

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

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Ethics vs. Professionalism

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*Professionalism and civility are not optional behaviors to be displayed only when one is having a good day. Professionalism and civility are the mainstays of our profession and the foundations upon which lawyers practice law.<sup>1</sup>*

The foundation of my remarks today rests on the following three propositions:

- (1) For over a century, the legal profession has been increasing the distance between professional ethics and professionalism to the point where little overlap exists.
- (2) One of the unintended consequences of decoupling ethics and professionalism has been the diminution of the public's respect for confidence in the legal system.
- (3) A renewed emphasis on professionalism is the only way to begin restoring the public's confidence and trust.

I.

THE PUBLIC'S PERCEPTION OF THE LEGAL PROFESSION

The public has always been ambivalent about lawyers and always will be. For example, in his commencement address at Yale College on July 25, 1776, the Reverend Timothy Dwight IV (who later became Yale's eighth president) warned the graduating students about "meanness" and "infernal knavery" that "multiplies needless litigations," "retards the operation of justice," and "postpones trial to glean the last emptyings of a client's pocket."

However, about sixty years later, Alexis de Tocqueville, painted an entirely different picture of lawyers and judges in his monumental work *Democracy in America*. He observed:

[T]he authority [the Americans] have entrusted to members of the legal profession, and the influence which these individuals exercise in the Government, is the most powerful existing security against the excesses of democracy.

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<sup>1</sup>*Wisner v. Laney*, 984 N.E.2d 1201, 1203 (Ind. 2012).

He continued

If I were asked where I place the American aristocracy, I should reply without hesitation that it is not composed of the rich, who are united together by no common tie but that it occupies the judicial bench and the bar.

De Tocqueville's lofty opinion of lawyers is not shared by Americans today. Public opinion polls reflect a lukewarm, if not negative, view of the legal profession.

- According to most polls, the public continues to have the greatest trust and confidence in the courts compared to the other two branches of government.
- However, the Gallup Organization polling reflects that the rating of lawyers' honesty has declined during the last 40 years:

1976	Very High/High	25%	Very Low/Low	26%
2018	Very High/High	19%	Very Low/Low	28%

- In a 2018 Rasmussen poll, 43% of the respondents stated that they did not trust lawyers.
- In a 2013 Pew Research Center poll, the lawyers were ranked at the bottom of professions contributing a lot of society.
- A recent ABA survey reported that  
74% of the respondents believed lawyers were more interested in winning than in seeing that justice is done.  
60% believed that lawyers were more interested in making money than in serving clients.  
51% agreed that society would be better off with fewer lawyers.
- Finally, 91% of the respondents in a recent Harris poll stated that legal services were too expensive.  
22% reported that they had a legal problem within the past year that required legal assistance, yet only 12% actually hired a lawyer.  
69% responded that they would use online legal services if it would save them money.

The cultural image of the legal profession portrayed by the entertainment media reflects the same erosion of the public's trust and confidence in lawyers.

In the mid-Twentieth Century, lawyers and judges were depicted as noble figures. Examples include: Atticus Finch in *To Kill a Mockingbird* (Gregory Peck in the movie and Jeff Daniels in the play), even though Harper Lee added new facets to his character in *Go Set a Watchman*; Hans Rolfe (Maximillian Schell in *Judgment at Nuremberg*); Chief Judge Dan Haywood (Spencer Tracey in *Judgment at Nuremberg*); and Lawrence Preston (played by E.G. Marshall in the early '60s television show *The Defenders*); and Bart Matthews (played by Reed Hadley in the mid-50s television show *The Public Defender*).

However, in more recent times, it has become more difficult to find lawyers and judges in popular entertainment acting with professionalism and civility. For every Jack McCoy (Sam Waterston in *Law and Order*), there is an Arnie Becker (Corbin Bernsen in *L.A. Law*) or a Patricia G. Hewes (Glenn Close in *Damages*) or a Billy McBride (Billy Bob Thornton in *Goliath*) or a Saul Goodman (Bob Odenkirk in *Better Call Saul*).

We should not be too hasty in placing the blame on the entertainment industry for the erosion of our image. In a 2012 poll commissioned by the American College of Trial Lawyers, 44% of the respondents stated that the ethics displayed by television lawyers was better than real world lawyers, while 41% stated that it was about the same.

These fictional depictions of judges and lawyers are not documentaries. They are not intended to provide an accurate account of what lawyers and judges actually do or their true value to society. Television and motion picture viewers do not watch these shows because they want to learn more about our legal system but because they want to be entertained. The milieu in which lawyers and judges work – conflict resolution – provides a template for the creation of entertaining fictional storylines.

This point has been made clearly and convincingly by Craig Turk, an Emmy Award, Golden Globe Award, and Writers Guild Award-nominated writer and producer, whose credits include *The Guardian*, *Cold Case*, *Law and Order*, *Boston Legal*, *Private Practice*, *The Good Wife*, *FBI*, and *The Code*. Before embarking on his entertainment career, Craig earned his law degree from Harvard and served as general counsel for John McCain's 2000 presidential campaign.

At a 2011 American Inns of Court symposium in Washington, Craig was asked why he focused his attention on lawyers and doctors. He responded that he was competing with *Ice Road Truckers* (a popular show on the History Channel). Then he asked rhetorically, "can you imagine trying to write a popular weekly show about an architect or an engineer?"

Analyzing what the American legal community has done – or has not done – to cause the decline in the public's trust and confidence in the legal profession is complex, controversial, and beyond the scope of this presentation. While I do not have a prescription to cure the condition, I am prepared to suggest one of the causes and to propose a possible response.

## II.

### THE DISCONNECT BETWEEN PROFESSIONAL ETHICS AND PROFESSIONALISM

The Canons of Professional Ethics were promulgated in 1908. Their purpose was to address concerns over the profession's commercialization and its low public esteem. As Professor Benjamin Barton of the University of Tennessee College of Law has noted, these Canons contained provisions that were “broadly moral,” “practical,” and “hortatory.”<sup>2</sup>

However, with the adoption of the Model Code of Professional Responsibility in 1969, the general advice (referred to as “canons” and “ethical considerations”) was separated from the specific mandatory minimums (referred to as “disciplinary rules”). As a result, the Model Code contained some provisions that were hortatory and others that were enforceable. The moral and ethical provisions were physically placed in a separate category from the enforceable minimum rules. Accordingly, in the words of Professor Barton, “the Disciplinary Rules govern lawyer conduct, and the Canons and the Ethical Considerations [were] relegated to food for thought.”<sup>3</sup>

The final step occurred with the adoption of the Model Rules of Professional Conduct in 1983. These rules “jettisoned the broadly moral or ethical [provisions in the Model Code] in favor of black letter minimums of lawyer conduct” that amount to a “quasi-criminal set of rules.”<sup>4</sup>

While the goals of these changes can be debated, it is commonly asserted that one goal is to increase the number of lawyers who know and follow the minimum standards of the profession. Two questions occur to me. First, is that enough? Second, how are we doing? My answers are “no, accomplishing this goal is not enough” and “our current efforts may be making the problem worse.”

Professor Barton provides three rationales for these answers. First, the current Model Rules' focus on the narrow question – what am I *allowed* to do? – can easily eclipse broader moral questions, such as what *should* I do? or is it the *right thing* to do?<sup>5</sup> Second, the current gap between minimum standards and a broader conception of professionalism causes cynicism and disillusionment among law students, as well as the bench and bar.<sup>6</sup> Finally, lawyers are trained not only to analyze the boundary between permissible and impermissible behavior, but also to consider the odds of being caught and the likely punishment. When rules are not enforced, persons have less moral compunction about

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<sup>2</sup>Benjamin H. Barton, *The ABA, The Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach to the Canons*, 83 N.C.L. Rev. 411, 430 (2005) (“Barton”).

<sup>3</sup>Barton, 83 N.C.L. Rev. at 436-37.

<sup>4</sup>Barton, 83 N.C.L. Rev. at 411, 438.

<sup>5</sup>Barton, 83 N.C.L. Rev. at 454.

<sup>6</sup>Barton, 83 N.C.L. Rev. at 444-46.

violating them. Because the minimum ethics rules are notoriously under-enforced in Tennessee and elsewhere, the odds that lawyers who do not fear reprisals will follow them are decreased.<sup>7</sup>

### III.

#### A LAWYER'S BASIC DUTIES

There is little dispute that lawyers owe duties to their clients as well as to the courts and their opposing parties. A lawyer's core duties to a client include: (1) the duty of competence;<sup>8</sup> (2) the duty to preserve a client's private information and to properly invoke privilege during discovery and trial;<sup>9</sup> (3) the duty to avoid conflicts between a client's interests and those of the lawyer or other parties represented by the lawyer;<sup>10</sup> and (4) the duty to zealously represent a client's interests.<sup>11</sup> The duty of "zealous advocacy" necessarily includes the first three core duties, but, in the minds of some, it suggests something more than simply the pursuit of excellence. For some practitioners, zealous advocacy connotes a strong desire to win and to do everything and anything necessary to accomplish a client's goals.<sup>12</sup>

A lawyer's core duties to the courts and opposing parties include: (1) the duty to behave reasonably, including acting with respect to the court and with civility to opposing parties;<sup>13</sup> (2) the duty to tell the truth both as to law and to fact;<sup>14</sup> (3) the duty to assert only claims and defenses that have some objective merit;<sup>15</sup> (4) the duty of proper motive;<sup>16</sup> and

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<sup>7</sup>Barton, 83 N.C.L. Rev. at 423.

<sup>8</sup>Tenn. Sup. Ct. R. 8, RPC 1.1. Hereafter, references to Tennessee's Rules of Professional Conduct will be cited using "RPC" only.

<sup>9</sup>RPC 1.6.

<sup>10</sup>RPC 1.7-1.9.

<sup>11</sup>Tenn. Sup. Ct. R. 8, Preamble ¶ 3.

<sup>12</sup>Carol Rice Andrews, *Ethical Limits on Civil Litigation Advocacy: A Historical Perspective*, 63 Case W. Res. L. Rev. 381, 386 (2012) ("Andrews").

<sup>13</sup>RPC 3.4, 3.5.

<sup>14</sup>RPC 3.3, 4.1.

<sup>15</sup>RPC 3.1.

<sup>16</sup>RPC 3.2, cmt. 1. The Tennessee Supreme Court has stated that "[a]n attorney who institutes meritless litigation or files suit for an improper purpose may also face sanctions

(5) the duty of just cause. While the duty of just cause is difficult to define, it includes the four other duties to the court and the opposing party. Thus, a cause or tactic is not just if it is not reasonable, honest, objectively meritorious, and properly motivated.<sup>17</sup>

Lawyers, judges, and legal scholars are regularly called upon to police the ethical boundaries of legal advocacy. Most often, the issues arise from the tension between the duty of zealous advocacy on a client's behalf and the duty of just cause.

The Tennessee Rules of Professional Conduct accentuate the importance of a lawyer's duties to the court and opposing counsel at the expense of the lawyer's duty to be a zealous advocate. While the Model Code of Professional Responsibility formerly required zealous advocacy as a black letter rule,<sup>18</sup> the current Rules of Professional Conduct do not. The strongest statement regarding zealous advocacy appears in the Preamble which describes zealous advocacy as one of the fundamental roles of a lawyer.<sup>19</sup> However, a comment to RPC 1.3 also states:

A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy on the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client . . . The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.<sup>20</sup>

Under Tennessee's current Rules of Professional Conduct, like similar rules in most other states, lawyers have a duty to be diligent but not necessarily zealous. Lawyers are not mercenaries; they are professional advocates and counselors.<sup>21</sup> The zealousness of a lawyer's advocacy must be tempered by the lawyer's superior duties of reasonable behavior, candor, and objective merit. Accordingly, the Tennessee Supreme Court has joined other

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imposed by the courts under Rule 11 of the Tennessee Rules of Civil Procedure. In addition, an attorney may be disciplined by the Board of Professional Responsibility for violating ethical requirements which prohibit the filing of frivolous claims or soliciting employment by means of fraud or false or misleading statements." *Simpson Strong-Tie Co. v. Stewart, Estes & Donnell*, 232 S.W.3d 18, 27 (Tenn. 2007).

<sup>17</sup>Andrews, 63 Case W. Res. L. Rev. at 387.

<sup>18</sup>ABA Model Code of Prof'l Responsibility, DR7-101 (1980).

<sup>19</sup>Tenn. Sup. Ct. R. 8, Preamble ¶ 3 states, in part: "As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.

<sup>20</sup>RPC 1.3 cmt. 1.

<sup>21</sup>*Flowers v. Board of Prof'l Responsibility*, 314 S.W.3d 882, 898 (Tenn. 2010).

courts in holding that “a lawyer’s duty to act zealously on behalf of his [or her] client is no excuse for unprofessional conduct.”<sup>22</sup>

#### IV.

##### WHAT PROFESSIONALISM MEANS

The Preamble to the Tennessee Rules of Professional Conduct, using language from the Model Rules, states that “[f]ailure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process.”<sup>23</sup> However, the Preamble also contains the following provision not found in the Model Rules:

Essential characteristics of the lawyer are knowledge of the law, skill in applying the applicable law to the factual context, thoroughness of preparation, practical and prudential wisdom, ethical conduct and integrity, and dedication to justice and the public good.<sup>24</sup>

The concept of professionalism sets a higher standard.<sup>25</sup> Justice Robert Benham of the Georgia Supreme Court illustrated the difference when he wrote, quoting Chief Justice Harold Clark, that “[e]thics is that which is required and professionalism is that which is expected.”<sup>26</sup>

The current sense of a decline in professionalism is not new. However, narrowing the scope of the Model Rules of Professional Conduct has given rise to what some refer to as the “professionalism movement.” Among the most significant challenges facing the professionalism movement are (1) the lack of consensus regarding what “professionalism” entails and (2) the lack of a strategy to incorporate the values of professionalism into the practical context of today’s practice of law.

“Professionalism” has proved to be a very elastic term. Some have compared our current inability to define “professionalism” to Justice Potter Stewart’s observation about pornography in *Jacobellis v. Ohio* when he wrote “I know it when I see it.” Examining the existing professionalism creeds currently in existence reveals many common threads. With

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<sup>22</sup>*Bailey v. Board of Prof'l Responsibility*, 441 S.W.3d 223, 234 (Tenn. 2014).

<sup>23</sup>Tenn. Sup. Ct. R. 8, Preamble ¶ 20.

<sup>24</sup>Tenn. Sup. Ct. R. 8, Preamble ¶ 1.

<sup>25</sup>In its Preamble, the Memphis Bar Association Guidelines for Professional Courtesy and Conduct states that “[a] lawyer should strive to achieve higher standards of conduct than those called for by the Code of Professional Responsibility.” *See also* the Lawyer’s Creed of Professionalism found in Local Rule 5.04 of the Rules of the Circuit, Chancery, Criminal, and Probate Courts for the Twentieth Judicial District.

<sup>26</sup>*Evanoff v. Evanoff*, 418 S.E.2d 62, 63 (Ga. 1992).

some effort, a workable description of professionalism that is flexible enough to incorporate the nuances of local legal cultures can be fashioned.

It would be presumptuous of me to offer a definitive definition of professionalism. However, others who write and speak more authoritatively about professionalism, regularly include the following six attributes in their description of what legal professionalism looks like:

- (1) Accountability – taking responsibility for your actions and decisions;
- (2) Consideration – awareness of your action’s effects on others;
- (3) Civility – being respectful and acting in a courteous and cordial manner is not inconsistent with zealous representation;
- (4) Humility – being aware that all of us can and do make mistakes and that we do not know everything there is to know;
- (5) Collegiality – our duty to our clients cannot overpower our respect for the courts and our profession – as Shakespeare observed, we should “strive mightily, but eat and drink as friends” (*The Taming of the Shew*, Act I, Scene 2); and
- (6) Consistency – treating everyone, judges, colleagues, opposing counsel, court staff, and the person on the street in the same way.

A one-size-fits-all strategy for promoting professionalism in the practice of law does not exist. Success will require both individual and collective commitment to identify and demand adherence to professional norms. Informed by our personal values and our professional traditions and culture, each of us must accept the responsibility to act professionally. The cumulative force of these individual commitments will provide the impetus for local legal communities and legal organizations to articulate their understanding of what professionalism entails and then to weave this understanding into their conduct and practice.

## V.

### APPLICATIONS OF SELECTED RULES OF PROFESSIONAL CONDUCT

The following discussions of applications of selected Rules of Professional Conduct provide an opportunity to consider what the minimum ethical standards require and what the standards of professionalism expect. In some circumstances, the answers may be similar; in others they may be different. When the answers differ, it will be helpful to consider how following the higher standard will affect not just the particular dispute at hand, but also the view of the lawyers among their professional peers, and the public’s opinion of the legal profession.

A.

*Referring a Prospective Client to Another Lawyer When the Referring Lawyer Has a Conflict of Interest*

Lawyers owe their clients a duty of loyalty.<sup>27</sup> During the course of their professional relationship with a client, they cannot intentionally engage in conduct that prejudices or damages their client except as required or permitted by the Rules of Professional Conduct.<sup>28</sup> Accordingly, lawyers may not represent a client if doing so would be directly adverse to another client or would materially limit the lawyer's responsibilities to another client or a former client.<sup>29</sup> This obligation is imputed to other members of the lawyer's firm.<sup>30</sup>

A lawyer who declines to represent a prospective client because the lawyer or the lawyer's firm has a conflict of interest is not required to make a referral to other counsel. Practical considerations may weigh against making a referral. The lawyer's current client may be displeased to learn about the referral. The lawyer may not desire to assume potential liability for making a negligent referral.

However, the Rules of Professional Conduct do not prevent a lawyer from referring a prospective client that he or she has declined to represent to another competent attorney. Lawyers commonly provide referrals when they are unable to take on a representation themselves, and they are particularly well-positioned to provide this service.

Facing an opposing party represented by competent counsel does not damage or prejudice a client's interests. Thus, making a referral does not violate the lawyer's duty of loyalty because lawyers are not ethically required to "press for every advantage that might be realized for a client."<sup>31</sup>

In Formal Ethics Opinion 2016-1,<sup>32</sup> the Committee on Professional Ethics of the Bar of the City of New York identified the following five ethical limitations on lawyers who refer a prospective client to another lawyer: (1) the referral must be made in good faith and the lawyer may not make material misrepresentations about the lawyer or lawyers to whom the

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<sup>27</sup>RPC 1.7 cmt. states that "[l]oyalty and independent judgment are essential elements in the lawyer's relationship with a client."

<sup>28</sup>*See Cohn v. Board of Prof'l Responsibility*, 151 S.W.3d 473, 492-93 (Tenn. 2004).

<sup>29</sup>RPC 1.7(a).

<sup>30</sup>RPC 1.10.

<sup>31</sup>RPC 1.3 cmt. 1.

<sup>32</sup>Ass'n of the Bar of the City of New York, Comm. on Prof'l Ethics, Op. 2016-1.

prospective client is being referred; (2) the lawyer must be very circumspect in his or her communications with a prospective client until a conflict check has been completed;<sup>33</sup> (3) the lawyer must safeguard an existing client's confidential information when communicating with a prospective client;<sup>34</sup> (4) the lawyer must make it clear that he or she is not representing the prospective client and is not giving legal advice;<sup>35</sup> and (5) lawyers who are prohibited from taking on a representation because of a conflict of interest cannot share in any legal fees paid by the prospective client in the matter because they are ethically prohibited from performing any work on or accepting joint responsibility for the prospective client's case.

B.

*Representing a Non-party Witness at a deposition in a Proceeding Where  
The Lawyer Also Represents a Named Party*

It is not uncommon for a lawyer representing a party to represent one or more non-party witnesses during their depositions. This circumstance arises frequently when a corporate or government litigant provides representation to officers, employees, former employees, independent contractors, or others. These representations have a number of benefits, including eliminating the need to hire multiple law firms, enhancing the lawyer's ability to manage litigation strategy, and improving the efficiency of the discovery process.

Lawyers are ethically permitted to represent non-party witnesses as long as they take several precautions. First, the lawyer must determine whether there is or could be a conflict of interest between the party client and the witness client. If there is or could be a conflict, the lawyer must comply with the disclosure and informed consent<sup>36</sup> requirements of RPC 1.7. In determining whether the information and explanation provided to the party client and the witness client are reasonably adequate, the factors to be considered include whether the person has experience in legal matters or in making similar decisions and whether the person is independently represented by other counsel.<sup>37</sup>

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<sup>33</sup>See RPC 1.8.

<sup>34</sup>See RPC 1.6(a).

<sup>35</sup>See RPC 4.3.

<sup>36</sup>RPC 1.0(e) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

<sup>37</sup>RPC 1.0 cmt. 6.

Second, the lawyer must determine whether the representation qualifies as a limited-scope representation. If the lawyer determines that the representation is a limited-scope representation, then the lawyer must determine whether the representation is reasonable under the circumstances and must obtain the witness client's informed consent, preferably in writing.<sup>38</sup>

Third, because representation of the party client and the witness client amounts to common representation, the lawyer must explain that the duty of confidentiality operates differently in a joint representation than it does in a single-client representation. Among joint clients, there is a presumption that confidential information material to the joint representation will be shared among the joint clients unless an exception applies.<sup>39</sup>

Finally, the lawyer must comply with the rules governing the solicitation of potential clients in RPC 7.3. As a precaution, the lawyer should have the party client make the witness client aware that the lawyer's services are available. There is no solicitation if the witness agrees to speak with the lawyer as a result of this information. A more detailed discussion of these requirements is contained in Formal Ethics Opinion 16-2 prepared by the Committee on Professional Ethics of the Bar of the City of New York.<sup>40</sup>

### C.

#### *Whether a Lawyer May Seek Advantage for a Client in a Civil Dispute by Threatening a Separate Non-criminal Proceeding Against an Adverse Party*

RPC 4.4(a)(2) prohibits a lawyer from "threaten[ing] to present a criminal or lawyer disciplinary charge for the purpose of obtaining advantage in a civil matter." It does not, however, prohibit threats to instigate ancillary civil proceedings against an adverse party. Despite the inapplicability to RPC 4.4(a)(2), threats to institute ancillary civil proceedings may run afoul of other ethics rules.

Under certain circumstances, threats to instigate civil proceedings may violate the laws against extortion. A threat that constitutes criminal extortion or a similar offense will likely violate RPC 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects) and RPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

Threats to instigate a civil proceeding may also subject a lawyer to discipline if they are made without sufficient basis in law and fact. Knowingly baseless threats, including a definitively stated threat to commence other civil proceedings when the lawyer does not

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<sup>38</sup>RPC 1.2(c).

<sup>39</sup>RPC 1.7 cmts. 30-31.

<sup>40</sup>Ass'n of the Bar of the City of New York, Comm. on Prof'l Ethics, Op. 2016-2.

intend to do so, may violate RPC 4.1(a) (providing that “in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person”) and RPC 8.4(c) (stating that a “lawyer . . . shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation”).

Finally, a threat to instigate a civil proceeding may run afoul of RPC 4.4(a)(1) (prohibiting a lawyer from “us[ing] means that have no substantial purpose other than to embarrass, delay, or burden a third person”). It may also violate RPC 3.1 (prohibiting a lawyer from asserting or controverting an issue in a proceeding that is frivolous). An action will be deemed “frivolous” “if the lawyer is unable . . . to make a good faith argument on the merits of the action taken.”<sup>41</sup>

#### D.

#### *The Inadvertent Release or Receipt of Confidential Information*

The increased use of technology in the practice of law, coupled with the pressure to produce large numbers of documents within tight deadlines and the need to delegate key tasks to support personnel, has created an environment conducive to the inadvertent disclosure of confidential information. Inadvertent disclosures have become increasingly common, even in cases handled by careful lawyers, and the consequences of these inadvertent disclosures can be significant.

The inadvertent release of a client’s confidential information can constitute an ethical violation if a lawyer has not taken reasonable steps to prevent it. Unlike earlier versions of the Model Rule that required the release to be “knowingly” made, RPC 1.6(a) states that, with some defined qualifications, “[a] lawyer shall not reveal information relating to the representation of a client.” In addition, RPC 1.6(c) requires lawyers to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” Thus, lawyers who have not made reasonable efforts to prevent the inadvertent or unauthorized release of client information will find themselves in ethical jeopardy.<sup>42</sup>

An inadvertent release of a client’s confidential information may run afoul of other ethics rules. If the inadvertent disclosure is caused by the lawyer’s own actions, the lawyer’s obligation to provide competent representation under RPC 1.1 may be violated. If the

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<sup>41</sup>RPC 3.1 cmt. 2.

<sup>42</sup>RPC 1.6 cmt. 18 explains that the factors to consider the reasonableness of a lawyer’s actions “include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use.)”

inadvertent disclosure occurs as a result of a subordinate lawyer or employee, the lawyer's duty to provide adequate supervision under RPC 5.1 and 5.3 may be breached. Thus, failing to use reasonable care to instruct subordinates about the identification and handling of confidential client information may cause the supervising lawyer to violate RPC 1.6(c) if confidential documents are inadvertently disclosed.

Upon discovery that confidential client information has been released inadvertently, the lawyer responsible for the release must act promptly to request the return of the information and to prevent its further dissemination. The lawyer must notify the client<sup>43</sup> and must act immediately to rectify the error. While parties receiving inadvertently disclosed confidential information have no inherent "fairness" interest in keeping or using the information, waiting too long to request the return of the information may complicate the request if the receiving party has reasonably changed its position in reliance on its belief that information is available.<sup>44</sup>

The steps available to cure the inadvertent release of information begin with a request to return the information.<sup>45</sup> If opposing counsel refuses to return the document or otherwise refuses to honor your wishes, promptly seek judicial relief.<sup>46</sup>

A lawyer receiving confidential information that he or she "knows or reasonably should know" has been disclosed inadvertently should also consider the possible ethical implications of his or her conduct. RPC 4.4(b) requires the lawyer to "immediately terminate review or use of the information" and to "notify the person or the person's lawyer if communication with the person is prohibited by RPC 4.2."<sup>47</sup> The lawyer must also "abide

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<sup>43</sup>RPC 1.4(a)(3) requires lawyers to "keep the client reasonably informed about the status of the matter." Tenn. Sup. Ct. R. 8, RPC 1.4 cmt. 7 also provides that "[a] lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person."

<sup>44</sup>See *United States ex rel. Bagley v. TRW, Inc.*, 204 F.R.D. 170, 182 (C.D. Cal. 2001).

<sup>45</sup>RPC 4.4(3). A telephone call followed by a prompt written or emailed notification request is appropriate.

<sup>46</sup>This relief could include invoking the clawback provisions in Tenn. R. Civ. P. 26.02(5). It could also include seeking a protective order requiring the return of the documents and prohibiting the use of confidential information. In some circumstances, it may be appropriate to (1) obtain the identification of all persons to whom the information may have been made available in any form, (2) require that these persons be provided with a copy of the protective order, (3) file a motion in limine to ensure that no use is made of the information, and (4) obtain a description of the steps taken to ensure that no use of the information has been or will be made.

<sup>47</sup>RPC 4.4(b)(1), (2).

by that person's or lawyer's instructions with respect to the disposition of written information or refrain from using the written information until obtaining a definitive ruling on the proper disposition from a court with appropriate jurisdiction."<sup>48</sup> Lawyers seeking a definitive judicial ruling must disclose this information to the court in a way that limits disclosure of the information to others.<sup>49</sup>

E.

*The Use of Social Media for Investigative Purposes*

No one can control all the information posted about them on the internet, including social media such as Facebook, Twitter, Instagram, Snapchat, Pinterest, LinkedIn, and YouTube. However, to the extent that persons are able to control their own social media presence, they generally have some degree of control over access to the information they post. Depending on the type of social media utilized and the privacy settings available, persons may have some control over the people to whom their information will be available.

Several ethical rules prohibit or limit communications between a lawyer and other persons involved in a legal proceeding. For example, RPC 3.5(b) prohibits a lawyer from communicating *ex parte* with judge, juror, prospective juror, or other official involved in a proceeding in which the lawyer is also involved. In addition, RPC 4.2 prohibits communication about the subject of a representation with a person the lawyer knows to be represented by another lawyer in the matter without consent or legal authorization, and RPC 4.3 restricts communications between a lawyer representing a client and unrepresented persons.

As long as there is no "communication" between the lawyer and a party, witness, juror, or other official involved in a proceeding, no ethical prohibition exists to prevent a lawyer from viewing the public portion of their social media profile or any of their public posts made through social media. Some social media platforms automatically notify a person when someone views his or her profile. The prevailing view is that this amounts to communication between the social media site and the person whose information is viewed, not a communication between the lawyer and that person.<sup>50</sup>

Using social media to conduct investigations or discovery is no different from the traditional way these tasks are performed. In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.<sup>51</sup> A

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<sup>48</sup>RPC 4.4(b)(3).

<sup>49</sup>RPC 4.4 cmt. 3.

<sup>50</sup>See Colorado Bar Ass'n, Formal Ethics Opn. 127 (Sept. 2015).

<sup>51</sup>RPC 4.1(a).

lawyer is also prohibited from engaging in conduct that involves dishonesty, fraud, deceit, or misrepresentation.<sup>52</sup> In light of these clear provisions, a lawyer acting on behalf of a client must never use deception to gain access to a restricted portion of a social media profile or other restricted communications. A lawyer cannot circumvent this prohibition by delegating the investigatory tasks to another person.<sup>53</sup>

In a comprehensive formal ethics opinion on this topic, the Colorado Bar Association's Ethics Committee concluded:

A lawyer acting on behalf of a client may request permission to view a restricted portion of a social media profile or website of an unrepresented party or unrepresented witness only after the lawyer identifies himself or herself as a lawyer, and discloses the general nature of the matter in which the lawyer represents the client. A lawyer acting on behalf of a client may not request permission to view a restricted portion of a social media profile or website of a person the lawyer knows to be represented by counsel in that same matter, without obtaining consent from that counsel. When requesting or obtaining information from a third person who has access to restricted portions of a social media profile or website of a party or witness, a lawyer is subject to the same standards as when requesting any other information in the hands of a third person. A lawyer may not request permission to view a restricted portion of a social media profile or website of a judge while the judge is presiding over a case in which the lawyer is involved as counsel or as a party, nor may a lawyer seek to communicate *ex parte* with a judge through social media concerning a matter or issue pending before the judge. A lawyer may not request permission to view a restricted portion of a social media profile or website of a prospective or sitting juror. A lawyer must never use any form of deception to gain access to a restricted portion of a social media profile or website. Finally, a lawyer may not avoid prohibitions relating to the use of social media for investigative purposes by delegating investigative tasks to others.<sup>54</sup>

#### F.

##### *A Lawyer's Competence to Pursue an Appeal*

RPC 1.1 requires lawyers to provide "competent representation" which requires "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the

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<sup>52</sup>RPC 8.4(c).

<sup>53</sup>RPC 5.1, 5.3.

<sup>54</sup>Colorado Bar Ass'n, Formal Ethics Opn. 127 (Sept. 2015).

representation.” In this day of legal specialization, lawyers who are inexperienced with appellate practice might be considered to be negligent or unethical if they do not refer the case to an attorney who handles appellate work.<sup>55</sup>

Do not take the differences between trial and appellate courts lightly.<sup>56</sup> Pursuing an appeal is very different from litigating a case in the trial court. Lawyers who are capable and competent in the trial courts may be much less so in appellate courts because they are unfamiliar with appellate rules and with appellate practice. Unless a lawyer has or will be able to develop the necessary knowledge of the rules and applicable case law, the more prudent course is either to decline the appellate representation or to associate another lawyer more familiar with appellate practice.

Every step of the appellate process from the filing of the notice of appeal to the preparation and filing of the record and briefs is now governed by specific and sometimes technical rules. Failure to follow these rules, which differ significantly from the Tennessee Rules of Civil Procedure, may prevent or impair appellate review of a client’s case. Thus, they can present ethical issues for appellate lawyers unfamiliar with appellate practice.

Our caselaw is now strewn with opinions pointing out the pitfalls facing inexperienced appellate lawyers. Appeals have been dismissed for failure to comply with the appellate rules.<sup>57</sup> The appellate courts have declined to consider issues that have not been properly briefed.<sup>58</sup> Lawyers have been disciplined for failure to adhere to the Tennessee Rules of Appellate Procedure.<sup>59</sup>

## G.

### *Conflicts of Interest on Appeal*

All lawyers should be familiar with the restriction in RPC 1.7(a)(1) pertaining to direct conflicts of interest. It states that “a lawyer shall not represent a client if the

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<sup>55</sup>J. Michael Medina, *Ethical Concerns in Civil Appellate Advocacy*, 43 Sw. L.J. 677, 680 (1989).

<sup>56</sup>Kay N. Hunt & Eric J. Magnuson, *Ethical Issues on Appeal*, 19 Wm. Mitchell L. Rev. 659, 661 (1993).

<sup>57</sup>See, e.g., *In re Kendall H.*, No. E2017-010340COA-R3-PT, 2017 WL 3446818, at \*1 (Tenn. Ct. App. Aug. 11, 2017); *W & H LLC v. Community Bank*, 2016 WL 369494, at \*4 (Tenn. Ct. App. Jan. 29, 2016); *Duchow v. Whalen*, 872 S.W.2d 692, 692 (Tenn. Ct. App. 1993).

<sup>58</sup>See, e.g., *Mesad v. Yousef*, No. M2016-01931-COA-R3-CV, 2018 WL 1040115, at \*5 (Tenn. Ct. App. Feb. 22, 2018); *Heflin v. Iberiabank Corp.*, No. W2016-02414-COA-R3-CV, 2018 WL 522429, at \*5 (Tenn. Ct. App. Jan. 23, 2018); *Bean v. Bean*, 40 S.W.3d 52, 55-56 (Tenn. Ct. App. 2000); *Blair v. Badenhope*, 940 S.W.2d 575, 576-77 (Tenn. Ct. App. 1996).

<sup>59</sup>*Hoover v. Board of Prof'l Responsibility*, 395 S.W.3d 95, 105 (Tenn. 2012) (failure to file an appellate brief).

representation . . . of one client will be directly adverse to another client.”<sup>60</sup> Other potential conflicts can arise on appeal that are not as easy to identify. Accordingly, appellate lawyers should be mindful of RPC 1.7(a)(2) which provides that a conflict can arise when “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”

### Personal Conflicts of Interest

RPC 1.7 cmt. 10 states that a “lawyer’s own interests should not be permitted to have an adverse effect on the representation of a client.” Appeals can trigger potential personal conflicts of interest. This sort of conflict can arise when a client has had a bad result at trial, desires to appeal and either the client or the lawyer believes that the bad result at trial was, at least in part, caused by the poor performance of the lawyer.

Two circumstances illustrate this problem. First, if a lawyer is concerned that his or her conduct could have contributed to the bad result, a lawyer might be tempted to recommend an appeal in an effort to change or mitigate the result. A personal conflict could arise if appealing the case is in the lawyer’s best interest but not necessarily the client’s. Second, lawyers appealing a case they tried could be faced with the decision to raise issues or to make arguments that could reveal a mistake they made in the trial court. For example, if a lawyer failed to raise an issue or assert a defense at trial and the appeal could bring this oversight to light, the lawyer might be tempted to shape the issues on appeal in a way that keeps the oversight hidden.

### Positional or Issue Conflicts

A positional or issue conflict occurs “when a . . . [lawyer] adopts a legal position for one client seeking a particular legal result that is directly contrary to the position taken on behalf of another client seeking an opposite result in a completely unrelated matter.”<sup>61</sup> While this type of conflict can occur at all levels of litigation, it can be of particular concern to appellate attorneys because appellate decisions make law of general application and because the first decisions of appellate courts govern later cases until they are overturned.<sup>62</sup>

The following hypothetical illustrates a circumstance triggering a positional conflict concern. A lawyer representing a client in a case pending before the Tennessee Court of Appeals asserts that the cap on noneconomic damages in Tenn. Code Ann. § 29-39-102(a)(2) (2012) is unconstitutional. At the same time, the same lawyer is representing

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<sup>60</sup>This restriction is aptly illustrated in *Clinard v. Blackwood*, 46 S.W.3d 177, 189 (Tenn. 2001) in which a law firm was disqualified from representing a party on appeal when the lawyer representing the opposing party joined the firm.

<sup>61</sup>John S. Zienkowski, *Positional Conflicts of Interest*, 71 Tex. L. Rev. 457, 460 (1993).

<sup>62</sup>*Positional Conflicts: Is It Ethical to Simultaneously Represent Clients with Opposing Legal Positions?*, Mich. B.J., May 2002.

another client in an entirely different appeal before the Court of Appeals in which the lawyer is asserting that the same cap on noneconomic damages is constitutional.

This circumstance triggers consideration of RPC 1.7(a)(2) and particularly RPC 1.7 cmt. 24. The question that must be addressed is whether the lawyer can effectively argue both sides of the same legal question without compromising the interests of one client or the other. In a case involving the necessity of a jury instruction in a capital case, the Supreme Court of Delaware held that a lawyer whose client would benefit from arguing that the instruction should not have been given would be required to withdraw from the case because he was advocating a contrary position in another capital case pending before the court. *Williams v. State*, 805 A.2d 880, 882 (Del. 2002).

## H.

### *Should a Civil Case Ethically Be Appealed?*

The decision to appeal is the client's. However, clients may, and generally do, seek their lawyer's advice. RPC 1.4 not only requires a lawyer to give this advice but also requires a lawyer to explain relevant limitations on his or her conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

RPC 3.1 provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless after reasonable inquiry the lawyer has a basis in law and fact for doing so that is not frivolous." In addition, Tenn. Code Ann. § 27-1-122 (2017) contains financial sanctions for frivolous appeals.

With regard to factual issues on appeal, it is important to remember that the appellate court will generally consider only the facts and evidence that were submitted to the trial court. If a fact was not discovered or the evidence was not presented to the trial court, an appellate lawyer can make no use of it other than to argue that the trial court erred by preventing the discovery or excluding the evidence. Thus, as a general matter, any argument offered on appeal must already be substantiated by the facts in the record before it can be presented.

RPC 3.1 also applies to legal arguments. It is problematic for a lawyer to base an appeal on legal authority that is contrary to clear legal precedent. To avoid a finding that such an appeal is frivolous, the lawyer must acknowledge the controlling precedent and then be able to make a good faith argument for reversing, extending, or modifying it.<sup>63</sup>

In some circumstances, the client's reasons for pursuing an appeal may have ethical implications. If the client desires to appeal to delay the execution of the judgment, to

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<sup>63</sup>See J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority*, 59 U. Miami L. Rev. 341 (2005).

increase the costs for the opposing party, or to harass the opposing party or third parties, RPC 3.2 may prevent the lawyer from pursuing the appeal, even if it is not frivolous.

Should a lawyer decide that he or she cannot ethically pursue an appeal but the client insists on filing an appeal, the lawyer must advise the client of the applicable time deadlines and of the client's option to seek the advice of other attorneys regarding the appeal. If the lawyer's representation agreement with the client contemplates representation through appeal or fails to limit the representation to the trial only, the lawyer may have additional considerations. See RPC 1.3 cmt. 4.

## I.

### *An Appellate Lawyer's Obligation to Inform a Client of Trial Counsel's Malpractice*

Retaining appellate counsel is becoming commonplace, particularly in complex or high-stakes civil litigation. Appellate lawyers may be engaged at different stages of litigation, including pre-trial, trial, post-trial, and on appeal. While both trial counsel and appellate counsel share the common goal of providing the client with the best possible representation,<sup>64</sup> complexity can arise, particularly after a bad result at trial, when there is a possibility that a misstep by trial counsel may have contributed to the result.

The following comments involve only the circumstance in which an appellate lawyer has been retained after trial. Notwithstanding the structure of the engagement, once the appellate lawyer becomes counsel of record, his or her client is the party litigant, not the litigant's trial attorney. In this circumstance, an appellate lawyer may find him- or herself in an awkward ethical quagmire should he or she, after reviewing the trial record, discover that the trial lawyer failed to advance available claims, defenses, or arguments or engaged in other conduct potentially amounting to malpractice.

The first question is whether RPC 8.3(a)<sup>65</sup> requires the appellate lawyer to report the trial lawyer to the Board of Professional Responsibility. This obligation is limited to only "those offenses that a self-regulating profession must vigorously endeavor to prevent."<sup>66</sup> While multiple episodes of malpractice trigger the mandatory reporting duty because these repetitive acts call into question the lawyer's fitness to practice law, the consensus is that a discrete act of malpractice by an otherwise competent and honest lawyer should not be viewed as triggering RPC 8.3(a)'s duty to report the lawyer to the regulating authorities.<sup>67</sup>

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<sup>64</sup>Nancy Winkelman, *The Relationship Between Trial and Appellate Counsel*, 57 For the Defense, Oct. 2015, at 50.

<sup>65</sup>RPC 8.3(a) states that "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the Disciplinary Counsel of the Board of Professional Responsibility."

<sup>66</sup>RPC 8.3 cmt. 3.

<sup>67</sup>See David H. Tennant, *Mixing Business With Ethics: The Duty to Report Malpractice by Trial Counsel*, 51 For the Defense, Nov. 2009, at 56.

The Rules of Professional Conduct do not directly address the duty of an appellate lawyer to inform a client about malpractice committed by trial counsel. However, appellate lawyers should be aware that Board of Professional Responsibility might recognize such a requirement or that a court might recognize a common-law duty to report the trial attorney's malpractice, thereby permitting the client to sue the appellate lawyer for malpractice for failing to report the trial lawyer's malpractice.

As Mr. Tennant has noted, "whether trial counsel met the requisite level of competence at trial, and whether any failing by trial counsel materially affected the outcome of the trial and might impact the appeal, are highly nuanced questions to be answered by a malpractice attorney, not appellate counsel." Nonetheless, some acts of trial counsel are so obviously mistaken and so far below the standard of competent representation, that appellate counsel may conclude that malpractice has occurred. This sort of negligence will likely have a negative impact on the appeal. In this circumstance, does the client have a right to know about a truly material error that occurred at trial and to be provided with an explanation about the effect of this error on the appeal?

RPC 1.1 (the duty of competence), RPC 1.4 (the duty to communicate), and RPC 1.7 (conflicts of interest with current clients) have direct bearing on an appellate lawyer's duty to report the trial lawyer's malpractice to his or her client.

RPC 1.4(a)(2) requires an appellate lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." If the appellate lawyer is evaluating which issues to raise on appeal or whether to assert claims or arguments on appeal that were not raised at trial by the trial lawyer, RPC 1.4(a)(2) may obligate the appellate lawyer to inform the client of the omission and the appellate strategy in light of the omission.

RPC 1.4(a) (3) also requires an appellate lawyer to "keep the client reasonably informed about the status of the matter." Whether under RPC 1.4(a)(2) or RPC 1.4(a)(3), the lawyer's duty to explain matters to a client requires disclosures to the extent reasonably necessary to permit the client "to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued."<sup>68</sup>

RPC 1.7(a)(2) provides that a "lawyer . . . shall not represent a client if . . . there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer." However, RPC 1.7(b)(4) permits the lawyer to continue the representation with the client's informed consent. If the appellate lawyer is relying on the trial lawyer's referrals, then informed consent would require full disclosure of the nature and extent of the appellate lawyer's reliance on the trial lawyer for business. If the appellate lawyer and the trial lawyer are in the same firm, managing this conflict will be essentially insurmountable because both the appellate and the trial lawyer have direct financial interests at stake.

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<sup>68</sup>RPC 1.4 cmt. 5.

In light of the ethical complexities surrounding an appellate lawyer's duty to report a trial lawyer's malpractice to a client, Mr. Tennant counsels that many experienced appellate lawyers expressly limit the scope of their representation by disclaiming any obligation to assess the trial lawyer's performance or to communicate any findings or opinions about the trial lawyer's performance. RPC 1.2(c) permits limiting the scope of representation if the limitation is reasonable and if the client gives informed consent. He emphasizes, however, that an appellate attorney must obtain the client's agreement to the limited-scope of the representation before he or she reviews the appellate record. Appellate lawyers who undertake to limit the scope of their representation after they have discovered malpractice by the trial lawyer will be required to disclose what they discovered, and if they do not, they will be exposed to ethical jeopardy under RPC 8.4.

## J.

### *Candor in Appellate Practice*

RPC 3.3 imposes a duty of candor on appellate attorneys both with regard to statements of fact and statements of law. Failure to make a factual disclosure is the equivalent of an affirmative misrepresentation.<sup>69</sup> By the same token, knowingly making false representations of law constitutes dishonesty to the tribunal.<sup>70</sup>

The duty of candor, while in tension with an attorney's duty to represent his or her client zealously,<sup>71</sup> is not inconsistent with it.<sup>72</sup> Lawyers have a "dual trust" – a duty to the courts to observe all appropriate standards of professional conduct and a duty to their clients to advance their cause to the best of their ability.<sup>73</sup> Whenever these two trusts conflict, the lawyer's duty to the court supersedes the lawyer's duty to the client.<sup>74</sup>

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<sup>69</sup>RPC 3.3 cmt. 3.

<sup>70</sup>RPC 3.3 cmt. 4.

<sup>71</sup>RPC 1.3 cmt. 1; *Bailey v. Board of Prof'l Responsibility*, 441 S.W.3d 223, 234 (Tenn. 2014); *State v. Hester*, 324 S.W.3d 1, 72 (Tenn. 2010) (recognizing that lawyers are expected to zealously assert their client's position).

<sup>72</sup>*In re Moncier*, 550 F.Supp.2d 768, 807 (E.D. Tenn. 2008) (stating that "the idea that there is a conflict between zealous advocacy and ethical and professional behavior is completely false"); *In re T.B.L.*, No. M2005-02413-COA-R3-PT, 2006 WL 1521122, at \*2 n.3 (Tenn. Ct. App. June 2, 2006).

<sup>73</sup>*In re Education Law Ctr., Inc.*, 429 A.2d 1051, 1056 (N.J. 1981).

<sup>74</sup>*U. S. Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 925 (4th Cir. 1995); *Polansky v. CNA Ins. Co.*, 852 F.2d 626, 632 (1st Cir. 1988); *Steinle v. Warren*, 765 F.2d 95, 101 (7th Cir. 1985).

### Candor Regarding the Record

Every appellate brief must contain a statement of facts.<sup>75</sup> These facts must be supported by a citation to the record.<sup>76</sup> A citation of fact not supported by the record may be viewed as a violation of RPC 3.3(a)(1). In fact, any distortion of the record may be seen as a lack of candor.<sup>77</sup> After finding five material misstatements of the record in the Government's brief, the United States Court of Appeals for the District of Columbia noted:

The number and character of these misrepresentations lead us to conclude that the Government's conduct has been irresponsibly careless at best or deliberately misleading at worst. A lawyer appearing before us has a duty to assert facts only if, after a reasonably diligent inquiry, he [or she] believes those facts to be true.<sup>78</sup>

Misrepresentation of the record is not only unethical; it is poor strategy for two reasons. First, it is likely that alert opponents will discover it and then use it to their advantage or that the court and its staff will uncover it.<sup>79</sup> Second, once discovered, a misrepresentation of the record not only undermines the lawyer's credibility, but it also harms the client's case.

Factual misstatements can include assertions that a fact is "established" or that testimony is "uncontroverted" with citations to one portion of the record when other portions of the record demonstrate that differing testimony or evidence was offered on the same point.<sup>80</sup>

### Candor Regarding the Law

A lawyer's duty of candor regarding the law is broader than the duty of candor regarding the facts. Not only must lawyers avoid making a false statement of law,<sup>81</sup> they must also "disclose . . . 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."<sup>82</sup>

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<sup>75</sup>Tenn. R. App. P. 27(a)(6).

<sup>76</sup>Tenn. R. App. P. 27(a)(6).

<sup>77</sup>See *Amstar Corp. v. Envirotech Corp.*, 730 F.2d 1476, 1486 (D.C. Cir. 1984).

<sup>78</sup>*United States v. Williams*, 952 F.2d 418, 421 (D.C. Cir. 1991).

<sup>79</sup>*In re Disciplinary Action Boucher*, 837 F.2d 869, 871 (9th Cir. 1988), modified 850 F.2d 597 (9th Cir. 1988); *State v. Rhinehart*, No. 2 CA-CR 2009-0379, 2010 WL 4278504 ¶ 42 n.3 (Ariz. Ct. App. Oct. 12, 2010).

<sup>80</sup>*In re Chakeres*, 687 P.2d 741, 742 (N.M. 1984).

<sup>81</sup>RPC 3.3(a)(1).

<sup>82</sup>RPC 3.3(a)(2).

To be covered by RPC 3.3(a)(2), the authority need not be “controlling”; it must simply be “directly adverse.”<sup>83</sup> Appellate courts will consider lawyers who fail to cite adverse legal authority as either incompetent or deceptive.<sup>84</sup>

The duty to disclose adverse legal authority is based on three premises. The first is that legal argument is a discussion seeking to determine the legal principles properly applicable to the case.<sup>85</sup> The second is that the purpose of litigation is to promote truth and justice by enabling the court to make an informed decision.<sup>86</sup> The third is that the function of an appellate brief is to assist, not mislead, the court.<sup>87</sup> As Judge Charles Susano has pointed out:

Lawyers are officers of the court. They are part of the enterprise. They are not outside the castle walls, lobbing fire balls against the castle. They are part of the dignity of the Court system. They work within the Court system to bring it to its best outcomes. They bring it to its best adjudications. If that were not their role, they would not be required to disclose authority contrary to a client's position. But they are so required. It's because we are all engaged in the highest calling—the achievement of an appropriate outcome consistent with zealous advocacy. Lawyering is not simply about winning in spite of fairness, but winning while displaying fairness.<sup>88</sup>

The ethical obligation to disclose adverse authority arises only when a lawyer knows that the omitted legal authority is directly adverse to his or her position. Ascertaining whether the duty arises requires considering three questions: (1) is the authority one which the court should clearly consider in deciding the case, (2) would a reasonable judge properly believe that the lawyer who failed to disclose adverse authority was lacking in candor and fairness, and (3) might the judge consider himself or herself misled by an implied representation that the lawyer knew of no adverse authority?<sup>89</sup>

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<sup>83</sup>*Tyler v. State*, 47 P.3d 1095, 1104 (Alaska Ct. App. 2001).

<sup>84</sup>*Hedge v. County of Tippecanoe*, 890 F.2d 4, 8 (7th Cir. 1989).

<sup>85</sup>*In re Thonert*, 733 N.E.2d 932, 934 (Ind. 2000).

<sup>86</sup>Robert H. Aronson, *An Overview of the Law of Professional Responsibility*, 61 Wash. L. Rev. 823, 864 (1986).

<sup>87</sup>*Tyler v. State*, 47 P.3d at 1109.

<sup>88</sup>*Joiner v. Joiner*, No. E2005-01619-COA-R10-CV, 2005 WL 2805566, at \*2 (Tenn. Ct. App. Oct. 27, 2005).

<sup>89</sup>*Tyler v. State*, 47 P.3d at 1104-05; see also *Matthews v. Kindred Healthcare, Inc.*, No. 05-1091-T-AN, 2005 WL 3542561, at \*4-5 (W.D. Tenn. Dec. 17, 2005); *Tri-Cities Holdings, LLC v. Tenn. Health Servs. & Dev. Agency*, No. M2015-00580-COA-R3-CV, at \*10 (Tenn. Ct. App. Feb 22, 2016).

Assertions that the lawyer was unaware of the adverse authority may be found to be unreasonable under the circumstances.<sup>90</sup> Citing cases as controlling authority when they have been overruled has also been considered as a failure to cite adverse authority.<sup>91</sup>

When confronting a question regarding whether to disclose adverse authority, the most prudent route is to disclose the authority rather than ignore it. By disclosing adverse authority, the lawyer has an opportunity to distinguish it. Failing to disclose adverse authority may (1) give the authority extra weight, (2) provide opposing counsel the opportunity to point out the omission, and (3) undermine the lawyer's credibility.

### Cases That Have Become Moot

Subject to several well-known exceptions, Tennessee's appellate courts will only decide issues that are justiciable, that is, issues arising from a genuine, existing controversy require the adjudication of presently existing facts.<sup>92</sup> A case must remain justiciable from the time it is filed until the moment of final appellate decision.<sup>93</sup> A moot case is one that has lost its justiciability either by court decision, acts of the parties, or some other reason occurring after the commencement of the case.<sup>94</sup>

Courts do not desire to render advisory opinions by deciding moot cases. Thus, when a case is settled while on appeal, RPC 3.3(a)(1) & RPC 8.4(c) impose an obligation on counsel to inform the court that the case is moot before the court issues its opinion. Failing to do so because one or both parties desire a ruling violates the duty of candor.<sup>95</sup>

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<sup>90</sup>See *Terminex Int'l Co. v. Kay*, 150 F.R.D. 532, 537 (E.D. Pa. 1993).

<sup>91</sup>*Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997); *Cimino v. Yale Univ.*, 638 F. Supp. 952, 959 n. 7 (D. Conn. 1986); *Clayton v. City of Cape Canaveral*, 354 So. 2d 147, 150 (Fla. Dist. Ct. App. 1978).

<sup>92</sup>*City of Memphis v. Hargett*, 414 S.W.3d 88, 96 (Tenn. 2013).

<sup>93</sup>*State v. Ely*, 48 S.W.3d 710, 716 n.3 (Tenn. 2001).

<sup>94</sup>*Norma Faye Pyles Family Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 96, 204 (Tenn. 2009).

<sup>95</sup>*Merkle v. Guardianship of Jacoby*, 912 So. 2d 595, 600 (Fla Dist. Ct. App. 2005); *AIG Hawai'i Ins. Co. v. Bateman*, 923 P.3d 395, 402 (Haw. 1996); *Amherst & Clarence Ins. Co. v. Cazenovia Tavern, Inc.*, 453 N.E.2d 1077, 1078 (N.Y. 1983); *City of Oklahoma City v. Oklahoma Tax Comm'n*, 789 P.2d 1287, 1297 n. 14 (Okla. 1990).