

# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## DEVELOPMENTS AND PRACTICE NOTES

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### STANDARDS FOR APPELLATE CONDUCT ADOPTED IN TEXAS

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On February 1, 1999, the Supreme Court of Texas and the Texas Court of Criminal Appeals jointly adopted and promulgated a set of ethical and professional guidelines for appellate practice in Texas, the “Standards for Appellate Conduct.” The adoption of the Standards made Texas the first jurisdiction in the United States to adopt guidelines specifically directed to attorneys practicing in the appellate courts. This article will explain how and why the Standards came into being, provide a brief overview of the Standards’ content, and address the Standards’ limitations and benefits.

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## I. PROPOSING THE ADOPTION OF APPELLATE STANDARDS

Lawyers outside the former Republic of Texas may wonder what it was about appellate practice in the Lone Star State that prompted its appellate courts to attempt to regulate the conduct of attorneys who appear before them. Were appellate advocates on the former frontier so rowdy and rambunctious that in order to regain some sense of decency and decorum the courts wanted to rein them in? Quite the contrary. Texas has a well-organized, highly specialized, and very civilized appellate bar. Due to those factors, the appellate bar saw a need for professional standards, conceived a solution, and worked for the implementation of that solution.

Although there has always been a handful of Texas lawyers known for their appellate work, the number of appellate specialists in the state exploded in the 1980s and 1990s. The watershed year for appellate lawyers was 1987, when the State Bar created the Appellate Practice & Advocacy Section (which now includes over 1500 members), and the Texas Board of Legal Specialization began offering a certification exam in Civil Appellate Law (with almost 400 lawyers now certified).<sup>1</sup> It was also in 1987 that the State Bar Professional Development Program began offering an annual CLE course in Appellate Law. This annual course became one of the best-attended and highest quality CLE programs in the state. Moreover, it provided an annual gathering that enhanced the sense of community among appellate practitioners.

These events were merely an outward reflection of developments in the practice. Many lawyers were beginning to concentrate their practice on appeals—whether in appellate sections of large law firms, as designated appellate specialists in litigation firms, in appellate boutiques, or as appellate solo practitioners. Lawyers began to realize that appellate practice requires a different set of skills than those used in trial litigation, and by the early 1990s, most Texas law schools had begun to offer courses in appellate advocacy. Most importantly, an increasing number of litigants and trial lawyers became willing

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1. See Melissa M. Serfass, *Standards for Certification of Appellate Specialists*, 1 J. APP. PRAC. & PROCESS 381, 398 (1999) (setting forth details of the Texas specialization standards).

to hire appellate specialists—before, during, and after trial. By the 1990s Texas had a well-developed appellate bar that was matched in only a few jurisdictions of this country.

The growth of the appellate bar unquestionably inspired the creation of the Standards for Appellate Conduct. As appellate lawyers developed their own practice identity, they realized that their relationships with clients, with judges, and with each other were decidedly different from the relationships typically experienced by trial lawyers. When jurisdictions became concerned about an apparent rise in unprofessional practices in the late 1980s and early 1990s, some of them promulgated creeds and codes to control that conduct.<sup>2</sup> Most of those efforts were directed at lawyers in the trial courts. Many appellate lawyers felt relatively untouched by this turn of events, perhaps because they considered appeals to be a more genteel, dignified, and academic form of combat than trial litigation. Thus, they felt comparatively immune to the problems of overly aggressive and unprofessional conduct, and they found their practices largely unaffected by the proposed solutions.

Despite feeling somewhat above the professionalism fray initially, some appellate lawyers still thought that the appellate bar fell somewhat short of being all that it could be in this department. Though many appellate lawyers viewed themselves as adhering to high standards of professionalism, they were all too accustomed to seeing lawyers involved in appeals resort to tactics that were unprofessional, unnecessary, and unlikely to make a favorable impression on the appellate courts.

In the fall of 1993, I presented a paper at the annual Advanced Civil Appellate Practice CLE course, offering suggestions for improving the professionalism of appellate practice and introducing the possibility that the appellate bar might draft formal guidelines.<sup>3</sup> The presentation received the highest audience ratings of the seminar, primarily because so many practitioners responded favorably to the idea of openly

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2. See, e.g., IOWA STANDARDS FOR PROFESSIONAL CONDUCT (adopted Apr. 10, 1996); STANDARDS OF CIVILITY, N.Y. RULES OF COURT § 1200 app. A (McKinney 1999) (adopted Sept. 1, 1990).

3. See Kevin Dubose, *Ten Suggestions for A More Civilized Appellate Bar*, STATE BAR OF TEX. PROF. DEV. PROGRAM, ADVANCED CIVIL APPELLATE PRACTICE COURSE Q (1993).

talking about practicing appellate law in a more professional manner.

## II. CREATING THE STANDARDS

In 1995, the Appellate Practice & Advocacy Section of the State Bar of Texas agreed to study the idea of ethical guidelines for appellate lawyers. A committee was appointed, whose members included a current appellate justice, a former appellate justice, a current appellate court staff attorney, a former appellate court staff attorney, full-time appellate lawyers, and lawyers who do both trial and appellate work.<sup>4</sup> The committee was well qualified to do its job: Several members of the committee had published materials on ethics and professionalism in appellate advocacy,<sup>5</sup> another had done extensive work on an ABA professionalism project, and one had been the principal architect of the Texas Lawyer's Creed.

The committee began by reviewing creeds and standards of conduct from almost 40 jurisdictions—all focusing on conduct by trial attorneys. It then engaged in thoughtful and provocative discussions about the role and responsibilities of appellate lawyers, and about the relationship between the various duties owed by lawyers. The committee assigned responsibilities for initial drafting, followed by circulation of drafts, rigorous editing, and more discussions. I have never served on a Bar committee that was as committed and conscientious as this one was.

After a year of hard work, the committee completed a draft of the Standards for Appellate Conduct. The Council of the Appellate Practice & Advocacy Section approved the draft and forwarded it to the State Bar Board of Directors for its approval. The Board appointed an ad hoc committee to study the Standards. The ad hoc committee sent a draft of the Standards to

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4. These committee members were Jessie Amos, the Honorable Eugene Cook, David M. Gunn, David Hricik, the Honorable Ann McClure, Shane Sanders, Steve Tatum, and Charles R. Watson, Jr. (chair).

5. See Dubose, *supra* note 4; David M. Gunn, *Why Appellate Law is So Appealing*, STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED APPELLATE PRACTICE COURSE M (1994); Ann Crawford McClure, *The Bermuda Triangle: Ethics, Malpractice and Frivolous Appeals*, STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED APPELLATE PRACTICE COURSE U (1990).

every trial and appellate judge in Texas (state and federal), to every former chief justice of a Texas court of appeals, to the chair of every State Bar Section, and to other selected individuals, soliciting comments and suggestions. Of the many responses the committee received, the great majority expressed unreserved approval; a few respondents suggested minor modifications. The Standards, as modified, were approved by the State Bar Board of Directors in 1997.

The Standards were then forwarded to the Supreme Court of Texas and the Texas Court of Criminal Appeals. After considerable discussion and numerous interruptions, the Standards were jointly adopted and promulgated by the state's two highest appellate courts and were published in the state's bar journal.<sup>6</sup>

### III. SUBSTANCE OF THE STANDARDS

The Standards are divided according to the respective duties at play in the appellate process: Lawyers' Duties to Clients; Lawyers' Duties to the Court; Lawyers' Duties to Lawyers; and the Court's Relationship with Counsel.<sup>7</sup> The Standards contemplate a balance among these duties. For example, recognizing that some attorneys justify unprofessional conduct by elevating the perceived duty to zealously represent the client above all other duties, the Standards provide that "[c]ounsel will be faithful to their clients' lawful objectives, while mindful of their concurrent duties to the legal system and the public good."<sup>8</sup>

The section concerning duties to clients also stresses the need for communication with the client, not only about what can be expected in the appellate process,<sup>9</sup> but also about the Standards themselves. It suggests that lawyers inform their clients upon undertaking representation that these Standards exist, that civility and courtesy are expected, that counsel reserves the right to make reasonable accommodations to

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6. See *Standards for Appellate Conduct*, TEX. B. J., Apr. 1999, at 399.

7. See TEX. STANDARDS FOR APP. CONDUCT (1999), reprinted in full *infra*.

8. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Clients, ¶ 4 (1999).

9. *Id.* ¶ 5.

opposing counsel, that appeals will only be pursued in good faith, and that counsel will not take frivolous positions.<sup>10</sup>

The section covering duties to the court similarly stresses good faith, professionalism, integrity and respect. Lawyers are cautioned not to “misrepresent, mischaracterize, misquote, or miscite the factual record or legal authorities,”<sup>11</sup> and they are reminded of the duty to disclose adverse authorities.<sup>12</sup> The Standards require lawyers to “conduct themselves before the Court in a professional manner, respecting the decorum and integrity of the judicial process,”<sup>13</sup> and to “be civil and respectful in all communications with the judges and staff.”<sup>14</sup> Attorneys are specifically advised not to let their clients or their own ill feelings toward the court or any other parties in the appellate process “influence their conduct or demeanor.”<sup>15</sup>

The section governing duties to other lawyers emphasizes respect and consideration in all dealings between counsel. It admonishes attorneys to refrain from making personal attacks on opposing counsel, from withholding consent to reasonable requests for extensions of time, from manipulating margins and type size to gain unfair advantage, and from serving documents on opposing counsel in a manner that unfairly limits the opportunity to respond.<sup>16</sup>

Finally, in the section entitled “The Court’s Relationship with Counsel,” the Standards directly address the conduct of the courts as well as counsel because, as the preamble to this section notes, “[N]o one more surely sets the tone and pattern for the conduct of appellate lawyers than appellate judges.”<sup>17</sup> In adopting the Standards, the Texas appellate courts have stated their commitment to honor the Standards by refraining from rewarding inappropriate conduct.<sup>18</sup> They have agreed to

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10. *Id.* ¶¶ 1, 9, 10, 12, & 13.

11. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to the Court, ¶ 3 (1999).

12. *Id.* ¶ 4.

13. *Id.* ¶ 7.

14. *Id.* ¶ 8.

15. *Id.* ¶ 10.

16. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to Lawyers, ¶¶ 2, 5, 10, & 11 (1999).

17. TEX. STANDARDS FOR APP. CONDUCT, The Court’s Relationship with Counsel, preamble (1999).

18. *Id.* ¶ 1.

exemplify the spirit of the Standards by being “courteous, respectful, and civil to counsel,”<sup>19</sup> and by “demonstrat[ing] respect for other judges and courts.”<sup>20</sup>

#### IV. LIMITATIONS AND BENEFITS OF THE STANDARDS

The purpose of the Standards is not to establish another set of rules that might provide ammunition for sanctions, grievances, or satellite litigation. The Standards specifically state, “Use of these standards for appellate conduct as a basis for motions for sanctions, civil liability, or litigation would be contrary to their intended purpose and shall not be permitted.”<sup>21</sup> Although some have questioned whether this lack of enforcement power deprives the Standards of any strong effect, I believe that they can have a positive influence, for two reasons.

First, the Standards educate the Bar about the kind of conduct expected and preferred by the appellate courts. Lawyers who are determined to be unprofessional will not be deterred by advisory guidelines, and lawyers who are instinctively professional, courteous, and accommodating at every turn may not need to follow a code. But for the majority of lawyers who are not always certain what conduct is expected in the appellate courts, the Standards are illuminating. Young lawyers or lawyers who rarely practice in the appellate courts may not realize that appellate judges and justices frown on counsel’s opposing reasonable requests for scheduling accommodations, personal attacks on opposing counsel, or gamesmanship in pagination or service of written papers. The Standards clarify the courts’ views on those subjects and many others, making it easier for practitioners to understand the full extent of what it means to conduct oneself professionally.

Second, the Standards give practitioners a valuable tool to use with clients who demand unprofessional conduct. Litigants are naturally more emotionally involved in their lawsuits than are their attorneys, and they may not appreciate the value of being courteous and accommodating to the parties they consider

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19. *Id.* ¶ 3.

20. *Id.* ¶ 7.

21. TEX. STANDARDS FOR APP. CONDUCT, preamble (1999).

to be their sworn enemies. Lawyers are sometimes torn between the desire to behave professionally among themselves and a compulsion to follow their clients' marching orders. The Standards not only assist the lawyer in giving the client a clear expression of the courts' expectations, but they also impose on the lawyer an affirmative duty to educate the client about ethical and professional appellate practice. They require the attorney to advise the client "that civility and courtesy are expected,"<sup>22</sup> that "counsel reserves the right to grant accommodations to opposing counsel,"<sup>23</sup> that "a client has no right to instruct a lawyer to refuse reasonable requests made by other counsel,"<sup>24</sup> and that "a client has no right to demand that counsel abuse anyone or engage in any offensive conduct."<sup>25</sup> If for no other reason than assisting the lawyer in handling a difficult client who demands unprofessional conduct, the Standards are worthwhile.

As the preamble to the Texas Lawyer's Creed states, "Professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this Creed for no other reason than it is right."<sup>26</sup> The same statement could be made about the Standards of Appellate Conduct. Treating other lawyers in a more civilized and accommodating manner should make all lawyers feel better about themselves and one another, which will help when someone needs accommodation, or when a lawyer is considering someone for a referral. And the appellate court judges feel better about themselves when they perceive that they are engaged in the dignified task of resolving disputes between professional advocates rather than having to referee an unpleasant dogfight.

Even for those who are cynical enough to not be motivated by simply doing the right thing, behaving in a more professional manner also happens to improve the chances that their clients may prevail. Although appellate judges decide cases based on the law and the facts rather than on the personalities of the advocates, they also are human beings whose perception of the

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22. TEX. STANDARDS FOR APP. CONDUCT, Lawyer's Duties to Clients ¶ 9 (1999).

23. *Id.* ¶ 10.

24. *Id.*

25. *Id.* ¶ 11.

26. *The Texas Lawyer's Creed*, TEX. JUR. 3D DESK BOOK, Item No. 68.



message is unavoidably influenced by their feelings about the messenger. Credibility plays a role in decision-making, and human beings do not place much credibility in people they consider offensive. Judges may conclude, consciously or unconsciously, that persons who resort to unprofessional tactics are doing so in order to gain an unfair advantage because they lack confidence in their substantive arguments. In short, behaving in a professional manner is not only a nice idea, it is a smart idea that advances the interests of one's client in incalculable ways. The Standards provide invaluable assistance in accomplishing that goal.

#### V. CONCLUSION

I have always felt that appellate lawyers in this part of the country are among the most ethical and professional members of the bar. The adoption of the Standards by the appellate courts in Texas does not indicate an acute problem that needed to be fixed, but rather reflects their awareness that all involved in the appellate process can be even more ethical and more effective, particularly when equipped with guidelines for the conduct courts expect from advocates. If lawyers practicing in the appellate courts will heed these suggestions, they will improve the quality of life for appellate judges, lawyers, and litigants.

## STANDARDS FOR APPELLATE CONDUCT

*Lawyers are an indispensable part of the pursuit of justice. They are officers of courts charged with safeguarding, interpreting, and applying the law through which justice is achieved. Appellate courts rely on counsel to present opposing views of how the law should be applied to facts established in other proceedings. The appellate lawyer's role is to present the law controlling the disposition of a case in a manner that clearly reveals the legal issues raised by the record while persuading the court that an interpretation or application favored by the lawyer's clients is in the best interest of the administration of equal justice under law.*

*The duties lawyers owe to the justice system, other officers of the court, and lawyers' clients are generally well-defined and understood by the appellate bar. Problems that arise when duties conflict can be resolved through understanding the nature and extent of a lawyer's respective duties, avoiding the tendency to emphasize a particular duty at the expense of others, and detached common sense. To that end, the following standards of conduct for appellate lawyers are set forth by reference to the duties owed by every appellate practitioner.*

*Use of these standards for appellate conduct as a basis for motions for sanctions, civil liability or litigation would be contrary to their intended purpose and shall not be permitted. Nothing in these standards alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure or the Code of Judicial Conduct.*

## LAWYERS' DUTIES TO CLIENTS

*A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by a real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest. The lawyer's duty to a client does not militate against the concurrent obligation to treat with*

*consideration all persons involved in the legal process and to avoid the infliction of harm on the appellate process, the courts, and the law itself.*

1. Counsel will advise their clients of the contents of these Standards of Conduct when undertaking representation.
2. Counsel will explain the fee agreement and cost expectation to their clients. Counsel will then endeavor to achieve the client's lawful appellate objectives as quickly, efficiently, and economically as possible.
3. Counsel will maintain sympathetic detachment, recognizing that lawyers should not become so closely associated with clients that the lawyer's objective judgment is impaired.
4. Counsel will be faithful to their clients' lawful objectives, while mindful of their concurrent duties to the legal system and the public good.
5. Counsel will explain the appellate process to their clients. Counsel will advise clients of the range of potential outcomes, likely costs, timetables, effect of the judgment pending appeal, and the availability of alternative dispute resolution.
6. Counsel will not foster clients' unrealistic expectations.
7. Negative opinions of the court or opposing counsel shall not be expressed unless relevant to a client's decision process.
8. Counsel will keep clients informed and involved in decisions and will promptly respond to inquiries.
9. Counsel will advise their clients of proper behavior, including that civility and courtesy are expected.
10. Counsel will advise their clients that counsel reserves the right to grant accommodations to opposing counsel in matters that do not adversely affect the client's lawful objectives. A client has no right to instruct a lawyer to refuse reasonable requests made by other counsel.
11. A client has no right to demand that counsel abuse anyone or engage in any offensive conduct.
12. Counsel will advise clients that an appeal should only be pursued in a good faith belief that the trial court has committed error or that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.

13. Counsel will advise clients that they will not take frivolous positions in an appellate court, explaining the penalties associated therewith. Appointed appellate counsel in criminal cases shall be deemed to have complied with this standard of conduct if they comply with the requirements imposed on appointed counsel by courts and statutes.

### LAWYERS' DUTIES TO THE COURT

*As professionals and advocates, counsel assist the Court in the administration of justice at the appellate level. Through briefs and oral submissions, counsel provide a fair and accurate understanding of the facts and law applicable to their case. Counsel also serve the Court by respecting and maintaining the dignity and integrity of the appellate process.*

1. An appellate remedy should not be pursued unless counsel believes in good faith that error has been committed, that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.
2. An appellate remedy should not be pursued primarily for purposes of delay or harassment.
3. Counsel should not misrepresent, mischaracterize, misquote, or miscite the factual record or legal authorities.
4. Counsel will advise the Court of controlling legal authorities, including those adverse to their position, and should not cite authority that has been reversed, overruled, or restricted without informing the court of those limitations.
5. Counsel will present the Court with a thoughtful, organized, and clearly written brief.
6. Counsel will not submit reply briefs on issues previously briefed in order to obtain the last word.
7. Counsel will conduct themselves before the Court in a professional manner, respecting the decorum and integrity of the judicial process.
8. Counsel will be civil and respectful in all communications with the judges and staff.
9. Counsel will be prepared and punctual for all Court appearances, and will be prepared to assist the Court in

understanding the record, controlling authority, and the effect of the court's decision.

10. Counsel will not permit a client's or their own ill feelings toward the opposing party, opposing counsel, trial judges or members of the appellate court to influence their conduct or demeanor in dealings with the judges, staff, other counsel, and parties.

### LAWYERS' DUTIES TO LAWYERS

*Lawyers bear a responsibility to conduct themselves with dignity towards and respect for each other, for the sake of maintaining the effectiveness and credibility of the system they serve. The duty that lawyers owe their clients and the system can be most effectively carried out when lawyers treat each other honorably.*

1. Counsel will treat each other and all parties with respect.
2. Counsel will not unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation by opposing counsel.
3. Counsel will not request an extension of time solely for the purpose of unjustified delay.
4. Counsel will be punctual in communications with opposing counsel.
5. Counsel will not make personal attacks on opposing counsel or parties.
6. Counsel will not attribute bad motives or improper conduct to other counsel without good cause, or make unfounded accusations of impropriety.
7. Counsel will not lightly seek court sanctions.
8. Counsel will adhere to oral or written promises and agreements with other counsel.
9. Counsel will neither ascribe to another counsel or party a position that counsel or the party has not taken, nor seek to create an unjustified inference based on counsel's statements or conduct.
10. Counsel will not attempt to obtain an improper advantage by manipulation of margins and type size in a manner to avoid court rules regarding page limits.

11. Counsel will not serve briefs or other communications in a manner or at a time that unfairly limits another party's opportunity to respond.

#### THE COURT'S RELATIONSHIP WITH COUNSEL

*Unprofessionalism can exist only to the extent it is tolerated by the court. Because courts grant the right to practice law, they control the manner in which the practice is conducted. The right to practice requires counsel to conduct themselves in a manner compatible with the role of the appellate courts in administering justice. Likewise, no one more surely sets the tone and the pattern for the conduct of appellate lawyers than appellate judges. Judges must practice civility in order to foster professionalism in those appearing before them.*

1. Inappropriate conduct will not be rewarded, while exemplary conduct will be appreciated.
2. The court will take special care not to reward departures from the record.
3. The court will be courteous, respectful, and civil to counsel.
4. The court will not disparage the professionalism or integrity of counsel based upon the conduct or reputation of counsel's client or co-counsel.
5. The court will endeavor to avoid the injustice that can result from delay after submission of a case.
6. The court will abide by the same standards of professionalism that it expects of counsel in its treatment of the facts, the law, and the arguments.
7. Members of the court will demonstrate respect for other judges and courts.