RESPONDING TO APPELLATE LAWYERS WHO CROSS THE LINE

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Although the parties and their lawyers had no direct contact in the months that had passed since trial, the flames of bitterness burned brightly on appeal. The amount in controversy was large. Feelings were hard. Appellate briefs and motions asserted charges and countercharges of straying outside the record and misrepresenting the facts. Counsel accused each other of advancing "specious," "outrageous," and "disingenuous" arguments, founded on "wholesale misrepresentations" if not outright "lies."

An extreme scenario? Yes. Typical of appellate practice? No. But such counterproductive diversions occur with disturbing frequency, even in cases involving experienced and skilled appellate lawyers — lawyers who should know better.

There is no shortage of well-written and informative articles identifying such unprofessional, if not unethical, conduct. The focus of this Article is to suggest specific responses when opposing appellate counsel approaches or crosses the line.

DEALING WITH COUNSEL WHO STRAYS FROM OR DISREGARDS THE RECORD

The governing rule is straightforward and easy to recite. Parties are forbidden from presenting to the appellate court any matters outside the record of the lower tribunal: "That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court."[1] Indeed, federal and state appellate rules specifically require references to the record.[2] Contrary to the

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1. *Altchiler v. Dept. of Prof. Reg.*, 442 S.2d 349, 350 (Fla. Dist. App. 1st 1983).
2. Fed. R. App. P. 28(a)(7) (2002) (requiring that appellant's brief contain "appropri-

position advanced by an attorney presenting an oral argument the Author recently witnessed, reliance on information outside of the record does not become permissible on the ground that opposing counsel has broken the rule first. There is no "nanny-nanny-boo-boo" exception to the rule.

In the usual case, extra-record matters on which attorneys improperly rely are not manufactured from whole cloth.[3] The information usually exists *somewhere* in *some form*. One recurring violation is the attorney's attempt to rely on the record in a different case, such as a criminal prosecution of one party.[4] As a general rule, unless the record of the other case is part of the trial record and is brought to the attention of the trial court, the parties cannot rely on it and the court cannot consider it on appeal.[5] The argument that the appellate court may take judicial notice of the record in the other proceeding will fail.[6]

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ate references to the record"); 11th Cir. R. 28–1(i) (2002) (stating that "every assertion regarding matter in the record shall be supported by a reference to . . . the original record where the matter relied upon is to be found"); Fla. R. App. P. 9.210(b)(3) (2002) (instructing that appellate briefs include "[r]eferences to the appropriate volume and pages of the record or transcript"); *In re Order as to Sanctions*, 495 S.2d 187, 187 (Fla. Dist. App. 2d 1986) (indicating that the "types of misconduct which may subject an attorney to sanctions" include filing a brief "without record references" and making misrepresentations of fact).

3. For a case in which blatantly false assertions of fact were made, see *Hutchins v. Hutchins*, 501 S.2d 722, 723 (Fla. Dist. App. 5th 1987) (Striking falsities and sanctioning counsel, the court stated, "We are concerned that counsel who appear before this court clearly understand that briefs submitted to us, upon which we must rely so heavily in the discharge of our appellate function, be truthful and fair in all respects.").

4. *See Trans-Sterling, Inc. v. Bible*, 804 F.2d 525, 528 (9th Cir. 1986) (denying motion to supplement record or, alternatively, to take judicial notice of dismissal of counts of criminal indictment against a party, and striking portions of a brief's appendix containing "a copy of a criminal indictment in another, unrelated case").

5. Evan J. Langbein, *"The Record, Counsel, Just the Record" — A Matter of Professionalism*, 9 Record 7, 9–10 (Spring 2001) (citing *Young v. City of Augusta*, 59 F.3d 1160, 1168 (11th Cir. 1995) (instructing that "[g]enerally, a reviewing court will not consult the evidence or record of another case if it was not first considered in the district court, although it has that power"); *In re Adoption of Freeman*, 90 S.2d 109, 110–111 (Fla. 1956); *Abichandani v. Related Homes of Tampa, Inc.*, 696 S.2d 802, 803 (Fla. Dist. App. 2d 1997)); *Matthews v. Matthews*, 133 S.2d 90, 96–97 (Fla. Dist. App. 2d 1961); *Bergeron Land Dev., Inc. v. Knight*, 307 S.2d 240, 241 (Fla. Dist. App. 4th 1975)).

6. Langbein, *supra* n. 5, at 8–9; *Hillsborough County Bd. of County Commrs. v. Pub. Employees Rel. Commn.*, 424 S.2d 132, 134 (Fla. Dist. App. 1st 1982) (stating that "an appellate court may not take judicial notice of the record in a separate proceeding"); *Weintraub v. Weintraub*, 756 S.2d 1092, 1092 (Fla. Dist. App. 3d 1092) (denying motion to take judicial notice of the record in an unrelated case). An appellate court may, however, take judicial "notice of proceedings in other courts" that are directly related to the case before it on appeal. *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (citing *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172

At times, parties rely on information that is technically in the record, but still not properly before the appellate court on review. For example, appellate counsel may not rely on unsworn statements of fact made by a party's attorney.[7] Moreover, the side that lost in the trial court may not recite the *contested* testimony of its witnesses as facts in violation of the standard of review.[8] Additionally, materials that were not before the trial court for consideration at the time of rendition of the order on review, such as attachments to a post-trial motion asserting facts for the first time, may not be considered on appeal.[9]

How should one respond to the above transgressions or to the innumerable other ways in which the prohibition against presenting matters outside the record is violated? One approach is literally to "call them on it." If one receives a brief that appears to contain references to facts not supported by the record, place a tele-

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(10th Cir. 1979)). Appellate courts also may "take judicial notice of another court's opinion — not for the truth of the facts recited therein, but for the existence of the opinion." *S. Cross Overseas Agencies, Inc. v. Wah Kwong Ship. Group Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999); *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 207 n. 5 (9th Cir. 1995) (noting that "[j]udicial notice is properly taken of orders and decisions made by other courts or administrative agencies").

7. *Sabina v. Dahlia Corp.*, 650 S.2d 96, 99 (Fla. Dist. App. 2d 1995); *Blimpie Capital Venture, Inc. v. Palm Plaza Partners, Ltd.*, 636 S.2d 838, 840 (Fla. Dist. App. 2d 1994) (stating that a "court cannot make a factual determination based on an attorney's unsworn statements"); *but see Centennial Ins. Co. v. Fulton*, 532 S.2d 1329, 1331 (Fla. Dist. App. 2d 1988) (unwilling "to hold that representations of counsel as an officer of the court mean nothing" when there was no "evidence nor even any argument which challenged the accuracy of the attorney's representation").

8. *Avitia v. Metro. Club of Chi., Inc.*, 49 F.3d 1219, 1224 (7th Cir. 1995). A statement of fact that "treats contested testimony of the losing party's witnesses as 'facts' violates" the appellate rules. *Id*.

> We are not sticklers, precisians, nitpickers, or sadists. But in an era of swollen appellate dockets, courts are entitled to insist on meticulous compliance with rules sensibly designed to make appellate briefs as valuable an aid to the decisional process as they can be. A misleading statement of facts increases the opponent's work, our work, and the risk of error.

Id.

9. *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1047 (6th Cir. 2001) (refusing to consider evidence in deposition that "was never entered in the record or presented to the district court"); *Holmberg v. Baxter Healthcare Corp.*, 901 F.2d 1387, 1392 n. 4 (7th Cir. 1990) (denying motion to supplement record as an attempt "to build a new record on appeal" and granting motion to strike portions of the brief referring to the "facts outside the record"); *Riley v. City of Montgomery*, 104 F.3d 1247, 1251 n. 4 (11th Cir. 1997) (granting motion to strike portions of the brief referring to evidence, including a witness's deposition "that was submitted to the district court after it had granted . . . motions for summary judgment and, accordingly, [had been] stricken by the district court as untimely"); *Ballard Med. Prods. v. Wright*, 821 F.2d 642, 643 (Fed. Cir. 1987) (stating that citation to documents filed in district court after final judgment was entered is improper).

phone call to opposing counsel. Ask opposing counsel to furnish record citations for the facts at issue. If opposing counsel cannot do so, agree to permit opposing counsel to file a corrected brief identical to the original but with the extra-record information omitted.

There is certainly no obligation to take this approach, and the lawyer who breaks the appellate rules should not complain that opposing counsel did not call the violation to his or her attention before exposing it to the court. But, taking the high road has advantages. For example, it makes review easier for the court and for the appellate attorney who spots the violation. If a corrected brief is filed, the overburdened appellate court will not be required to spend time resolving a factual dispute. Innocent appellate counsel will be able to focus on the merits of the appeal, rather than to devote time, and perhaps precious pages of a brief, to the often tedious and painstaking task of explaining exactly how the other side has exceeded the bounds of the record or otherwise misstated the facts.

In some cases, however, there may be no reason to telephone opposing counsel. Experience may indicate that such a call would be to no avail. Or, the offending brief may be so riddled with misstatements that it is evident a conference would be a waste of time because the other side is not interested in accuracy.

In these situations, or others in which it is left to counsel to set the record straight, counsel should do so with specificity and brevity. Most importantly, if the offending statements appear in an initial brief or in an answer brief, which means the innocent party still has an answer or reply brief to file, do not file a motion to strike. Instead, use the answer or reply brief to identify and correct the misstatements.[10]

There are two reasons why responding by brief is preferred to responding by motion. First, the appellate courts are deluged with motions. They do not need, or want, to receive more of them, even if they are meritorious. Second, and of equal importance, if a motion to strike is used, the fudging attorney will have an opportu-

10. Fla. R. App. P. 9.210(c)–(d) (indicating that the contents of an answer brief or reply brief may argue the facts).

nity to file a response.[11] Such a response is more likely to further muddy the waters than to acknowledge a mistake.

If no answer or reply brief remains to be filed and the misstatements are serious enough that the decisional process could be affected if they are left uncorrected, counsel is left with little choice but to file a motion to strike.[12] In this situation, the violation of the rule will be argued outside the context of the brief. Counsel must be certain to explain sufficient facts and issues so that the misstatements are put into context and their importance is explained. The motion should not, however, argue the merits of the appeal.

DEALING WITH COUNSEL WHO USES LANGUAGE THAT CROSSES THE LINE

Appellate attorneys, like all attorneys, should not use derogatory, exaggerated, or excessively combative language to describe the parties, the trial court, opposing counsel, or opposing counsel's arguments. Using such extreme prose subjects the offending paper to striking and exposes the offending attorney to sanctions.[13] But, what language goes too far? Certainly one may not impugn the honesty and integrity of opposing counsel,[14] indulge in uncomplimentary personality references when discussing opposing counsel,[15] criticize an argument as a flimsy excuse or meaningless quibbling,[16] or imply "that the trial judge is a part of the crime involved."[17]

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11. Fla. R. App. P. 9.300(a) (stating that "[a] party may serve 1 response to a motion"); *id*. 27(a)(3)(A) (indicating that "[a]ny party may file a response to a motion").

12. *Id*. 9.210(a) (stating that only an "initial brief, the answer brief, a reply brief, and a cross-reply brief" are allowed); Fed. R. App. P. 28(a)–(c) (discussing the appellant's brief, the appellee's brief, and reply briefs).

13. *E.g. Mullen v. Galati*, 843 F.2d 293, 294 (8th Cir. 1988) (ordering pro se appellant to explain why court should not charge costs against appellant for using "improvident, insolent and scandalous language" in appellate brief, and why such "remarks should not be stricken from appellant's brief"); *Davis v. State ex rel. Cromwell*, 23 S.2d 85, 87 (Fla. 1945) (granting motion to strike for use of the words "unconscientious" and "offensive personality" when describing opposing counsel); *Easton v. Weir*, 228 S.2d 396, 396 (Fla. Dist. App. 2d 1969) (expunging language in brief commenting on counsel's honesty and integrity); *Sabawi v. Carpentier*, 767 S.2d 585, 586 (Fla. Dist. App. 5th 2000) (stating that the purpose of the facts in a brief is to inform the court of pertinent issues only).

14. *Easton*, 228 S.2d at 396.

15. *Davis*, 23 S.2d at 87.

16. *Snyder v. Sec. of Health & Human Servs.*, 117 F.3d 545, 549 (Fed. Cir. 1997).

17. *Mullen*, 843 F.2d at 294.

The best course is to steer clear of inflammatory language in all cases, even if the provocative words are unlikely to be stricken or draw sanctions. That is, even if the shoe fits, do not use terms such as "fallacious," "specious," "ridiculous," "incredible," "lie," "misrepresent," "silly," "outrageous," "disingenuous," "misleading," or words of similar ilk. Such language will not advance a party's cause. It is always more effective and more efficient to plainly and calmly explain the uncolored truth. Appellate courts do not care for histrionics. Their use may be deemed more illustrative of the caliber of the name-caller's arguments than the integrity of opposing counsel or the merit of opposing counsel's position.

What, then, should counsel do when the client, the court, or counsel is on the receiving end of such disparagement? As in the case of assertions that exceed the record or misstate the facts, an answer or reply brief may be used to explain why the position the pejorative language attempts to bolster is incorrect.[18] A positive and persuasive rebuttal should have even greater force when juxtaposed against unwarranted aspersions. On the other hand, responding in kind with similarly exaggerated language will reflect poorly on appellate counsel and the client.

If there is no remaining responsive brief, there is ordinarily little reason to file a motion to strike based solely on the opponent's use of offensive language. Again, appellate courts receive far more motions than they should, and they recognize disparaging remarks for what they are. A motion to strike based solely on name-calling may seem unnecessary or even hypersensitive. On the other hand, if a motion to strike must be filed on *another* ground, such as the factual misstatements addressed above, consider expanding the motion to include opposing counsel's use of indecorous language.[19] It may well be that the offensive language is so intertwined with the misstatements that it is the focal point of the motion to strike anyway.

18. *Supra* n. 10 and accompanying text (discussing responding by brief as opposed to responding by motion).

19. *Supra* nn. 11–12 and accompanying text (discussing responding to opposing counsel with a motion).

CONCLUSION

How does the above suggested approach of making measured and modest responses to lawyers who go outside the line square with the duty of zealous representation? Perfectly well. The goal of zealous representation — or any representation — is to win the case. Taking the high road and refusing to respond in kind to dishonest or contentious counsel shows the court confidence in one's position and professionalism. It also builds credibility. While this approach will not fill a gap in the record or substitute for a silver-bullet case, attorneys who follow it will give their clients the best chance for success on appeal.