



## ETHICS AND PROFESSIONALISM:

### Integrity in the Courtroom

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On Behalf of the Tennessee  
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### Why Integrity in the Courtroom?



- **The practice of law is more than a job, it is a profession!**
- **The practice of law is a higher calling, especially when children are involved!**
- **We are officers of the legal system, citizens with special responsibilities for the quality of justice, as well as representatives of clients!**

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## Why Integrity in the Courtroom?



“Other than medicine and the clergy, no profession can compare to law in the narrative richness it offers. The human pageant comes through the office door. In lawyering, as in ministry, we are called to accomplish much meaningful work during our daily rounds, since the subject of our work is the incredibly diverse area of human relations. We can and should reflect on the participants’ needs and motivations, seeking to gain a better understanding of ourselves and others. In so doing, we can further our goal of finding meaning and satisfaction in the practice of law.”

Steven Keeva, *Transforming Practice*.

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## How to Achieve Integrity?

**Follow the Tennessee Rules of Professional Conduct (Rules of the Supreme Court, Rule 8)**

- ✓ **Spirit of Public Service**
- ✓ **Common Calling to Promote Justice and the Common Good**

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## Preamble: A Lawyer’s Responsibilities



- **Knowledge of the law**
- **Skill in fact/law analysis**
- **Thoroughness of preparation**
- **Practical and prudential wisdom**
- **Ethical conduct**
- **Dedication to justice and the common good**

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## The Core Competencies: Rule 1.1

The ABA MacCrate Report (1993) Identified ten lawyering skills and four critical values essential for competent representation of clients: view these as HABITS



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## Fundamental Lawyering Skills

- Problem-solving
- Legal analysis and reasoning
- Legal research
- Factual investigation
- Communication
- Counseling
- Negotiation
- Courtroom advocacy
- Organization and management of work
- Recognizing and resolving ethical dilemmas



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## Fundamental Lawyering Values

- Provision of Competent Representation
- Striving to Promote Justice, Fairness, Morality
- Striving to Improve the Profession
- Professional Self-Development



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## What Do These Skills Have To Do With Trial Advocacy?

**A lawyer can't be ethical in the courtroom without being ethical in all core competencies!**



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## Problem Solving



- Identifying and Diagnosing the Problem
- Generating Alternative Solutions and Strategies
- Developing a Plan of Action
- Implementing the Plan
- Choose two: leave room to change your mind

**HABIT: get into the habit of strategy development. Have a Plan A, Plan B, Plan C**

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## Legal Research, Analysis, and Reasoning



- Read the statutes and rules of procedure
- Research the law. Example: 36-6-608, Uniform Child Abduction Prevention Act: abduction prevention orders; credible evidence
- Apply the law to the facts
- Using the law and the facts, make arguments, points that have reasonable bases in law and fact (Rule 3.1).

**HABIT: Carry the Tennessee Compilation and the Rules of Evidence with you!**

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## Factual Investigation

- Identify the assumptions we make in daily life
- Challenge these assumptions with facts
- Lawyer from the facts!



**HABIT: Have a factual investigation plan.**

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## Factual Investigation Plan

- Interviews, Home Visits
  - With clients and witnesses
- Subpoena Records
  - School, medical, criminal, employment, DCS
- Take and Defend Depositions
  - Motions for AOC to pay
- Find and Interview Experts
  - Motions for AOC to pay
- Informal Investigation
  - Internet, Facebook, other sources



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## Counseling

- Rule 1.2 Scope of Representation/Allocation of Authority
- Rule 1.4 Communication
- Rules 1-7-1.11 Conflicts of Interest
- Rule 1.14 Client with Diminished Capacity
- Rule 2.1 Advisor



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## Counseling: Allocation

- **Objective (Goal) of Representation**
  - What does client wish to accomplish, short term and long term?
- **Means to Accomplish Representation**
  - Settlement? Trial? Expense? Concern for interests of third persons? How about continuances?
- **Decisions**
  - Settlement, Plea, Testimony (especially in criminal cases)



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## Counseling: Scope

- **Limited by Agreement/Retainer**
  - Must be reasonable under the circumstances
- **Except when?**
  - Court appointments, Tenn. Sup. Ct. Rule 13, Section 1, (e) (5): until the case has been concluded, including appeals, or court allows withdrawal
  - Tenn. Sup. Ct. Rule 40: cannot limit scope. Must attend staffings, reviews, hearings, foster care review board; treatment, school, and placement meetings as necessary
  - Tenn. Sup. Ct. Rule 40A: duties specified in court order



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## Communication With Client

### Rule 1.4

- Reasonably consult with client about means by which objectives will be accomplished
- Keep client reasonably informed
- Promptly comply with reasonable requests for information
- Explain a matter so that client can make informed decisions



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## Communication With Parties

### Rule 4.2

- **Can't talk to a represented party unless:**
  - Obtain lawyer's consent or judge's order
  - Tell unrepresented parties that you can't give them legal advice
- **Except when?**
  - Not about "subject of representation"
  - Simply to set up meetings or home visits
  - State employee where state is only party (Ethics Opinion 82-FR-27)
  - Law allows: Rule 40 permits interviewing caseworkers

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## Communication with Unrepresented Persons

### Rule 4.3

- **Cannot give legal advice unless the advice is to get counsel**
- **Correct person's misunderstanding of role of lawyer**
- **Need to identify self and reason for interviewing witness 83-F-46**

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## Loyalty: Meaning?

- **Lawyer abides by the client's directives about the objectives of representation. Example: client wants to move forward with trial without a continuance. What are the ethical choices?**
- **While the client does not dictate the strategy, the client dictates how he/she wishes the case to be disposed or whether to admit or deny the accusations.**



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## Loyalty: Meaning?

- **Respect one's client whether present or absent: don't make statements in client's absence that you wouldn't make in client's presence.**
- **Stephen Covey: One of the most important ways to manifest integrity is to be loyal to those who are not present.**



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## Loyalty: Who is the Client?

- The agency? The caseworker?
- The State?
- The parent?
- The custodian?
- The child?



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## Client with Diminished Capacity

- **Who?** Children, drug addicted, mentally ill or intellectually challenged clients
- **How?** As far as reasonably possible, maintain a normal client-lawyer relationship. Children as young as five have opinions entitled to respect.
- **How to determine capacity?**
  - > Ability to articulate reasons
  - > Variability of state of mind
  - > Ability to appreciate consequences
  - > Substantive fairness of decision
  - > Consistency of decision

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## Client with Diminished Capacity

### Take Protective Action

- Consult with family members
- Use a reconsideration period to permit clarification or improvement of circumstances
- Consult with support groups, professional services, “protective agencies,” diagnosticians
- Be guided by client’s wishes/values to extent known and client’s best interests
- Intrude into client’s autonomy to least extent feasible

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## Courtroom Ethics

Whether it is Opening/Closing Statements, Direct or Cross Examination, or Introduction of Evidence, the rules are the same:

- Relevant
- Good faith basis in fact
- Supportable by admissible evidence



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## Courtroom Ethics Rules

### Rule 3.3, Candor Towards the Tribunal

- Lawyer may not lie or introduce false evidence
- If witness lies, ask for recess, counsel witness to tell the truth; if witness lies, tell the court that testimony is false.
- If client lies, ask for recess. Counsel client to correct the lie. If counsel refuses, withdraw. State only that withdrawal is required by Rules of Professional Conduct.

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## Courtroom Ethics Rules

### Rule 3.4, Fairness to Opposing Party and Counsel. CANNOT:

- Obstruct, alter, destroy or conceal evidence or potential evidence
- In trial, allude to matter not reasonably believed to be relevant or admissible
- Assert personal knowledge of facts in issue
- Assert personal opinion about credibility, culpability, justness of the cause

### Rule 3.5, Impartiality of Tribunal

- Prohibits ex parte communications



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## Other Courtroom Ethics Issues



### Objection Ethics

- Ethical to object when lawyer reasonably believes there is an objection or reasonably believes form of question is improper
- Not ethical to object as a tactic to interrupt a successful examination

### Witness Preparation

- It is ethical to prepare a witness and help witness to better communicate answers, but cannot tell witness what the testimony should be.

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## Lawyer as Witness: Rule 3.7

- Should not serve as both advocate and witness
- Best advice is to withdraw as attorney and serve as witness
- Opportunity for this issue to arise from GAL investigation when GAL is a material witness to an act that constitutes abuse or neglect or proves abuse or neglect. Example: child shows GAL how and where individual hurt her. GAL is the best or only available witness.

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## Take Away

- “We are what we repeatedly do. Excellence, then, is not an act, but a habit.”

--Aristotle

**Let us all strive to make ethics and professionalism, in and out of the courtroom, a HABIT.**

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