

Bar Counsel Report

In Re: SUNEEL J. NELSON
Bar No.: 12052
Case No.: 81950
Filed: 03/29/2021

ORDER OF SUSPENSION

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that attorney Suneel J. Nelson be suspended from the practice of law in Nevada for five years and one day based on violations of RPC 1.3 (diligence), RPC 1.4 (communication), RPC 1.5 (fees), RPC 1.15 (safekeeping property), RPC 3.2 (expediting litigation), RPC 3.4 (fairness to opposing party and counsel), RPC 8.1 (disciplinary matters), and RPC 8.4 (misconduct).¹

The State Bar has the burden of showing by clear and convincing evidence that Nelson committed the violations charged. *In re Discipline of Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995). We defer to the panel's factual findings that Nelson violated the above listed rules as those findings are supported by substantial evidence and are not clearly erroneous. SCR 105(3)(b); *Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 105, 294 P.3d 427, 432 (2013). In particular, the evidence demonstrates that Nelson failed to (1) complete the legal work for which he was retained in two client matters, resulting in dismissal of one client's appeal and the other clients having to pursue their claim, which remains unresolved, on their own; (2) honestly and timely communicate with the clients about the status of their cases; (3) keep in trust and/or refund the unearned retainer fees the clients paid for his representation; (4) comply with an order to pay the costs of a prior disciplinary matter; and (5) meaningfully or honestly respond to the State Bar's inquiries regarding the grievances.² The admitted exhibits included the complaint, Nelson's answer, notices and scheduling orders, and documentation supporting the charges. The clients testified regarding Nelson's representation and lack of communication and diligence, and the State Bar's investigator testified as to Nelson's failure to respond to grievance inquiries and inquiries about his failure to pay costs from a prior disciplinary matter, and his failure to deposit funds in his trust account, which supported the complaint's allegations concerning Nelson's professional misconduct. SCR 105(2).

Turning to the appropriate discipline, we review the hearing panel's recommendation de novo. SCR 105(3)(b). In determining the appropriate discipline, we weigh four factors: "the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors." *In re Discipline of Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008).

Nelson knowingly violated duties owed to his clients (communication, diligence, and safekeeping property), the profession (failure to respond to lawful requests for information by a disciplinary authority), and the public (misconduct). His misconduct harmed his clients financially as they paid fees for services not rendered and legally as one client had his appeal dismissed without being heard on the merits. Nelson's failure to cooperate with the disciplinary investigation harmed the integrity of the profession, which depends on a self-regulating disciplinary system.

The baseline sanction for Nelson's misconduct, before consideration of aggravating and mitigating circumstances, is suspension. See Standards for Imposing Lawyer Sanctions, *Compendium of Professional Responsibility Rules and Standards*, Standard 4.42 (Am. Bar Ass'n 2017) (providing suspension is appropriate when "a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client"); Standard 7.2 ("Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system."). The panel found and the record supports five aggravating circumstances (prior disciplinary offenses, dishonest or selfish motive, pattern of misconduct, multiple offenses, and indifference to making restitution) and no mitigating circumstances.

Considering all the factors, we agree with the panel that a suspension is appropriate. But we disagree with its recommendation for a five-year-and-one-day suspension, which goes beyond what is necessary to serve the purpose of attorney discipline. *State Bar of Nev. v. Claiborne*, 104 Nev. 115, 213, 756 P.2d 464, 527-28 (1988) (observing the purpose of attorney discipline is to protect the public, the courts, and the legal profession, not to punish the attorney); see *In re Discipline of Schaefer*, 117 Nev. 496, 515, 25 P.3d 191, 204 (2001) ("Although the recommendations of the disciplinary panel are persuasive, this court is not bound by the panel's findings and recommendation, and must examine the record anew and exercise independent judgment."). Applying the relevant factors to these circumstances, we conclude that a two-year suspension adequately serves the purpose of attorney discipline.

Accordingly, we hereby suspend attorney Suneel J. Nelson from the practice of law in Nevada for a period of two years commencing from the date of this order. Nelson shall pay \$5,500 in restitution to John Pierre White and \$4,000 in restitution to Greg and Tim Thompson as outlined in the hearing panel's recommendation. Further, Nelson shall pay the costs of the disciplinary proceedings, including \$2,500 under SCR 120, within 30 days from the date of this order.

It is so ORDERED.

In Re: KRISTOPHER M. MILICEVIC
Bar No.: 12447
Case No.: 82337
Filed: 04/09/2021

ORDER OF REINSTATEMENT

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation to reinstate suspended attorney Kristopher M. Milicevic with certain conditions. As no briefs have been filed, this matter stands submitted for decision. SCR 116(2).

This court suspended Milicevic from the practice of law for three years for violating RPC 1.3 (diligence), RPC 1.4 (communication), RPC 1.16 (declining or terminating representation), RPC 1.5 (fees), RPC 8.1(d) (disciplinary matters), and RPC 8.4 (misconduct). *In re Discipline of Milicevic*, Docket Nos. 71578 and 72696 (Order of Suspension, June 13, 2017). Milicevic filed his petition for reinstatement on June 29, 2020, after his suspension ended. Following a hearing, the panel unanimously recommended that he be reinstated to the practice of law with certain conditions.

Based on our de novo review, we agree with the panel's conclusions that Milicevic has satisfied his burden in seeking reinstatement by clear and convincing evidence. SCR 116(2) (providing that an attorney seeking reinstatement must demonstrate compliance with certain criteria "by clear and convincing evidence"); *Application of Wright*, 75 Nev. 111, 112-13, 335 P.2d 609, 610 (1959) (reviewing a petition for reinstatement de novo). We therefore approve the panel's recommendation that Milicevic be reinstated. We also approve the conditions on reinstatement recommended by the panel, as set forth below.

Accordingly, Kristopher M. Milicevic is hereby reinstated to the practice of law in Nevada. As conditions of his reinstatement, Milicevic must (1) obtain a mentor approved by the State Bar who will review his practice to ensure that he does not abandon his clients; (2) either work in a law firm under the supervision of another attorney, or work in an environment that has sufficient staff to prevent him from being overwhelmed by his practice; (3) continue mental health counseling with Dr. Ryder for the next year and attend at least one session each quarter or more often if recommended to ensure he does not have any mental health relapse; and (4) complete 15 CLE credits, 5 of which must be in ethics or professional responsibility, in addition to the credits required by SCR 210.1.³

It is so ORDERED.

In Re: LYNN R. SHOEN
Bar No.: 1197
Case No.: 82238
Filed: 03/08/2021

ORDER OF REINSTATEMENT

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation to reinstate suspended attorney Lynn R. Shoen with certain conditions. As no briefs have been filed, this matter stands submitted for decision. SCR 116(2).

This court suspended Shoen from the practice of law for four years and six months commencing from April 24, 2014, based on violations of several rules of professional conduct, including RPC 1.3 (diligence), RPC 1.4 (communication), RPC 1.8 (conflict of interest: current clients: specific rules), RPC 1.15 (safekeeping property), RPC 3.4 (fairness to opposing party and counsel), RPC 8.1(a) (bar admission and disciplinary matters), and RPC 8.4 (misconduct). *In re Discipline of Shoen*, Docket No. 69697 (Order Approving Conditional Guilty Plea Agreement, Apr. 22, 2016). Shoen filed her petition for reinstatement on April 23, 2019. The hearing panel initially struck Shoen's petition because she had not satisfied all of the conditions of the disciplinary order, but this court issued a writ of mandamus directing the hearing panel to vacate the order striking her petition. *See Shoen v. State Bar of Nev.*, 136 Nev., Adv. Op. 30, 464 P.3d 402, 405 (2020) (discussing how recent amendments to the disciplinary rules affected the consideration of Shoen's petition). Following a hearing, the panel unanimously recommended that she be reinstated to the practice of law with certain conditions.

Our review of the petition for reinstatement is de novo. *Application of Wright*, 75 Nev. 111, 112-13, 335 P.2d 609, 610 (1959) (reviewing a petition for reinstatement de novo). Having considered the record, we agree with the hearing panel's conclusion that Shoen satisfied most of the criteria set forth in SCR 116(2)(a)-(g) by clear and convincing evidence. And, while Shoen did not pay the entirety of the restitution before seeking reinstatement as required by this court's disciplinary order, we are satisfied that Shoen has demonstrated "good and sufficient reason why [she] should nevertheless be reinstated." SCR 116(2); see also *Shoen*, 136 Nev., Adv. Op. 30, 464 P.3d at 403-04 (2020) (acknowledging that "an attorney who cannot demonstrate the criteria still may be reinstated if [she] 'presents good and sufficient reason why [she] should be reinstated'" (quoting SCR 116(2))). We therefore approve the panel's recommendation that Shoen be reinstated. We also approve the conditions on reinstatement recommended by the panel, as set forth below.

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Accordingly, attorney Lynn R. Shoen is hereby reinstated to the practice of law in Nevada effective on the date of this order. As a condition of her reinstatement, Shoen shall be prohibited from maintaining her own practice and shall instead be required to work under the supervision of another Nevada licensed attorney with at least ten years of experience. Shoen shall also be prohibited from being a signatory to or having any access to any trust account or client or third-party funds of any kind, regardless of the characterization of those funds, such as "flat-fee." Shoen shall also be placed on probation for a period of two (2) years, during which time she shall be required to pay all outstanding restitution and costs owed and have a mentor approved by the State Bar. Shoen shall also pay the costs of the reinstatement proceeding, including \$2,500 under SCR 120, within 30 days from the date of this order, if she has not done so already.

It is so ORDERED.

In Re: TRAVIS D. AKIN
Bar No.: 13059
Case No.: OBC20-0848
Filed: 02/24/2021

PUBLIC REPRIMAND

To Travis D. Akin:

In January 2020, the Eighth Judicial District Court appointed you as appellate counsel for three defendants in their respective matters pending in the Nevada Supreme Court.

In all three appeals, briefing schedules were either established or reinstated, and you were directed to file and serve various documents and/or pleadings in each case. However, despite multiple directives and warnings from the Supreme Court, you failed to file and serve documents or pleadings as ordered by the Supreme Court and required by the Nevada Rules of Appellate Procedure.

In each case, the Supreme Court and its clerk's office sent you warnings that sanctions would be imposed if you did not comply with their orders and failed to file the required documents, including an Opening Brief and Appendix in each matter. You also were warned that failure to comply would result in your removal as counsel-of-record in the appeals and referral to the State Bar for disciplinary investigations.

In June 2020, in all three appeals, the Supreme Court imposed conditional sanctions which would be automatically vacated if you filed the required pleadings. However, you failed to do so and did not further communicate with the Supreme Court.

Your failure to comply with judicial orders caused the Supreme Court to remove you as appellate counsel in July 2020 for one case. The court removed you from the other two cases in August 2020. All three appeals had to be remanded to the Eighth Judicial District Court for appointment of new appellate counsel.

Your actions delayed the appeals of your clients and wasted the time and resources of the Supreme Court and District Court.

In light of the foregoing, you violated Rule of Professional Conduct 1.3 (Diligence) and RPC 3.4(c) (Fairness to Opposing Party and Counsel) and are hereby PUBLICLY REPRIMANDED.

In Re: KIM I. MANDELBAUM
Bar No.: 318
Case No.: OBC20-1085
Dated: 02/19/2021

LETTER OF REPRIMAND

To Kim I. Mandelbaum:

A Southern Nevada Disciplinary Board Screening Panel convened on February 16, 2021, to consider the above-referenced grievance against you. The Panel concluded that you violated Nevada Rules of Professional Conduct and that you should be reprimanded for your handling of the State Bar's subsequent investigation inquiries. This letter constitutes delivery of the Panel's reprimand.

On October 2, 2020, grievant Alex Cordier reported that you had failed to pay your bill for document storage of over 600 boxes of legal records in their custody at your direction. Mr. Cordier reported that this was the second occasion that his professional expenses of safekeeping legal materials were not timely paid by you. He reported attempting to contact you without success by certified mail, email, facsimile and hand-delivery. He reported that they were prepared to destroy your legal records for your failure to respond to them about your financial obligation.

The State Bar sent letters of investigation to you on October 7, 2020, November 12 and December 7. These letters were directed to your SCR 79 address, a USPS forwarding address and your last known professional email address to no avail. Your SCR 79 phone number was not in service to reach you and you did not provide the State Bar with a current email address. These information queries were important for the State Bar to properly discharge its responsibilities to the public and the legal profession. The information would have helped determine if any clients might be harmed and if you had quickly remediated the danger to your client's legal

records. You have failed to respond to the State Bar's inquiries.

RPC 8.1 states that "... a lawyer ... in connection with a disciplinary matter, shall not: ... (b) ... knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority ..." It is for this essential reason of communication that SCR 79(1) mandates every Nevada lawyer "... shall provide to the State Bar ..." "permanent" and "current" contact information.

You negligently breached that duty to respond to the lawful demand for information. You also knowingly failed to provide the State Bar with your current email address as required by SCR 79. The potential harm to your clients and the profession is significant in that client records may have been destroyed for your abandonment of the records storage account.

ABA Standards for Imposing Lawyer Sanctions ("Standards"), Section 7.3 (Violation of duties owed as a professional) states: "Reprimand is generally appropriate when a lawyer negligently engaged in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system."

Based on the foregoing, you are hereby REPRIMANDED for a violation of RPC 8.1 and SCR 79. Please promptly conclude this matter by remitting the minimum costs of \$1,500 within 30 days of the issuance of this sanction. SCR 120(3).

Please allow this reprimand to serve as a thoughtful reminder of your professional ethical obligations. We wish you well and trust that no similar problems will arise in the future.

**In Re: STEPHEN STEIN
Bar No.: 41
Case No.: OBC20-0898
Dated: 02/23/2021**

LETTER OF REPRIMAND

To Stephen Stein:

On February 16, 2021, a Screening Panel of the Southern Nevada Disciplinary Board considered the above-referenced grievance. Based on the evidence presented, the Panel concluded that you violated the Rules of Professional Conduct ("RPC") and should be issued a Letter of Reprimand. This letter shall constitute a delivery of that reprimand.

On May 21, 2019, Grievant paid you \$1,500.00 to assist her daughter with a criminal record seal. Between May 2019 and August 2020, Grievant stated that either

she, her husband, or her daughter, has contacted you a minimum of once a month to follow up on the record seal. Grievant stated that your answer to them was always that the file was "up north" and are just waiting to hear back.

On or about August 9, 2020, Grievant attempted to contact you but was told that you are no longer in the practice and had not left a forwarding number. Grievant eventually hired Nevada Expungement Services who confirmed that you had done nothing on behalf of Grievant's daughter. On or about December 8, 2020, you spoke with an investigator with the State Bar and admitted that you failed to provide any services to Grievant's daughter.

RPC 1.3 (Diligence) states that a lawyer "shall act with reasonable diligence and promptness in representing a client." In this case, you failed to perform any of the services you were retained for. This type of ethical breach caused potential injury to Grievant's daughter. Under ABA Standard 7.3, reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

RPC 1.4 (Communication) states, in pertinent part, that a lawyer shall "[k]eep the client reasonably informed about the status of a matter" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." In this case, Grievant and her family members contacted you on multiple occasions, to which you would respond that you were waiting to hear back from the court. This type of ethical breach caused potential injury to Grievant's daughter. Under ABA Standard 7.3, reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

RPC 1.15 (Safekeeping Property) states, in pertinent part, that "[a] lawyer shall hold funds or other property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." Specifically, RPC 1.15(c) states that "[a] lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." In this case, [you [sic]] kept the \$1,500.00 retainer Grievant paid you without performing any work. This type of ethical breach caused injury to Grievant's daughter. Under ABA Standard 4.13, reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

RPC 1.16 (Declining or Terminating Representation) states, in pertinent part, that "a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if ... [t]he representation will result in violation of the Rules

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of Professional Conduct or other law.” In this case, you should have terminated your representation of Grievant’s daughter as your conduct resulted in violations of the RPCs. This type of ethical breach caused injury to Grievant’s daughter. Under ABA Standard 7.3, reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

Accordingly, you are hereby REPRIMANDED for violating RPCs 1.3 (Diligence), 1.4 (Communication), 1.15 (Safekeeping Property), and 1.16 (Declining or Terminating Representation). In addition, pursuant to Supreme Court Rule 120(3), you are required to remit to the State Bar of Nevada the amount of \$1,500 within 30 days of this Letter. I trust that this reprimand will serve as a reminder to you of your ethical obligations, and that no such problems will arise in the future.

In Re: ALDA ANDERSON
Bar No.: 8746
Case No.: OBC20-0799
Dated: 02/23/2021

LETTER OF REPRIMAND

To Alda Anderson:

A Screening Panel of the Southern Nevada Disciplinary Board reviewed the above referenced grievance and unanimously determined to issue you a Letter of Reprimand for violations of Rules of Professional Conduct (RPC) set forth below regarding your handling of a criminal case.

On June 30, 2020, you appeared on a criminal matter in Las Vegas Justice Court with your client, Ms. Winn, who was in custody. At that time, the court set the case for an in-custody preliminary hearing set on July 14, 2020.

On July 14, 2020, you failed to appear for the scheduled preliminary hearing for Ms. Winn who was still in custody. The Court rescheduled the preliminary hearing for July 30, 2020.

On July 30, 2020, you appeared late for the scheduled preliminary hearing for Ms. Winn who was still incarcerated. During a bench conference, counsel for Ms. Winn’s co-defendant stated that his client wanted to waive the preliminary hearing and be bound over to district court. When the prosecutor asked you if your client wanted to waive up without negotiations, you asked “what does that mean?”

The transcript of the hearing confirms that, despite the State having six witnesses present and ready to testify, you advised the Court that you were not ready to go forward with the preliminary hearing and that you did not know much about criminal law. The Court then asked you if you could be prepared at the next date

set for preliminary hearing. You informed the Court you could not guarantee that you would be ready to conduct the preliminary hearing at the next date. As a result, due to concerns that you could not effectively represent your client, the Court removed you from the case and appointed a track attorney to represent your client moving forward.

Based upon the foregoing, you are hereby REPRIMANDED for your conduct related to representation of the foregoing client(s), which conduct violated the Nevada Rules of Professional Conduct (“RPC”) as follows:

RPC 1.1 (Competence)—for failing to demonstrate the understanding of basic criminal law concepts and procedure.

RPC 1.3 (Diligence) and RPC 3.2 (Expediting Litigation)—for missing a scheduled in-custody preliminary hearing date for your client. Additionally, for failing to appear on time and be prepared to conduct the preliminary for your client who was still in custody on the subsequent setting.

The Nevada Supreme Court and the American Bar Association Standards for Imposing Lawyer Sanctions adopted an analysis of four factors to consider for disciplinary sanctions: “the duty violated, the lawyer’s mental state, the potential or actual injury caused by the lawyer’s misconduct, and the existence of aggravating or mitigating factors ...” *In re Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (Nev. 2008).

You have a duty to understand the legal concepts and demonstrate skill, thoroughness, and preparation in any area of law in which you agree to represent a client. You also have a duty to act with reasonable diligence and promptness when representing a client. The evidence shows that you demonstrated a failure to understand the basic criminal procedure of waiving a preliminary hearing to proceed to district court. Alternatively, you were unprepared to conduct preliminary hearing on your client’s case. As a result, the presiding judge removed you from the case because she lacked confidence that you could adequately represent your client. Your conduct has injured your client by delaying her preliminary hearing while she was in custody.

Thus, weighing the rules violated, your mental state, the potential or actual injury caused, two ABA Standards are applicable. They are: (1) ABA Standard 4.53, which states that “Reprimand is generally appropriate when a lawyer: (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or (b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client;” and (2) ABA Standard 7.3, which states that “Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal profession.”

The Supreme Court of Nevada has provided two types of reprimand: a Public Reprimand or a Letter of Reprimand. The latter is the lowest form of discipline available. Based upon the above factors, the Panel finds that the lesser of the two sanctions is appropriate. Finally, in accordance with Nevada Supreme Court Rule 120 you are assessed costs in the amount of \$1,500.

ENDNOTES:

1. Nelson was allowed an extension of time until January 15, 2021, to file an opening brief. Because he did not file the brief, this matter was submitted for decision on the record on January 25.
2. After the State Bar noticed intent to take a default, Nelson filed an answer to the bar complaint, but he thereafter failed to appear at the status hearing and the formal disciplinary hearing, despite having notice of those proceedings. At 4:24 p.m. on August 13, 2020, the day before the formal disciplinary hearing, he sent a motion by email to the panel chair, with a copy to bar counsel, seeking to vacate the hearing date and continue it for 90 days. Bar counsel responded at 5:29 p.m. and recommended denying the request, asserting that (1) the complaint was filed in February 2020, which Nelson did not answer until May 2020; (2) before the complaint was filed, Nelson did not meaningfully respond to grievance inquiries, which dated back to fall 2019; (3) Nelson stipulated to the disciplinary hearing date and several witnesses were prepared to testify; (4) Nelson failed to identify hearing exhibits or witnesses of his own, even though he stipulated to do so in May and then again in June; and (5) he failed to appear at the August 3 pre-hearing conference, although he did provide a few documents the following day regarding a hospitalization for a couple of days in May 2019 that could serve as a mitigating factor. The panel considered Nelson's continuance request at the disciplinary hearing and denied it.
3. Milicevic has complied with the hearing panel's recommendation that he pay the outstanding fees and costs from an earlier disciplinary proceeding as well as the SCR 120(5) costs for the reinstatement proceeding.

TIP

FROM THE BAR COUNSEL

Candor in Appellate Advocacy

Appellate advocates are no different from other lawyers—they must follow the same rules of professional conduct. Zealous advocacy does not excuse professional misconduct at any stage. One important rule to consider during an appeal is RPC 3.3, Candor Toward the Tribunal.

“Truth is the cornerstone of the judicial system”¹ Appellate lawyers often face a conflict between truth and loyalty when the core premise of their client's case is simply untrue. A disadvantageous lower court decision may have been correct. Or, on the other hand, a trial court victory may have been incorrect. For appellate lawyers, their duty of candor may, on the right facts, require them to confess error below, notwithstanding their duty to advocate zealously for their clients. RPC 3.3 requires appellate lawyers to recite the facts and law candidly even if it hurts their position. Candor always trumps client confidentiality.

RPC 3.3 also requires appellate lawyers “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.” Note that the rule mentions adverse authority from a controlling jurisdiction. This is not the same as controlling authority. Lawyers in trouble often provide creative arguments that the case they failed to cite was not “controlling” for a variety of reasons. These arguments misconstrue the rule.

For example, in *Schutts v. Bentley Nevada Corp.*, 966 F. Supp. 1549 (D. Nev. 1997), the Nevada federal district court took a plaintiff's lawyer to task for failing to cite two Ninth Circuit decisions that were directly adverse to the plaintiff's

position. The lawyer attempted to justify his omission with a conflicting decision from the Second Circuit. He argued that the Ninth Circuit cases were “not the law of the land” until the Supreme Court acted to reconcile the Ninth Circuit and Second Circuit decisions. The court promptly dismissed the lawyer's argument as “truly bizarre.”² The two cases, it said, were “the law, here, in this court. End of story.”³

For practical purposes, good appellate advocates generally embrace RPC 3.3. Credibility is an important commodity for top-tier advocates. Failure to disclose adverse authority leaves a court feeling deceived. It erodes judicial trust. Worse, judges will likely view the omission as an admission of deficiency and overvalue the case's impact. If the authority were so readily distinguishable, then surely a good appellate advocate would have taken the opportunity to dismantle it. Top-tier appellate advocates provide their best arguments to criticize, distinguish, or downplay the adverse authority or, if appropriate, candidly recognize its impact and seek reversal.

Candor builds credibility with the courts, which ultimately leads to greater influence and success.

ENDNOTES:

1. *Office of Disciplinary Counsel v. Kiesewetter*, 889 A.2d 47, 56 (Pa. 2005).
2. *Id.* at 1563.
3. *Id.*