APPELLATE ETHICS IN TEXAS: ADHERING TO A HIGHER STANDARD

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Kevin Dubose is an appellate lawyer in Houston, and a founding partner of Alexander Dubose & Jefferson LLP. He is a former Chair of the State Bar of Texas Appellate Section, and of the Appellate Section of the Houston Bar Association.

Kevin first wrote about legal ethics in the early 1990s, and since then has written and spoken about that subject numerous times. He is a lawyer who other lawyers frequently turn to for ethical advice.

When Chair of the State Bar Appellate Section, Kevin appointed, and served on, a committee to draft standards of professionalism designed for appellate law. Those efforts culminated in the creation of the *Standards for Appellate Conduct*, which were adopted by the Supreme Court of Texas and Texas Court of Criminal Appeals in 1999. It became the first, and remains the only, ethical standards specifically designed for appellate practice in the United States.

In 2012, Kevin received the Chief Justice Jack Pope Professionalism Award from the Texas Center for Legal Ethics (TCLE). In 2015, he joined the Board of Directors of TCLE, and currently serves as Chair of the Board. Since 2017 he has participated in over 30 CLE programs on behalf of TCLE.

In 2020, Kevin received the Lola Wright Foundation Award from the Texas Bar Foundation, in recognition of outstanding public service in advancing and enhancing legal ethics in Texas.

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I. Introduction

Texas appellate lawyers have the benefit and the burden of practicing under the *Standards for Appellate Conduct* ("the Standards"). The Standards were conceived and drafted by a committee of the State Bar of Texas Appellate Section, and jointly promulgated by the Supreme Court of Texas and the Court of Criminal Appeals in 1999. The Standards articulate aspirational goals rather than enforceable rules; their preamble states, "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." Nevertheless, they are featured on the website of every appellate court in Texas, and they truly do articulate the expectations of the justices and the appellate practitioners who make up the Texas appellate community. All those who practice in the Texas appellate courts would be well advised to adhere to them.

Texas is the only jurisdiction that has adopted a set of ethical guidelines applicable to appellate practice. Thus, appellate lawyers in other jurisdictions are bound only by their state's version of the Uniform Disciplinary Rules of Professional Conduct. And non-appellate lawyers in Texas are bound only by the Texas Disciplinary Rules of Professional Conduct ("the Rules"). But the Rules themselves recognize that they state "minimum standards of conduct beyond which no lawyer can fall without being subject to disciplinary action." Rules, Preamble ¶7. They also acknowledge that they "do not . . . exhaust the moral and ethical considerations that should guide a lawyer," *id.* at ¶11, and that, "Each lawyer's own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules." *Id.* at 9. But for Texas appellate lawyers another touchstone is provided by the Standards, and in many instances the Standards describe a higher standard of ethics and professionalism than the Rules. This paper will highlight some of those differences by presenting a series of related hypotheticals and analyzing how the Rules and Standards provide different answers to the questions raised by the hypotheticals.

II. Accepting an appellate engagement

Clarence Client approaches Andrea Advocate about handling the appeal of a case in which judgment was rendered against Clarence following a bench trial before a well-respected judge. After reviewing the judgment, the findings of fact and conclusions of law, the pleadings, and the post-trial briefing, Andrea concludes that the trial judge's rulings were mostly correct, the case turned out as it should have, and there is no realistic chance of reversal on appeal. Andrea reports her assessment to Clarence, and says she should decline the proffered engagement.

Clarence responds that he is much more optimistic than Andrea, that the papers do not fairly depict what transpired at trial, and that Andrea will probably feel differently after she reads the trial transcript. Clarence also informs Andrea that he has an ongoing business relationship with the Defendant, DefCon1 Industries, they are in the process of negotiating a new comprehensive contractual relationship, and if he can create some uncertainty about this judgment that will provide him with better leverage in the negotiations with DefCon1. Additionally, if he has to pay a judgment, he needs more time to generate income, and to consider the transfer or liquidation of assets, or even bankruptcy. And although DefCon1 prevailed on technical legal arguments, they engaged in unsavory business practices, and Clarence might welcome the opportunity to expose them in a high-profile appeal. Finally, even if he ultimately loses, Clarence does not want to go down without a fight, he would rather pay his money to Andrea than to Defcon1, and everybody has a right to legal representation.

Although Andrea remains convinced that there is no good faith basis for arguing that reversible error exists, she knows she has fulfilled her duty of candor to her client, and Clarence will proceed with the appeal, whether represented by Andrea or someone else. Andrea has proposed a robust hourly rate to which Clarence agreed without flinching. The trial was lengthy, so reading and annotating the transcript and trial exhibits will require many hours. The case involves numerous cutting-edge legal arguments and will require briefing up to the maximum page limits. Andrea has not originated any new matters in her firm in over six months, and this case would likely produce more revenue and generate more press than any case she has ever originated. Andrea tells Clarence she will take the case.

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The Rules provide that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous." Rule 3.01. The comments to that Rule explain that "A filing or contention is frivolous if it contains knowingly false statements of fact," and a contention may **not** be frivolous "even though the lawyer thinks the client's position ultimately may not prevail." In other words, counsel should not agree to bring or defend an action or argument if it requires making

knowingly false statements of fact. Additionally, the Preamble states that, "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."

As far as Andrea can tell at this point, pursuing Clarence's appeal will not require her to knowingly make false statements of fact. And it is not an apparent that simply pursuing an appeal would rise to the level of harassment or intimidation. So, under the Rules, there does not appear to be a problem with Andrea accepting this appellate engagement.

The *Standards* provide that, "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." *Standards*, Lawyer's Duties to the Court § 1. The next section forbids pursuing an appeal "primarily for purposes of delay or harassment." *Id.* at §2. Moreover, the Standards require the attorney to "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." *See Standards*, Lawyer's Duties to the Client §12.

Andrea does not have a good faith belief that error has been committed. And from Clarence's comments, it appears that at least part of the reason for pursuing the appeal is to buy time to make financial arrangements (delay), and another reason is to expose DefCon1's bad conduct in a more public forum (harassment). For all these reasons, the Standards suggest that Andrea should not accept this appellate engagement.

III. Communications with client upon engagement

Andrea tells Clarence that her firm has a standard retainer agreement that she will draft and send to him to sign. Clarence tells Andrea that he hates long contracts filled with legalese, and that they should be able to trust each other without a lengthy agreement. He instructs Andrea to draft a brief one-paragraph agreement saying that Andrea will handle the appeal and Clarence will pay Andrea's usual hourly rate under customary terms. Andrea does that, they both sign the agreement, and that is the only agreement they ever sign.

Especially in light of such an abbreviated employment contract, Andrea requests a meeting with Clarence to talk about the case, the difference between trials and appeals, and the expectations that he should have for the appeal. Clarence says that he has no expectations other than that she will do her work, and he will pay her for her actual work, not for sitting around talking to him about his expectations. Andrea reluctantly agrees to forego the meeting and starts working on the appeal without any further communications with her client.

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The Rules require only that lawyers inform clients as circumstances develop during the litigation: "A lawyer shall keep a client reasonably informed about the status of the matter and promptly comply with reasonable requests for information," and "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rules 1.03(a), 1.03(b). The Rules also require lawyers to communicate with clients when they become aware that the client is contemplating criminal or fraudulent acts. Rules 1.02(c), 1.02(d); 3.03(b).

Andrea's obligation to keep Clarence reasonably informed about the status of the appeal will arise over the course of the appeal. She will comply with reasonable requests when, if ever, requests are made by Clarence. She expressed her concerns that might affect Clarence's ability to make informed decisions during their initial conversation when she tried to decline the representation. And she is not aware that Clarence is contemplating any criminal or fraudulent acts. Under the Rules, she seems to have complied with all required disclosures and may proceed with the appeal.

The Standards require attorneys to advise clients of quite a bit upon engagement, including:

- that the Standards exist and what they require, Lawyer's Duties to Clients §1;
- the fee agreement and cost expectations, *id.* at §2;
- the nature of the appellate process, the range of potential outcomes, timetables, effect of the appeal on the existing judgment, the availability of alternative dispute resolution, *id.* at §5;
- the expectation of proper behavior, civility and courtesy, *id.* at §9;
- the attorney's right to agree to reasonable requests by opposing counsel, *id.* at §10;
- that an appeal should only be pursued with a good faith belief that error was committed, *id.* at §12;

- the attorney will not take frivolous positions in the appellate court, and the penalties associated with that conduct, *id.* at §13.

It appears that Andrea has not complied with any of these required disclosures to clients under the Standards.

IV. Communications with client about opposing counsel and court

DefCon1 hires an appellate lawyer, Madison "Mad Dog" Doggett, who has a reputation for aggressive tactics and questionable ethics. He has had multiple grievances filed against him, and one resulted in a temporary suspension of his license. It is widely known that Mad Dog contributes generously to the campaign funds of appellate justices.

Andrea tells Clarence that Defcon1 has hired Mad Dog, and that he is a scum bag who is not a very good lawyer, but gets good results by buying off judges through campaign contributions, and some judges on the court they are assigned to are susceptible to that sort of influence. She also tells Clarence about Mad Dog's aggressive tactics, and about his track record with the grievance committee. Clarence tells her, "I know his type, I run across them in the business world all the time. You have to come right back at him, fight fire with fire. If you let him get away with anything he will perceive that as a sign of weakness and find ways to exploit it. And you have to find a way to bring up his grievance, conviction, and license suspension, if not in the briefing, at least in oral argument." Andrea silently balks at this advice, because it is not her typical style of dealing with other lawyers. But she is concerned about losing Clarence's confidence if she protests, so she says nothing and reluctantly decides she must comply with her client's directives.

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The Rules do not address what lawyers may tell clients about other counsel or the court other than a general statement in the Preamble that "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." Rules, Preamble at ¶4. With regard to Clarence's instructions about how to treat opposing counsel, Rule 1.02 provides that, with certain exceptions not applicable here, "a lawyer shall abide by a client's decisions . . . concerning the objectives and general methods of representation." Rule 1.02(a).

Andrea may consider her comments to be merely factual and not disrespectful, although they are certainly close to that line. This may be a close call under the Rules; under the Standards there is little ambiguity.

The Standards set a higher bar for behaving with respect and civility, a sentiment expressed in multiple ways in the Standards.

- **Duties to Clients**. Lawyers are forbidden from expressing negative opinions about opposing counsel and the court and are required to advise their clients that proper behavior, civility, and courtesy are expected. Lawyer's Duties to Clients at §7, 9, 10. Clients have no right to demand that counsel be abusive or offensive. *Id.* at §10, 11.
- **Duties to Lawyers**. Lawyers are required to:
  - treat each other and all parties with respect, Lawyer's Duties to Lawyers at §1;
  - refrain from making personal attacks on counsel or parties, id. at §5;
  - refrain from attributing bad motives or improper conduct to other counsel or making unfounded accusations of impropriety, id. at §6;

Andrea's comments certainly "express a negative opinion about opposing counsel and the court." She also has made a "personal attack on counsel," "attribute[ed] . . . improper conduct to other counsel," and has made "unfounded accusations of impropriety." She has not advised Clarence that "proper behavior, civility, and courtesy are expected," nor has she advised him that "Clients have no right to demand that counsel be abusive or offensive." Clarence's directive to her about how to deal with opposing counsel is contrary to the Standards, as is her decision to abide by his instructions.

V. Granting scheduling accommodations to opposing counsel

A few days before the Brief of Appellee is due, Mad Dog contacts Andrea and tells her that he is going to file a motion seeking a 30-day extension and asks if he can report her as unopposed. Andrea contacts Clarence and he explodes. "Agree to something he wants? Do that man a favor? Why in the world would we do that? Absolutely not!" Angela explains that while she rarely opposes an extension, when she does her customary approach is to simply report that she is opposed in a certificate of conference and filing a motion in opposition is not necessary or appropriate. Clarence strongly disagrees. "No, I'm afraid that certificate of conference stuff is too subtle. The court

may not even read that. I want you to file a full-throated motion in opposition. Do some snooping around, check out his social media posts, see what he's been up to during the past 30 days instead of working on this brief and use that." Andrea agrees, reports to Mad Dog that she is opposed, and then files an aggressive motion in opposition.

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The Rules do not specifically address responding to opposing counsel's requests for scheduling accommodations. But they do generally provide that "a lawyer shall abide by a client's decisions . . . concerning the objectives and general methods of representation." Rule 1.02(a). There is an exception to this rule that states, "When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct."

Because the conduct Clarence has directed Andrea to engage in is not something "not permitted by the rules of professional conduct or other law," under the Rules she is probably bound to abide by Clarence's wishes regarding opposition to the motion for extension.

In contrast, the Standards specifically provide that the lawyer reserves the right to grant reasonable accommodations to opposing counsel, Lawyer's Duty to Client at §10, and clients have no right to instruct a lawyer to refuse reasonable requests. *Id.* at § 11. Moreover, the Standards clearly mandate that, "Counsel will not unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation by opposing counsel." Lawyer's Duty to Lawyers at § 2.

Under the Standards, Andrea retains the right to grant reasonable scheduling accommodations to opposing counsel, the client has no right to demand otherwise, and Andrea is directed not to oppose reasonable requests for extension. Because this is a first request for an extension, and the extension requested is only thirty days, that request is almost "reasonable" by definition. (In most appellate courts, a first extension for thirty days is granted automatically by the clerk's office without being seen by the justices.) Andrea should tell Clarence that the Standards suggest that she not oppose Mad Dog's motion for extension, and he has no right to demand otherwise.

VI. Including material outside the record in briefing

As the briefing progresses, Andrea learns of important, potentially case-dispositive, facts that were not adequately developed by trial counsel on either side. In the Appellee's Brief, counsel for DefCon1 filled in some of these gaps with outside-the-record statements that favor DefCon1.

While preparing her Reply Brief, Andrea learns about facts that not only rebut the outside-the-record statements made by DefCon1, but also substantially benefit Clarence's legal position. Andrea explains to Clarence that she cannot include those facts in her brief, because they are outside the record. Clarence insists that the facts he wants to add to the brief are true, they are independently verifiable, and, in any event, DefCon1 started this by going outside the record first. Andrea remains unconvinced.

Clarence contacts the managing partner of Andrea's firm, Manfred Managing, whom he knows because they belong to the same country club. Clarence insists that Manfred order Andrea to add the controversial material to the brief.

Manfred summons Andrea to his office and tells her the material should be added to the brief. He says he understands Andrea's reluctance, but the material in question really is true, and Clarence should not be punished because of the ineptitude of his trial counsel. Finally, he tells Andrea that it is their job to represent their clients to the best of their ability, and it is up to the appellate court to choose what weight to give the arguments presented to them in briefs.

Andrea adds the outside-the-record statements to the brief, signs it, and files it.

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The Rules do not directly address the discussion of facts outside the record in an appellate brief. However, they do provide that, "A lawyer shall not . . . "in representing a client before a tribunal . . . state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence." Rule 3.04(c)(2). Interpreted strictly, this rule is speaking about prospective statements made before or

during trial that **will not** be supported by admissible evidence. The same logic should apply on appeal to statements made retrospectively that **were not** supported by admissible evidence.

Additional guidance is provided by the briefing rules in the Texas Rules of Appellate Procedure, which provide that all factual statements in the Statement of Facts "must be supported by record references," and the Argument section of the brief must include "appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(g), (i). And numerous cases hold that appellate courts may not consider facts outside the record. But the ethical issue that arises is the temptation to include outside-the-record statements, knowing that even though the court cannot expressly rely on those facts in its opinions, it also cannot completely banish those outside-the-record from its consciousness, just as jurors cannot completely disregard evidence despite an objection and an instruction to disregard. If those outside-the-record facts are prejudicial enough, they may influence the court's decision, even if they never appear in the opinion.

Andrea's inclusion of facts in an appellate brief that are outside the record does not strictly violate the prospective language of Rule 3.04(c)(2).

Here the Standards also fail to directly address citing facts outside the record in a brief. The closest provision says, "Counsel should not misrepresent, mischaracterize, misquote, or miscite the factual record or legal authorities." Lawyers' Duties to the Court, §3. If counsel refers to something in the record and mischaracterizes it or misquotes it, that is clearly a violation. But if the briefwriter simply asserts facts without attempting to link them to anything in the record, that improper conduct violates TRAP Rule 38.1, but does not technically amount to misrepresenting, mischaracterizing, misquoting, or misciting the record. Perhaps, given Rule 38.1's requirement that facts and legal arguments in a brief be supported by citations to the record, an argument could be made that counsel is implying that asserted facts are in the record, and thereby is misrepresenting or mischaracterizing the record. That would be in keeping with the spirit of the Standards, but, sadly, does not seem to literally violate them.

Andrea's inclusion of facts in an appellate brief that are outside the record does not strictly violate the language of section 3 of lawyers' Duties to the Court.

VII. Conduct in court

The case gets set for oral argument, and Andrea schedules a moot court, which Clarence attends. Andrea presents a preview of the argument she intends to give. Upon completion of the argument, Clarence explodes into a tirade about how weak and timid she comes across, and how she has a duty to him as her client to demonstrate more passion for their position, and to communicate his utter contempt for DefCon1. He insists that she argue the facts – including the outside-the-record facts – that put the black hat on DefCon1, regardless whether they are relevant to the legal arguments. Moreover, he reminds her that Mad Dog's checkered past is their Achilles heel, and demands that she mention his license suspension, perhaps by way of a snide suggestion to the court that the same state of mind that resulted in Mad Dog's license suspension seems to be driving his arguments in this case..

Angela resists Clarence's suggestion at first, pointing out that his suggestions are not congruent with her personal style. This enrages Clarence, who reminds her that he is the client and she is his lawyer – though it is not too late to change that (and forfeit his delinquent payment of her invoices). Manfred also is present for the moot court and reinforces Clarence's suggestion. When Andrea seems unconvinced, Manfred asks to speak to Andrea privately. When they step outside he reminds her of his personal friendship with Clarence, and explains what an embarrassment this would be among their circle of friends if Clarence fires the firm. He also reminds her that this is the year she will be considered for partner, and that losing this client would not inure to her benefit in that process. Andrea reluctantly agrees. During the oral argument a few days later she is aggressive and emotional, and spends much of her time making personal attacks on the officers of DefCon1 and Madison Doggett. When the justices try to steer her toward legal questions she reacts with hostility and suggests that the court is bought and paid for.

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The Rules require that "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." Rules, Preamble at ¶4. They also prohibit counsel from "engag[ing] in conduct intended to disrupt the proceedings," Rules at 3.04(c)(5), or from "disobey[ing] an obligation under the standing rules of or a ruling by a tribunal. . . ." *Id.* at 3.04(d).

It is unlikely that Andrea's argument style disrupted the proceedings or disobeyed any rulings by the tribunal. However, her remarks certainly did indicate a lack of respect, though that is often a subjective analysis.

The Standards demand more than the Rules, requiring that counsel:

- "conduct themselves before the Court in a professional manner, respecting the decorum and integrity of the judicial process," Lawyer's Duties to the Court at §7;
- be "civil and respectful in all communications with the judges. . . ." *id.* at §8;
- refrain from permitting "a client's or their own feelings toward the opposing party, opposing counsel, trial judges, or members of the appellate court to influence their conduct or demeanor in dealing with the judges, . . other counsel, and parties," *id*. at §10;
- "treat [opposing counsel] and all parties with respect," Lawyer's Duties to Lawyers at §1;
- refrain from making "personal attacks on opposing counsel or parties," *id.* at §5.

It seems clear that Andrea violated all these directives of the Standards. She failed to conduct herself in a professional manner, failed to be civil and respectful to the justices, allowed her client's feelings to influence her conduct and demeanor in dealing with the court and opposing counsel, did not treat opposing counsel with respect, and made personal attacks on opposing counsel. This is precisely the kind of conduct that the Standards were promulgated to avoid.