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APPELLATE STANDARDS OF CONDUCT AS ADOPTED IN TEXAS

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I. INTRODUCTION

The Standards for Appellate Conduct (Standards) were adopted by the Texas Supreme Court and the Texas Court of Criminal Appeals on February 1, 1999.[1] Texas was the first state in the country

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1. *Order of the Supreme Court of Texas and the Court of Criminal Appeals*, 62 TEX. B.J. 399, 399 (1999).

to promulgate professional standards specifically for appellate practitioners.[2] This Essay examines the reasons for the adoption of the Standards and the process that led to their adoption. Additionally, this Essay discusses cases citing or interpreting the Standards. Finally, this Essay explores whether similar standards have been adopted in other states.

II. STANDARDS FOR APPELLATE CONDUCT

The Standards are appended to this Essay.[3] The following preamble sets forth their underlying goals:

> Lawyers are an indispensable part of the pursuit of justice. They are officers of courts charged with safeguarding, interpreting, and applying the law through which justice is achieved. Appellate courts rely on counsel to present opposing views of how the law should be applied to facts established in other proceedings. The appellate lawyer's role is to present the law controlling the disposition of a case in a manner that clearly reveals the legal issues raised by the record while persuading the court that an interpretation or application favored by the lawyer's clients is in the best interest of the administration of equal justice under law.
>
> The duties lawyers owe to the justice system, other officers of the court, and lawyers' clients are generally well-defined and understood by the appellate bar. Problems that arise when duties conflict can be resolved through understanding the nature and extent of a lawyer's respective duties, avoiding the tendency to emphasize a particular duty at the expense of others, and detached common sense. To that end, the following standards of conduct for appellate lawyers are set forth by reference to the duties owed by every appellate practitioner.
>
> Use of these standards for appellate conduct as a basis for motions for sanctions, civil liability, or litigation would be contrary to their intended purpose and shall not be permitted. Nothing in these standards alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure, or the Code of Judicial Conduct.[4]

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2. Kevin Dubose, *Standards of Appellate Conduct: Insight into Their Creation and Purpose*, 62 TEX. B.J. 558, 558 (1999).

3. *See infra* Appendix A. The Standards are also available at www.supreme.courts.state.tx.us/rules/conduct.asp.

4. TEX. STANDARDS FOR APP. CONDUCT preamble ¶¶ 1–3, *reprinted in* TEX. R. APP. P. (Vernon Supp. 2005). The Standards are also available in the Texas Bar Journal. *See* TEX. B.J. 399 (1999).

The Standards are divided into four major sections: (1) Lawyers' Duties to Clients; (2) Lawyers' Duties to the Court; (3) Lawyers' Duties to Lawyers; and (4) The Court's Relationship with Counsel.[5]

The first section, entitled "Lawyers' Duties to Clients," sets forth the Standards relating to the duties appellate practitioners owe their clients.[6] In this section, the Standards caution appellate practitioners regarding the need to balance competing interests by stating, "The lawyer's duty to a client does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of harm on the appellate process, the courts, and the law itself."[7]

The second section, entitled "Lawyers' Duties to the Court," contains the Standards governing an appellate practitioner's responsibilities in relation to the court.[8] These Standards remind appellate practitioners that they are officers of the court and must fairly and accurately portray their case both factually and legally.[9] Additionally, the Standards provide that lawyers "serve the Court by respecting and maintaining the dignity and integrity of the appellate process."[10]

The third section, entitled "Lawyers' Duties to Lawyers," relates the Standards governing a lawyer's relationship with other lawyers.[11] These Standards emphasize that the manner in which lawyers treat other lawyers impacts the effectiveness and credibility of the judicial system.[12] "The duty that lawyers owe their clients and the system can be most effectively carried out when lawyers treat each other honorably."[13]

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5. *See generally* TEX. STANDARDS FOR APP. CONDUCT (examining the role of appellate lawyers).

6. *See* TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Clients (asserting that a lawyer's duties to the client include allegiance, protection and the advancement of "the client's legitimate rights, claims, and objectives").

7. *Id.*

8. *See* TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to the Court (maintaining that an appellate lawyer has a duty to "assist the Court in the administration of justice at the appellate level").

9. *Id.*

10. *Id.*

11. *See* TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Lawyers (stating that lawyers have a responsibility to treat other lawyers with respect and dignity).

12. *Id.*

13. *Id.*

The final section, entitled "The Court's Relationship with Counsel," contains Standards to guide the court in its relationship with appellate practitioners.[14] This section emphasizes that judges must set the right tone and pattern for professional behavior and must control and discourage unprofessional behavior by those appearing before the court.[15] "Judges must practice civility in order to foster professionalism in those appearing before them."[16]

III. Rationale for the Standards and the Process of Adoption

A. *Growth of the Appellate Bar*

Although a handful of lawyers in Texas were known as specialists in appellate work prior to the 1980s and 1990s, the number of appellate specialists rapidly increased until it reached a large enough number in 1987 that the State Bar created an Appellate Practice & Advocacy Section.[17] Also in 1987, the Texas Board of Legal Specialization began to offer certification in civil appellate law.[18] Finally in 1987, the first Advanced Civil Appellate Practice Course was offered by the State Bar Professional Development Program.[19]

As lawyers began concentrating on appellate law as a specialty, other practitioners began to realize that appellate practice requires a unique set of skills.[20] Courses in appellate advocacy became a standard offering in Texas law schools.[21] As the awareness of the specialized skills possessed by appellate lawyers grew, litigators be-

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14. *See* Tex. Standards for App. Conduct, The Court's Relationship with Counsel (emphasizing the court's control over appellate practice and that lawyers must "conduct themselves in a manner compatible with the role of the appellate courts in administering justice").

15. *Id.*

16. *Id.*

17. Kevin Dubose, *Standards of Appellate Conduct: Insight into Their Creation and Purpose*, 62 Tex. B.J. 558, 558 (1999).

18. *Id.*

19. *Id.*

20. *See id.* (analyzing the rise of the appellate bar in Texas and noting that appellate lawyers possess different skills than trial litigation lawyers).

21. *Id.* (reporting that the growth of appellate practice in Texas gradually extended to law school classrooms).

gan hiring them to assist in preserving error at the trial level, particularly with the jury charge and in handling the case on appeal.[22]

B. *The Development and Adoption of the Standards*

In 1989, Roger Townsend, chairperson of the Appellate Practice & Advocacy Section, suggested the possible development of a Code of Appellate Advocacy.[23] Because the Texas Supreme Court was on the verge of adopting the Texas Lawyer's Creed, the suggestion was tabled and eventually died in committee.[24] In the fall of 1993, Kevin Dubose presented a CLE paper containing suggestions regarding a more civilized appellate bar at the Advanced Civil Appellate Practice Course.[25] The presentation was favorably received, and appellate practitioners began openly discussing the need for a more professional approach to the practice of appellate law.[26] In the spring of 1995, the Appellate Practice & Advocacy Section of the State Bar selected "The Appellate Lawyer's Creed" as one of its projects.[27] Charles "Skip" Watson, a well-known and highly regarded appellate specialist from Amarillo, was appointed to steer the project committee in the summer of 1995.[28] A committee was formed and included: a current and a former appellate justice; a current and a former appellate court staff attorney, appellate specialists, practitioners who engaged in both trial and appellate practice; people who had published articles on professionalism and ethics in appellate practice; a person who had extensively worked on a professionalism project for the ABA; and the person primarily responsible for the Texas Lawyer's Creed.[29]

Over the next year, the committee reviewed professional standards from almost forty jurisdictions, which primarily focused on

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22. Kevin Dubose, *Standards of Appellate Conduct: Insight into Their Creation and Purpose*, 62 TEX. B.J. 558, 558 (1999).

23. *Id.* at 559.

24. *See id.* (explaining that the Texas Lawyer's Creed was expected to cover the same material as the Standards).

25. *Id.* Kevin Dubose is a former chairperson of the State Bar Appellate Practice and Advocacy Section. *Id.* at 560.

26. *Id.*

27. Kevin Dubose, *Standards of Appellate Conduct: Insight into Their Creation and Purpose*, 62 TEX. B.J. 558, 559 (1999).

28. *Id.*

29. *Id.*

the conduct of trial attorneys.[30] After extensive thought, drafting, and editing, the committee completed a draft entitled, "Standards of Appellate Conduct," and the council of the Appellate Practice & Advocacy Section approved it in August 1996.[31] A draft of the Standards was then sent to the State Bar Board of Directors for approval.[32] A committee of the Board sent a copy of the proposed Standards to every state and federal trial and appellate judge in Texas, all former Texas appellate court chief justices, the chairperson of each State Bar section, and various other individuals in an effort to solicit comments and suggestions.[33] Some changes were made based on the suggestions received by the committee, and the State Bar Board of Directors approved the Standards, as modified, in April 1997.[34] The Supreme Court of Texas and the Texas Court of Criminal Appeals jointly adopted the Standards on February 1, 1999, and the Standards "were published in the April 1999 *Texas Bar Journal.*"[35]

IV. TEXAS CASES

A. Ex parte Lafon

In *Ex parte Lafon*,[36] Roy Lester Lafon asserted in an application for writ of habeas corpus that his original attorney rendered ineffective assistance of counsel.[37] Lafon contended that his original attorney erroneously advised him that if he pleaded no contest to a pending DWI charge and appealed, "he would have a better chance of [an] acquittal."[38] Lafon further contended that his original attorney failed to inform him that no record or brief was filed in the appeal when she persuaded Lafon "to sign a motion to withdraw the notice of appeal."[39]

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30. *Id.*

31. *Id.*

32. Kevin Dubose, *Standards of Appellate Conduct: Insight into Their Creation and Purpose*, 62 TEX. B.J. 558, 559 (1999).

33. *Id.*

34. *Id.*

35. *Id.* at 560 (citing *Order of the Supreme Court of Texas and the Court of Criminal Appeals*, 62 TEX. B.J. 399 (1999)).

36. 977 S.W.2d 865 (Tex. App.—Dallas 1998, no pet.).

37. *Ex parte* Lafon, 977 S.W.2d 865, 866 (Tex. App.—Dallas 1998, no pet.).

38. *Id.*

39. *Id.*

The appellate court affirmed the trial court's denial of Lafon's habeas application because the testimony regarding the actions taken by the original attorney and the reason for those actions were conflicting. However, the court noted, "in rejecting appellant's version of the facts and concluding counsel rendered effective representation, the conduct admitted by retained counsel during his testimony concerns us."[40] The court noted that the original attorney admitted to filing an appeal in which there was no appealable issue for the sole purpose of delaying Lafon's sentence.[41] Relying in part on the section of the Standards providing that an appeal should not be pursued for purely tactical reasons, such as delay, the court concluded:

> Although counsel stopped short of filing a brief in the appeal, apparently in recognition of the fact that there were no justiciable issues to discuss, we believe the frivolous motion to quash and notice of appeal, which he filed for the sole purpose of obstructing the implementation of a criminal sentence, constitute an abuse of the legal process and violate the spirit and the letter of disciplinary rule 3.01.[42]

The court ordered a copy of its opinion to be forwarded to the Office of the General Counsel of the State Bar of Texas.[43]

B. Schlafly v. Schlafly

In *Schlafly v. Schlafly*,[44] the ex-husband appealed a trial court's final divorce decree.[45] The appellate court affirmed the portion of the judgment relating to custody but reversed the portion of the judgment pertaining to property division because the trial court erred in awarding the ex-husband's separate property to the ex-wife.[46] Although the appellate court was not required to reach the ex-husband's issue regarding error in the overall community property division, the court noted, "for reasons explained below, we are compelled to address the manner in which [the ex-husband] has presented this issue to us and to emphasize the critical role of the

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40. *Id.* at 868.
41. *Id.*
42. *Ex parte Lafon*, 977 S.W.2d at 868.
43. *Id.* at 868-69.
44. 33 S.W.3d 863 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).
45. Schlafly v. Schlafly, 33 S.W.3d 863, 866-67 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).
46. *Id.* at 872, 874.

appellate advocate in accurately and fairly representing the record in briefing to this court."[47]

In his brief, the ex-husband argued that the trial court awarded over ninety percent of the community property to the ex-wife.[48] The court noted that it was "overwhelmingly apparent" that the brief misrepresented the trial court's actions and failed to disclose material facts essential to a proper determination of the claim.[49] The ex-husband's calculation of the ninety percent figure was "based on the parties' pre-trial inventory valuations and not on the valuations used by the trial court in its property division."[50] In addition, the ex-husband's calculation failed to recognize or even mention the debts assessed against each party's share of the community estate.[51] The court asserted that the facts set forth in the ex-husband's brief did not "even approach a fair portrayal of the facts appearing in the record."[52]

The court cited the Standards, together with the Texas Disciplinary Rules of Professional Conduct and the Texas Lawyer's Creed, in admonishing "counsel against making misrepresentations to a court" because a lawyer owes the appellate court the duty to fairly portray the record on appeal.[53] The court continued:

> Counsel who mischaracterize or misrepresent the facts in the appellate record impose a tremendous hardship on the reviewing court and its staff. The voluminous case load and the sheer size of the appellate records in many cases often make for a very time-consuming review. When counsel misrepresent the facts on which their legal arguments are based, they not only delay the entire process by unnecessarily adding to the court's workload but also render a tremendous disservice to their clients. . . .
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> Our adversary system contemplates that each party's advocate will present and argue favorable and unfavorable facts in the light most advantageous to his client; it does not contemplate misrepresentation

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47. *Id.* at 872.
48. *Id.*
49. *Id.* at 872-73.
50. *Schlafly*, 33 S.W.3d at 873.
51. *Id.* "According to the trial court's spreadsheet attached to its findings of fact and conclusions of law, [the ex-husband's] share in the division of the community estate, including property and debts, was $13,642.13, while [the ex-wife's] share was a *negative* $22,847.11." *Id.*
52. *Id.*
53. *Id.*

> or mischaracterization of those facts. . . . Failure to observe these very basic standards of appellate practice erodes the ethical standards on which the legal profession and the appellate process are based.[54]

The court concluded that the ex-husband's "blatant misrepresentation and mischaracterization of the facts in his briefing" to the court was inexcusable.[55] As a result, the court found good cause for ordering the ex-husband to pay all costs of the appeal.[56]

C. In re Goldblatt

In *In re Goldblatt*,[57] a probate court entered a final judgment which "permanently enjoined Goldblatt from interfering in any way with the business property of A & W Industries, Inc."[58] While Goldblatt's subsequent appeal from the judgment was pending, he proceeded with an eviction suit in justice court seeking to evict A & W from its business property.[59] "A & W then filed a 'Motion to Enforce Judgment and for Contempt for Violation of the Permanent Injunction' in the probate court."[60] The probate court granted the "motion and held Goldblatt in contempt."[61] Because the final judgment containing the permanent injunction was on appeal, the appellate court concluded that the probate court was without jurisdiction to hold Goldblatt in contempt, noting that only the appellate court had jurisdiction at that time.[62] "Although A & W had filed a motion for contempt" in the appellate court, the appellate court declined to exercise its contempt power at that time.[63] The appellate court did, however, caution Goldblatt in a footnote:

> It would be advisable for Goldblatt and his attorneys to terminate all attempts to evict A & W from the property until this court has had an opportunity to address the merits of Goldblatt's appeal challenging the final judgment. Moreover, this court will not tolerate any

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54. *Id.* at 873-74.
55. *Schlafly*, 33 S.W.3d at 874.
56. *Id.*
57. 38 S.W.3d 802 (Tex. App.—Fort Worth 2001, orig. proceeding).
58. *In re* Goldblatt, 38 S.W.3d 802, 803 (Tex. App.—Fort Worth 2001, orig. proceeding).
59. *Id.*
60. *Id.* at 803-04.
61. *Id.* at 804.
62. *Id.* at 804-05.
63. *In re Goldblatt*, 38 S.W.3d at 805.

> 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 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.[64]

D. Davis v. State

In *Davis v. State*,[65] the court "clerk advised the parties by letter that the appeal had been set for submission and oral argument."[66] The letter stated that no motion to reschedule the oral argument would be granted unless one of the parties showed good cause.[67] The letter cautioned that participation in trial would not be sufficient good cause grounds and "encouraged counsel to arrange in advance with the trial court or alternate counsel as necessary to overcome potential scheduling conflicts."[68] Appellant's counsel misunderstood the letter to mean that he must hire substitute counsel and file a motion to substitute counsel if he could not appear for argument.[69] In a motion responding to the clerk's letter, appellant's attorney stated:

> In light of the Court's Order requiring that appointed counsel make certain that somebody appear for oral argument, this Motion is nothing but a complete waste of time, effort and energy not to mention a total waste of paper. If the Court's posture is that appointed counsel needs to make certain that someone appear for oral argument, and trial or illness excuses will not be acceptable to the Court, then it seems to me that if I have made arrangements for a very competent lawyer to appear, it should be as easy as pie.[70]

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64. *Id.* at 805 n.2.

65. No. 14-00-00166-CR, 2001 WL 951278 (Tex. App.—Houston [14th Dist.] Aug. 23, 2001, no pet.).

66. Davis v. State, No. 14-00-00166-CR, 2001 WL 951278, at *1 n.1 (Tex. App.—Houston [14th Dist.] Aug. 23, 2001, no pet.) (not designated for publication).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

The appellate court set out the foregoing procedural occurrences in a footnote to its opinion.[71] The court then stated that counsel's remarks fell short of the professional rules requiring lawyers "to demonstrate respect for the legal system and for those who serve it."[72] The court commented that the remarks in the motion demonstrated "a lack of professionalism and respect for the court."[73] The court asserted, "Whatever personal disdain counsel may harbor for the court's practices and procedures, he nevertheless must observe basic standards of professional conduct and rules of decorum in his dealings and communications with the court."[74] The court quoted the provision in the Standards that requires "counsel to be civil and respectful in all communications with the judges and staff."[75] The court strongly urged "counsel to conduct himself in a professional manner in future dealings with [the] court."[76]

E. Fortier v. State

In *Fortier v. State*,[77] the court cited the Standards in addressing language used by the state in a motion for rehearing.[78] The court noted that a litigant must zealously urge its stance but "not to the detriment of professionalism" and that "those representing the [s]tate in a criminal prosecution" are subject to the same standards as other litigants.[79] The court explained that motions for rehearing are an opportunity to "reveal or explain potential error to the court. Though no one writing style may best facilitate that effort, language which is caustic, condescending, sarcastic, petty, or like tone only detracts from it. So too does it evince disrespect for the tribunal and legal system."[80]

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71. *See Davis*, 2001 WL 951278, at *1 n.1 (analyzing the Texas Disciplinary Rules of Professional Conduct and the Standards).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* (quoting TEX. STANDARDS FOR APP. CONDUCT, Lawyer's Duties to the Court (1999)).

76. Davis v. State, No. 14-00-00166-CR, 2001 WL 951278, at *1 n.1 (Tex. App.—Houston [14th Dist.] Aug. 23, 2001, no pet.) (not designated for publication).

77. 105 S.W.3d 697 (Tex. App.—Amarillo 2003, pet. ref'd).

78. Fortier v. State, 105 S.W.3d 697, 702 n.6 (Tex. App.—Amarillo 2003, pet. ref'd) (citing TEX. STANDARDS FOR APP. CONDUCT, The Court's Relationship with Counsel).

79. *Id.*

80. *Id.*

F. Brown v. State

In *Brown v. State*,[81] appellate counsel asserted that trial counsel rendered ineffective assistance because the defense "offered actually supported the [s]tate's argument."[82] Appellate counsel contended that the "only defensive theory at trial was that appellant had never actually held a gun to anyone's head at a party."[83]

The appellate court noted that the evidence showed that trial "counsel attempted to discredit the [s]tate's witnesses, ... attempted to prove appellant had sold his only gun prior to the incident," and attempted to prove that the complainant and her sister had a motive to lie.[84] Accordingly, the appellate court concluded that the record showed that trial "counsel did not rely solely on the defense" that appellate counsel "insinuate[d]" in the brief.[85] The court cautioned:

> Appellant's appellate counsel has repeatedly misstated the record in this appeal. This court has adopted the Standards for Appellate Conduct as a part of our local rules. We direct counsel's attention to these rules, which specifically state that "[c]ounsel should not misrepresent, mischaracterize, misquote, or miscite the factual record."[86]

G. In re Lerma

In *In re Lerma*,[87] the court cited the Standards in addressing a motion for sanctions.[88] The motion first alleged that relator's petition for writ of mandamus was groundless because the relator had "an adequate remedy by appeal."[89] The court cited the Standards

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81. Nos. 2-02-442-CR & 2-02-443-CR, 2003 WL 21940905 (Tex. App.—Fort Worth August 14, 2003, pet. ref'd).

82. Brown v. State, Nos. 2-02-442-CR & 2-02-443-CR, 2003 WL 21940905, at *4 (Tex. App.—Fort Worth August 14, 2003, pet. ref'd) (not designated for publication) (asserting ineffective assistance of counsel, in part because defense counsel's argument aided the state's prosecution).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at *4 n.2 (quoting TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to the Court).

87. 144 S.W.3d 21 (Tex. App.—El Paso 2004, orig. proceeding).

88. *See In re* Lerma, 144 S.W.3d 21, 26-29 (Tex. App.—El Paso 2004, orig. proceeding) (analyzing the Standards in a mandamus action).

89. *Id.* at 26.

to support the proposition that the duty not to bring frivolous proceedings "applies specifically to lawyers practicing before an appellate court."[90] The court reasoned, however, that "the denial of mandamus relief due to the existence of an adequate remedy by appeal does not automatically establish that the mandamus petition [was] so clearly groundless as to warrant sanctions."[91] The court concluded that the record contained no evidence to establish that the relator had filed the petition in bad faith or for purposes of delay or harassment.[92] The court cautioned, however, that its decision not to grant sanctions "should not be taken as approval of a party filing a mandamus petition where the party already has an appeal pending to address the same issues. . . . In such a case, the party should take special care to explain why appeal is not an adequate remedy."[93]

The motion also alleged that the "[r]elator filed a misleading appendix."[94] The court noted that the Standards caution counsel against making misrepresentations to a court by instructing appellate counsel to not "misrepresent, mischaracterize, misquote or miscite the factual record or legal authorities."[95] The relator responded that he inadvertently included a dismissal order in the appendix because he "was overworked and [his] memory and mind failed [him]."[96] The relator further explained that he "did not pay attention to the details of the case while represented by counsel [and]. . . . he could not utilize the clerk's record" in preparing the mandamus petition "because it was sealed."[97] Finally, the relator claimed that he did not include the dismissal order to intentionally misstate the facts, "but instead intended to rely on a different dismissal order to support his argument that the trial court lacked jurisdiction to consider the petition in intervention."[98]

The court noted that the record did not support the relator's response that he failed to remember that the trial judge had de-

90. *Id.*
91. *Id.* at 26-27.
92. *Id.* at 27.
93. *Lerma*, 144 S.W.3d at 27 n.7.
94. *Id.*
95. *Id.* at 27 (quoting TEX. STANDARDS FOR APP. CONDUCT (1999)).
96. *Id.* (citing to the court record).
97. *Id.*
98. *In re* Lerma, 144 S.W.3d 21, 27 (Tex. App.—El Paso 2004, orig. proceeding).

stroyed the original dismissal order included in the appendix.[99] When the relator asked the trial judge to "reinstate" the case following the entry of the original dismissal order, the trial judge "explained that the case remained pending because [the trial judge] had not filed the dismissal order but had destroyed it."[100] "Despite being present and personally hearing Judge Martinez's admonishment that the copy of the order in his possession was void, [r]elator thereafter attempted to use the void dismissal order" both before the trial court and by including it in the appendix.[101] The court further noted that it was "troubled that the copy of the dismissal order included" in the appendix bore "the stamped seal of the District Clerk's office even though the original document was never filed with the District Clerk."[102] Although the relator explained that his legal assistant acquired certified copies of the exhibits included in the "appendix and he had no reason to question the certification of the dismissal order," the court noted that the dismissal order was only stamped as an attachment to the motion for new trial, not as a separate document.[103] The court asserted:

> Relator does not explain why he provided this Court with a separate copy of the dismissal order bearing the District Clerk's stamped seal as opposed to leaving it attached to the certified copy of the motion for new trial. Whether or not it was Relator's intention, it certainly gives the impression that the document is a valid court order when it is not.[104]

Given relator's pattern of attempting to use the dismissal order despite repeated admonishments that the order was void, the court asserted, "Relator's assertions that he mistakenly included the document fall flat."[105] The court also had noted that the motion for sanctions was supported by the affidavit of the Chief Deputy of the District Clerk's office who stated that the relator's legal assistant, who is also his wife, "attempted to file a copy . . . of the dismissal

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99. *Id.* at 27-28.

100. *Id.* at 28.

101. *See id.* (explaining that the relator attempted to use a void order on multiple occasions).

102. *Id.* (admonishing the relator for his use of improper documents).

103. *See Lerma*, 144 S.W.3d at 28 (examining the relator's explanation for his repeated use of a void document).

104. *Id.* at 29.

105. *Id.*

order as an original," but the District Clerk's office "refused to file the copy."[106] The court concluded:

> Giving [r]elator the benefit of the doubt, the inclusion of Exhibit 1 may have been an inadvertent mistake but it indicates a serious lack of attention to detail and a failure to appreciate the importance of being accurate when appearing before this Court in any appeal or original proceeding. It is a decidedly close question, but we will exercise our discretion by declining to impose sanctions.[107]

H. Sossi v. Willette & Guerra

In *Sossi v. Willette & Guerra*,[108] the court of appeals again cited the Standards in determining whether sanctions were appropriate against an appellant for filing a frivolous appeal.[109] In the notice of appeal, appellant represented that he was "appealing from an order denying his motion for joinder in a civil action, pursuant to" section 15.003(c) of the Texas Civil Practice and Remedies Code.[110] "In his docketing statement, appellant set out that the trial court denied his motion for joinder . . . and that the issue on appeal was one of consolidation and joinder."[111] There was not an order attached to the docketing statement, and appellant's brief did not contain an appendix.[112] In its motion requesting sanctions, appellee stated that it pointed out the frivolous nature of the appeal when it received the notice of appeal and urged appellant "to reconsider and dismiss the appeal."[113] "When appellant did not respond to that request, appellee filed its own docketing statement and response brief" asserting that the court lacked appellate jurisdiction.[114]

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106. *See id.* (commenting on the relator's wife's attempt to file the improper document).

107. *Id.*

108. 139 S.W.3d 85 (Tex. App.—Corpus Christi 2004, no pet.).

109. Sossi v. Willette & Guerra, 139 S.W.3d 85, 89-90 (Tex. App.—Corpus Christi 2004, no pet.) (citing the Standards in considering a frivolous appeal, and determining whether sanctions were appropriate in light of the Standards, the Texas Disciplinary Rules of Professional Conduct, and the Texas Lawyer's Creed).

110. *Id.* at 89.

111. *Id.* at 89-90.

112. *Id.* at 90.

113. *Id.*

114. *Sossi*, 139 S.W.3d at 90.

The court cited the provision of the Standards that instructs appellate counsel not to "misrepresent, mischaracterize, misquote or miscite the factual record or legal authorities."[115] The court concluded that in light of the applicable statutory provisions "pertaining to interlocutory appeals, the supporting case law, the facts of the case, and appellant's . . . 'misrepresentations regarding the nature of the appeal,'" appellant could not have "had any reasonable expectation that [the] [c]ourt would assume jurisdiction of the appeal."[116] The court further noted:

> [A]ppellant, who has mischaracterized the nature of the appeal as an interlocutory appeal, which requires that judgment be rendered not later than the 120th day after the date of the perfection of the appeal, has imposed a hardship on this reviewing Court and its staff, as well as on other appeals pending before this Court.[117]

Accordingly, the court awarded the appellee, "as just damages for having to respond to the frivolous appeal, attorney's fees in the amount of $4,600."[118]

I. Gleason v. Isbell

In *Gleason v. Isbell*,[119] the majority in a per curiam order granted a pro se appellant's motion to withdraw his "tentative interim motion for rehearing en banc" and granted the appellant additional time to file a motion for rehearing and rehearing en banc.[120] One justice filed a concurring and dissenting opinion to explain the reasons he disagreed with the court's granting the pro se appellant additional time to file another motion for rehearing and "to address the important and seldom-discussed responsibility of pro se litigants to act with dignity, respect, and civility in their dealings with courts, counsel, and other participants in the legal system."[121]

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115. *Id.* (quoting TEX. STANDARDS FOR APP. CONDUCT, Lawyer's Duties to the Court).

116. *Id.*

117. *Id.*

118. *Id.*

119. 145 S.W.3d 354 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

120. Gleason v. Isbell, 145 S.W.3d 354, 355 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (ordering and granting withdrawal of improper motions).

121. *See id.* at 355-56 (Frost, J., concurring in part and dissenting in part) (concurring in the withdrawal of motion, dissenting in the grant of extension of time, and discussing the duty of pro se litigants to conduct themselves with dignity).

In the tentative interim motion, the appellant characterized the opinion as "'disingenuous, dishonest[,] and retaliatory'" as well as "'false, corrupt[,] and fraudulent.'"[122] The "motion [was] rife with personal insults and contain[ed] conclusory allegations of corruption and criminal conduct by the court and its staff."[123] The motion accused "the court of 'misrepresenting' or 'fraudulently misrepresenting' more than a dozen times."[124] Citing the Standards, the dissenting justice asserted:

> 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. For those appearing in appellate courts, these standards are embodied in the *Standards for Appellate Conduct*, which were adopted and promulgated by the Texas Supreme Court and the Court of Criminal Appeals. Primarily aspirational, the *Standards for Appellate Conduct* do not alter the existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure, or the Code of Judicial Conduct, but they set forth the basic standards of behavior expected in Texas appellate courts. By levying intemperate and demeaning personal attacks against the panel members who heard his case and acting with incivility in his dealings with this court, appellant has violated these standards. Moreover, appellant has demonstrated a pattern of abusive and inappropriate conduct directed not only to the justices of this court but to other participants in the legal process as well.[125]

V. STANDARDS IN OTHER STATES

It appears that most other states rely on the ethical standards applicable to all lawyers rather than adopting standards specific to appellate practitioners.[126] However, it is clear that a significant body of case law exists in other states discussing both "appellate

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122. *Id.* at 356.

123. *Id.*

124. *Id.*

125. *Gleason*, 145 S.W.3d at 358-59.

126. *See generally* Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 REV. LITIG. 301 (2004) (discussing the model rules that are particularly important to appellate lawyers).

lawyers' lack of candor" and "the poison pens with which they write their briefs."[127]

For example, in one case from Indiana, a veteran appellate advocate was suspended from practice for language used in a brief, although the suspension was later reduced to a public reprimand.[128] In Indiana, a case may be transferred from an intermediate appellate court to the Indiana Supreme Court when an opinion or memorandum decision of the intermediate court erroneously and materially misstates the record.[129] In a brief in support of a petition for transfer, the attorney included the following language:

> The Courts of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point. Clearly, such a decision should be reviewed by the Indiana Supreme Court. Not only does it work an injustice on appellant Michigan Mutual Insurance Company, it establishes dangerous precedent in several areas of the law. This will undoubtedly create additional problems in future cases.[130]

In a footnote to the foregoing statement, the attorney asserted, "Indeed, the opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or law supported its decision)."[131]

In analyzing that decision, one commentator believes the Indiana Court of Appeals tested the bounds of the ethical rules, questioning whether the attorney crossed the line in criticizing the court or whether the court revealed its thin skin in disciplining him.[132]

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127. *See id.* at 304 (briefly commenting on the deficiencies in some appellate lawyers' conduct).

128. *See In re Wilkins*, 777 N.E.2d 714, 714, 719 (Ind. 2002) (suspending an attorney who alleged in his filing to the court that some judges harbored unethical motives behind their decisions).

129. *See id.* at 715-16 (discussing transfer to a higher court).

130. *Id.* at 715.

131. *Id.* at 715-16.

132. *See* Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 REV. LITIG. 301, 347 (2004) (questioning the appellate court's response to criticism and stating that while "it is true that a party cannot appeal from a decision without criticizing it, advocates must be careful about how far they go in their criticism").

VI. BENEFITS OF THE STANDARDS

Kevin Dubose, who was substantially involved in the adoption of the Standards, forecasted that two primary benefits would follow from their promulgation.[133] "First, the Standards educate the bar about the kind of conduct expected and preferred by appellate courts."[134] Less experienced lawyers or those who do not specialize in appellate law and therefore appear infrequently in appellate courts benefit greatly by having a written set of standard expectations that allows them to "understand the full extent of what it means to conduct oneself professionally in the appellate courts."[135]

"Second, the Standards give practitioners a valuable tool to use with clients who demand unprofessional conduct."[136] Appellate practitioners often have a difficult time convincing emotionally involved litigants that the high road is the best road.[137] Because the client pays the bill, appellate practitioners can become "torn between wanting to behave professionally themselves, but feeling compelled to follow their clients' marching orders."[138] Appellate practitioners faced with that difficult dilemma can utilize the Standards in explaining their ethical responsibilities.[139] "If for no other reason than assisting the lawyer in handling a difficult client who demands unprofessional conduct, the Standards are worthwhile."[140]

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133. *See* Kevin Dubose, *Standards of Appellate Conduct: Insight into Their Creation and Purpose*, 62 TEX. B.J. 558, 560 (1999) (commenting that "The purpose of the Standards [was] not to provide another set of rules that provide ammunition for sanctions, grievances, or satellite litigation").

134. *Id.*

135. *See id.* (noting that the Standards will help young lawyers and those lawyers who do not specialize in appellate law realize that "appellate judges and justices frown on opposing reasonable requests for scheduling accommodations, personal attacks on opposing counsel, or gamesmanship in pagination or service of written papers").

136. *Id.*

137. *Id.*

138. *See* Kevin Dubose, *Standards of Appellate Conduct: Insight into Their Creation and Purpose*, 62 TEX. B.J. 558, 560 (1999) (explaining the difficulty lawyers encounter when dealing with emotionally involved clients who believe the other party is their sworn enemy).

139. *See id.* (examining the duties imposed by the Standards, and finding that the Standards require lawyers to advise their clients that lawyers have a duty to act with civility and courtesy)

140. *Id.*

VII. Conclusion

The Standards demonstrate the concern that appellate practitioners have regarding professionalism and the bar's need to police its own conduct. The courts' acknowledgment of the Standards in case law demonstrates that the Standards have not been written and forgotten but have a working application in the appellate bar.

VIII. APPENDIX A

ON FEBRUARY 1, 1999, THE SUPREME COURT OF TEXAS AND THE COURT OF CRIMINAL APPEALS ISSUED THE FOLLOWING ORDER PERTAINING TO THE STANDARDS FOR APPELLATE CONDUCT:

At the request of the Council of the Appellate Practice and Advocacy Section of the State Bar and the Board of Directors of the State Bar of Texas, and based upon their submission to our Courts, the Supreme Court of Texas and the Texas Court of Criminal Appeals hereby adopt and promulgate the attached Standards of Appellate Conduct. 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.

STANDARDS FOR APPELLATE CONDUCT

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

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

Use of these standards for appellate conduct as a basis for motions for sanctions, civil liability or litigation would be contrary to their

intended purpose and shall not be permitted. Nothing in these standards alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure of the Code of Judicial Conduct.

LAWYER'S DUTIES TO CLIENTS

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by a real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest. The lawyer's duty to a client does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of harm on the appellate process, the courts, and the law itself.

1. Counsel will advise their clients of the contents of these Standards of Conduct when undertaking representation.
2. Counsel will explain the fee agreement and cost expectation to their clients. Counsel will then endeavor to achieve the client's lawful appellate objectives as quickly, efficiently, and economically as possible.
3. Counsel will maintain sympathetic detachment, recognizing that lawyers should not become so closely associated with clients that the lawyer's objective judgment is impaired.
4. Counsel will be faithful to their clients' lawful objectives, while mindful of their concurrent duties to the legal system and the public good.
5. Counsel will explain the appellate process to their clients. Counsel will advise clients of the range of potential outcomes, likely costs, timetables, effect of the judgment pending appeal, and the availability of alternative dispute resolution.
6. Counsel will not foster clients' unrealistic expectations.
7. Negative opinions of the court or opposing counsel shall not be expressed unless relevant to a client's decision process.

8. Counsel will keep clients informed and involved in decisions and will promptly respond to inquiries.

9. Counsel will advise their clients of proper behavior, including that civility and courtesy are expected.

10. Counsel will advise their clients that counsel reserves the right to grant accommodations to opposing counsel in matters that do not adversely affect the client's lawful objectives. A client has no right to instruct a lawyer to refuse reasonable requests made by other counsel.

11. A client has no right to demand that counsel abuse anyone or engage in any offensive conduct.

12. Counsel will advise clients that an appeal should only be pursued in a good faith belief that the trial court has committed error or that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.

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

LAWYERS' DUTIES TO THE COURT

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

1. An appellate remedy should not be pursued unless counsel believes in good faith that error has been committed, that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.

2. An appellate remedy should not be pursued primarily for purposes of delay or harassment.

3. Counsel should not misrepresent, mischaracterize, misquote, or miscite the factual record of legal authorities.

4. Counsel will advise the Court of controlling legal authorities, including those adverse to their position, and should not cite authority that has been reversed, overruled, or restricted without informing the court of those limitations.

5. Counsel will present the Court with a thoughtful, organized, and clearly written brief.

6. Counsel will not submit reply briefs on issues previously briefed in order to obtain the last word.

7. Counsel will conduct themselves before the Court in a professional manner, respecting the decorum and integrity of the judicial process.

8. Counsel will be civil and respectful in all communications with the judges and staff.

9. Counsel will be prepared and punctual for all Court appearances, and will be prepared to assist the Court in understanding the record, controlling authority, and the effect of the court's decision.

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

THE COURT'S RELATIONSHIP WITH COUNSEL

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

practice civility in order to foster professionalism in those appearing before them.

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