

Persuasion through Candor

An Appellate Lawyer's
Duty and Opportunity

BY MARCY GLENN

*A lawyer's duty of candor and goal of persuasion are mutually beneficial and interrelated.
This article explores how these objectives maximize the effectiveness of representation.*

In 1860, botanist Asa Gray wrote to Charles Darwin: “Your candor is worth everything to your cause.”¹ They were corresponding about Darwin’s recently published book, *On the Origin of Species*, but over 150 years later, Gray’s comment applies with equal force to the practice of law. Lawyers must be “scrupulously honest *at all times*, for honesty is ‘basic’ to the practice of law.”² This article reviews the lawyer’s duties of candor in appeals and the interrelated goal of persuading the tribunal.³ Further, it recommends that lawyers capitalize on the opportunities that “scrupulous[] honest[y]” provides—to establish trust with the appellate court, to confront directly problematic facts and law, and ultimately, to more effectively persuade the tribunal.

The Duty of Candor to the Court

Under Colorado Rule of Professional Conduct (Colo. RPC) 3.3, a lawyer has a duty of “Candor Toward the Tribunal.” Rule 3.3(a) provides that a lawyer “shall not knowingly” (1) “make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer,” or (2) “fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”⁴ More generally, under Rule 8.4(c), it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” These rules have a variety of applications in the appellate process.

Do Not Misstate the Facts or Law

Rule 3.3(a)(1) prohibits knowingly made “false statement[s],” but the spirit of the rule arguably extends beyond falsehoods to include misleading statements and omissions.⁵ In addition, “dishonesty” as used in Rule 8.4(c) “encompasses conduct evincing a lack of honesty, probity or integrity in principle [and] a lack of fairness and straightforwardness. . . .”⁶ A statement is material if it “had the *potential* to mislead” the court.⁷

A lawyer who knowingly misrepresents the trial record in appellate filings or at oral argument “make[s] a false statement of fact,” and if the misstatement is material, the lawyer violates Rule 3.3(a)(1).⁸ Material and knowing

misstatements of facts related to the appellate process also violate Rule 3.3(a)(1). For example, the Colorado Supreme Court has affirmed findings of Rule 3.3(a)(1) violations where a lawyer misidentified herself as the appellant’s appointed counsel in a notice of appeal,⁹ and where a lawyer backdated a brief and made false statements about its filing date in her opposition to a motion to dismiss the appeal.¹⁰

Similarly, when a lawyer “ghostwrites” an appellate filing for an ostensible pro se litigant, the lawyer may violate Rule 3.3(a)(1). Under Colorado Appellate Rule 5(e), a lawyer may draft appellate pleadings and briefs without entering an appearance, so long as the filings identify the drafting attorney.¹¹ The Tenth Circuit, however, has no comparable rule and has held that “[t]he duty of candor toward the court mandated by Model Rule 3.3 is particularly significant to ghostwritten pleadings.”¹² In the Tenth Circuit, “the participation by an attorney in drafting an appellate brief is per se substantial [assistance], and must be acknowledged by signature.”¹³

As an advocate, an appellate lawyer has an obvious responsibility to present legal arguments as advantageously as possible and is “not required to present an impartial exposition of the law. . . .”¹⁴ But just as obviously, a lawyer may not misstate the law in any context, including in an appeal, because “[l]egal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal.”¹⁵ Yet, lawyers breach this duty with alarming frequency, including when they cite decisions that have been reversed or otherwise limited,¹⁶ quote from dissenting or concurring opinions without notation,¹⁷ replace key text in quotes with ellipses,¹⁸ and misstate or overstate case holdings and other authorities.¹⁹

Disclose Relevant Legal Authority

A lawyer’s Rule 3.3(a)(2) duty to “disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel” requires an understanding of the meaning of (1) a “tribunal,” (2) “legal authority in the controlling jurisdiction,” and (3) “directly adverse.”

The ethics rules define a “tribunal” as “a court, an arbitrator in a binding arbitration proceeding or a legislative body,

administrative agency or other body acting in an adjudicative capacity,”²⁰ a definition that clearly includes an appellate court. The definition does not include a neutral in a mediation and, therefore, Rule 3.3(a)(2) does not apply to a lawyer participating in an appellate mediation, although other rules do apply.²¹

Significantly, Rule 3.3(a)(2) does not refer to “controlling authority” but instead requires disclosure of directly adverse “legal authority in the controlling jurisdiction.” “Legal authority” includes court decisions, statutes, rules, and regulations, and may also include decisions that are not yet final.²² Most important, it is not limited to decisions that constitute binding precedent in the jurisdiction but also encompasses on-point, yet non-binding, decisions of lower or coordinate courts.²³ The “controlling jurisdiction” is generally construed to mean, in state cases, the forum state, and in federal cases, the judicial district or

circuit.²⁴ Of course, any on-point U.S. Supreme Court decision should be disclosed, regardless of where the appeal is pending.

There’s room for debate on the meaning of “directly adverse” authority, but the safest test is one the American Bar Association articulated in 1949 and some courts have applied in the ensuing decades: “a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.”²⁵ “When the question is a new or novel one . . . on which there is a dearth of authority, the lawyer’s duty may be broader.”²⁶ Rule 3.3(a)(2) mandates disclosure even where the directly adverse authority is in dictum or where counsel believes that the case is distinguishable. Those are arguments that the lawyer can and should make in disclosing the authority, but they are not an excuse for non-disclosure.²⁷

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Rule 3.3(a)(2) applies only to adverse authority “not disclosed by opposing counsel,” which raises the question whether an appellant or petitioner may wait until the reply brief is filed to disclose an authority not cited in the answer brief. While this issue has apparently not arisen in Colorado or Tenth Circuit decisions, the better approach is to disclose the adverse authority in the opening brief or petition.²⁸

The Duty of Candor to the Client

Beyond the appellate lawyer’s duty of candor to the tribunal, the Colorado Rules of Professional Conduct also require a lawyer to communicate in candor with the client “to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”²⁹ Before commencing work on an appeal, a lawyer should have a frank conversation with the client about the strengths and weaknesses of the appeal; the likely cost of the appeal, both tangible (in attorney fees) and intangible (in time and emotion); and the lawyer’s experience and ability to handle the appeal.

Implicit in these obligations is the need for honest self-reflection, including on whether an appeal would be frivolous, and whether the lawyer is qualified to handle it. Some appeals are straightforward. Others are complex, both substantively and procedurally. Regardless, appeals involve special rules, standards of review, and other jurisprudential principles, and they call for specialized research, analysis, writing, and oral advocacy skills. A lawyer who handled the case at the trial level, whether successfully or not, might or might not be competent to represent the client on appeal, depending on the specific circumstances of the case and the individual lawyer’s experience and skill set. If the lawyer concludes that it is necessary to associate or consult with an appellate expert or, at a minimum, to undertake focused study in appellate practice, the lawyer should discuss that conclusion with the client, obtain the client’s concurrence about how the appeal will be handled, and act appropriately to ensure competent representation.³⁰

Candor as an Opportunity

Aristotle identified three modes of persua-

sion: (1) *ethos*—an appeal to the authority or credibility of the presenter; (2) *pathos*—an appeal to the audience’s emotions; and (3) *logos*—an appeal to logic through the use of facts or authorities that support the speaker’s thesis.³¹ In trials, particularly jury trials, where the factfinder hears a broad range of evidence, makes credibility determinations, and finds facts in part based on emotional connections to the parties and the witnesses, *pathos* is often critical. In appeals, *logos* tends to dominate—and if the facts and the law do not actually support the client’s position, the logical strength of the lawyer’s arguments will take a significant hit.

Ethos is critical in all phases of a case, including on appeal. Every lawyer desires the decision maker’s trust. With credibility, every assertion is accepted as presumptively accurate and believable. Without it, every representation is suspect. And trust built over a career can be lost in an instant.

To be sure, a lawyer’s ethical duties of candor are obligations enforceable through attorney disciplinary proceedings, malpractice exposure, and the risk of a damaged reputation in the legal community. But viewed as a glass half-full, those *duties* translate into an affirmative *opportunity* for appellate lawyers to create and maintain *ethos*. Absolute candor, including acknowledging unhelpful facts or law, reinforces that the appellate judges can trust the disclosing lawyer, and the jurists’ confidence in the lawyer’s integrity often pays dividends throughout the appeal. In addition, prompt and robust disclosure affords the lawyer the valuable opportunity to address problematic facts or law in an affirmative rather than defensive posture—in the words of one federal judge, to “[c]onfront applicable adverse authority expressly and early.”³²

By contrast, “[m]isrepresentation of the record on appeal is poor strategy. Alert opponents will detect the error. An appellate panel of three judges assisted by a staff of able law clerks will confirm what the opponents point out or will itself uncover the defects.”³³ And courts “do read the cases cited in appellate briefs and have low regard for patently false assertions regarding the precedent” those briefs miscite.³⁴ After all, “[t]he ostrich is a noble animal, but not a proper model for an appellate advocate. . . . The ostrich-like

tactic of pretending that potentially dispositive authority against a litigant’s contention does not exist is as unprofessional as it is pointless.”³⁵

Conclusion

There’s no denying that problematic facts and adverse legal authority pose challenges for appellate lawyers. But channeling Asa Gray, the appellate lawyer’s “candor is worth everything to [the lawyer’s] cause.” Misrepresentation and concealment have no place in appellate litigation. The ethical, smart, and effective appellate practitioner confronts bad facts and law honestly and directly, and candidly advises the client on the strength of the appeal and the lawyer’s own qualifications. As an invaluable bonus, the appellate lawyer’s scrupulous candor to the tribunal will inspire the court’s confidence, which often will inure to the client’s benefit. **CL**



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NOTES

1. *The Correspondence of Charles Darwin*, vol. 8 at 46 (Cambridge Univ. Press 1993).
2. *People v. Goodman*, 334 P.3d 241, 247 n.37 (Colo. O.P.D.J. 2014) (emphasis in original; internal quotation marks and citation omitted).
3. The article does not address a criminal defense lawyer’s duties to the court and the client if the lawyer finds the appeal to be “wholly frivolous.” *Anders v. State of Calif.*, 386 U.S. 738, 744 (1967). *Cf.*, *A.L.L. v. People*, 226 P.3d 1054, 1063–64 (Colo. 2010) (rejecting *Anders* procedures for dependency and neglect appeals). Nor does it address a lawyer’s duties to not offer false evidence and to take remedial measures regarding false evidence. See CBA Ethics Comm., Formal Op. 123, “Candor to the Tribunal and Remedial Measures in Civil Proceedings” (June 18, 2011). See, e.g., *Nix v. Whiteside*, 475 U.S. 157, 169–70 (1986) (relying in part on ABA Model Rule 3.3 to hold that a lawyer’s “revelation of his client’s perjury” was consistent with the lawyer’s professional

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obligations); *People v. Casey*, 948 P.2d 1014, 1016 (Colo. 1997) (attorney violated Colo. RPC 3.3(a)(2) when he failed to disclose to the trial court that his client was impersonating the named defendant).

4. See also *Restatement (Third) of the Law Governing Lawyers*, § 111 (2000).

5. A comment to a separate rule governing “Truthfulness in Statements to Others” observes that “partially true but misleading statements can be the equivalent of affirmative false statements.” Colo. RPC 4.1, cmt. [1]. For non-Colorado decisions deeming misleading statements to violate Rule 3.3(a)(1), see, e.g., *Sukumar v. Nautilus, Inc.*, 842 F.Supp.2d 951, 962 n.7 (W.D.Va. 2012); *Daniels v. Alander*, 818 A.2d 106, 110–11 (Conn.App. 2003); and *In re Kalal*, 643 N.W.2d 466, 474 (Wis. 2002).

6. *People v. Katz*, 58 P.3d 1176, 1189 (Colo. O.P.D.J. 2002) (citation omitted).

7. *People v. Maynard*, 219 P.3d 430, 436 (Colo. O.P.D.J. 2008) (emphasis in original).

8. See also, e.g., *Herzfeld & Stern v. Blair*, 769 F.2d 645, 647 (10th Cir. 1985) (sanctioning lawyer); *In re Disciplinary Action Boucher*, 837 F.2d 869, 871 (9th Cir.), as modified, 850 F.2d 597 (9th Cir. 1988) (suspending attorney); *United States v. Williams*, 952 F.2d 418, 421 (D.C.Cir. 1991) (publicly reprimanding prosecutor).

9. *In re Roose*, 69 P.3d 43, 46 (Colo. 2003).

10. *Maynard*, 219 P.3d at 436.

11. For a discussion of C.A.R. 5(e), see Glenn, “Pro Se Civil Appeals—Resources and Opportunities,” 45 *Colorado Lawyer* 57, 59 and nn.20–25 (June 2016).

12. *Duran v. Carris*, 238 F.3d 1268, 1272 (10th Cir. 2001) (citation omitted).

13. *Id.*

14. Colo. RPC 3.3, cmt. [2].

15. Colo. RPC 3.3, cmt. [4].

16. E.g., *Palmer v. Shinseki*, No. 07-3547, 2009 WL 1441132 at *13 (Vet.App. May 22, 2009); *Parasco v. Pac. Indem. Co.*, 870 F.Supp. 644, 646 n.1 (E.D.Pa. 1994).

17. *Sukumar*, 842 F.Supp.2d at 962 n.7.

18. E.g., *United States v. Fernandez*, 516 F. App’x 34, 36 (2d Cir. 2013); *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1347–50, 55 (Fed.Cir. 2003). Cf., *Cordova v. Eighth Judicial Dist. Ct.*, No. 64933, 2014 WL 991121 at *1 n.1 (Nev. Mar. 12, 2014) (omitting key language in a sentence without using ellipses).

19. E.g., *In re Jones*, 418 B.R. 687, 695 n.26 (Bankr.E.D.La. 2009) (brief contained a “blatant misstatement of the law”), *aff’d sub nom.*, *Jones v. Wells Fargo Bank, N.A.*, No. CIV. 07-3599, 2010 WL 3398849 (E.D.La. Aug. 24, 2010); *Keosha C. v. Dep’t of Child Safety*, No. 1 CA-JV 16-0492, 2017 WL 2374834 at *2 n.5 (Ariz.App. June 1, 2017) (brief “misleadingly paraphrase[d]” the relevant statute).

20. Colo. RPC 1.0(m).

21. ABA Formal Op. 06-439, n.2 (Apr. 12, 2006); Colo. RPC 2.4, cmt. [5].

22. E.g., *Sims v. United States*, No. 1:08-CR-00116-MR, 2014 WL 2986000 at *1 (W.D.N.C. July 2, 2014) (an appellate decision “that is not

yet final pending the issuance of the mandate”); *Dilallo v. Riding Safely, Inc.*, 687 So.2d 353, 355 (Fla. Dist. Ct. App. 1997) (statute); *Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc.*, 464 N.W.2d 551, 554, 556–57 (Minn.App. 1991) (same), *aff’d in part and rev’d in part on other grounds*, 482 N.W.2d 771 (Minn. 1992).

23. E.g., *Former Emps. of Chevron Prods. Co. v. U.S. Sec’y of Labor*, 245 F.Supp.2d 1312, 1323 n.7 (Ct. Int’l Trade 2002) (duty extends to “not only decisions of relevant appellate courts, but also decisions of the same court, courts of coordinate jurisdiction and even lower courts”) (citation and internal quotation marks omitted). *But see Brundage v. Estate of Carambio*, 951 A.2d 947, 956–57 (N.J. 2008) (only “binding” decisions constitute “legal authority in the controlling jurisdiction”).

24. E.g., *Chen v. Lynch*, 810 F.3d 466, 469 n.2 (7th Cir. 2016) (same federal circuit); *Lumaj v. Gonzales*, 462 F.3d 574, 576 n.1 (6th Cir. 2006) (same federal circuit); *United States v. Crumpton*, 23 F.Supp.2d 1218, 1219 (D.Colo. 1998) (same federal judicial district); *Time Warner Entm’t Co. v. Does #1-2*, 876 F.Supp. 407, 415 (E.D.N.Y. 1994) (same federal judicial district); *Patterson v. Patterson*, 266 P.3d 828, 834 (Utah 2011) (same state).

25. ABA Formal Op. 280 (June 18, 1949). See, e.g., *In re Bowen*, No. 12-31699-KLP, 2015 WL 5717439 at *3 (Bankr.E.D.Va. Sept. 29, 2015); *Tyler v. State*, 47 P.3d 1095, 1104–05 (Alaska App. 2001).

26. ABA Formal Op. 280.

27. See, e.g., *Jewelpak Corp. v. United States*, 297 F.3d 1326, 1333 n.6 (Fed.Cir. 2002); *Lopez v. Colvin*, No. 215CV02039RFBNJK, 2016 WL 5858712 at *1 (D.Nev. Apr. 25, 2016); *Tyler*, 47 P.3d at 1107.

28. See, e.g., *Jorgenson v. Volusia Cty.*, 846 F.2d 1350, 1352 (11th Cir. 1988) (“The appellants had a duty to refrain from affirmatively misleading the court as to the state of the law. They were not relieved of this duty by the possibility that opposing counsel might find and cite the controlling precedent . . .”).

29. Colo. RPC 1.4(b).

30. See Colo. RPC 1.1 (duty of competence). “A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.” Colo. RPC 1.1, cmt. [2].

31. Aristotle, *On Rhetoric: A Theory of Civil Discourse* (Oxford Univ. Press 1991).

32. Michel, “Effective Appellate Advocacy,” 24 *Litigation* 19, 23 (1998).

33. *Boucher*, 837 F.2d at 871.

34. *Stevens v. McBride*, 492 F.Supp.2d 928, 971 (N.D.Ind. 2005), *aff’d in part, vacated in part on other grounds*, 489 F.3d 883 (7th Cir. 2007).

35. *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) (internal quotation marks and citation omitted).