ETHICS ON APPEAL: ADVOCACY WITH INTEGRITY

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One of the most surprising things about ethics on appeal is how little is written on the topic. Perhaps that paucity of material is due to the smaller number of appeals that are filed in comparison to the number of cases filed at the trial court level.[2] Even though fewer appellate cases are filed overall, every litigator is likely at some point to become involved in the appellate process or at least encounter the need to counsel clients with regard to whether or not to pursue an appeal. The fact that many people encounter the appellate process only occasionally and thus find it unfamiliar may mean that we as a profession should spend more, not less, time considering the ethical issues that may arise in this arena.

The rules of ethics typically are rules of general, rather than specific, application. Indeed, there are no rules in the North Carolina Rules of Professional Conduct that are directly targeted at appeals or the appellate process.[3] Still, a lawyer counseling a client, considering an appeal, or pursuing an appeal encounters many ethical questions along the way. These questions often can be answered by reference to the general rules governing professional conduct, even if it sometimes is more difficult to determine the correct application within the appellate context.

I. CAN THE CASE ETHICALLY BE APPEALED?

When a client loses a case at the trial court, it may then want to know its options. The decision of whether to pursue an appeal generally belongs to the client. In making

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[1] This manuscript is an updated version of a manuscript on a similar topic prepared in 2008 by Allison Van Laningham.

[2] The Fiscal Year 2007-08 Annual Report on the North Carolina Courts (the last version available at http://www.nccourts.org/Citizens/Publications/AnnualReports.asp), indicates that, in that fiscal year, 204 appeals and 569 petitions were filed in the Supreme Court and 1,575 appeals and 849 petitions were filed in the Court of Appeals. In comparison, 368,801 cases and proceedings were filed in the Superior Court division and 3,114,046 cases and proceedings were filed in the District Court division.

[3] In fact the word "appeal" is mentioned only once in the Scope of the Rules, *see* Scope 0.2, section 5, once in the text of a Rule, *see* Rule 1.5(8)(c), and four times in the comments to the Rules, *see* Rule 1.3, cmt. 4; Rule 1.6, cmt. 14, Rule 1.16, cmt. 11, Rule 3.3, cmt. 14.

that decision, though, the client may (and usually will) want its lawyer's advice. In fact, Rule 1.4 of the North Carolina Rules of Professional Conduct[4] imposes on the lawyer a duty to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[5]

It certainly is possible to file a notice of appeal from any final decision of a trial court. From an ethical perspective, the trickier issue is whether the case may or should be appealed. Before discussing that issue with the client, the lawyer must consider several issues.

A. Is the Appeal Frivolous?

Rule 3.1 of the North Carolina Rules of Professional Conduct provides that a lawyer "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[6] Thus, if there is neither a good faith basis to support the arguments that would be necessary to prosecute the client's appeal nor a good faith basis to argue for an extension or change of existing law, the lawyer would be ethically prohibited from filing an appeal even if the client wants to do so.[7]

[4] Unless otherwise noted, all references herein to professional conduct rules are to the North Carolina Rules of Professional Conduct.

[5] N.C. Rules of Prof'l Conduct R. 1.4(b) (2009).

[6] N.C. Rules of Prof'l Conduct R. 3.1 (2009).

[7] Note that this paper is written from the background of appeals in civil cases. Although it discusses rules that are applicable in all cases, those rules may be applied somewhat differently in the criminal context. For instance, Comment 3 to Rule 3.1 provides that "[t]he lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim that otherwise would be prohibited by this Rule." In addition, North Carolina cases have held that it is a violation of the rules of professional conduct for a lawyer in a criminal case to fail to seek or perfect an appeal in certain instances. *See In re Robinson*, 39 N.C. App. 345, 250 S.E.2d 79 (1979) (holding that an attorney's failure to perfect four separate criminal appeals amounted to a lack of diligence under a precursor to Rule 1.3); *In re Dale*, 39 N.C. App. 370, 250 S.E.2d 82 (1979) (stating that an attorney's failure to perfect an appeal where a sentence of death was imposed in the trial court was improper).

There is a critical distinction between what constitutes "good faith" on appeal and what constitutes "good faith" in a trial court. At the trial-court level, a lawyer may present arguments or defenses in a good-faith expectation that facts might arise during discovery to substantiate such arguments or defenses.[8] By the time a case reaches the appellate stage, however, the universe of facts already is established and closed. The appellate court will generally not consider facts or evidence not presented to the trial court. If a fact was not discovered or the evidence was not presented at the trial level, the appellate lawyer can make no use of it other than to argue, if it was an issue, that the trial court erred by preventing the discovery or excluding the evidence. Thus, any argument or defense offered on appeal must *already* be substantiated by the record before it can be presented.

By the same token, and more akin to the application of the rule for trial-level work, the lawyer's subjective *belief* that the client's position might fail on appeal is not the test for whether an appeal is ethical. Instead, Rule 3.1 contemplates that the lawyer is versed in the facts of the case and applicable law before presenting arguments or defenses on appeal. After being armed with such knowledge, it is only when "the lawyer is unable to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law"[9] that the action is considered frivolous such that it would present an ethical barrier for a prospective appellate lawyer.

In the event that a lawyer determines that he cannot ethically pursue the appeal but the client insists on filing an appeal, the lawyer needs to advise the client of applicable time deadlines and advise the client of its option to seek the advice of other attorneys regarding the appeal. In the event that the lawyer's representation agreement with the client contemplates representation through appeal (or fails to limit the representation to the trial level only), the lawyer may have additional considerations if he refuses to file the appeal for the client.[10]

B. Why Does the Client Want to Appeal?

In some instances, the reasons for the client's desire to pursue the appeal may have ethical implications. For instance, if the reason is solely to delay execution of the

[8] *See* N.C. Rules of Prof'l Conduct R. 3.1, cmt. 2 (2007) ("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 substantiated or because the lawyer expects to develop vital evidence only by discovery.")

[9] *Id.*

[10] *See infra* Section III.A.

judgment, to increase costs for the opposing party, or to harass the opposite side, it may be unethical for the lawyer to pursue the appeal even if the appeal is not frivolous.

Rule 3.2 provides that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."[11] The Comment to the Rule provides that a failure to expedite will not "be reasonable if done for the purpose of frustrating an opposing party's attempt to rightful redress or repose."[12] Further, the Comment notes: "The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."[13]

II. IS THERE A CONFLICT?

All lawyers are familiar with conflicts checks and ensuring that we not take on a representation that will place us in an adverse position to an existing client. Rule 1.7 governs such direct conflicts and subsection (a) provides that a lawyer cannot take on a representation if "the representation of one client will be directly adverse to another client . . . ."[14]

In the appellate context, though, potential conflicts arise in ways that may not be as easy to identify. Subsection (a) of Rule 1.7 provides that a lawyer shall not undertake a representation if "the representation of one or more clients may 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."[15] It is this prohibition that an appellate lawyer may need to consider when determining whether he faces either an issue conflict or a personal conflict, as explained below.

A. Issue Conflicts

Because appellate court opinions can create precedent, an appellate lawyer may encounter an issue that is not often faced by the trial lawyer—the issue conflict. If representation of a client on appeal will cause the lawyer to advocate a position that, if

[11] N.C. Rules of Prof'l Conduct R. 3.2 (2009).

[12] *Id.* at cmt. 1 (2009).

[13] *Id.*

[14] N.C. Rules of Prof'l Conduct R. 1.7(a)(1) (2009).

[15] *Id.*

adopted, would be adverse to the interests of another client, an issue conflict likely is present.

For instance, imagine one client whose legal position depends upon the plain, clear and unambiguous nature of a particular statute. If another client's appellate position will be that the statute is in fact ambiguous and unclear, the success of one client on appeal will necessarily harm the position of the other. The same lawyer or law firm should not take both sides of that same issue and generally cannot do so without informed consent from both clients.

Just arguing the opposing position, even if the argument is unsuccessful, may have implications for the law firm and its other clients. Because appellate briefs and opinions are written and the positions taken by the parties discernable from the public record, those positions readily are subject to scrutiny. The law firm may find itself in the unhappy position of having its own arguments cited back to it when it takes the opposite position on behalf of another client. Such a possibility is one reason for the conflict rule's admonition that a lawyer not take on a representation when that representation will be "materially limited" by responsibilities to another client.[16]

B. Personal Interest Conflicts

Another type of conflict that can arise when a lawyer considers whether to counsel a client to appeal and whether to handle that appeal for the client is a personal conflict. If, for instance, a lawyer believes (or the client believes) that a bad result at the trial level may have resulted, at least in part, from poor performance by the lawyer, the lawyer might find herself facing a potential personal conflict. In the event of a bad outcome, especially if the client blames the lawyer or the lawyer fears that could be the case, there might be a temptation to advise the client to pursue an appeal in an effort to change or insolate that bad outcome for the benefit of the lawyer. If an appeal is in the best interest of the lawyer but perhaps not in the best interest of the client, a personal conflict between the lawyer's interest and the client's interest may be present.

By the same token, a trial lawyer turned appellate lawyer could find himself in a situation when an argument or issue on appeal could reveal a mistake that the lawyer made at the trial level. For instance, if the lawyer failed to raise an issue or a defense and the issues presented on appeal could bring that error to light, a lawyer might be tempted to handle the appeal and to shape the issues (or attempt to do so) in a way that would keep the issue hidden.

[16] *Id.*

Rule 1.7 counsels that a lawyer should not undertake a representation when the representation "would be materially limited by . . . a personal interest of the lawyer."[17] In the scenarios outlined above, the lawyer's personal interest could come into play on appeal in a way that would promote the lawyer's interests over the client's. In such a circumstance, the lawyer would be well advised to refer the client to other counsel to evaluate whether an appeal should be taken and, if so, to evaluate the issues that should be raised during that appeal.

III. SHOULD THE LAWYER HANDLE THE APPEAL?

When the client has a case that can be appealed ethically, and no conflicts are present, the lawyer must then consider whether he should handle the appeal. Again, several considerations enter the calculus as the lawyer works through this question.

A. Does the Representation Agreement Cover an Appeal?

One of the initial considerations regarding whether the lawyer should handle the appeal is the agreement between the lawyer and the client. Rule 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[18]

Though Rule 1.3 does not mention appeals, the comments to the rule explain that the "reasonable diligence" owed a client continues not only through trial proceedings, but on any appeal as well. Whether the lawyer has an obligation to assist the client with the appeal may depend on the scope of the representation agreement. Comment 4 to Rule 1.3 provides that "[w]hether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client."[19] Further, "[u]nless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client."[20] If the representation agreement provides that the client has retained the lawyer to handle the matter generally or to conclusion (as opposed to just through the trial level, for instance), the client may reasonably believe that the agreement covers appeals or the agreement may reasonably be found to extend through the appellate process.

If there is a possibility at the outset of the representation that a lawyer might not want to handle any eventual appeal, the lawyer may be wise to set out the limitations of

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[17] *Id.*

[18] N.C. Rules of Prof'l Conduct R. 1.3 (2009).

[19] *Id.* at cmt. 4.

[20] *Id.*

the representation in the initial agreement. Rule 1.2 provides that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances."[21] In the initial retainer letter and conference with the client, for example, the lawyer could define the initial scope of the representation to include only proceedings at the trial court level with the possibility of reaching a separate agreement should the matter be appealed.

Even when the agreement does not extend through the appeal, Comment 4 to Rule 1.3 provides that "if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter."[22] For example, Comment 14 to Rule 1.6 provides that "[i]n the event of an adverse ruling [requiring disclosure of a client's confidential information], the lawyer must consult with the client about the possibility of appeal" and cites Rule 1.4 on communication.[23]

B. Can the Lawyer Meet the Duty of Competence on Appeal?

A lawyer owes a duty of competency to that lawyer's client. Rule 1.1 outlines that duty:

> A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.[24]

In unfamiliar territory, which the appellate process is for some, questions about this duty come into play. Because of the number and degree of technicality of some of the appellate rules, lawyers who are very capable and supremely competent in the trial courts may not be so in the context of the appeal. Unless the lawyer has or can develop the necessary knowledge of the rules and applicable case law necessary for the representation, the lawyer should either decline the appellate representation or, at a minimum, associate another lawyer who does have the requisite knowledge.

[21] N.C. Rules of Prof'l Conduct R. 1.2(c) (2009).

[22] N.C. Rules of Prof'l Conduct R. 1.3, cmt. 4 (2009).

[23] N.C. Rules of Prof'l Conduct R. 1.6, cmt. 14 (2009).

[24] N.C. Rules of Prof'l Conduct R. 1.1 (2009).

Recent history in North Carolina definitively shows that handling an appeal is entirely different from handling that same matter at the trial court.[25] Our appellate law is now littered with decisions that dismiss appeals for one violation of the appellate rules or another. The basis for dismissal ranges from failure to properly format the brief under the North Carolina Rules of Appellate Procedure[26] to failure to properly compose assignments of error under the now-superseded Appellate Rule 10. Fortunately for appellate lawyers, the Supreme Court recently outlined a test for dismissal of appeals for nonjurisdictional rules violations that requires the court to first consider lesser sanctions before dismissal of the appeal is appropriate.[27] Hopefully this decision will cause fewer

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[25] *See, e.g.*, *Jones v. Harrelson and Smith Contractors, LLC*, 180 N.C. App. 478, 638 S.E.2d 222 (2006), *reversed and remanded by* 362 N.C. 226, 657 S.E.2d 352 (2008), *on remand*, -- N.C. App. --, 670 S.E.2d 242 (2008), *and affirmed by* 363 N.C. 371, 677 S.E.2d 453 (2009). After a partial loss in Superior Court in 2005, Ms. Jones appealed to the North Carolina Court of Appeals. Ms. Jones's brief to the court of appeals failed to comply with certain appellate rules: "Plaintiff's broad assignments of error and her failure to reference the specific record pages to the order she purports to appeal from require dismissal of her appeal." *See Jones*, 180 N.C. App. at 487, 657 S.E.2d at 229. Five appellate opinions and four years after the superior court case was decided, Ms. Jones finally prevailed on having her appeal heard on the merits for the most part, notwithstanding her violations of the appellate rules. Still, at least one of her arguments on appeal was never heard on the merits because of failure to comply with appellate rules. *See Jones*, -- N.C. App. at --, 670 S.E.2d at 249 (declining to consider Ms. Jones's argument that she was owed prejudgment interest).

[26] *See, e.g.*, *Selwyn Village Homeowner's Ass'n v. Cline & Co.*, 186 N.C. App. 645, 651 S.E.2d 909 (2007), *reversed and remanded*, -- N.C. --, 667 S.E.2d 720 (2008), *affirmed on other grounds*, 670 S.E.2d 644 (2008) (Table). In *Selwyn*, Judge Tyson, on behalf of a unanimous panel of the Court of Appeals, wrote that the case should be dismissed for appellate rules violations. The violations cited were the following:

> (1) "In the argument section of defendant's brief, defendant states the questions presented and references the assignments of error pertinent to the question. Defendant failed to identify the pages at which the assignments of error appear in the record following the questions presented," *id.* at 648, 651 S.E.2d at 911, and
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> (2) "Defendant's brief violates Appellate Rule 26(g)(1) by containing: (1) an improper index margin; (2) double-spaced captions and headings; and (3) no appendix page reference," *id.* at 649, 651 S.E.2d at 912.

[27] *See Dogwood Dev. and Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 201, 657 S.E.2d 361, 367 (2008) (holding that "when a party fails to comply with one or more nonjurisdictional appellate rules, the court should first determine whether the noncompliance is substantial or gross under Rules 25 and 34. If it so concludes, it should

cases to be dismissed for rules violations but, regardless of the effect of the decision, the many dismissals of appeals to this point is a reminder of how different the appellate process can be.[28]

There is no doubt that participation in an appeal is very different from prosecution of a case at the trial level. There are certain jurisdictional requirements for appeals that, like statutes of limitation, are inflexible and unyielding. For instance, failure to both file *and serve* a notice of appeal within the allowed time period will deprive the appellate court of jurisdiction and cause the appeal to be dismissed. Likewise, the method of conveying the evidence or issues from the trial level generally is limited to material that is either contained in or presented along with the record on appeal. Failure to include certain information in the record can deprive the appellate court of jurisdiction and

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then determine which, if any, sanction under Rule 34(b) should be imposed. Finally, if the court concludes that dismissal is the appropriate sanction, it may then consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal.").

[28] Even the most seasoned appellate lawyer may have difficulty at times discerning the proper application of the appellate rules in light of seemingly inconsistent outcomes in the Court of Appeals on similar issues. *Compare, e.g.*, *Dogwood Dev. and Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 183 N.C. App. 389, 395-98, 645 S.E.2d 212, 217-19 (2007) (Judge Hunter dissenting from a decision to dismiss the case for appellate rules violations), *reversed and remanded*, 362 N.C. 191, 657 S.E.2d 361 (2008), *with McKinley Bldg. Corp. v. Alvis*, 183 N.C. App. 500, 508-14, 645 S.E.2d 219, 225-28 (2007) (Judge Tyson dissenting from decision to impose sanctions other than dismissal) *and Peverall v. County of Alamance*, 184 N.C. App. 88, 96-99, 645 S.E.2d 416, 422-23 (2007) (same). The analysis becomes even more challenging when it is recognized that *McKinley* was decided on June 5, 2007 and found that four appellate rules violations (failure to reference the record or transcript under Rule 10(c), failure to reference assignments of error in the argument, failure to state the grounds for appellate review, and failure to state the applicable standard of review) did not warrant dismissal. Also on that day, June 5, 2007, the court decided *Dogwood* and determined that the same rules violations discussed in *McKinley* (failure to reference the record or transcript under Rule 10(c), failure to reference assignments of error in the argument, failure to state the grounds for appellate review, and failure to state the applicable standard of review) required that the case be dismissed. It is likely the hope of every lawyer who spends any time on appeals that the Supreme Court's decision in *Dogwood Development and Management Co., LLC*, 362 N.C. 191, 657 S.E.2d 361, in which it reversed and remanded one of the decisions discussed above and announced a standard for consideration of sanctions in the event of nonjurisdictional appellate rules violations, will help to calm what many have viewed as very turbulent (and, even for the most conscientious lawyer, potentially dangerous) appellate waters.

subject the appeal to dismissal. Even if the proper jurisdictional material is included, if material needed to make the necessary arguments to the appellate courts is not included in the record, there may be no way for the appellate court to consider the material or properly address the issues.

The means of communicating the merits of the case to the appellate court is limited to briefing, sometimes supplemented by a short oral argument. Other than the brief and any oral argument, the advocate has no other opportunity to communicate with the appellate court about the substance of the issues on appeal.

Every step of the appellate process from the notice of appeal to the record on appeal to assignments of error to briefing is subject to specific and sometimes highly technical rules that, if not followed, may prevent or negatively impact appellate review of the client's case. Because these rules are quite different from the rules in the trial courts, they can create ethical issues for the would-be appellate lawyer, especially if that lawyer is only an occasional visitor to the appellate process.

IV. CANDOR TO THE COURT

Professional Responsibility Rule 3.3 provides that a lawyer has a duty of candor to the tribunal. Courts have repeatedly stated that candor is critical to the judicial system and to the appellate process. For instance, the Fourth Circuit Court of Appeals addressed the issue this way:

> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or lack of candor in any material respect quickly erodes the validity of the process.[29]

[29] *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993). In addition, it is likely that, if a lawyer violates Rule 3.3, the lawyer may also be in violation of Rule 8.4(c), which provides that it is "professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . ." N.C. Rules of Prof'l Conduct R. 8.4(c) (2009).

This duty of candor applies in several different ways to the appellate lawyer, from correctly portraying case law and the record to informing the appellate court of developments in the case to disclosure of adverse authority.

A. Misstatements of Law or Fact

Counsel has the duty to avoid knowingly making a false statement of law or fact to the court. Rule 3.3 provides that lawyers "shall not knowingly . . . make a false statement of material 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 . . . ."[30] In the context of an appeal, this issue most often arises through representation of the record or quotation of the law.

An appellant's brief must include a statement of facts. The rules require that the facts be supported by citations to the record.[31] Thus, a citation of facts that are not supported by the record, even if the record would support the citation, violates the appellate rules. If there is no record citation because there is no record support, the problem extends beyond the appellate rules to ethical provisions. In addition, problems can arise when a fact is asserted to be "established" or testimony is claimed to be "uncontroverted" with citation to one portion of the record when other portions of the record demonstrate that differing testimony or evidence was offered about the issue.[32]

The same type of problem can occur with selective citation of case law or other provisions. If the material cited excludes key portions or is taken out of context such that the meaning as represented in the quotation is not wholly consistent with the material cited, the duty of candor is implicated. If the mis-citation was knowingly done, there likely was a violation of the duty.

In *State v. Hooper*, the Supreme Court indicated that the duty of candor extends to include a requirement of consistency.[33] In that case, the State had taken conflicting positions in two different cases and, in fact, an inconsistent position between its argument at the Court of Appeals and its argument at the Supreme Court regarding the appropriate

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[30] N.C. Rules of Prof'l Conduct R. 3.3 (2009).

[31] *See* N.C. R. App. P. 28(b)(5). Rule 28(b)(5) provides in part that the facts shall be "supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be."

[32] *See, e.g., In re Chakeres*, 687 P.2d 741 (N.M. 1984) (censuring a lawyer for representing to the court that testimony was "uncontroverted" when the full record showed that was not the case).

[33] 358 N.C. 122, 591 S.E.2d 514 (2004).

court to consider an appeal of a probation revocation (the Superior Court or the Court of Appeals). The court defined counsel's duty of candor and consistency:

> [W]here the same party argues two wholly opposing positions in contemporaneous appeals[34] or switches positions during the course of a single appeal, we believe that the party has a responsibility to advise the affected courts and, if asked, to justify its actions. Otherwise, such reversals can frustrate not only the fair disposition of individual cases but also the effective administration of justice.[35]

Thus, the duty of candor to the court may extend beyond the single case before the court to the same issues raised in other cases argued by the lawyer.[36] The Supreme Court noted the importance of candor to the court by stating that "[c]andor and consistency in briefs and oral arguments are paramount to the ability of our appellate courts to preserve and interpret the law."[37]

B. Updates on Case Status

Suppose that an appellate case has been fully briefed and argued and, while the parties are waiting for a decision from the appeals court, they settle the case. One of the issues on appeal has not been addressed by the jurisdiction and the defendant wants for the court to decide the issue, despite the settlement. The plaintiff no longer cares whether or not the court decides the issue but does not object to such a decision. The defendant wants its lawyer to refrain from informing the appellate court about the settlement so that the decision on the case will issue. Neither defendant's counsel nor plaintiff's counsel can ethically comply with that request.

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[34] Although the party taking differing positions in the *Hooper* case was the State (and thus the client was the same in all of the affected cases), taking differing positions in cases on behalf of different clients would implicate not only the duty of candor to the court but also the ethical requirement to avoid issue conflicts. *See supra* Section II.A.

[35] *Hooper*, 358 N.C. at 127, 591 S.E.2d at 517.

[36] There are likely common sense limits on how far any duty of consistency extends. The Supreme Court in *Hooper* addressed the issue in the context of inconsistency between the same issue on behalf of the same client in both the same case and in contemporaneous cases. The consistency concern would likely be largely reduced or eliminated if, for instance, there is a passage of time between cases that may be accompanied by the creation or revelation of additional authority (not to mention a decision in the initial case that would inform the issue).

[37] *Hooper*, 358 N.C. at 126, 591 S.E.2d at 517.

From an appellate perspective, once the case is settled, the appeal is moot. The North Carolina Court of Appeals noted that "[a] case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy."[38]

As early as 1849, the United States Supreme Court admonished lawyers that attempting to obtain a decision in a moot case is a fraud on the court:

> [A]ny attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court.[39]

Thus, a lawyer would have a duty to disclose a change in the case status so that the appellate court can avoid entering an advisory opinion in a moot case.

The North Carolina Supreme Court considered the impact of a settlement or resolution of a case while the case is on appeal in *State ex rel Rhodes v. Gaskill*.[40] In *Gaskill*, the parties resolved the case by means of a consent judgment about a month prior to oral argument in the Supreme Court. Counsel informed the court about the consent judgment during the oral argument, but did not otherwise move to dismiss the case. Dismissing the case on its own motion, the court noted that:

> Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law . . . . If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action.[41]

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[38] *Citizens Addressing Reassignment and Educ., Inc. v. Wake County Bd. of Educ.*, 182 N.C. App. 241, 246, 641 S.E.2d 824, 827 (2007) (citing and quoting *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003); internal quotation marks omitted).

[39] *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255 (1850).

[40] 325 N.C. 424, 383 S.E.2d 923 (1989).

[41] *Id.* at 426, 383 S.E.2d at 925 (citing and quoting *In re Peoples*, 296 N.C. 109, 147-48, 250 S.E.2d 890, 912 (1978)).

Additionally, the court stated that the principle that "a court will not decide a 'moot' case is recognized in virtually every American jurisdiction. In state courts, the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint."[42]

C. Disclosing Adverse Authority

A difficult issue that an appellate lawyer may face is the requirement that he disclose adverse authority to the appellate court, especially when the other side has missed the case and not cited it to the court. The issue can become even more difficult when a client, not fully versed in legal ethics, does not want for its lawyer to "do the other side's work for it" by bringing the authority to the court's attention.

Assuming that the authority falls within the terms of the rule, such disclosure is exactly what Rule 3.3 requires. The rule provides, "(a) A lawyer shall not knowingly . . . (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."[43] As Comment 4 provides, "[t]he underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case."[44]

By its terms, the rule does not limit the disclosure obligation to controlling precedent in the court that will decide the appeal nor is the requirement limited to case law. Instead, the rule uses more broad terminology of "legal authority in the controlling jurisdiction" and the comment's interpretation could be read to be broader still. Reasonable minds could differ, under the terms of the rule, on the reach of the obligation. The rule and the comment combined, however, seem to make it clear that the rule is not strictly limited to only controlling precedent. A good standard is that, if the lawyer believes that the court would consider the authority important[45] or if there is a concern that, absent disclosure of the authority, the court would believe that the lawyer misled it, the material should be disclosed.

An appellant may shoulder the burden of this duty more than most appellees. That is because the rule does not allow an appellant to refrain from disclosing adverse

[42] *Gaskill*, 325 N.C. 424, 426, 383 S.E.2d 923, 925 (internal citation omitted).

[43] N.C. Rules of Prof'l Conduct R. 3.3 (2009).

[44] *Id.* at cmt. 4.

[45] *See* ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 280 (1949).

authority in its opening brief and instead wait to see if the appellee unearths it. Instead, the obligation is for the appellant to disclose such "legal authority in the controlling jurisdiction" of which it is aware in the first instance—its opening brief.[46]

The Court of Appeals considered the duty of candor in this context in *State v. Cagle*.[47] In *Cagle*, the defendant-appellant apparently cited a number of cases to the court that predated the Supreme Court's decision in *State v. Rogers*,[48] which the Court of Appeals found controlled the issue on appeal.[49] The court noted counsel's failure to cite the case:

> In passing, we note that defense counsel did not cite, allude to, or attempt to distinguish *Rogers* . . . . Our Supreme Court explicitly stated that in *Rogers* it had overruled its own prior decisions and the decisions of this Court [on the issue in the case] . . . . Virtually all the authority defense counsel cites predated *Rogers*. In addition, failure to discuss *Rogers* violates counsel's duty of candor to this Court. *See* North Carolina Rules of Professional Conduct Rule 3.3(a)(2) . . . .[50]

Although it may sometimes be hard to get past the feeling that a lawyer is helping his opponent (and not his client) by pointing our adverse authority, in the end such candor is not only ethically required but also helpful to the reputation of the appellate lawyer.[51] The credibility of counsel is only increased as the appellate courts recognize that he adheres to the duty of candor and recognizes the important principle that it underscores—the state and consistency of the rule of law is fundamental and must be protected beyond the bounds of a particular case.

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[46] *See Jorgenson v. County of Volusia*, 846 F.2d 1350, 1352 (11th Cir. 1988).

[47] 182 N.C. App. 71, 641 S.E.2d 705 (2007).

[48] 346 N.C. 262, 485 S.E.2d 619 (1997).

[49] *Cagle*, 182 N.C. App. at 75, 485 S.E.2d at 708-09.

[50] *Id.*, 485 S.E.2d at 709.

[51] The recognition of such candor inspires from the courts remarks such as: "With commendable candor, defendant brings forward three additional assignments of error that he concedes have been previously decided contrary to his position by this Court." *State v. Wooten*, 344 N.C. 316, 338, 474 S.E.2d 360, 373 (1996). In contrast, a lack of candor results in admonitions like this one: "When called upon to lend extraordinary relief to parties, the court has a right to look for full discovery and perfect candor on their part. It is by their non-observance of this rule that the plaintiffs in this action have put themselves and their cause at some disadvantage before this court." *Phifer v. Barnhart*, 88 N.C. 333, 1883 WL 2367, at *3 (Feb. 1883).

V. CONCLUSION

Discerning the application of ethical rules to appeals can be made more difficult by the fact that there are fewer appeals filed than cases in the trial courts and a correspondingly smaller number of ethics opinions and decisions specifically in the appellate context. Still the rules of ethics are rules of general application and they apply, sometimes even more stringently, in the appellate context. As the North Carolina Supreme Court noted:

> Apart from this case, it is a sad mistake to suppose that the practice of the law is a game of hazard, to be won by shift, subterfuge, deception and dissembling. On the contrary, the law requires of those who practice in its courts the strictest and most delicate observ[ance] of candor, truth, integrity, justice and fair dealing in the conduct of all legal proceedings, in and out of court.[52]

Indeed, the premise of advocacy with integrity drives the lawyer's role in the judicial process in general and the appellate process in particular. It is the covenant between the appellate lawyer and the court that the lawyer's signature or representation reflects a good-faith belief that the appeal is not frivolous and that the material presented is honest and complete.

[52] *Brooks v. Brooks*, 90 N.C. 142, 1884 WL 1782, at *3 (Feb. 1884).