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## The Texas Standards for Appellate Conduct: An Annotated Guide and Commentary

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# ARTICLE

*Justice Gina M. Benavides & Joshua J. Caldwell*

## The Texas Standards for Appellate Conduct: An Annotated Guide and Commentary

**Abstract.** The legal profession is bound by ethical rules that govern and guide our conduct and actions as lawyers. One of the under-appreciated, but profoundly important set of guidelines is the Texas Standards for Appellate Conduct. These Standards serve as an excellent practice guide for appellate practitioners and appellate courts and as a model code of conduct for the Bar as a whole.

The goal of this Article is to dissect the Texas Standards for Appellate Conduct and provide useful commentaries for the readers to better appreciate and understand each element of the Standards. The commentaries provide direct case examples and anecdotal guidance for the audience's benefit. Lastly, the Authors hope that this Article serves as a teaching tool, refresher course, or general reminder of how important ethics are in the legal profession and how all parties involved in it can benefit by subscribing to these Standards.

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### I. INTRODUCTION

This Article began as a Continuing Legal Education presentation to local bar associations and has since evolved into its current form. It discusses the Texas Standards for Appellate Conduct (the “Standards”) and provides annotated editorial commentary that will include observations from the field, as well as examples of how the Standards have been followed—and not followed—in appellate practice.

As a starting point, the adoption of the Appellate Standards of Conduct in the late 1990s was the brainchild of the Appellate Section of the State Bar of Texas, which sought to develop ethical guidelines for appellate practitioners.<sup>1</sup> Texas was the first jurisdiction in the United States to adopt such standards.<sup>2</sup> As professional standards of conduct began developing in other jurisdictions throughout the country for the trial bar, appellate lawyers in Texas thought that the appellate bar “fell somewhat short of being all that

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1. See Kevin Debose, *Standards for Appellate Conduct Adopted in Texas*, 2 J. APP. PRAC. & PROCESS 191, 194 (2000) (noting the Appellate Section of the Texas State Bar appointed a committee to “complete[] a draft of the Standards for Appellate Conduct”).

2. See *id.* at 191 (“The adoption of the Standards made Texas the first jurisdiction in the United States to adopt guidelines specifically directed to attorneys practicing in the appellate courts.”); see also Catherine Stone, *Appellate Standards of Conduct as Adopted in Texas*, 37 ST. MARY’S L.J. 1097, 1097–98 (2006) (“Texas was the first state in the country to promulgate professional standards specifically for appellate practitioners.”).

it could be in this department.”<sup>3</sup> In response, the Appellate Section of the State Bar of Texas appointed a committee made up of a current appellate justice, a former appellate justice, a current court staff attorney, a former appellate court staff attorney, full-time appellate lawyers, and lawyers who do both trial and appellate work.<sup>4</sup>

After a year of studying creeds and standards of conduct for trial lawyers from nearly forty jurisdictions, the committee drafted the Standards.<sup>5</sup> The draft was circulated to the Appellate Section and the State Bar Board of Directors.<sup>6</sup> The Board of Directors then appointed an ad hoc committee that studied the Standards and sought feedback by forwarding a copy of the proposed Standards to every state and federal trial and appellate judge in Texas, every former chief justice of the Texas Courts of Appeals, the chair of every state bar section, and other key stakeholders.<sup>7</sup> The revised Standards were eventually approved by the State Bar Board of Directors in 1997 and forwarded to the Supreme Court of Texas and the Texas Court of Criminal Appeals for review and approval.<sup>8</sup> Once adopted, the Standards were printed in the April 1999 Texas Bar Journal.<sup>9</sup> Some appellate courts, such as the First and Fifth Courts of Appeals, have specifically adopted the Standards into each Court’s practitioners’ guide to their respective courts.<sup>10</sup> All the other courts provide links to the Standards on their website for counsel’s reference.<sup>11</sup>

The Standards are divided into five sections: (1) the Preamble; (2) Lawyers’ Duties to Clients; (3) Lawyers’ Duties to the Court;

3. Debose, *supra* note 1, at 193.

4. *Id.* at 194.

5. *Id.*

6. *Id.* at 194–95.

7. *Id.* at 195.

8. *Id.* at 194.

9. *Id.*

10. See Order of the Court of Appeals for the First District of Texas, Misc. No. 99-9012 (Dec. 18, 2002), [http://www.txcourts.gov/media/183737/conduct\\_order.pdf](http://www.txcourts.gov/media/183737/conduct_order.pdf) [https://perma.cc/7RR3-K3LD] (adopting the Standards “by Order of the Supreme Court of Texas and the Texas Court of Criminal Appeals under Misc. Docket No. 99-9012 on February 1, 1999”); Fifth Court of Appeals, *Standards for Appellate Conduct*, TEX. JUD. BRANCH, <http://www.txcourts.gov/5thcoa/practice-before-the-court/appellate-conduct/> [https://perma.cc/F7XP-43AY] (relaying the February 1, 1999 order by the Texas Supreme Court and Court of Criminal Appeals pertaining to the Standards).

11. See Second Court of Appeals, *Practice Before the Court*, TEX. JUD. BRANCH, <http://www.txcourts.gov/2ndcoa/practice-before-the-court/> [https://perma.cc/QGU4-26QF] (linking the Standards for Appellate Conduct to its webpage); see also Seventh Court of Appeals, *Practice Before the Court*, TEX. JUD. BRANCH, <http://www.txcourts.gov/7thcoa/practice-before-the-court/> [https://perma.cc/6ZFY-W2VV] (linking general standards of conduct to its webpage).

(4) Lawyers' Duties to Lawyers; and (5) the Court's Relationship with Counsel.<sup>12</sup> This Article will analyze and annotate each section.

## II. PREAMBLE

This Article has divided the Standards' Preamble into three paragraphs:

Lawyers are an indispensable part of the pursuit of justice. They are officers of courts charged with safeguarding, interpreting, and applying the law through which justice is achieved. Appellate courts rely on counsel to present opposing views of how the law should be applied to facts established in other proceedings. The appellate lawyer's role is to present the law controlling the disposition of a case in a manner that clearly reveals the legal issues raised by the record while persuading the court that an interpretation or application favored by the lawyer's clients is in the best interest of the administration of equal justice under law.<sup>13</sup>

**Commentary:** The opening paragraph of the Preamble recognizes the vital role that lawyers play in the big picture of our justice system and, more specifically, in the appellate arena. As a reminder, lawyers serve a noble part in helping appellate courts navigate the oftentimes rough waters of a case on appeal. Many cases are complex, dense, and unsettled, and appellate courts rely heavily on appellate counsel to assist in understanding the critical issue in a case.<sup>14</sup>

The duties lawyers owe to the justice system, other officers of the court, and lawyers' clients are generally well-defined and understood by the appellate bar. Problems that arise when duties conflict can be resolved through understanding the nature and extent of a lawyer's respective duties, avoiding the tendency to emphasize a particular duty at the expense of others, and

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12. See generally TEX. STANDARDS FOR APP. CONDUCT, *reprinted in* TEX. R. APP. P. (West 2016) (listing the Standards and dividing them into five parts, including the preamble).

13. *Id.* pmb. ¶ 1.

14. See *Maixner v. Maixner*, 641 S.W.2d 374, 376 (Tex. App.—Dallas 1982, no writ) (“Consequently, he is in a much better position than an appellate court, who must rely on the written record alone, to assess the needs of the child and to adjudge from personal observation which arrangement will serve the best interest of the child.” (citing *Little v. Little*, 590 S.W.2d 620, 624 (Tex. Civ. App.—Fort Worth 1972, no writ))); see also Brad M. Wilson, *Appeal Dismissed! Avoiding Premature Dismissal in the Court of Appeals: Appeals Are Often Dismissed Prematurely Because Attorneys Make Three Common-but Easily-Avoided-Errors*, 61 J. MO. B. 318, 322 (2005) (“Appellate courts rely on the record to make decisions, and it is the attorney's job to supply a complete record of the proceedings below.” (footnote omitted)).

detached common sense. To that end, the following standards of conduct for appellate lawyers are set forth by reference to the duties owed by every appellate practitioner.<sup>15</sup>

**Commentary:** The second paragraph of the Preamble recognizes that the legal profession has a set of duties that are already understood and followed by the appellate bar.<sup>16</sup> In this Article, certain standards are cross-referenced along with pre-existing duties that apply to all lawyers under the Texas Disciplinary Rules of Professional Conduct, as well as professional obligations spelled out in the Texas Lawyer's Creed.

Use of these standards for appellate conduct as a basis for motions for sanctions, civil liability or litigation would be contrary to their intended purpose and shall not be permitted. Nothing in these standards alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure or the Code of Judicial Conduct.<sup>17</sup>

**Commentary:** The third paragraph of the Preamble appears to neutralize the Standards by emphasizing that the Standards shall not be used as the basis for any liability against a practitioner who fails to follow them. Nevertheless, in a profession in which credibility, candor, and honesty are valued attributes, lawyers should be mindful of the reputational and professional damage that can occur from disregarding rules prescribing ethical conduct.

### III. 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

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15. TEX. STANDARDS FOR APP. CONDUCT pmb. ¶ 2.

16. *Texas Ethics Resources*, ST. B. TEX., [https://www.texasbar.com/AM/Template.cfm?Section=Ethics\\_Resources](https://www.texasbar.com/AM/Template.cfm?Section=Ethics_Resources) [<https://perma.cc/MA4W-7J4A>] (choosing not to differentiate between the types of Texas attorneys when stating that *all* Texas attorneys are bound by the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure).

17. TEX. STANDARDS FOR APP. CONDUCT pmb. ¶ 3.

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

**Standard 1:** Counsel will advise their clients of the contents of these Standards of Conduct when undertaking representation.<sup>18</sup>

**Commentary:** This standard sets forth a good rule of thumb for appellate practitioners: provide full disclosure to your client regarding all boundaries of a lawyer’s representation, even on appeal. This standard coincides with Texas Disciplinary Rule 1.02(f), which mandates that a lawyer consult with his or her client regarding the ethical and legal bounds of a lawyer’s particular representation.<sup>19</sup>

**Standard 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.<sup>20</sup>

**Commentary:** This standard coincides with existing duties owed by lawyers to clients under Texas Disciplinary Rule 1.04 with regard to fees.<sup>21</sup>

**Standard 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.<sup>22</sup>

**Commentary:** Generally, appellate lawyers should not allow emotions regarding a client’s case cloud his or her judgment and advocacy on appeal.<sup>23</sup> However, effective lawyering sometimes requires empathy to

18. *Id.* ¶ 1, Standard 1.

19. *Compare id.* (requiring counsel to fully brief their clients on the appellate standards of conduct), with TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.02(f), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (West 2016) (Tex. State Bar R. art. X, § 9) (“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.”).

20. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to Clients Standard 2.

21. Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct governs how attorneys handle fees. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.04. Comment 2 to Rule 1.04 states that: “In a new client-lawyer relationship, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation.” *Id.*

22. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to Clients Standard 3.

23. *See Prudholm v. State*, 274 S.W.3d 236, 242 (Tex. App.—Houston [1st Dist.] 2008), *aff’d*, 333 S.W.3d 590 (Tex. Crim. App. 2011) (agreeing with opposing counsel “that the prosecutor’s

enable a lawyer to fully understand and appreciate the extent of the client's situation and determine the best solution.

**Standard 4:** Counsel will be faithful to their clients' lawful objectives, while mindful of their concurrent duties to the legal system and the public good.<sup>24</sup>

**Commentary:** As with all lawyers, appellate counsel should diligently fulfill his or her client's objectives on appeal, but should not forget his or her other duties to the profession and the public at large.<sup>25</sup>

**Standard 5:** Counsel will explain the appellate process to their clients. Counsel will advise clients of the range of potential outcomes, likely costs,

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statements about her personal feelings and beliefs" were out of bounds); *Pritchett v. Highway Ins. Underwriters*, 304 S.W.2d 585, 596 (Tex. Civ. App.—Texarkana 1957), *aff'd in part, rev'd in part*, 309 S.W.2d 46 (1958) (finding the attorney's comment regarding their "personal feelings relative to women serving as jurors . . . and as to the inferences as to damage to his client's character and business" were out of place and were not related to the issue at hand); *accord* *Prudential Ballard Realty Co. v. Weatherly*, 792 So. 2d 1045, 1067 (Ala. 2000) (per curiam) ("We will not let our emotions and personal feelings dictate the result in any case; our decisions are governed solely by the law and the facts."); *Cummings v. Borough of Nazareth*, 242 A.2d 460, 468 (Pa. 1968) ("Of course, emotions must not be allowed to run rampant, nor will they, under our adversary court system where opposing attorneys are allowed maximum latitude to prove that the cause of the disabled person is not as presented by himself and counsel."); *Hatch v. State Farm Fire & Cas. Co.*, 930 P.2d 382, 398 (Wyo. 1997) ("A trial should be a rational exercise, not an emotional experience. When counsel intentionally drive an otherwise routine case to the margins by infecting the trial with personal issues or by purposefully seeking to supercharge emotions, alert observers quickly recognize that the object is not justice, but victory. . . .").

24. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Clients Standard 4.

25. For example, in *Bond v. State*, the appellate court noted that an attorney may not misrepresent the facts of a case or characterize a court as "'despotic' and 'erratic and irrational'" as it is offensive and beyond the attorney's duty to zealously advocate for his client. *Bond v. State*, 176 S.W.3d 397, 401–02 (Tex. App.—Houston [1st Dist.] 2004, no pet.). Another example comes from San Antonio, where the appellate court impressed the limitations of fundamental First Amendment rights by noting, "an attorney's right to free speech and her obligation to zealously represent her client are limited in the formal judicial setting where the State has a substantial interest in preserving the integrity of the judicial process and the public's confidence therein." *In re Maloney*, 949 S.W.2d 385, 387 (Tex. App.—San Antonio 1997, no writ) (per curiam) (first citing *In re Sawyer*, 360 U.S. 622 (1959); then citing *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871); then citing *In re Westfall*, 808 S.W.2d 829, 835–36 (Mo. 1991) (en banc); then citing *Cerf v. State*, 458 So. 2d 1071, 1074 (Fla. 1984) (per curiam); then citing *In re Frerichs*, 238 N.W.2d 764, 768 (Iowa 1976) (en banc); then citing *In re Buckley*, 110 Cal. Rptr. 121, 129 (1973) (en banc); then citing *State v. Nelson*, 504 P.2d 211, 214 (Kan. 1972) (per curiam); and then citing *Mossop v. Zapp*, 179 S.W. 685, 685 (Tex. Civ. App.—Galveston 1915, no writ)).



timetables, effect of the judgment pending appeal, and the availability of alternative dispute resolution.<sup>26</sup>

**Commentary:** Because appellate courts, and the appellate system at large, oftentimes do not receive the type of public attention that trial courts receive, it is imperative that appellate counsel explains the appellate process to his or her client, including the contemplative nature of an appellate decision, how such decisions are rendered and the anticipated timetable of the process.<sup>27</sup>

**Standard 6:** Counsel will not foster clients' unrealistic expectations.<sup>28</sup>

**Commentary:** This standard can be quite difficult to follow in practice, but appellate counsel should temper rather than encourage a client's unrealistic expectations in order to avoid further confusion, anger, or malice once an appeal has been decided.<sup>29</sup>

**Standard 7:** Negative opinions of the court or opposing counsel shall not be expressed unless relevant to a client's decision process.<sup>30</sup>

**Commentary:** Appellate counsel should refrain from expressing any negative opinions or ad hominem criticism about a court or his or her

26. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Clients Standard 5.

27. See, e.g., *Ex parte Wilson*, 956 S.W.2d 25, 29 (Tex. Crim. App. 1997) (Baird, J., dissenting) (per curiam) ("[I]t is the *professional duty of an appellate lawyer* to explain the meaning and effect of an appellate court decision in his client's case, to acquaint his client with available options for further review of the case, and to assist his client with the decision whether to seek such review." (quoting *Ex parte Jarret*, 891 S.W.2d 935, 944 (Tex. Crim. App. 1994), *overruled by Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997) (per curiam))).

28. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Clients Standard 6.

29. In the particular context of initial interview, investigation, and assessment of the case, *Texas Practice Guide* cautions attorneys to refrain from communicating to their client "[o]verly optimistic advice about the matter until it is fully evaluated, including researching current case law." 1 ADELE HEDGES & KIM J. ASKEW, TEX. PRAC. GUIDE: CIVIL PRETRIAL § 1:169 (2017 ed.). It adds that "a lawyer should not pander to the client's unrealistic expectations." *Id.* Similar advice is provided to attorneys in the *Texas Practice Guide Torts*, which states: "[C]ounsel should not be overly optimistic about the matter until it is fully evaluated, including researching current case law and should not pander to the client's unrealistic expectations." 3 KNOX D. NUNNALLY & RONALD G. FRANKLIN, TEX. PRAC. GUIDE TORTS § 11:293 (2017 ed.).

30. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Clients Standard 7.

opposing counsel, unless such opinions will aid a client's decisions in an appeal.<sup>31</sup>

**Standard 8:** Counsel will keep clients informed and involved in decisions and will promptly respond to inquiries.<sup>32</sup>

**Commentary:** Communication with a client is a key factor to competent, diligent, and ethical representation.<sup>33</sup> This standard coincides with Texas Disciplinary Rule 1.03(a), which requires a lawyer to keep his or her client reasonably informed about a client's case, as well as respond to reasonable requests by the client for information.<sup>34</sup>

**Standard 9:** Counsel will advise their clients of proper behavior, including that civility and courtesy are expected.<sup>35</sup>

**Commentary:** The standard places an obligation upon the appellate practitioner to ensure that his or her client understands appropriate behavior on appeal, as well as the value of civility and courtesy to other parties, the court, and its personnel.<sup>36</sup>

31. See *Bond v. State*, 176 S.W.3d 397, 401–02 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (chastising an attorney for making disparaging remarks about the court, depicting it as “despotic,” “erratic[,] and irrational”); see also *Johnson v. Johnson*, 948 S.W.2d 835, 840 (Tex. App.—San Antonio 1997, writ denied) (finding attorneys have latitude in making arguments in the appellate context, however, they may not go beyond “their rights and evidence a want of proper respect for the court” (quoting *Mossop v. Zapp*, 179 S.W. 685, 685 (Tex. Civ. App.—Galveston 1915, no writ))).

32. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Clients Standard 8.

33. *Ex Parte Guzman*, 730 S.W.2d 724, 733 (Tex. Crim. App. 1987) (stressing the importance of communication and finding that the attorney was unable to put on a case due to his failure to discuss the issues with the client (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984))). Courts have found that failure to communicate in a variety of contexts may result in ineffective assistance of counsel. See *Smith v. State*, No. 04-12-00020-CR, 2012 WL 6743567, at \*3 (Tex. App.—San Antonio Dec. 31, 2012, no pet.) (supporting the conclusion that an attorney's failure to inform his client “of [a] plea offer's deadline” constitutes deficient performance (citing *Strickland*, 466 U.S. at 688–90)); see also *Flores v. State*, 784 S.W.2d 579, 581 (Tex. App.—Fort Worth 1990, pet. ref'd) (finding an attorney's failure to communicate with opposing counsel regarding his client's decision constitutes ineffective assistance of counsel).

34. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03(a), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2016) (Tex. State Bar R. art. X, § 9) (“A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.”).

35. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Clients Standard 9.

36. See, e.g., *Gleason v. Isbell*, 145 S.W.3d 354, 360 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (per curiam) (“Incivility does not advance a litigant's legal position, but only tends to eclipse or obscure whatever legal points he intended to make. Incivility is not only ineffective but also ill-

**Standard 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.<sup>37</sup>

**Commentary:** This standard is a near verbatim recitation of Part II, Section 10 of the Texas Lawyer's Creed, which places the right to grant accommodations and requests by opposing counsel which do not adversely affect a client's objectives solely in hands of the lawyer and not the client.<sup>38</sup>

**Standard 11:** A client has no right to demand that counsel abuse anyone or engage in any offensive conduct.<sup>39</sup>

**Commentary:** This standard coincides with Part II, Section 6 of the Texas Lawyer's Creed.<sup>40</sup> This standard clearly establishes that a client has no right to instruct an appellate practitioner to engage in abusive or offensive conduct toward anyone or any entity.

**Standard 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.<sup>41</sup>

**Commentary:** This standard corresponds to Standard 1 of a Lawyer's Duty to the Courts.<sup>42</sup> The standard is of importance to appellate practitioners because it states that a lawyer shall advise his or her client that a sufficient basis should exist prior to pursuing an appeal. However, the

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advised. At a minimum, courts and those appearing before them expect and deserve civility and courtesy from *all* participants in the legal process." (emphasis added) (first citing TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Clients Standard 9; and then citing *id.* Lawyers' Duties to the Court Standard 8)).

37. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Clients Standard 10.

38. *See* TEXAS LAWYER'S CREED: A MANDATE FOR PROFESSIONALISM pt. II(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.").

39. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Clients Standard 11.

40. *See* TEXAS LAWYER'S CREED: A MANDATE FOR PROFESSIONALISM pt. II(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.").

41. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Clients Standard 12.

42. *Cf. id.* Lawyers' Duties to the Court Standard 1 (using similar language).

standard is another that can be difficult to follow in practice, when a client's true interest in pursuing an appeal is solely to delay proceedings and the client is willing to pay for the use of the appellate process to accomplish this goal.

**Standard 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.<sup>43</sup>

**Commentary:** This standard overlaps with Texas Disciplinary Rule 3.01, which states 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.”<sup>44</sup> Appellate counsel plays a vital role in ensuring that clients understand the viability of an appeal and whether such an appeal should be pursued.<sup>45</sup> Furthermore, by following this standard, courts will operate more efficiently without having to address frivolous positions on appeal.<sup>46</sup>

#### IV. 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.

**Standard 1:** An appellate remedy should not be pursued unless counsel believes in good faith that error has been committed, that there is a reasonable

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43. *Id.* Lawyers' Duties to Clients Standard 13.

44. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.01, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2016) (Tex. State Bar R. art. X, § 9).

45. *See In re Schulman*, 252 S.W.3d 403, 407 (Tex. Crim. App. 2008) (illustrating the importance of advising a client on the viability of their appeal by discussing an attorney's right to withdraw from representation after determining the client's appeal is wholly frivolous (quoting *McCoy v. Court of Appeals of Wisconsin*, Dist. 1, 486 U.S. 429, 436 (1988))).

46. *Cf.* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.02 (prohibiting a lawyer from taking a frivolous position that will increase the cost, burdens, and time expended to resolve a matter).

basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.<sup>47</sup>

**Commentary:** Like its counterpart standard mentioned above (Standard 12), this standard specifically deals with a lawyer’s duty to the courts rather than the previous standard, which places a lawyer’s duty to his or her client to advise against pursuing a bad-faith appeal.

Furthermore, while the Standards do not allow for sanctions, Texas Rule of Appellate Procedure 45 (“TRAP”) authorizes a court—upon a party’s motion or sua sponte—to assess appellate sanctions if the court determines that an appeal is frivolous.<sup>48</sup> In several appellate cases where sanctions were imposed under this rule, parties attempted to re-litigate and appeal issues that were already decided.<sup>49</sup> In the context of appointed counsel for criminals (as well as termination of parental rights cases), appellate counsel has the ability to file *Anders* briefs with the court, in which counsel concludes that based on his/her “good-faith review of the law and record . . . [there is] no plausible grounds for appeal.”<sup>50</sup>

**Standard 2:** An appellate remedy should not be pursued primarily for purposes of delay or harassment.<sup>51</sup>

**Commentary:** In *Archer v. Wood*,<sup>52</sup> the Dallas Court of Appeals found that counsel who had requested oral argument, then failed to appear, and also provided the court with inadequate briefing, brought the appeal for purposes of delay and assessed sanctions under the TRAP.<sup>53</sup> In contrast, a Fort Worth Court of Appeals denied a motion to sanction an appellant who brought an ERISA claim to recover benefits from a previous suit, despite res judicata, which the court found prevented the appellant from recovering such benefits.<sup>54</sup> The court observed that “while the litigation in this suit was very contentious, we do not find that this appeal was brought solely to

47. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to the Court Standard 1.

48. TEX. R. APP. P. 45.

49. *See, e.g.*, *Njuku v. Middleton*, 20 S.W.3d 176, 178 (Tex. App.—Dallas 2000, pet. denied) (imposing sanctions against the appellants for bringing a frivolous appeal, and finding appellant repeatedly attempted to relitigate issues that were previously decided (citing TEX. R. APP. P. 45)).

50. *Kelly v. State*, 436 S.W.3d 313, 318 (Tex. Crim. App. 2014).

51. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to the Court Standard 2.

52. *Archer v. Wood*, 771 S.W.2d 631 (Tex. App.—Dallas 1989, no writ).

53. *Id.* at 633.

54. *Duran v. Resdoor Co.*, 977 S.W.2d 690, 693 (Tex. App.—Fort Worth 1998, pet. denied).

harass the companies, or that it was completely groundless and filed for purposes of delay.”<sup>55</sup>

**Standard 3:** Counsel should not misrepresent, mischaracterize, misquote, or miscite the factual record or legal authorities.<sup>56</sup>

**Commentary:** The Fourteenth Court of Appeals sanctioned an attorney in a divorce case after the appellate lawyer cited to evidence outside the appellate record and failed to “recognize or even mention the debts assessed against each party’s share of the community estate in arguing that the trial court made a disproportionate division of community property in favor of [his ex-wife].”<sup>57</sup>

The Thirteenth Court of Appeals imposed sanctions on an attorney who “mischaracterized the nature of the appeal as an interlocutory appeal,” which required the court to unnecessarily accelerate the appeal.<sup>58</sup> The court found that the mischaracterization imposed a hardship on the court and its staff, as well as on other appeals pending before the court.<sup>59</sup>

**Standard 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.<sup>60</sup>

**Commentary:** This standard relates to TRAP 38.1 (appellant’s brief)<sup>61</sup> and 38.2 (appellee’s brief),<sup>62</sup> as well as the Texas Disciplinary Rule of Professional Conduct 3.03(a)(4).<sup>63</sup> In a 1997 case from the Thirteenth Court of Appeals, the court ordered the relators of a mandamus proceeding to respond in writing to the court and show cause why the court should not impose sanctions for the relators’ failure to disclose a case directly adverse

55. *Id.*

56. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to the Court Standard 3.

57. *Schlafy v. Schlafy*, 33 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

58. *Sossi v. Willette & Guerra*, 139 S.W.3d 85, 90 (Tex. App.—Corpus Christi 2004, no pet.)

59. *Id.* (citing *Schlafy*, 33 S.W.3d at 873).

60. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to the Court Standard 4.

61. TEX. R. APP. P. 38.1.

62. *Id.* R. 38.2.

63. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 3.03(a)(4), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (West 2016) (Tex. State Bar R. art. X, § 9).

to their position as controlling authority, despite their filing of a thirty-seven page brief and three pages of authorities.<sup>64</sup>

In contrast, another attorney fulfilled this standard by writing a letter brief to the court following oral argument, clarifying a case that she cited at argument.<sup>65</sup> The attorney apologized to the court for misstating the law at argument and voluntarily corrected the error with a more thorough response.<sup>66</sup>

**Standard 5:** Counsel will present the Court with a thoughtful, organized, and clearly written brief.<sup>67</sup>

**Commentary:** Like Standard 4, this standard relates to the briefing rules of the TRAP. Failure to comply with this standard, may result in a waiver of the issue on appeal.<sup>68</sup> In practice, courts will typically provide parties with an opportunity to correct defective briefs before the briefs are considered “filed” by the court.<sup>69</sup> Any failure to correct these errors may result in a dismissal in civil cases.<sup>70</sup> Criminal appeals that fail to comply with these rules and standards follow separate procedures under the TRAP.<sup>71</sup>

64. *In re Colonial Pipeline Co., Texaco, Inc.*, 960 S.W.2d 272, 273–74 (Tex. App.—Corpus Christi 1997) (orig. proceeding).

65. *See, e.g.,* Marcia Coyle, *Dear Supreme Court: When a Lawyer Confesses Error*, NAT’L L.J. (Oct. 4, 2017, 5:53 PM), <https://www.law.com/nationallawjournal/almID/1202799663925/?sreturn=20180305140514> [https://perma.cc/JXH7-V7BF] (describing the letter an attorney sent to the Supreme Court to correct an inaccuracy in her oral argument).

66. *Id.*

67. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to the Court Standard 5, *reprinted in* TEX. R. APP. P. (West 2016).

68. *See* Sunnyside Feedyard, L.C. v. Metro. Life Ins. Co., 106 S.W.3d 169, 173 (Tex. App.—Amarillo 2003, no pet.) (“Failure to brief, or to adequately brief, an issue by an appellant effects a waiver of that issue on appeal.” (citing TEX. R. APP. P. 38.1(h); Gen. Servs. Comm’n v. Little-Tex Insulation Co., 39 S.W.3d 591, 598 n.1 (Tex. 2001), *superseded by statute*, TEX. GOV’T CODE ANN. §§ 2260.001–108 (West 2017), *as recognized in* Jackson v. Texas S. Univ., 997 F. Supp. 2d 613 (S.D. Tex. 2014); Fredonia State Bank v. Gen. Am. Life Ins. Co., 881 S.W.2d 279, 284–85 (Tex. 1994))).

69. *See* TEX. R. APP. P. 38.9 (providing that if the court finds a defect in a brief, it may order the brief be amended, supplemented, or redrawn).

70. *See id.* R. 38.8, 38.9 (authorizing a court to dismiss the appeal for want of jurisdiction if an appellant fails to timely amend their brief by deeming the noncompliant brief as if the party failed to file one).

71. *See id.* R. 38.8(b) (governing an appellant’s brief in a criminal case).

**Standard 6:** Counsel will not submit reply briefs on issues previously briefed in order to obtain the last word.<sup>72</sup>

**Commentary:** One common example in reply briefs before the court, which could be construed to violate this standard, is the raising of new issues or arguments.<sup>73</sup> Like the other efforts to circumvent the briefing rules, raising new issues, arguments, or claims on appeal may result in a waiver of the argument.<sup>74</sup>

**Standard 7:** Counsel will conduct themselves before the Court in a professional manner, respecting the decorum and integrity of the judicial process.<sup>75</sup>

**Commentary:** Simply stated, do not be disrespectful to a court or its personnel.

In 1996, the El Paso Court of Appeals referred an attorney to the State Bar of Texas for possible violations of the Texas Disciplinary Rules of Professional Conduct.<sup>76</sup> After the lawyer's case had been submitted to the court by oral argument, counsel called a court staff member by telephone "for the purpose of inquiring, among other things, as to what his 'chances' were in the then pending case and whether he should 'settle' his case prior to the issuance of the opinion."<sup>77</sup> The court found, as a matter of law, that "any attempt to solicit or receive information on the merits of a pending case from a staff member of an appellate court constitutes an impermissible *ex parte* communication with chambers" because it undermines the integrity of the courts, breeds skepticism and distrust, and thwarts principles upon which the justice system is based.<sup>78</sup> The El Paso Court did not make any findings of fact as to the alleged improprieties, but felt the mandatory need to refer the matter to the State Bar.<sup>79</sup>

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72. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to the Court Standard 6.

73. See *U.S. Lawns, Inc. v. Castillo*, 347 S.W.3d 844, 849 (Tex. App.—Corpus Christi 2011, pet. denied) (finding the appellants were barred from "attacking the merits of the unchallenged ground in its reply brief").

74. See *id.* (reasoning a court of appeals may not reverse a trial court's judgment based on a point of error not properly preserved and raised).

75. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to the Court Standard 7.

76. *In re J.B.K.*, 931 S.W.2d 581, 582 (Tex. App.—El Paso 1996, no writ).

77. *Id.* at 583.

78. *Id.* at 584.

79. *Id.* at 585.



In 1997, the San Antonio Court of Appeals sanctioned an attorney who made “disparaging remarks” in his reply brief by questioning the fitness of the trial judge.<sup>80</sup> The Fourth Court of Appeals also noted that counsel made similar comments about the trial court during oral arguments.<sup>81</sup> The court forwarded its opinion to the State Bar and asserted that the attorney’s actions put into questions his honesty, trustworthiness, and fitness to practice law.<sup>82</sup>

In 1997, the Corpus Christi Court of Appeals<sup>83</sup> found an attorney in contempt of court for twice violating an injunction issued by the court.<sup>84</sup> As a sanction, a split court, sitting en banc, fined the lawyer \$500 for each of the two convictions and ordered him confined to jail for thirty days.<sup>85</sup> Subsequently, the court set aside its order of confinement and ordered the lawyer to attend a one-day long ethics course sponsored by the Texas Center for Legal Ethics and Professionalism, and insisted that the lawyer pay a fine of \$1,000.<sup>86</sup>

**Standard 8:** Counsel will be civil and respectful in all communications with the judges and staff.<sup>87</sup>

**Commentary:** In *In re Wightman*,<sup>88</sup> the Dallas Court of Appeals denied habeas relief to a lawyer who was held in contempt for sending a letter to a trial court judge expressing his opinion that the judge was incompetent and corrupt.<sup>89</sup> The letter also threatened to file disciplinary charges and sue the judge if the judge failed to rule in the lawyer’s favor.<sup>90</sup> The lawyer was sentenced to ninety days in jail; by denying habeas relief, the appellate court affirmed the decision.<sup>91</sup>

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80. *Johnson v. Johnson*, 948 S.W.2d 835, 840–41 (Tex. App.—San Antonio 1997, writ denied).

81. *Id.* at 840.

82. *Id.* at 841.

83. *In re Cantu*, 961 S.W.2d 482 (Tex. App.—Corpus Christi 1997, no pet.) (en banc).

84. *Id.* at 489.

85. *Id.* at 490.

86. *Id.* at 494–95.

87. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to the Court Standard 8, *reprinted in* TEX. R. APP. P. (West 2016).

88. *In re Wightman*, No. 05-98-01697-CV, 1998 WL 877494 (Tex. App.—Dallas Dec. 17, 1998, no pet.) (not designated for publication).

89. *Id.* at \*1.

90. *Id.* at \*3.

91. *Id.* at \*1.

Anecdotally, the Thirteenth Court of Appeals received a letter from an attorney challenging the clerk's "analysis of the law" which resulted in the attorney being charged a \$145 filing fee for a habeas petition filed on behalf of his client. The letter included the following threat: "I shall shortly file a suit against you" for recovery of the fee. The lawyer added, however, that he harbored "no ill will" against the clerk.

One of the best explanations and commentaries on civility and respect in the courts and judicial system is found in *Gleason v. Isbell*.<sup>92</sup> In that case, a pro se appellant filed a motion for rehearing which lodged several accusations against the panel's original opinion, including calling it "disingenuous," "dishonest," "retaliatory," "false," "corrupt," and "fraudulent."<sup>93</sup> Writing separately from the majority on the issue of whether to grant appellant's motion to withdraw his motion for rehearing and grant a motion for extension of time to file a new motion for rehearing, then-Justice, now Chief Justice Kem Thompson Frost noted that:

Judges are the guardians of the court as an institution and so they must insist that all who come before the court act with dignity, decorum, and respect. Even though judges, on a personal level, might be willing to suffer insults and personal attacks like those contained in appellant's filings, they must, by virtue of their office, protect the dignity of the court from such offensive and unacceptable conduct. As individuals, the justices of this court may not have garnered appellant's respect or esteem, but, we must, as judges, demand respect for this court as an institution.

[ . . . . ]

As guardians of the public's confidence in our legal system, judges must maintain a strong commitment to both inspire and demand the highest standards of civility and personal behavior from litigants and lawyers appearing in the courts of this state.<sup>94</sup>

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92. *Gleason v. Isbell*, 145 S.W.3d 354 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (per curiam).

93. *Id.* at 356 (Frost, J., concurring and dissenting).

94. *Id.* at 358.

**Standard 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.<sup>95</sup>

**Commentary:** In the spirit of this standard, TRAP 45 permits an appellate court to award the prevailing party just damages upon a determination that a civil appeal is frivolous.<sup>96</sup>

The [C]ourts of [A]ppeals have recited four factors which tend to indicate that an appeal is frivolous: (1) the unexplained absence of a statement of facts; (2) the unexplained failure to file a motion for new trial when it is required to successfully assert factual sufficiency on appeal; (3) a poorly written brief raising no arguable points of error; and (4) the appellant’s unexplained failure to appear at oral argument.<sup>97</sup>

In *Stafford v. Stafford*,<sup>98</sup> the Amarillo Court of Appeals sanctioned an appellant’s counsel under TRAP 45 where the court found that counsel: (1) failed to mention that an earlier opinion of the court resolved the issue he raised; (2) filed an incomplete record; (3) filed an inadequate brief; and (4) failed to respond to the appellee’s motion for sanctions.<sup>99</sup>

As a practical tip, if appellate counsel is asked a question during oral argument about the trial record that they are unable to answer, he or she should offer to file a post-argument “letter brief” providing the requested information.

**Standard 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

95. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to the Court Standard 9, *reprinted in* TEX. R. APP. P. (West 2016).

96. TEX. R. APP. P. 45; *see also* *Am. Paging of Texas, Inc. v. El Paso Paging, Inc.*, 9 S.W.3d 237, 240, 242 (Tex. App.—El Paso 1999, pet. denied) (finding the appeal groundless and pursued in bad faith, and, therefore, imposing a penalty of 50% of actual damages where appellant failed to file a reporter’s record and failed to disclose material facts in its brief).

97. *Am. Paging of Texas, Inc.*, 9 S.W.3d at 241 (citing *In re S.R.M.*, 888 S.W.2d 267, 269 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Baw v. Baw*, 949 S.W.2d 764, 768 (Tex. App.—Dallas 1997, no writ); *James v. Hudgins*, 876 S.W.2d 418, 424 (Tex. App.—El Paso 1994, writ denied)).

98. *Stafford v. Stafford*, No. 07-04-0262-CV, 2004 WL 2029704 (Tex. App.—Amarillo Sept. 10, 2004, pet. dism’d).

99. *Id.* at \*3.

court to influence their conduct or demeanor in dealings with the judges, staff, other counsel, and parties.<sup>100</sup>

**Commentary:** Counsel should exercise good judgment in his or her behavior with other parties or court staff. In *In Re Terminix International, Co.*,<sup>101</sup> the Thirteenth Court of Appeals ordered sanctions be paid by a lawyer to his opposing counsel for refusing to fax a copy of the relator's mandamus petition.<sup>102</sup> Terminix, the relator, filed a mandamus petition delivered to the court by Federal Express on February 6, 2004, and sent the real parties a copy of the petition by certified mail.<sup>103</sup> The court requested an expedited response from real parties by February 11, 2004.<sup>104</sup> When counsel for real parties received the request for a response—but still had not received a copy of the petition—counsel for real parties asked relator's counsel to fax a copy of the petition.<sup>105</sup> Relator's counsel refused, explaining that "it was almost 5:00 p.m. on Friday, and no one was available in [his] office to send the fax at that time."<sup>106</sup> By refusing to provide a faxed copy, relator's counsel reduced the real parties' "response time from five days to two."<sup>107</sup> In imposing sanctions, the court found that relator's counsel's refusal "was unreasonable and designed to thwart opposing counsel's ability to timely and effectively respond to the petition."<sup>108</sup>

#### V. 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.

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100. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to the Court Standard 9.

101. *In re Terminix Int'l, Co.*, 131 S.W.3d 651 (Tex. App.—Corpus Christi 2004, no pet.).

102. *Id.* at 653–54.

103. *Id.* at 652–53.

104. *Id.*

105. *Id.* at 653.

106. *Id.*

107. *Id.*

108. *Id.* at 654.

**Standard 1:** Counsel will treat each other and all parties with respect.<sup>109</sup>

**Commentary:** When it comes to lawyer-to-lawyer relationships, this is the Golden Rule.<sup>110</sup> Counsel should always treat all opposing counsel and parties the way that they would expect to be treated.

**Standard 2:** Counsel will not unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation by opposing counsel.<sup>111</sup>

**Commentary:** This standard relates closely to Standard 10 of the Lawyer’s Duties to their Clients.<sup>112</sup> Appellate counsel should not withhold consent to reasonable requests for filings or scheduling accommodations made by opposing counsel.<sup>113</sup>

**Standard 3:** Counsel will not request an extension of time solely for the purpose of unjustified delay.<sup>114</sup>

**Commentary:** Sometimes appellate counsel must seek reasonable requests for extension of time to file briefs or other matters before an appellate court. Those requests, however, should be reasonable and not brought solely for purposes of delaying justice for any party.<sup>115</sup>

**Standard 4:** Counsel will be punctual in communications with opposing counsel.<sup>116</sup>

109. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to Lawyers Standard 1, *reprinted in* TEX. R. APP. P. (West 2016).

110. *See* TEXAS LAWYER’S CREED: A MANDATE FOR PROFESSIONALISM ¶ 4 (“The desire for respect and confidence by lawyers from the public should provide the members of our profession with the necessary incentive to attain the highest degree of ethical and professional conduct.”).

111. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to Lawyers Standard 2.

112. *See id.* Lawyers’ Duties to Clients Standard 10 (instructing counsel to advise their clients that they may make reasonable accommodations for opposing counsel).

113. Dubose, *supra* note 1, at 197 (“Young lawyers or lawyers who rarely practice in the appellate courts may not realize that appellate judges and justices frown on counsel’s opposing reasonable requests for scheduling accommodations . . .”).

114. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to Lawyers Standard 3.

115. *See, e.g.,* Medrano v. Zapata, No. 03-12-00131-CV, 2013 WL 610822, at \*1 (Tex. App.—Austin Feb. 12, 2013, no pet.) (per curiam) (allowing counsel an additional extension (even though this was the sixth motion for extension of time filed) where counsel provided what the court believed was a “reasonable explanation[],” but warning that “no further extensions of time will be granted”).

116. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to Lawyers Standard 4.

**Commentary:** Just like Standard 9's Duties to the Courts, counsel should be punctual with his or her communications to opposing counsel.<sup>117</sup> In many circumstances, opposing counsel acts on a tight deadline in which a response from opposing counsel is necessary and required by the court. Appellate counsel should be mindful of these time constraints and respond promptly to an opposing counsel's communication.

**Standard 5:** Counsel will not make personal attacks on opposing counsel or parties.<sup>118</sup>

**Commentary:** No matter how contentious or bitter a particular case may be, counsel should refrain from personally attacking any lawyer or party in order to foster continued dignity and civility in the practice of law.<sup>119</sup>

**Standard 6:** Counsel will not attribute bad motives or improper conduct to other counsel without good cause, or make unfounded accusations of impropriety.<sup>120</sup>

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117. See *In re Terminix Int'l, Co.*, 131 S.W.3d 651, 654 (Tex. App.—Corpus Christi 2004, no pet.) (fining counsel for unreasonably refusing to “fax a copy of the petition for writ of mandamus to opposing counsel”); see also Dubose, *supra* note 1, at 197–98 (discussing the useful nature of the Standards in instructing attorneys regarding a court's expectations for their conduct in appellate proceedings).

118. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Lawyers Standard 5.

119. See *Arrington v. State*, No. 08-00-00389-CR, 2002 WL 1763995, at \*5 (Tex. App.—El Paso July 31, 2002, no pet.) (not designated for publication) (“While a prosecutor is permitted to attack the argument of defense counsel, he clearly cannot attack counsel's personal integrity.” (citing *Mosley v. State*, 983 S.W.2d 249, 258–59 (Tex. Crim. App. 1998))); *Garcia v. State*, 943 S.W.2d 215, 217 (Tex. App.—Fort Worth 1997, no pet.) (“The courts of this state have repeatedly admonished lawyers who engage in personal attacks on opposing counsel. When the admonishments are ignored, the courts, including this court and our sister court in Dallas, have imposed stronger sanctions.” (citing *Byas v. State*, 906 S.W.2d 86, 87 (Tex. App.—Fort Worth 1995, pet. ref'd) (per curiam); *Kelly v. State*, 903 S.W.2d 809, 812 (Tex. App.—Dallas 1995, pet. ref'd))); see also MYRON MOSKOVITZ, WINNING AN APPEAL 98–99 (rev. ed. 1985) (“This attitude will cause you to misdirect your attention and your energy. You are at oral argument to convince the judges, not your opponent.”). In *Byas v. State*, the Fort Worth Court of Appeals found that the prosecutor's comments that “defense counsel is a ‘slick attorney’ was not only irrelevant to the guilt or innocence of Appellant, but it implied that the prosecutor's credibility exceeded that of defense counsel[.]” 906 S.W.2d at 87. The court found that the prosecutor's remarks were inappropriate “personal attacks.” *Id.* But see *Weeks v. State*, 396 S.W.3d 737, 746 (Tex. App.—Beaumont 2013, pet. ref'd) (finding the prosecutor's response to opposing counsel was not a personal attack but an answer, thus it was not improper (citing *Mosley*, 983 S.W.2d at 258–59; *Davis v. State*, 268 S.W.3d 683, 713 (Tex. App.—Fort Worth 2008, pet. ref'd))).

120. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Lawyers Standard 6.

**Commentary:** Unfortunately, opposing counsel may act or behave in an inappropriate manner, or in violation of the Texas Disciplinary Rules of Professional Conduct. Counsel should be cautious, however, in making such accusations unless they are supported by good cause.<sup>121</sup>

**Standard 7:** Counsel will not lightly seek court sanctions.<sup>122</sup>

**Commentary:** Counsel should act with caution before seeking appellate sanctions against a party or an attorney. TRAP 45 governs sanctions in civil appeals,<sup>123</sup> and TRAP 52.11 governs sanctions that may be imposed in original proceedings.<sup>124</sup>

**Standard 8:** Counsel will adhere to oral or written promises and agreements with other counsel.<sup>125</sup>

**Commentary:** In order to facilitate the administration of justice and the appellate process, counsel who promise or reach agreements must adhere to such agreements to avoid further litigation, cost, and expenses of an appeal.<sup>126</sup> It is as simple—and important—as keeping one’s word.

**Standard 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.<sup>127</sup>

**Commentary:** The best appellate advocates rely on their own arguments and distinguish opposing counsel’s arguments.<sup>128</sup> While it is acceptable to

121. *See, e.g.,* Gilbert v. State, 494 S.W.3d 758, 770 (Tex. App.—Houston [14th Dist.] 2016, pet. ref’d) (overruling the appellant’s issues, including a claim that opposing counsel had personally attacked them, and finding the prosecutor’s argument was permissible (citing *Weeks*, 396 S.W.3d at 746)).

122. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to Lawyers Standard 7.

123. TEX. R. APP. P. 45 (outlining damages for frivolous appeals in civil cases).

124. *Id.* R. 52.11 (discussing groundless petitions and misleading statements).

125. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to Lawyers Standard 8.

126. *Cf.* Padilla v. LaFrance, 907 S.W.2d 454, 455 (Tex. 1995) (“As previously discussed, the summary judgment evidence established an enforceable settlement agreement as a matter of law.”).

127. TEX. STANDARDS FOR APP. CONDUCT, Lawyers’ Duties to Lawyers Standard 9.

128. Lawrence D. Rosenberg, *Oral Argument*, in A PRACTITIONER’S GUIDE TO APPELLATE ADVOCACY 284–85 (Anne Marie Lofaso ed., 2010) (instructing appellate attorneys on how to pare down the issues in their argument and examine the weaknesses of it).

draw reasonable inferences from a position taken by opposing counsel, such inferences should not be unjustified or unreasonable.<sup>129</sup>

**Standard 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.<sup>130</sup>

**Commentary:** TRAP 9.4 sets forth various guidelines regarding briefs, including: paper type and size, margins, spacing, typeface, and length of briefs.<sup>131</sup> Typically, briefs that are non-compliant are rejected by a court's clerk.<sup>132</sup> However, counsel should never attempt to manipulate the briefing rules to gain a strategic advantage, whatever it may be.<sup>133</sup>

**Standard 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.<sup>134</sup>

**Commentary:** Parties should not attempt to "one up" the opposing side by serving briefs or other filings in an unfair manner. The best cases are those that have given both sides the ability to fully brief their positions and opposing counsel an opportunity to reasonably respond.<sup>135</sup>

129. *Id.* at 279–80 (emphasizing the importance of anticipating your opponent's arguments to craft your own argument to counter theirs).

130. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Lawyers Standard 10.

131. *See* TEX. R. APP. P. 9.4 (detailing the requirements for all documents filed with a Texas appellate court).

132. *Id.* R. 9.4(k) ("If a document fails to conform with these rules, the court may strike the document or identify the error and permit the party to resubmit the document in a confirming format by a specified deadline."); *In re V.P.*, No. 02-14-00141-CV, 2015 WL 221891, at \*1 (Tex. App.—Fort Worth Jan. 15, 2015, no pet.) (per curiam) (mem.) ("We stated in our letter to Appellant that her failure to timely file an amended brief in compliance with the above rules could result in the waiver of noncompliant points, our striking her brief, or the dismissal of her appeal." (citing TEX. R. APP. P. 38.8(a), 38.9(a), 42.3(b), (c))); *see also* *Mendoza v. Fiesta Mart, Inc.*, No. 02-12-00324-CV, 2013 WL 260923, at \*1 (Tex. App.—Fort Worth Jan. 24, 2013, no pet. h.) (per curiam) (striking appellant's noncompliant brief and dismissing the appeal (citing TEX. R. APP. P. 38.8(a)(1), 38.9(a), 42.3(c), 43.2(f); *Newman v. Clark*, 113 S.W.3d 622, 623 (Tex. App.—Dallas 2003, no pet.) (per curiam))).

133. The Authors note that this particular standard should be amended to reflect changes to the briefing rules with regard to electronically filed documents. *See generally* TEX. R. APP. P. 9.4(j) (providing the guidelines for electronically filed documents).

134. TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Lawyers Standard 11.

135. *E.g.*, Dennis Owens & Anne Marie Lofase, *Professionalism and Ethics in Appellate Procedure*, in A PRACTITIONER'S GUIDE TO APPELLATE ADVOCACY 22–23 (Anne Marie Lofase ed., 2010) (echoing the emphasis should be on the merits of the case and not the extrinsic elements).



## VI. 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.

**Standard 1:** Inappropriate conduct will not be rewarded, while exemplary conduct will be appreciated.<sup>136</sup>

**Commentary:** It is rare to find written expressions of appreciation from appellate courts. Still, there are a few. In *Stovall v. State*,<sup>137</sup> the Texas Court of Criminal Appeals wrote:

The Court appreciates this well[-]prepared record from the office of the District Clerk of Tarrant County, and especially the deputy clerk who typed and included docket sheet entries instead of using a photographic copy of the handwriting of the trial judge, which is usually sent up in most records. Some copies of handwritten docket entries are almost impossible to read and some are illegible.<sup>138</sup>

Furthermore, under this standard, appellate courts might recognize an attorney's departure from the Standards as a means to discourage such behavior. For instance, in the case of *In re Goldblatt*,<sup>139</sup> the Fort Worth Court of Appeals admonished counsel for making misrepresentations to the court:

[T]his court will not tolerate any further misrepresentations by counsel for Goldblatt. At oral argument, counsel for Goldblatt informed this court that he had advised his client not to seek eviction until after the enforceability of the permanent injunction had been determined, but he also indicated in the petition for writ of mandamus and prohibition that “[e]ach of [Goldblatt’s] listed actions have been taken on the advice of counsel.” We remind counsel

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136. TEX. STANDARDS FOR APP. CONDUCT, Court's Relationship with Counsel Standard 1.

137. *Stovall v. State*, 480 S.W.2d 223 (Tex. Crim. App. 1972).

138. *Id.* at 224 n.1.

139. *In re Goldblatt*, 38 S.W.3d 802 (Tex. App.—Fort Worth 2001, no pet.).

of his ethical obligations under the Texas Disciplinary Rules of Professional Conduct and his obligations as an appellate practitioner under the Standards for Appellate Conduct adopted by this court.<sup>140</sup>

The *Goldblatt* case illustrates a clear instance of a court referencing the Standards and “not rewarding” such inappropriate conduct.

**Standard 2:** The court will take special care not to reward departures from the record.<sup>141</sup>

**Commentary:** This standard has been adopted into the rules of appellate procedure and the common law applying them.<sup>142</sup> TRAP 34.1 provides that the “appellate record consists of the clerk’s record and, if necessary to the appeal, the reporter’s record.”<sup>143</sup> Appellate courts cannot consider documents that are not included in the appellate record.<sup>144</sup>

This scenario is seen most often when items are included in the appendix to a brief that were not otherwise included in the appellate record.<sup>145</sup> Such items are not considered by the appellate court.<sup>146</sup> And oftentimes the

140. *Id.* at 805 n.2 (alterations in original) (citing TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.01, 3.03, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2016) (Tex. State Bar R. art. X, § 9)).

141. TEX. STANDARDS FOR APP. CONDUCT, The Court's Relationship with Counsel Standard 2.

142. *See* TEX. R. APP. P. 38.1(i) (“The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and *to the record.*” (emphasis added)); *Adams v. Reynolds Tile & Flooring, Inc.*, 120 S.W.3d 417, 423 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (interpreting Rule 38.1(f) as requiring appellate briefs to support their statement of facts by references to the record (citing *Nguyen v. Intertex, Inc.*, 93 S.W.3d 288, 293 (Tex. App.—Houston [14th Dist.] 2002, no pet.)); *see also* *Burke v. Ins. Auto Auctions Corp.*, 169 S.W.3d 771, 775 (Tex. App.—Dallas 2005, pet. denied) (“[A]n appellate court cannot consider documents or hearings that are cited in the brief and not attached as appendices if they are not formally included in the record on appeal.” (citing *Green v. Kaposta*, 152 S.W.3d 839, 841 (Tex. App.—Dallas 2005, no pet.))).

143. TEX. R. APP. P. 34.1.

144. *See* *Burke*, 169 S.W.3d at 775 (“We cannot consider those documents that are not properly included in the appellate record or before this Court.” (citing *Green*, 152 S.W.3d at 841)); *Green*, 152 S.W.3d at 841 (“We have little latitude on appeal and cannot remedy deficiencies in a litigant’s brief or supply an adequate record.” (citing *Strange v. Cont'l Cas. Co.*, 126 S.W.3d 676, 678 (Tex. App.—Dallas 2004, no pet.))).

145. *See, e.g., Adams*, 120 S.W.3d at 423 (failing to consider parts of an employee handbook that had been attached as appendices to the appellate brief, because those parts were not part of the appellate record (citing *Nguyen*, 93 S.W.3d at 293)).

146. *See* *Nguyen*, 93 S.W.3d at 293 (“The attachment of documents as exhibits or appendices to briefs is not formal inclusion in the record on appeal and, therefore, the documents cannot be

court will say explicitly in its opinion that it is not considering those documents due to counsel's failure to follow the appropriate rules.<sup>147</sup> Therefore, as a practical tip: if a practitioner discovers that something was omitted from the appellate record when writing his or her brief, it would be wise to ensure that either a supplemental clerk's record or supplemental reporter's record is filed with the court.

**Standard 3:** The court will be courteous, respectful, and civil to counsel.<sup>148</sup>

**Commentary:** Many appellate judges throughout the State of Texas enjoy cordial relationships with attorneys throughout the state, and, in particular, with members of the Appellate Section of the State Bar of Texas.<sup>149</sup> Nevertheless, judges should be mindful of this standard when dealing with counsel. Judges are likewise reminded that Canon 1 of the Texas Code of Judicial Conduct encourages judges to establish, maintain, and enforce high standards of conduct.<sup>150</sup>

**Standard 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.<sup>151</sup>

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considered.” (citing *Perry v. Kroger Stores, Store No. 119*, 741 S.W.2d 533, 534 (Tex. App.—Dallas 1987, no writ)).

147. *Cf. Green*, 152 S.W.3d at 841 (finding the pro se appellants preserved nothing for the court's review; insisting pro se litigants are “held to the same standards as licensed attorneys and must comply with applicable laws and rules of procedure” (citing *Strange*, 126 S.W.3d at 677–78)).

148. TEX. STANDARDS FOR APP. CONDUCT, The Court's Relationship with Counsel Standard 3, reprinted in TEX. R. APP. P. (West 2016).

149. *Cf. Kevin Dubose, Standards of Appellate Conduct: Insight into Their Creation and Purpose*, 62 TEX. B.J. 558, 559 (1999) (describing Texas appellate culture as “comparatively immune to the problem (overly aggressive and unprofessional conduct [seen at the trial level])” and, therefore, “somewhat above the professionalism fray”); see also Lynne Liberato, *Sections: The Pride of the Bar*, 63 TEX. B.J. 240, 240 (2000) (indicating that the Appellate Section of the State Bar of Texas worked keenly with the Texas Supreme Court to obtain approval of the Standards).

150. TEX. CODE JUD. CONDUCT, Canon 1, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2013).

151. TEX. STANDARDS FOR APP. CONDUCT, The Court's Relationship with Counsel Standard 4.

**Commentary:** Under this standard, judges should not call into question an appellate counsel's professionalism or integrity based upon who that lawyer represents or who that lawyer associates with on a case.<sup>152</sup>

**Standard 5:** The court will endeavor to avoid the injustice that can result from delay after submission of a case.<sup>153</sup>

**Commentary:** All appellate courts provide reports to the Office of Court Administration regarding the number of cases disposed of and the average length of time to disposition.<sup>154</sup> Generally, intermediate appellate courts strive to dispose of cases within a year of submission.<sup>155</sup> In certain cases, the legislature obligates appellate courts to dispose of cases at a faster pace.<sup>156</sup> Appeals from an order terminating parental rights should as far as

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152. *But see* *Sheshtawy v. Sheshtawy*, 150 S.W.3d 772, 778–79 (Tex. App.—San Antonio 2004, pet. denied) (finding a judge need not recuse himself from presiding over a divorce proceeding despite the fact that the judge had a personal relationship with the wife's attorney and that the judge had made disparaging comments to the husband without more, because it did not demonstrate the judge was impartial or biased); *Garcia v. State*, No. 03-97-00641-CR, 1998 WL 798593, at \*2 (Tex. App.—Austin Nov. 19, 1998, pet. ref'd) (concluding, after the judge was accused of “tak[ing] it upon himself to publicly humiliate a lawyer in the context of a judicial proceeding,” that “[w]hatever this Court may think of the district court's handling of appellant's trial, and in particular of the court's statements to and about defense counsel, we cannot say that the court committed reversible error”); *Dallas Consol. Elec. St. Ry. Co. v. Rutherford*, 78 S.W. 558, 560 (Tex. Civ. App. 1904, no writ) (“Several assignments of error are presented complaining of remarks made by the trial judge tending to humiliate defendant's counsel and prejudice or disparage him before the jury.”).

153. TEX. STANDARDS FOR APP. CONDUCT, The Court's Relationship with Counsel Standard 5.

154. *Statistics & Other Data*, TEX. JUD. BRANCH, <http://www.txcourts.gov/statistics/annual-statistical-reports/> [<https://perma.cc/GS7E-KQDU>]; *see also* Carl Reynolds, *Texas Courts 2030—Strategic Trends & Responses*, 51 S. TEX. L. REV. 951, 960 n.30 (2010) (“[N]ot all clerks report every year, but reporting [to the Office of Court Administration] is mandatory.”); Kent Rutter, *Texas Supreme Court*, 72 TEX. B.J. 32, 32, 32 n.1 (2009) (commenting on Texas Supreme Court case disposition statistics and crediting the Office of Court Administration as the basis for said statistics); Randy Wilson, *Civil Litigation Trends in One of the Nation's Largest Counties*, HOUS. LAW., July–Aug. 2013, at 10, 14 (crediting the Texas Office of Court Administration for data concerning litigation trends).

155. *See* TEX. OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: COURT LEVEL 11 (2016) (indicating at least 100% clearance rate within the 2016 year for all Texas courts of appeals).

156. Ann Crawford McClure et al., *A Guide to Proceedings Under the Texas Parental Notification Statute and Rules*, 41 S. TEX. L. REV. 755, 818 (2000) (“[T]he Legislature has mandated that the Texas Supreme Court issue rules that ensure expeditious rulings in Chapter 33 proceedings. Although an application is deemed granted if the trial court fails to timely rule, the Legislature's clear intent is that courts timely rule—either grant or deny—and that the Texas Supreme Court draft rules that will ensure that outcome.” (footnote omitted)).

reasonably possible be disposed of “[w]ithin 180 days of the date the notice of appeal is filed.”<sup>157</sup>

**Standard 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.<sup>158</sup>

**Commentary:** Judges are not excused from following the Standards. Further, not only should judges ensure that the Standards are followed, but judges should likewise lead by example.

**Standard 7:** Members of the court will demonstrate respect for other judges and courts.<sup>159</sup>

**Commentary:** Oftentimes judges will disagree with fellow judges or sister courts in a decision or opinion.<sup>160</sup> Judges must always maintain professionalism, respect, and civility for one another, even if disagreement arises, regardless of the magnitude of the decision being rendered. The Bar (and public) are always watching, and the Bench should always strive to serve as the leading example of high ethical standards.

## VII. CONCLUSION

This Article has hopefully provided the reader with a deeper insight into each standard. The Standards serve as a guiding light not only for practitioners, but also for the courts and their personnel. The Authors believe that when we all strive toward the Standards, the practice of law, our profession, and the administration of justice all benefit.

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157. TEX. R. JUD. ADMIN. 6.2(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. F app. (West 2013).

158. TEX. STANDARDS FOR APP. CONDUCT, The Court's Relationship with Counsel Standard 6.

159. *Id.* Standard 7.

160. *Cf.* Catherine M. Stone et al., *Civility in the Legal Profession: A Survey of the Texas Judiciary*, 36 ST. MARY'S L.J. 115, 120 (2004) (“Judges have lost the ability to disagree without being disagreeable.”).