Chapter 2

The Ethical, Professional Advocate

The majority of this book focuses on *how* to present arguments to a court; this chapter, by contrast, focuses on *who* you present to the court. In other words, this chapter focuses on you—the source of the message. Every interaction you have as an attorney, whether that interaction is with the court, opposing counsel, or a client, gives you the opportunity to demonstrate—and others the opportunity to observe—what kind of lawyer you have chosen to be. Have you chosen to be fair? Truthful? Respectful? Aggressive? Evasive? Sloppy? Your goal should be to always act as—and to be perceived as—an ethical, professional, and credible lawyer.

In an adversarial setting, it is easy to get caught up in the fight and to become lax about acting ethically and professionally. This chapter serves as a gentle reminder not to leave your ethics and professionalism at the door when you transition to situations that require persuasive, rather than objective, writing.

I. Why Act Ethically and Professionally?

As you learned in the last chapter, *The Nature of Persuasion*, one reason to act ethically and professionally is because your credibility as an advocate affects the persuasiveness of your argument. A court will be more receptive to your argument if it perceives you, the source of that message, as credible. For example, if you tell the court, "Your Honor, the evidence will show that the police officers continued to question my client even after my client unequivocally invoked her right to counsel," the court

"Ethics" and "Professionalism"

The two terms we use throughout this chapter are broad. "Ethics" at its broadest means "[a] set of principles of right conduct." *The American Heritage Dictionary of the English Language* 630 (3d ed. 1992). "Professionalism" often refers to the standards of people practicing an occupation when that occupation requires significant training and study. *See id.* at 1446 (defining "professionalism" and "professional").

Those terms can be narrowed to "professional ethics," "legal ethics," or "rules of professional conduct." Generally, those more narrow terms refer to required standards that govern a lawyer's conduct. An attorney who fails to follow those governing standards risks a disciplinary action or disbarment.

This chapter uses the broader terms — ethics and professionalism — to encourage you to think broadly about the set of principles or standards you will adhere to in your practice.

must be able to assume that you have diligently investigated the facts and that you are representing those facts accurately. Although you might prevail the first, or even the second, time that you inaccurately represent the facts or the law to the court, your luck will eventually run out. When it does, you will have tarnished your credibility. Moreover, in the extreme case, it will become impossible to persuade a court of anything because you will have been suspended from practice or disbarred for unethical conduct. Thus, if your goal is to persuade courts on behalf of your clients, become an unfailingly credible resource for the court.

You should, however, keep in mind one other important reason for acting ethically and professionally: It is the right thing to do. Members of the public who seek out an attorney are vulnerable. They have an important matter they are unable to resolve. To resolve that matter, they need to enter the legal system — a system whose procedures can seem confusing and inaccessible. Ethical and professional rules protect those members of the public and the integrity of the court system. The rules ensure fairness amongst the parties before the court. Acting in an ethical and professional way — even when doing so is not required by a rule — protects us and our profession. We must face ourselves in the mirror every day, and we must interact with other lawyers nearly every day. Those everyday interactions are more satisfying and vastly easier when we act ethically and professionally.

II. Some Guiding Principles

Although specific rules govern the conduct of an advocate, a few general principles will make those specific rules much easier to follow. Here,

we present a few general principles before we turn to the specific rules that govern a lawyer's conduct.

A. A "Zealous Advocate" Is Not a "Zealot"

First, understand what it means to be a "zealous" advocate. You will hear the word "zealous" bandied about a lot in the context of representing clients. Lawyers sometimes use the obligation to represent clients zealously as a justification for unethical, unprofessional, aggressive, or inappropriate behavior. Those lawyers, however, misunderstand the term.

The concept of "zeal" as a professional ethic was first introduced in 1908 when the Canons of Professional Ethics explained that a lawyer owes his client "warm zeal in the maintenance and defense of [the client's] rights."[1] But even then, the Canons took care to remind lawyers that "[t]he office of attorney does not permit, much less does it demand … violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client."[2] By 1980, the professional code emphasized that being a zealous advocate does not change a lawyer's duty to "treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."[3]

Nevertheless, concerns arose that attorneys misunderstood what it means to "represent a client zealously." Thus, in the most recent revision, the concept of "zeal" has been replaced by the requirements of diligence and promptness.[4] The commentary to today's rules discusses the idea of "zeal in advocacy." That commentary explains that, "[a] lawyer is not bound … to press for every advantage that might be realized for a client" and "the lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons in the legal process with courtesy and respect."[5] As one court put it, "[t]o be vigorous … does not mean to be disruptively argumentative; to be aggressive is not a license to ignore the rules of evidence and decorum; and to be zealous is not to be uncivil."[6]

Thus, "zeal" does not mean you should become a "zealot."[7] The first term means "enthusiastic diligence"; the second means "fanatic." Do not

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1. ABA Canons of Prof'l Ethics Canon 15 (1908).
2. *Id.*
3. Model Code of Prof'l Responsibility EC 7-10 (1980).
4. Annotated Rules of Prof'l Conduct 43 (1992) ("Rule 1.3 substitutes reasonable diligence and promptness for zeal; the comment [explaining Rule 1.3 does], however, … requir[e] zeal in advocacy upon the client's behalf.").
5. Annotated Model Rules of Prof'l Conduct R. 1.3 cmt. (2007).
6. *In re Williams*, 414 N.W.2d 394, 397 (Minn. 1987).
7. *See* G.C. Hazard, Jr., & W.W. Holdes, *The Law of Lawyering* 70 (2d ed. 1990); *see also* Michael D. Murray & Christy H. DeSanctis, *Advanced Legal Writing and Oral Advocacy: Trials, Appeals, and Moot Courts* 3 (2009) (commenting that attorneys misunderstood the term "zeal" to mean "fanatically" or "cravenly").

Who's in Charge Here?

As you can see from the discussion about the word "zealous," the rules governing professional conduct have changed over time. Those changes can sometimes be confusing, in particular, because those changes involve a variety of "rules," "codes," and "canons." In an effort to help you sort through the different "rules," "codes," and "canons," here is a brief explanation of the rules governing the professional conduct of lawyers.

To begin, individual states adopt the rules that govern the conduct of lawyers practicing within that state. Thus, every state has its own unique set of rules governing the professional conduct of its practicing lawyers.

The American Bar Association (ABA) has, however, exerted enormous influence on the rules that each state has adopted. Since 1908, the ABA has published a set of model rules of professional conduct. As "model" rules, the ABA's rules are merely a recommended set of rules and have no binding authority. However, because most states have, to one degree or another, adopted the ABA's model rules, the ABA's rules provide a fairly good gauge for the rules that states have adopted. Over time, the ABA's model rules have changed. So that the change in names does not confuse you, here's a short history of the model rules of professional conduct.

1908 ABA adopts the Canons of Professional Ethics.
1969 ABA adopts the Model Code of Professional Conduct.
1983 ABA adopts the Model Rules of Professional Conduct.

Each new set of rules replaced the preceding set of rules. Thus, today, the ABA's recommended rules are the Model Rules of Professional Conduct. However, as mentioned above, each state is free to adopt the ABA's revisions or not.

confuse the two. Although others will cry "zealous advocacy" to justify boorish behavior, you know better.

B. "It Is What It Is"

Next, practice saying, "It is what it is." In your life as a lawyer, you will undoubtedly encounter facts that are inconvenient and law that is unfavorable. When you encounter an inconvenient fact or unfavorable law, you should say to yourself, "It is what it is." Face the facts. Acknowledge the law. And then explain why, despite the one or the other, your client should still prevail. If the particular facts or relevant law preclude you from arguing that your client still wins, then you must admit that conclusion. Talk to your client about the available options and, if necessary, settle or withdraw your complaint or appeal.

The alternative—ignoring inconvenient facts or unfavorable law—will ultimately do more harm than good. For example, if you avoid the

undesirable facts or law, you will lose the opportunity to present them in the light that will best serve your client. Worse, if the problematic facts or law prevent you from arguing that your client should still prevail, then you will have pursued a frivolous argument, wasting your client's money and exposing yourself to sanctions. Either way, when those bad facts or contrary law come to light—and they will—your credibility will be tarnished and possibly damaged beyond repair. Thus, although skirting some facts or a part of the law may seem like a good idea in the short term, the damage to you and to your client is simply not worth it. Instead, accept "it is what it is," and take the opportunity to couch the problematic facts and law in a way that minimizes their impact.

C. "Winning" Is a Relative Term

Finally, as an advocate, you should think carefully about what it means to "win." In adversarial settings, people talk a lot about winning and losing. Trials often are conceived as battles or, if really long and drawn-out, as wars. On appeal, people win or lose, as if appeals are sporting events in which one team is a winner and the other a loser. Lawyers refer to counsel representing other parties as their opponents, and they often revel in beating them.

Although that kind of shorthand for adversarial proceedings is common and sometimes useful, try to view proceedings as something other than a to-the-death battle. Doing so helps to avoid some of the ethical and professional pitfalls that befall those who become too caught up in the battle. Avoid seeing adversarial settings as wars in which all opponents are to be mercilessly crushed, and you may also avoid the temptations to take unethical or unprofessional shortcuts.

What does it mean to win? Winning in an adversarial setting may be defined as achieving the best possible outcome for your client in light of the existing facts and law and consistent with acting professionally and ethically.

An example involving an inmate's appeal and an assistant attorney general will illustrate the point. Along the way, you will also see how an attorney can accept that "it is what it is" and still act as a zealous advocate. In that case, an inmate brought a tort action against the prison. The inmate lost and—acting *pro se*—appealed the decision arguing that the trial court judge had erroneously granted summary judgment in favor of the state. An assistant attorney general was assigned to the case to represent the state government. Upon reviewing the facts and the law, the assistant attorney general determined that the inmate was correct: The trial court had, in fact, erroneously granted judgment in favor of the state. Although a non-frivolous argument could have been made that the appellate court should uphold the trial court's judgment, it had little chance of succeeding. Worse, if the appellate court rejected the inmate's

argument, there was a chance that the appellate court would announce a rule that would be detrimental to the state in the many other tort actions filed by prison inmates.

The assistant attorney general decided that the best outcome would be achieved by conceding that the trial court had erred but suggesting a rule that would benefit the state in the long run.[8] The court adopted the state's proposed rule. Although the appellate court held in favor of the inmate, the state "won" the appeal in the sense that it achieved the best possible outcome given the facts and the law.

Winning is not always about winning the case. If you carefully and objectively assess the facts and law, and make the best of what you have, you are less likely to push the boundaries of professionalism to achieve an illusory victory.

III. Specific Rules an Advocate Should Know

Although the general principles above will point you in the right direction most of the time, you can also turn to the rules of professional conduct. Each state's bar adopts rules of professional conduct that apply to members of that bar, which you can find by going to your state bar's website.[9] In most states, though, the rules of professional conduct generally follow the American Bar Association's Model Rules of Professional Conduct. Based on those model rules, here are some guidelines about how to conduct yourself as an ethical, professional advocate.

RULE	DO	DON'T
1.1	**Be competent**, which includes • Investigating the law and facts sufficiently to determine whether your client has grounds for a claim. • Submitting briefs that are organized, thoroughly researched, and supported by legal authority.	**Demonstrate incompetence by** • Failing to educate yourself about claims or arguments that your client might assert or about facts that might support those claims or arguments. • Submitting briefs that are so disorganized or unsupported by legal authority that the court is "called upon to supply the legal research and organization to flesh out a party's arguments." *Smith v. Eaton*, 910 F.2d 1469, 1471 (7th Cir. 1990)

8. *See Canell v. Oregon*, 58 P.3d 847 (Or. Ct. App. 2002) (adopting state's proposed rule).

9. You can find a link to the various states' rules on the American Bar Association's website: http://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest.html#States.

RULE	DO	DON'T
1.3	**Be diligent**. "Diligence" is an earnest, persistent effort to accomplish the task at hand, in this case, representing your client.	Allow an ever-expanding workload (or other personal events in your life) to cause you to **neglect** a client's case.
1.3	**Be prompt** in communicating with your client and attending to your client's matter.	**Procrastinate** such that you needlessly raise your client's anxiety; undermine your client's confidence in you; or, worst of all, adversely affect your client's legal position.
1.4	**Communicate regularly with your client**, both to consult about the means of achieving your client's objectives and to keep the client informed about the status of the case.	Avoid returning phone calls, letters, or e-mails.
1.6	**Maintain confidences**. Except under limited circumstances designated in the model rules or under the law, you cannot reveal any information relating to the representation of your client.	Gossip, tell tales, or post information about your clients, especially in a manner that would allow someone to identify your client.
3.1	**Assert an argument only if it can be supported by both the law and facts.** If winning your argument would require the court to overturn existing case law or a statute, your argument must recognize that.	**Assert a frivolous argument**. A lawyer makes a frivolous argument when it is wholly unsupported by either the law or the facts of the case. Although an attorney can argue that the law should be extended to new areas or that a previous decision should be overruled, such an argument should acknowledge that it is attempting to extend or overrule current law.
3.3	**Acknowledge contrary authority from the governing jurisdiction.** Doing so is not only ethical, but is good advocacy.	**Ignore contrary authority in the governing jurisdiction**. If you find yourself thinking, "maybe the court and opposing counsel won't find this case," you're asking for trouble.
3.3	**Correct a false statement of law or fact.** You may, at some time, inadvertently state the law or a fact incorrectly, or the law may change while your client's case is being considered. In either situation, you must alert the court.	**Knowingly make a false statement of law or fact** to the court. Never stretch your reading of the law or the facts such that you are misrepresenting one or the other.
3.4	**Follow court rules.**	Fail to research and, thereby, fail to become familiar with a court's rules.
3.4	**Be fair to the opposing party and counsel.**	**Be unreasonable by** • Making frivolous discovery requests. • Failing to respond to, or delaying a response to, a reasonable discovery request. • Raising a fact or issue at trial when you believe that the fact or issue is irrelevant or inadmissible.

RULE	DO	DON'T
3.5	**Avoid improper communications** with the court, counsel, or others.	**Communicate ex parte** with the judge or jury, unless permitted or required to do so by law. "Ex parte" means the communication occurs without the other party (or counsel for the other party) being present.

If the above basic principles and specific guidelines prove insufficient, and you find yourself confronting a decision about which you are uncertain, imagine that whatever you are about to do will end up on the front page of the *New York Times*. Or, imagine that your decision "goes viral." In other words, imagine that anyone with an Internet connection—that is, everyone—knows about the decision you just made. Do you still feel comfortable? If you have to spend much time and effort deciding whether a proposed course of action is ethical or professionally appropriate, you probably shouldn't do it.

Finally, remember that being a decent person will go a long way toward being an ethical lawyer. As one professor of legal ethics explained, "Being an ethical lawyer is not much different from being an ethical doctor or mail carrier or gas station attendant. You should treat others as you want them to treat you. Be honest and fair. Show respect and compassion. Keep your promises."[10] A good lawyer can competently and vigorously represent her client and, at the same time, be a decent person.

Practice Points

- An effective advocate is one whom the court can rely on. Adhering to the rules of professional conduct will enhance your credibility before the court and, therefore, your effectiveness as an advocate.
- Accept the limits of the law and the facts. Advocate for your client, but do so within the limits of the law and facts.
- Be familiar with the rules of professional conduct that govern in your jurisdiction.
- At all times, "[b]e honest and fair. Show respect and compassion. Keep your promises."[11]

10. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Vand. L. Rev. 871, 909 (1999).
11. *Id.*