LEGAL ETHICS AND MALPRACTICE ISSUES FOR APPELLATE LAWYERS

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[1] The views expressed are solely those of the author and should not be attributed to his firm or its clients.

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David Horan focuses on appellate litigation and analyzing and briefing complex issues before federal and state courts at all levels. He has extensive appellate experience and has conducted oral argument before the United States Supreme Court, federal and state courts of appeals, and federal trial courts. David's practice extends to all aspects of litigation, and he has substantial experience litigating class action issues and challenges to arbitration awards.

For over seven years, David has been a member of a team of Firm lawyers representing Expedia, Hotels.com, and Hotwire in dozens of putative class action and individual lawsuits by municipalities and consumers regarding online travel companies' hotel occupancy tax recovery charges and service fees. He argued a federal sentencing appeal, *Gould v. U.S.*, before the United States Supreme Court in October 2010. David also was lead counsel in a successful appellate representation in which the Fifth Circuit decided a civil RICO issue of first impression. In recent years, he has successfully represented on appeal Firm clients including CBS Corporation, First American Title Insurance, National Heritage Insurance (a subsidiary of Electronic Data Systems Corporation), PNC Bank, and R.J. Reynolds.

David leads the Issues & Appeals Practice in the Dallas Office. He has published articles and given presentations on appellate, civil procedure, criminal law, legal ethics, and legal writing matters.

EXPERIENCE HIGHLIGHTS

PNC Bank (formerly, National City Bank) secures complete appellate victory before the Dallas Court of Appeals

Special Committee of the Board of Directors of MoneyGram International defeats motion for preliminary injunction seeking to block recapitalization of MoneyGram

Specialty Products and Bondex International seek bankruptcy protection

AREAS OF FOCUS

Issues & Appeals
State & Local Taxation
Class Action & Multidistrict Litigation

HONORS & DISTINCTIONS

"Best Lawyers in Dallas," *D Magazine* (2011 & 2012)

Texas Super Lawyers "Rising Star" (every year since 2005)

"Best Lawyers Under 40," *D Magazine* (2006)

EDUCATION

Yale University (J.D. 2000; Book Reviews Editor, Law Journal; Prize trial finalist, Thomas Swan Barristers' Union Mock Trial Competition); University of Notre Dame (B.A. in Government and Philosophy summa cum laude 1996; Phi Beta Kappa)

BAR ADMISSIONS

Texas; U.S. Supreme Court; U.S. Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits; and U.S. District Courts for the Northern, Southern, Eastern, and Western Districts of Texas

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Randy Johnston is the author of the book *Robbed at Pen Point* and an attorney with the firm of Johnston Tobey PC in Dallas, Texas. He attended The University of Texas School of Law where he graduated with Honors in 1974. Mr. Johnston's practice concentrates on legal malpractice and professional liability. He is a member of the International Academy of Trial Lawyers, the American Board of Trial Advocates, the Texas and Dallas Trial Lawyers Associations, and is a former President of the Dallas Chapter of the American Board of Trial Advocates and a former President of the Dallas Trial Lawyer's Association. In 2012, he was one of five to receive the Texas Trial Legends Award from the Dallas Bar Association's Tort & Insurance Practice Section and in 2010, he was one of eight recipients of *"A Standing Ovation Award"* recognizing him as an outstanding volunteer to the Texas Bar CLE program.

EDUCATION

The University of Texas School of Law, Juris Doctor with Honors
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Associate Editor, Wye Magazine (campus literary publication)
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LICENSES/CERTIFICATIONS

Licensed by the State Bar of Texas and Federal Courts in Texas
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Texas Board of Legal Specialization, Member 1983-1985
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ACKNOWLEDGMENTS/HONORS

2010 "*A Standing Ovation Award*" from staff of the State Bar: outstanding volunteer to the State Bar CLE Program.
Dallas Bar Association - Presidential Citation for Law Jam 2; program for fundraising for legal aid for the poor.
Texas Lawyer – "*The GoTo Guide*" 2007, for Legal Malpractice in Texas
D Magazine - Best Lawyers in Dallas
Texas Monthly - Texas' Super Lawyers
Who's Who in American Law

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I. INTRODUCTION

This paper provides a basic survey of some of the legal ethics and malpractice issues that can arise in appellate practice in the Texas federal and state courts, including discussion of some relatively recent case law from the Texas state appellate courts and the United States Court of Appeals for the Fifth Circuit. This paper does not cover, among others, issues relating to attorneys' fees or retainers or various attorney-client issues arising at the time of the outset of an appellate engagement, including various aspects of potential conflicts of interest.

II. SELECTED LEGAL ETHICS ISSUES FOR TEXAS APPELLATE LAWYERS

A. Citing And Discussing Legal Authorities

The ethical rules applicable to lawyers in the state and federal appellate courts in Texas leave no doubt of the importance of properly citing and discussing legal authority to the courts.

Texas Disciplinary Rule of Professional Conduct ("Texas Rule") 3.03(a) provides: "A lawyer shall not knowingly: … (1) make a false statement of material fact or law to a tribunal; … [or] (4) fail to disclose to the tribunal 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…." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 3.03(a)(1), (4); *see also id.* 8.04(a)(4) ("Misconduct—(a) A lawyer shall not: … (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation…."). The American Bar Association Model Rules of Professional Conduct, which the Fifth Circuit has described as "[o]ur source for the standards of the profession," *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992), include a similar provision. Model Rule 3.3(a) provides: "A lawyer shall not knowingly: (1) make a false statement of 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; [or] (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…." MODEL RULES OF PROF'L CONDUCT R. 3.3(a); *see also id.* 8.4(c) ("Misconduct—It is professional misconduct for a lawyer to: … (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation….").

The comments to both Texas Rule 3.03(a) and Model Rule 3.3(a) explain that "[a] lawyer is not required to make a disinterested exposition of the law, but should recognize the existence of pertinent legal authorities" and that "[t]he underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 3.03 cmt.; MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. (substituting "must recognize the existence" for "should recognize the existence").

1. Duty to disclose authority

Courts around the country have condemned attorneys' failures to cite to controlling legal precedents, and the Texas federal and state courts are no exception. For example, a panel of the Fifth Circuit last year criticized a party for failing in its opening appellant's brief to even cite a Fifth Circuit decision rejecting the same argument made by the same party in an earlier appeal handled by the same counsel. *Trade-Winds Envtl. Restoration, Inc. v. Stewart Dev., LLC*, 409 Fed. Appx. 805, 807-08 & nn.2-3 (5th Cir. 2011). The Court of Appeals did not mince words: The appellant's "failure to cite our [earlier] opinion in its opening brief, filed several months after our opinion in that case was issued, falls well short of fulfilling counsel's duty of candor to the court. Counsel is reminded that practice before this court is a privilege, not a right." *Id.* at 808 n.3.

As one federal appellate court recently further observed, "[t]he ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless." *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) (internal quotation marks omitted). "When there is apparently dispositive precedent, an appellant may urge its overruling or distinguishing or reserve a challenge to it for a petition for certiorari but may not simply ignore it." *Id.*

2. Manner of citing and discussing authority

But courts have not reserved their reproaches for outright omissions of pertinent legal authorities—any discussions of, and citations to, legal authorities are also subject to ethical limitations.

Judges have invoked the duty of candor to criticize an attorney's citations to inapplicable case law. For example, one Fifth Circuit judge called out a court-appointed attorney for citing "cases from other jurisdictions that address versions of the Sentencing Guidelines that are no longer in force and are thus irrelevant to the instant case," cautioning "counsel henceforth to exercise greater care to avoid citing obviously inapplicable authority to this court." *United*

States v. Estrada, No. 01-40117, 31 Fed. Appx. 158, 2001 WL 1751408, at *2 n.10 (5th Cir. Dec. 17, 2001) (Weiner, J., specially concurring).

And, in one recent appeal before the Texarkana Court of Appeals, the appellant's brief tracked the analysis of four other Texas Courts of Appeals in relying on a Texas Supreme Court decision as the source of a particular definition of a word upon which the analysis turned. *Zanchi v. Lane*, 349 S.W.3d 97, 100-01 (Tex. App.—Texarkana 2011, no pet.). A majority of the Court of Appeals panel recognized that the appellant was following its sister courts' reasoning but concluded that those courts' reliance on the Texas Supreme Court decision was misplaced. *Id.* at 101. One justice, however, wrote a concurring decision that sharply criticized appellant's counsel for mimicking these other appellate courts' reliance on the Supreme Court decision, which the justice said "does not give any support to the appellant's statement": "We call this major improper attribution to the attention of counsel and remind counsel of the duty of candor to the court." *Id.* at 105 n.15 (Carter, J., concurring).

B. Distorting or Misrepresenting the Record

Ethical rules also prohibit lawyers appearing in appellate courts in Texas from misrepresenting or distorting the facts of a case and the record on appeal. Texas Rule 3.03(a)(1) provides that a "lawyer shall not knowingly: … make a false statement of material fact … to a tribunal," and Model Rule 3.3(a)(1) proscribes a lawyer's "mak[ing] a false statement of fact … to a tribunal or fail[ing] to correct a false statement of material fact … previously made to the tribunal by the lawyer." *See also* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.04(a)(4); MODEL RULES OF PROF'L CONDUCT R. 8.4(c).

As the Houston Court of Appeals has warned: "The duty of honesty and candor a lawyer owes to the appellate court, includes fairly portraying the record on appeal. Misrepresenting the facts in the record not only violates that duty but subjects offenders to sanctions." *Schlafly v. Schlafly*, 33 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). The panel further explained the importance of ethical advocacy on the facts of a case:

> Our adversary system contemplates that each party's advocate will present and argue favorable and unfavorable facts in the light most advantageous to his client; it does not contemplate misrepresentation or mischaracterization of those facts. While a lawyer may challenge the legal effect of unfavorable facts, he may not misrepresent them to the court. Where the record contains unfavorable facts, the appellate advocate should fairly disclose and portray them in his brief. Of course, having done so, he may then zealously and vigorously challenge their impact on the case or argue for the application of law which would minimize or eliminate the court's valid consideration of them.

Id. at 873-74.

Texas courts of appeal thus have been quite clear on appellate counsel's duty to present "a fair portrayal of the facts appearing in the record," which includes a prohibition on misrepresenting the facts in the record on appeal but also "fail[ing] to disclose material facts appearing in the record that are essential to a proper determination of" the issues on appeal. *Id.* at 872-73. The same panel of the Houston Court of Appeals explained the ethical and practical importance of complying with this duty:

> Counsel who mischaracterize or misrepresent the facts in the appellate record impose a tremendous hardship on the reviewing court and its staff. The voluminous case load and the sheer size of the appellate records in many cases often make for a very time-consuming appellate review. When counsel misrepresent the facts on which their legal arguments are based, they not only delay the entire process by unnecessarily adding to the court's workload but also render a tremendous disservice to their clients.

Id. at 873. Notably, the panel added, "[i]t is also very poor strategy to misrepresent the record because any material misstatements and/or omissions will almost certainly be detected by opposing counsel, the appellate panel, and/or the court's alert and able staff." *Id.*

The Fifth Circuit likewise has no tolerance for distortions of the record. *See Dube v. Eagle Global Logistics*, 314 F.3d 193, 194-95 (5th Cir. 2002) ("We rejected [the appellant counsel's] briefs as noncompliant because, inter alia, they contained 'specious arguments' and had 'grossly distorted' the record through the use of ellipses to misrepresent the statements and orders of the district court."), *vacated as moot* (5th Cir. Feb. 4, 2003).

The Fifth Circuit has also recently held appellate counsel responsible, at least in some circumstances, for independently investigating factual representations made on appeal. In *Medley v. Thaler*, 660 F.3d 833 (5th Cir. 2011), a panel of the Court of Appeals learned, after issuing its original opinion, that a prison mail regulation on which its original decision turned did not, in fact, exist. *Id.* at 834, 837, 839. The habeas

petitioner raised this "newly-uncovered fact" in a petition for panel rehearing, which the respondent opposed on the ground that the petitioner did not raise the there-is-no-such-regulation argument prior to rehearing. *Id.* at 839. The panel rejected that waiver argument and the respondent's counsel's explanation for his prior, erroneous representations that the regulation at issue actually existed:

> Moreover, for us to conclude that Medley has waived this argument would result in a perverse outcome. Namely, it would reward respondent's counsel for failing to investigate and correctly represent his client's policies to Medley, the district court, and this court. This court relied on those representations in issuing our erroneous original opinion. The respondent's current counsel of record, who was also the counsel of record for the respondent's original brief to this court, explains that until we requested a response, he 'assum[ed] that facts presented in Medley's exhibits and admissions were as they appeared.' Resp. to Pet. Reh'g 3. Counsel appears to be referring to the responses from prison staff regarding the mail room's purported policy. However, counsel acknowledges that he had no basis to believe that the representations made by those staff were correct, because he 'was not familiar with the local practices of the Clements Unit mail room' when he drafted the original brief to this court. *Id.*

Id. Notably, the Court of Appeals panel "emphasize[d] that in the future, we expect counsel to conduct any necessary investigations in order to ensure that he accurately represents the policies of his client to this court." *Id.* at 839-40.

C. Criticizing Lower Courts

Good strategic and tactical judgment should counsel against unduly criticizing or attacking the lower court on appeal. But, even if that were not so, an appellate counsel's attacking a lower court can also amount to an ethical violation.

Texas Rule 8.02(a) provides that a "lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge," and Model Rule 8.2(a) prohibits a lawyer's "mak[ing] a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge." *See also* MODEL RULES OF PROF'L CONDUCT R. 8.4(d) ("Misconduct—It is professional misconduct for a lawyer to: … (d) engage in conduct that is prejudicial to the administration of justice….").

A Fifth Circuit panel recently addressed an instance of inappropriate criticism of the judge below:

> Not content to raise this issue of law in a professional manner, [the appellant] and her attorneys launched an unjustified attack on [the magistrate judge]. …. These sentences [in the appellant's opening brief] are so poorly written that it is difficult to decipher what the attorneys mean, but any plausible reading is troubling, and the quoted passage is an unjustified and most unprofessional and disrespectful attack on the judicial process in general and the magistrate judge assignment here in particular.

Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 172 (5th Cir. 2011). The panel concluded that, under any possible reading of the argument in the appellant's brief, "the attorneys' attack on [the magistrate judge's] decisionmaking is reprehensible." *Id.*

Of course, an attorney's personal attacks on her opponent or opposing counsel are often no better received—even though the parties' trading *ad hominem* blows may have the effect of cancelling one another out. *See generally Big Dipper Entm't, LLC v. City of Warren*, 641 F.3d 715, 719 (6th Cir. 2011) ("In our view, a party should think twice about questioning the district court's integrity or that of opposing counsel. That two persons disagree does not mean that one of them has bad motives. And even in the worst cases, the better practice is usually to lay out the facts and let the court reach its own conclusions."). In one case, a panel of the Fifth Circuit, facing parties who were exchanging attacks and calling for sanctions against each other, effectively declared a plague on both parties' houses: "We deny both parties' motions for sanctions, because both parties contributed to the 'disharmony in the proceedings,' and 'utter[ly] disregard[ed] ... the time constraints every court faces.' Briefs in this Court were long on hyperbole and personal attacks and short on thoughtful analysis." *Walker v. City of Bogalusa*, 168 F.3d 237, 241 (5th Cir. 1999) (citations omitted). On a related note, one Dallas Court of Appeals justice recently offered the following advice to litigants who are considering seeking sanctions against an opponent: "My point is simply this: in a long and complicated piece of litigation like this case, lawyers on all sides are going to make mistakes. If they want their own mistakes to be judged charitably, they themselves should be slow to reach for the 'nuclear weapon' of sanctions against their opponents. *Davis v. Rupe*, 307 S.W.3d 528, 550

(Tex. App.—Dallas 2010, no pet.) (Fitzgerald, J., dissenting).

III. SELECTED LEGAL MALPRACTICE ISSUES FOR TEXAS APPELLATE LAWYERS

Under Texas law, an ultimate finding of liability for legal malpractice by a lawyer handling an appeal is a matter of law for a court to decide. That is because any liability depends on a determination that, but for the alleged malpractice, the party suing its lawyer would have prevailed on its appeal. *Grider v. Mike O'Brien, P.C.*, 260 S.W.3d 49, 55 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). Thus, under Texas law, causation is "a question of law when a plaintiff alleges appellate legal malpractice because 'the question of whether an appeal would have been successful depends on an analysis of the law and the procedural rules.'" *Resendez v. Maloney*, No. 03-09-00453-CV, 2010 WL 5395674, at *5 (Tex. App.—Houston [1st Dist.] Dec. 1, 2010, pet. denied) (quoting *Grider*, 260 S.W.3d at 55). As such, "where the issue of causation hinges on the possible outcome of an appeal, the question of causation is to be resolved by the court as a question of law." *Grider*, 260 S.W.3d at 55; *accord Millhouse v. Wiesenthal*, 775 S.W.2d 626, 627 (Tex. 1989) ("[I]n cases of appellate legal malpractice, where the issue of causation hinges on the possible outcome of an appeal, the issue is to be resolved by the court as a question of law.").

Whatever comfort that may or may not provide to Texas appellate lawyers, a variety of mistakes or potential allegations could form the basis for legal malpractice issues in connection with an attorney's handling of an appeal. This section provides a survey of some of the mistakes or alleged rules or ethical violations that might form the basis for a client's allegations of legal malpractice against its appellate lawyer.

A. Basic Mistakes

The most basic mistakes involve missing deadlines or otherwise violating the courts' rules, which most obviously raise malpractice issues when missing a deadline or violating a rule results in the appellate court's dismissing or denying an appeal without considering its merits.

1. Deadlines

The most critical appellate deadline involves the requirement to timely file a notice of appeal. In federal court, "[t]he time for filing a notice of appeal in a civil case is not subject to equitable tolling, and a timely notice of appeal is a jurisdictional prerequisite to appeal." *United States v. Rangel*, 442 Fed. Appx. 158, 159 (5th Cir. 2011). The same is true for appeals in Texas courts. The Texas Supreme Court has held that an appellant must "timely file[] an instrument in a bona fide attempt to invoke the appellate court's jurisdiction." *In Interest of K.A.F.*, 160 S.W.3d 923, 928 (Tex. 2005).

At the same time, electronic filing's arrival in many of the appellate courts brings with it enhanced convenience but also potential traps for the unwary that may cause an appeal to be dismissed. Potential missteps include misunderstanding either the deadlines for filing electronically or what an electronic filing system does and does not serve on opposing counsel.

The United States Court of Appeals for the Seventh Circuit recently noted the pitfalls of counsel's relying too heavily on the extent to which electronic filing extends the time period available for filing, including for filing documents that that have appellate jurisdictional implications. In *Justice v. Town of Cicero, Ill.*, 682 F.3d 662, 663-64 (7th Cir. 2012), the appellant's motion to reconsider was due on November 22, but he filed at 3 a.m. on November 23 and then asked the district court to deem the motion—*nunc pro tunc*—filed on November 22. The district court did so, but the Court of Appeals rejected that order as "an improper use of the *nunc pro tunc* procedure." *Id.* at 664. The panel explained:

> Justice's appeal allows a challenge to the October 25 order only if the 3 AM filing was timely without aid from the district judge's order. Yet it does not take a reference to *Cinderella* to show that midnight marks the end of one day and the start of another. Electronic filing systems do extend the number of hours available for filing. Instead of having until the clerk's office closes, litigants have until 11:59 PM. But e-filing does not increase the number of days available for filing. A document entered into the electronic system at 12:01 AM on a Thursday has been filed on Thursday, not on "virtual Wednesday." [Federal Rule of Civil Procedure] 6(a)(4)(A) is explicit on this point. It says that the last day allowed for filing ends "for electronic filing, at midnight in the court's time zone." Just as courts lack the power to grant extensions of time under Rule 6(b)(2), so the judiciary lacks the power to say that one day ends at 4 AM or 9 AM of the next day when an e-filing system is used.

Id. Notably, the rules for electronic filing in, for example, the Texas Supreme Court similarly impose a deadline of midnight in the court's time zone for any electronically filed document. The Seventh Circuit panel then offered this practical advice:

> Courts used to say that a single day's delay can cost a litigant valuable rights. With e-filing, one hour's or even a minute's delay can cost a litigant valuable rights. A prudent litigant or lawyer must allow time for difficulties on the filer's end. A crash of the lawyer's computer, or a power outage at 11:50 PM, does not extend the deadline, even though unavailability of the court's computer can do so under [Federal Rule of Civil Procedure] 6(a)(3).

Id. at 665 (citation omitted).

Counsel's misunderstanding of other aspects of e-filing can also lead to errors that result in a loss of appeal or other rights. Very recently, the Austin Court of Appeals affirmed a trial court's dismissal of a suit for judicial review because the petitioner failed to execute service of citation on the Texas agency within the required 30-day period. *TFJA, LP v. Tex. Comm'n on Envtl. Quality*, 368 S.W.3d 727 (Tex. App.—Austin 2012, pet. filed). One justice's opinion, concurring in part and dissenting in part, explained that the failure was due, among other things, "to a misunderstanding on the part of trial counsel," who "incorrectly believed that electronic filing would also accomplish service of the citation." *Id.* at 741 (Henson, J., concurring in part, dissenting in part).

The Fifth Circuit has also issued a pair of recent decisions in which it held that counsel's reliance on misinformation in a deficiency notice generated by a court's electronic filing system, or on the absence of any such deficiency notice, does not relieve a party of the consequences of filing a notice of appeal outside the requirements set by federal statutes and rules. *Craig v. Police Jury Grant Parish*, 347 Fed. Appx. 119 (5th Cir. 2009); *Kinsley v. Lakeview Reg. Med. Ctr. LLC*, 570 F.3d 586 (5th Cir. 2009).

Notably, the appellant in the *Craig* case tried to rely on the deficiency notice's explanation that the notice of appeal was electronically filed under the wrong designation ("Notice," rather than "Notice of Appeal") but that "no further action … [was] required." 347 Fed. Appx. at 121-22. That did not save Craig's appeal where the wrongly-designated notice did not satisfy the minimum requirements for a notice of appeal. *Id.*

But, even if it had in that case, Texas lawyers should be aware that not all courts' filing systems or clerk's offices may be so forgiving of errors in the mechanics and details of electronic filing. In *Vince v. Rock County, Wisc.*, 604 F.3d 391, 392 (7th Cir. 2010), the appellant's counsel filed a notice of appeal on the thirtieth and last day of the appeal period but, using the court's mandatory electronic filing system, transmitted the notice of appeal using the wrong event code. That error lead the district court clerk's office to direct counsel, several days later, to refile using the correct code. The Court of Appeals ultimately held that the original filing with the wrong code was "an error of form" that did not deprive the court of appellate jurisdiction. *Id.* at 393. But the Seventh Circuit panel offered this word of caution: "Counsel practicing in the federal courts today would be well advised to pay close attention to their electronic transmissions, so that errors in electronic filing do not adversely affect one of their cases." *Id.*

2. Compliance with rules of appellate procedure

Both the Texas state appellate courts and the Fifth Circuit may also dismiss appeals based on violations of rules and requirements other than deadlines. This can include dismissal for failing to comply with requirements at the outset of an appeal—even after a notice of appeal is timely filed—or for failing to file an appellant's brief or otherwise to prosecute an appeal. *See* FED R. APP. P. 3(a)(2) ("An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal."); *id.* 31(c) ("If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal."); 5TH CIR. R. 42.3 ("Dismissal for Failure To Prosecute."); TEX. R. APP. P. 38.8 ("Failure of Appellant to File Brief"); *id.* 42.3 ("Involuntary Dismissal in Civil Cases— …. Dismissal or affirmance may occur if the appeal is subject to dismissal: (a) for want of jurisdiction; (b) for want of prosecution; or (c) because the appellant has failed to comply with a requirement of these rules, a court order, or a notice from the clerk requiring a response or other action within a specified time."); *see also id.* 44.3 ("Defects in Procedure—A court of appeals must not affirm or reverse a judgment or dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities."). Cataloguing the list of rule violations that could result in dismissal would go beyond the scope of this paper, but certainly Texas attorneys must be aware that any such conduct could expose them to a legal malpractice claim by the client.

Appellate counsel also could face a malpractice claim where an appellate court does not entirely dismiss an appeal but determines that an issue or argument was not sufficiently raised or briefed at the appellate court level and therefore is waived. Several papers at recent Texas appellate practice seminars have discussed in detail the circumstances in which the various Texas appellate courts have found waiver and thereby refused to reach the merits of an issue or

argument on appeal. *See, e.g.*, Thomas S. Leatherbury, "Different Views on Briefing Waiver from the Courts of Appeals," State Bar of Texas 25th Annual Advanced Civil Appellate Practice Course (Sept. 8-9, 2011). The Fifth Circuit will, likewise, "decline to reach the merits of [] claims" on appeal "[i]n the absence of logical argumentation or citation to authority." *Alameda Films S.A. de C V v. Authors Rights Restoration Corp.*, 331 F.3d 472, 483 (5th Cir. 2003) (internal quotation marks omitted).

B. Ethical Violations Resulting In Dismissal

The Texas Rules of Disciplinary Conduct make clear that the ethical rules are not intended to create a standard for civil liability: "These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a Rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT Preamble ¶ 15; *see also* MODEL RULES OF PROF'L CONDUCT Preamble ¶ 20 ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability."). Texas courts have, accordingly, held that "[a] private cause of action does not exist for violation of the disciplinary rules" and "[a] claim that a lawyer has violated a rule of professional conduct should be raised in a disciplinary proceeding." *McGuire, Craddock, Strother & Hale, P.C. v. Transcontin. Realty Investors, Inc.*, 251 S.W.3d 890, 896 (Tex. App.—Dallas 2008, pet. denied).

Similarly, the Texas Supreme Court and the Texas Court of Criminal Appeals have promulgated and adopted the Texas Lawyer's Creed as well as the Standards for Appellate Conduct, but neither the Creed nor the Standard purports to itself create standards for civil liability. *E.g.*, TEX. STANDARDS FOR APPELLATE CONDUCT ("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."); *cf.* TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM ("I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that 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."). As one appellate court has explained:

> [T]he Texas Lawyer's Creed is not binding law, but is instead a recommended code of conduct. The Creed does not create new duties and obligations enforceable by the courts beyond those existing as a result of (1) the courts' inherent powers and (2) the rules already in existence. Therefore, in order for a provision of the Creed to be enforceable by the courts, the courts must act pursuant to their inherent powers or existing rules.

Cont'l Carbon Co. v. Sea-Land Serv., Inc., 27 S.W.3d 184, 189 (Tex. App.—Dallas 2000, pet. denied).

Nevertheless, Texas appellate courts have looked variously to the Texas Disciplinary Rules, the Texas Lawyer's Creed, and the Standards for Appellate Conduct when discussing whether an appellate lawyer has committed an ethical violation. *See, e.g.*, *In re A.D.*, 287 S.W.3d 356, 368-69 (Tex. App.—Texarkana 2009, pet. denied) (discussing both the Lawyer's Creed and Standards for Appellate Conduct with regard to "an extremely misleading statement" in a motion for rehearing); *Twist v. McAllen Nat'l Bank*, 248 S.W.3d 351, 364-65 (Tex. App.—Corpus Christi-Edinburg 2007, orig. proceeding) (discussing Texas Disciplinary Rules, Texas Lawyer's Creed, and Standards for Appellate Conduct when deciding on sanctions for conduct in mandamus proceeding). In practical effect, then, an appellate lawyer could face a claim by a client where an appellate court determines that an appellate lawyer has violated any ethical rule or standard and that the appropriate judicial response is to dismiss an appeal or otherwise decline to reach the merits of an issue or argument on appeal because of that ethical violation.

C. Positional Conflicts Of Interest

In addition to other possible conflicts of interest that may foreclose, or require multiple clients' consent to, an appellate representation, appellate lawyers should also be alert to "positional" or "issue" conflicts that may preclude taking on an appeal. Generally, "[a] positional conflict of interest occurs when a law firm adopts a legal position for one client seeking a particular legal result that is directly contrary to the position taken on behalf of another present or former client, seeking an opposite legal result, *in a completely unrelated matter*." John S. Dziekowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457, 460 (1993).

Texas Rule 1.06 sets forth the general rules on conflicts of interest, and the comments to Texas Rule 1.06 specifically address positional conflicts:

> A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.06 cmt. The comments thus make clear that, under the Texas Rules, the ethical pitfalls of positional conflicts are more likely to arise on appeal, where a decision in favor of one client on an issue may actually adversely affect the other client's position.

The comments to Model Rule 1.7, the ABA's general conflict of interest rule, offer a similar description of this ethical issue's contours:

> Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client.

MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. While the Model Rule 1.7's comments do not specifically call out special risks for positional conflicts in appellate representations, they do advise that "[f]actors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer." *Id.* And the comments then provide that, "[i]f there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters." *Id.*

D. Competence to Handle an Appeal

Attorneys practicing in Texas courts are also subject to a duty not to "accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless: (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or (2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.01(a); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). Attorneys considering handling an appeal for the first time or in an unfamiliar subject-matter area should give due consideration to this ethical limitation before proceeding with a representation.

E. Communications With The Client

Likewise, the general ethical duties to provide appropriate information and explanations to a client apply with just as much force to an appellate representation as to any other legal matter. *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.03; MODEL RULES OF PROF'L CONDUCT R. 1.4. In fact, counsel handling an appeal may need to be particularly vigilant about proactively communicating with a client. Because appeals often involve relatively long periods of time between court filings and appearances, opportunities for attorney-client interaction may be less frequent than in trial court cases or other legal engagements with more compressed schedules.

IV. CONCLUSION

Appellate lawyers may take some comfort in the fact that appellate practice affords a relatively limited range of interactions with clients and courts that may give rise to ethical and legal malpractice issues. But, as this limited survey of potential issues and selected court decisions demonstrates, lawyers practicing appellate law in Texas must be just as committed to their various professional and fiduciary duties, diligent in providing excellent service to their clients, and vigilant to avoid mistakes as any other Texas lawyer.

APPENDIX 1: EXCERPTS FROM TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

I. CLIENT-LAWYER RELATIONSHIP

Rule 1.01 Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

(b) In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer; or

(2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

(c) As used in this Rule "neglect" signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

….

Rule 1.03 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

….

Rule 1.06 Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or laws firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

….

Rule 3.02 Minimizing the Burdens and Delays of Litigation

In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.

Rule 3.03 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;

(3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;

(4) fail to disclose to the tribunal 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; or

(5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take

reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraph (a) and (b) continue until remedial legal measures are no longer reasonably possible.

….

Rule 8.02 Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office.

….

Rule 8.04 Misconduct

(a) A lawyer shall not:

(1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;

(2) commit a serious crime, or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(4) engage in conduct constituting obstruction of justice;

(5) state or imply an ability to influence improperly a government agency or official;

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(7) violate any disciplinary or disability order or judgment;

(8) fail to timely furnish to the Chief Disciplinary Counsel's office or a district grievance committee a response or other information as required by the Texas Rules of Disciplinary Procedure, unless he or she in good faith timely asserts a privilege or other legal ground for failure to do so;

(9) engage in conduct that constitutes barratry as defined by the law of this state;

(10) fail to comply with section 13.01 of the Texas Rules of Disciplinary Procedure relating to notification of an attorney's cessation of practice;

(11) engage in the practice of law when the lawyer is on inactive status or when the lawyer's right to practice has been suspended or terminated including but not limited to situations where a lawyer's right to practice has been administratively suspended for failure to timely pay required fees or assessments or for failure to comply with Article XII of the State Bar Rules relating to Mandatory Continuing Legal Education; or

(12) violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law.

(b) As used in subsection (a)(2) of this Rule, "serious crime" means barratry; any felony involving moral turpitude; any misdemeanor involving theft, embezzlement, or fraudulent misappropriation of money or other property; or any attempt, conspiracy, or solicitation of another to commit any of the foregoing.

APPENDIX 2: EXCERPTS FROM MODEL RULES OF PROFESSIONAL CONDUCT

Client-Lawyer Relationship

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

….

Client-Lawyer Relationship

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

….

Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

….

Advocate

Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of 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;

(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; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

….

Maintaining The Integrity Of The Profession

Rule 8.2 Judicial And Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

….

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

APPENDIX 3: EXCERPTS FROM TEXAS STANDARDS FOR APPELLATE 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.

APPENDIX 4: EXCERPTS FROM THE TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM

I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that 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.

I. Our Legal System

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."
2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.
3. I commit myself to an adequate and effective pro bono program.
4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.
5. I will always be conscious of my duty to the judicial system.

II. Lawyer To Client

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate legal means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this creed when undertaking representation.
2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.
3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.
4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.
5. I will advise my client of proper and expected behavior.
6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.
7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.
8. I will advise my client that we will not pursue tactics which are intended primarily for delay.
9. I will advise my client that we will not pursue any course of action which is without merit.
10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.

11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

III. Lawyer To Lawyer

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.
2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.
3. I will identify for other counsel or parties all changes I have made in documents submitted for review.
4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.
5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are cancelled.
6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.
7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.
8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.
9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.
10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.
11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.
12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the Court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.
13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.
14. I will not arbitrarily schedule a deposition, Court appearance, or hearing until a good faith effort has been made to schedule it by agreement.
15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.
16. I will refrain from excessive and abusive discovery.
17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.
18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.
19. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

IV. Lawyer And Judge

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.
2. I will conduct myself in Court in a professional manner and demonstrate my respect for the Court and the law.
3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.
4. I will be punctual.

5. I will not engage in any conduct which offends the dignity and decorum of proceedings.
6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.
7. I will respect the rulings of the Court.
8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.
9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.