THE DUTY OF DEFENSE COUNSEL TO RAISE FRIVOLOUS MOTIONS IN CRIMINAL CASES

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To The

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ANNUAL CRIMINAL DEFENSE CONFERENCE

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I. Criminal Cases Are Different

A. Who here has not ever had the thought, the desire to commit a crime?

B. Not all "criminal" acts are illegal: Justification; Insanity; Stand Your Ground.

C. Good People Dream What Bad People Do.

D. There is no reprieve once the sentence is fully served.

II. Utilize all your skills

A. Who you are and how you got there may cost or save a life, liberty, or one's reputation.

B. Necessity is the mother of invention.

C. Success has many Fathers, failure is an orphan
('Tis far better to share the glory than shoulder the loss alone).

D. Focus.

E. Fear not Failure.

III. Trained to Push the Envelope

A. While "[I]t is emphatically the province and duty of the judicial department to say what the law is," Marbury v. Madison, 5 U.S. 137, 177 (1803) it is our solemn responsibility – and no one else's – to **zealously** defend even the righteously accused. We need to look no further than the Preamble to the Wisconsin Rules of Professional Conduct for Attorneys. See Appendix at p.1.

B. Wisconsin's Rules of Professional Conduct charge us with the duty to not knowingly advance an unwarranted defense or advance a factual position "unless there is a basis for doing so which is not frivolous." For us, a special rule applies in criminal cases. See Appendix at pp. 5-6 [SCR 20:3.1 & 3.3].

C. Who here has not entered a plea of Not Guilty?

IV. You **can** make a difference

A. Believe it: PMA.

B. In that courtroom, who else, sworn to uphold the law, really cares about the poor soul sitting next to you? Only you!

C. What means **frivolous**?

1. A **frivolous** claim or defense is one based on an "indisputably meritless legal theory," an "outlandish legal theory," one whose "factual contentions are clearly baseless" such as a claim describing "fantastic or delusional scenarios." Neitzke v. Williams, 490 U.S. 319, 327-328, 109 S.Ct. 1827, 1833 (1989).

2. In determining whether an attorney's actions were frivolous, the court in In re Estate of Bilsie, 302 N.W.2d 508, 514 n.4 (Wis. Ct. App. 1981) observed that "[t]he United States Supreme Court has allowed sanctions against frivolous actions without defining the term except by its context."The court also noted that "[e]thical considerations in Wisconsin's Code of Professional Responsibility, SCRch. 20, use the term 'frivolous' without definition except by context." Id.

Providing a working definition, Wisconsin case law asserts that "[a] claim is frivolous . . . if the party or attorney 'knew or should have known' that the claim was 'without any reasonable basis in law or equity.'" Howell v. Denomie, 698 N.W.2d 621, 625-26 (Wis. 2005) (citing Stern v. Thompson & Coates, Ltd., 517 N.W.2d 658, 666 (Wis. 1994)).

D. When filed these cases were frivolous.

1. In Brown v. Bd. of Educ., 347 U.S. 483 (1954), the Supreme Court noted that since Plessy v. Ferguson, 163 U.S. 537 (1896), "American courts have since labored with the doctrine [of 'separate but equal'] **for over half a century**."Brown, 347 U.S. at 490-91 (emphasis added). Despite the duration of Plessy, the Supreme Court overruled it and held "that in the field of public education the doctrine of 'separate but equal' has no place." Brown, 347 U.S. at 495.

2. In United States v. Darby, 312 U.S. 100 (1941), the Supreme Court overruled the 23 year-old precedent ofHammer v. Dagenhart, 247 U.S. 251 (1918), which held that it was unconstitutional for Congress to use the Commerce Clause toregulate child labor. SeeDarby, 312 U.S. at 116-17 ("Hammer v. Dagenhart . . . should be and is now overruled."); seealsoHammer, 247 U.S. at 277 ("[W]e hold that this lawexceeds the constitutional authority of Congress.").

3. Erie R.R. v. Tompkins, 304 U.S. 64 (1938): In that landmark case, "the Supreme Court overruled a precedent that had been applied every day in every federal trial court **for nearly a century**." Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 Hofstra L. Rev. 1167, 1174 (2003) (emphasis added). That precedent being that "federal courts exercising jurisdiction . . . [in] diversity . . . are free to exercise an independent judgment as to what the common law of the State is[.]" Erie R.R., 304 U.S. at 71.

In his decision to overrule this doctrine, Justice Brandeis, quoting Justice Field's opinion in Baltimore & O. R. Co. v. Baugh, 149 U.S. 368, 401 (1893), noted that "I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, **in many instances**, unhesitatingly and confidently, but I think now **erroneously**, **repeated** the same doctrine.Erie R. R., 304 U.S. 64 at 78 (emphasis added).

4. In summary, numerous examples show that a claim that is contrary to established law is not frivolous if it is supported by a reasoned, colorable argument for change in the law. SeeHarrell v. United States, 1993 U.S. App. LEXIS 22907, at *6, No. 92-3510 (7th Cir. Ill. 1993)("A claim is frivolous if it is contrary to established law **and** unsupported by a reasoned, colorable argument for change in the law.") (emphasis added).

a. **What means colorable?**

"That which is in appearance only, and not in reality, what it purports to be, hence counterfeit, feigned, having the appearance of truth." Black's Law Dictionary 265 (6th ed. 1999) (citing Windle v. Flinn, 196 Ore. 654, 676 (1952)) .

5. State v. Silva, 259 So. 2d 153 (Fla. 1972): Jury Selection

6. Vicknair v. United States, 617 F.2d 1129 (5th Cir. Fla. 1980): Jeopardy Assessment/Tax Year-Termination

7. Rosin v. United States, No. 11-14391-AA (11th Cir. filed Sept. 12, 2012): **Initial Brief of Appellant**; [Logical] Extension of Lafler v. Cooper, 132 S.Ct. 1376 (2012); Missouri v. Frye, 132 S.Ct. 1399 (2012).

E. WHAT MEANS ZEALOUS?

1. "Filled with zeal" as in "religious zeal," or "revolutionary ardor," "excessive fervor to do something or accomplish some end." "A zeal for liberty is sometimes an eagerness to subvert with little care what shall be established." Samuel Johnson.

2. As Lord Brougham has so wisely observed: "An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion." The Trial at Large of Her Majesty, Caroline Amelia Elizabeth, Queen of Great Britain; In The House of Lords, On Charges of Adulterous Intercourse 3 (London, Printed for T. Kelly 1821).

3. There is an apparent lack of case lawdefining "zealous advocacy."Yet, despite not having a working definition for what it **is**, courts do weigh in on what it **is not**. SeeJacobson v. Garaas, 2002 ND 181, P24-25 (N.D. 2002) ("[T]o be zealous is not to be uncivil . . . There is a line of demarcation between zealous representation of a client and unethical conduct.)"; seealsoIn re Marriage of Davenport, 194 Cal. App. 4th 1507, 1537 (Cal. App. 1st Dist. 2011) ("[Z]ealous advocacy does not equate with 'attack dog' or 'scorched earth'; nor does it mean lack of civility . . . Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive.").

F. "Justice, Justice Shalt Thou Pursue." Deut. 16:20 (or are we only in Courts of Law, not Justice?).

G. The comments to Rule 3.1 of the American Bar Association Model Rules of Professional Conduct note as follows:

> The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. **However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.**[Emphasis added].

* * * *

> The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients positions. **Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail.**[Emphasis added].

a. The Supreme Court has noted that"**[i]ncremental changes in settled rules of law often result from litigation**. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help. There is, and should be, the strongest presumption of open access to all levels of the judicial system. **Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means**. This Court, above all, should uphold the principle of open access.Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1070-71 (1985) (Stevens, J., joined byBrennan, Marshall and Blackman, concurring) (emphasis added).

b. In fact, some case law suggests that the duty to zealousy advance the interests of a client includes making arguments that counsel does not believe will prevail. SeeMcDowell v. Waldron, 920 S.W.2d 555, 561 (Mo. Ct. App. 1996) ("In the comment to Rule 3.1 of the Missouri Rules of Professional conduct, our Supreme Court States:

> > The advocate has a duty to use legal procedure for the fullest benefit of the client's cause . . . Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail.

Clearly, it would be manifestly unfair to charge a lawyer with the duty to zealously assert positions which he does not believe will ultimately prevail, and then contend that he is bound by those arguments when sued by his client."); State v. Nakatsu, 2011 Haw. App. LEXIS 491, at *4-5 (May 16, 2011) ("As counsel himself recognizes, the source of his fee cannot interfere with his obligation to zealously represent his client[.] Moreover, counsel does not have the luxury of presenting only those arguments with which he agrees.").

H. Monroe H. Freedman, *The Professional Obligation to Raise **Frivolous** Issues in Death Penalty Cases*, 31 Hofstra L. Rev. 1167 (2003) (see Appendix pp. 9-22). [Emphasis added].