beware of trying desperately to support the order on appeal in any conceivable way. That may result in sanctions and an appellate decision that will reflect badly on you. *See, e.g.*, *Gallegos v. Jicarilla Apache Nation*, 97 F. App'x 806, 814 (10th Cir. 2003) (describing argument on appeal as "at best bizarre, and more likely, a grave mischaracterization" of the facts); *Reynolds v. Roberts*, 207 F.3d 1288, 1301–2 (11th Cir. 2000) (issuing order to show cause why appellee's counsel should not be sanctioned for defending ruling on appeal "with baseless arguments").

It is not always the trial court's error that needs to be brought to the attention of the appellate court. Years ago I had an appeal in the intermediate state appellate court in which I had relied heavily on a much earlier—and long-final—decision of that court. Just days before the oral argument, a routine check of the cases I had cited turned up a new state supreme court decision disapproving the decision I had relied on and holding that decision was in conflict with the newly announced law on the issue.

Although I did not have to confess that the judgment I was defending was erroneous, I did have to call the new, now-controlling decision to the attention of the appellate court and adapt my argument accordingly. Thank heavens for right-for-any-reason arguments, which had been preserved in the briefing.

Once you and your client have determined there is no other alternative but to confess error, when should you do so? The sooner the better. Consider communicating with opposing counsel as to what you plan to file. You may be able to stipulate and thereby avoid the expense and time of the appeal, while conserving scarce judicial resources. You will gain the respect of your colleague, as well as that of the court.

Carefully consider what the scope of the confession of error should be. In one recent civil appeal my colleagues and I defended, we acknowledged that the judgment had to be reversed for one particular reason raised by the appellant. We went

on to argue, however, that the appellant's other arguments were without merit. The appellate court wrote a short opinion, agreeing that the other issues raised by the appellant were not bases for reversal, and ruled only in accordance with our limited confession. So, even though the judgment was reversed, our trial counsel did not have to deal with the other issues on remand.

You do not, however, want to try to game the system by unscrupulously framing the scope of the confession. One case we know about really backfired on both the lawyer and client in that regard. Shortly before oral argument, the appellee filed a very narrow confession of error acknowledging that the record on appeal did not reflect the performance of a particular contractual obligation. On remand, it would have been a simple matter to come forward with record evidence that the obligation had in fact been performed. The appellee obviously hoped to convince the trial court on remand to constrain the proceedings to that narrow issue of fact, rather than the issues raised by the appellant. The appellate court saw through the confession as an attempt to set up a slam-dunk case on remand: The court refused to accept the narrow confession of error and instead directed the appellee to advise whether it was confessing the broader issue raised by the appellant or none at all.

The moral of this story is that there is a right way to confess error and a wrong way. Had the appellee acknowledged and addressed the other issues head-on in addition to its confession of error, the court might well have dealt with them and rendered an opinion directly identifying any issues that remain for the trial court on remand, as happened in our partner's case.

Conclusion

Life is short, and no appeal is worth endangering your professional reputation. Always honor your duty of candor to the court and confess error—albeit carefully—where you must. And take comfort from the fact that, by doing so, you will gain the respect of your fellow lawyers as well as the judges on the court. Your name even may be enshrined in the law books as a member of an honored profession who served it well.