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If One is Good, Two Must Be Better: A Comparison of the Texas Standards for Appellate Conduct and the Texas Disciplinary Rules of Professional Conduct.

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IF ONE IS GOOD, TWO MUST BE BETTER: A COMPARISON OF THE TEXAS STANDARDS FOR APPELLATE CONDUCT AND THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

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I. INTRODUCTION

The Supreme Court of Texas and the Texas Court of Criminal Appeals adopted the Standards for Appellate Conduct (Standards) on February 1, 1999.[1] The Standards were created to "educate the Bar about the kind of conduct expected and preferred by the appellate courts."[2] In addition, the Standards are

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1. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 399 (1999); Catherine Stone, *Appellate Standards of Conduct as Adopted in Texas*, 37 ST. MARY'S L.J. 1097, 1097 (2006).

2. Kevin Dubose, *Standards of Appellate Conduct: Insight into Their Creation and Purpose*, 62 TEX. B.J. 558, 560 (1999). At least one appellate judge has asserted that the Standards apply to pro se litigants as well. *See* Gleason v. Isbell, 145 S.W.3d 354, 357–59 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (Frost, J., concurring in part and dissenting in part) (asserting that the Standards for Appellate Conduct "set forth the basic standards of behavior expected in Texas appellate courts" and concluding that the pro se

intended to "give practitioners a valuable tool to use with clients who demand unprofessional conduct" by imposing "an affirmative duty to educate the client about the Standards of Appellate Conduct."[3] The benefits of the rule, according to at least one of its drafters, include enabling lawyers and judges to "feel better about themselves when they perceive that they are engaged in the dignified task of resolving disputes between professional advocates" as well as encouraging a professional manner "that advances the interests of . . . [their] client[s] in incalculable ways."[4]

The Standards themselves, however, caution that their use "as a basis for motions for sanctions, civil liability, or litigation would be contrary to their intended purpose and [thus] shall not be permitted."[5] The Standards further provide that they do not "alter[] existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure, or the Code of Judicial Conduct."[6]

Under the Texas Rules of Disciplinary Procedure, professional misconduct subject to sanction by the State Bar constitutes "[a]cts or omissions by an attorney . . . that violate one or more of the Texas Disciplinary Rules of Professional Conduct" (Disciplinary Rules).[7] In turn, the preamble to the Disciplinary Rules declares that the "Texas Rules of Professional Conduct define proper conduct for purposes of professional discipline."[8] Appellate counsel is thus encouraged to conform his conduct to the Standards; however, counsel will only be sanctioned by the State Bar for violations of the Disciplinary Rules.[9] Thus, an attorney's violation of an appellate standard may or may not result in

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litigant violated those standards).

3. Kevin Dubose, *Standards of Appellate Conduct: Insight into Their Creation and Purpose*, 62 TEX. B.J. 558, 560 (1999).

4. *Id.*

5. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 399 (1999).

6. *Id.*

7. TEX. R. DISCIPLINARY P. 1.06(V)(1), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon 2005).

8. TEX. DISCIPLINARY R. PROF'L CONDUCT pmbl. ¶ 10, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005).

9. *See* Kevin Dubose, *Standards of Appellate Conduct: Insight into Their Creation and Purpose*, 62 TEX. B.J. 558, 560 (1999) (explaining the Standards should be used as advisory guidelines only, rather than "as a basis for motions for sanctions, civil liability or litigation").

discipline, depending upon whether he has violated a Disciplinary Rule as well.[10] Conversely, counsel's conduct may conform to the Disciplinary Rules, but still violate the Standards, and thus invite the court's opprobrium "consciously or unconsciously."[11]

The Standards for Appellate Conduct are divided into four parts. The first part, "Lawyers' Duties to Clients," sets out the standards "relating to the duties appellate practitioners owe their clients."[12] The second part, "Lawyers' Duties to the Court," outlines the standards that address appellate counsel's responsibilities to the court.[13] The third part, "Lawyers' Duties to Lawyers," contains the governing standards applicable to a "lawyer's [dealings] with other lawyers."[14] The final part, "The Court's Relationship with Counsel," sets forth guidelines for appellate courts to follow when dealing with attorneys appearing before them.[15]

The Disciplinary Rules, on the other hand, consist of eight sections, each containing a number of rules relevant to the area each section addresses: "Client-Lawyer Relationship";[16] "Counselor";[17] "Advocate";[18] "Non-Client Relationships";[19]

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10. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT pmbl. ¶ 7 (providing "minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action"); *see also* Kevin Dubose, *Standards of Appellate Conduct: Insight into Their Creation and Purpose*, 62 TEX. B.J. 558, 560 (1999) (summarizing that the "purpose of the Standards is not to provide another set of rules that provide ammunition for sanctions, grievances, or satellite litigation").

11. Kevin Dubose, *Standards of Appellate Conduct: Insight into Their Creation and Purpose*, 62 TEX. B.J. 558, 560 (1999).

12. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 399 (1999); Catherine Stone, *Appellate Standards of Conduct as Adopted in Texas*, 37 ST. MARY'S L.J. 1097, 1099 (2006).

13. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999); Catherine Stone, *Appellate Standards of Conduct as Adopted in Texas*, 37 ST. MARY'S L.J. 1097, 1099 (2006).

14. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400–01 (1999); Catherine Stone, *Appellate Standards of Conduct as Adopted in Texas*, 37 ST. MARY'S L.J. 1097, 1099 (2006).

15. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 401 (1999); Catherine Stone, *Appellate Standards of Conduct as Adopted in Texas*, 37 ST. MARY'S L.J. 1097, 1100 (2006).

16. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01–.15.

17. TEX. DISCIPLINARY R. PROF'L CONDUCT 2.01–.02.

"Law Firms and Associations";[20] "Public Service";[21] "Information About Legal Services";[22] and "Maintaining the Integrity of the Profession."[23] Based on their section titles, then, the Disciplinary Rules are much broader than the Standards.

This Article will compare the Texas Standards for Appellate Conduct to the Texas Disciplinary Rules of Professional Conduct in order to determine what types of appellate conduct, if any, might violate one set of rules and not the other. The Article is divided into three parts. Each part reviews the standards contained in each of the first three sections of the Standards and examines the Disciplinary Rules that may be relevant to each standard. The Article will not review the standards under "The Court's Relationship with Counsel," because it addresses the court's duties to counsel.[24]

II. LAWYERS' DUTIES TO CLIENTS

The Standards

> 1. "Counsel will advise their clients of the contents of these Standards of Conduct when undertaking representation."[25]

As the introduction to the first part of the Standards observes, a "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."[26] To that end, the first standard under "Lawyers' Duties to Clients" requires that appellate counsel advise their clients of the contents of the

18. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.01–.10.
19. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.01–.04.
20. TEX. DISCIPLINARY R. PROF'L CONDUCT 5.01–.08.
21. TEX. DISCIPLINARY R. PROF'L CONDUCT 6.01.
22. TEX. DISCIPLINARY R. PROF'L CONDUCT 7.01–.07.
23. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.01–.05.
24. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 401 (1999); Catherine Stone, *Appellate Standards of Conduct as Adopted in Texas*, 37 ST. MARY'S L.J. 1097, 1100 (2006).
25. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 399 (1999).
26. *Id.*

Standards at the start of representation.[27] The intent of the requirement is to provide "a valuable tool to use with clients" who, because they have "become more emotionally involved in their lawsuits than their attorneys," may demand unprofessional conduct.[28] The Standards therefore "impose . . . an affirmative duty [on counsel] to educate the client about the Standards of Appellate Conduct."[29] In theory, at least, this first standard will assist a "lawyer in handling a difficult client who demands unprofessional conduct."[30]

The Disciplinary Rules

Due to the broad scope of the Disciplinary Rules, there is no exact counterpart to Standard 1 in the Disciplinary Rules. Rule 1.03(b) is analogous, however.[31] The rule requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[32] As the comment to the rule observes, a client should be provided with sufficient information not only to "participate intelligently in decisions concerning the objectives of the representation," but "the means by which they are to be pursued to the extent the client is willing and able to do so."[33]

The means by which the client's goals are to be pursued, and of which a client must be advised, include handling the case within ethical norms. Rule 8.04(a)(1) mandates that "[a] lawyer shall not . . . violate these rules, knowingly assist or induce another to do so, or do so through the acts of another."[34] Furthermore, a number of rules specifically require a lawyer to advise the client of the ethical ramifications of proposed conduct and the lawyer's ethical prohibition in participating in the conduct. An attorney, for example, has the duty to counsel his client not to offer false evidence.[35] Other ethical rules similarly limit the scope of

27. *Id.*

28. Kevin Dubose, *Standards of Appellate Conduct: Insight into Their Creation and Purpose*, 62 TEX. B.J. 558, 560 (1999).

29. *Id.*

30. *Id.*

31. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03(b).

32. *Id.*

33. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt. 1.

34. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(1).

35. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(5) & cmt. 5 ("Initially . . . a

representation and expressly require that the client be advised of the limitation.[36] Rule 1.03(b), like the first standard under "Lawyers' Duties to Clients," acts as a catch-all provision requiring counsel to advise his client of ethical limitations on proposed courses of conduct.

Rule 1.03 differs from its counterpart in the Standards in its timing and scope. The rule does not require an attorney to notify his client of all possible ethical restraints upon his representation, but only to the extent as to permit the client "to make informed decisions regarding the representation."[37] In addition, the lawyer is not specifically obligated to advise his client of ethical constraints upon undertaking representation but can wait until it is reasonably necessary to inform the client of ethical concerns so as to enable the client to make an informed decision regarding the course of representation.[38] Thus, under the Disciplinary Rules, a lawyer is obligated to advise his client of any ethical ramifications of representation only if, and when, the specific need arises, and not before.

The Standards

> 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."[39]

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lawyer should urge the client or other person involved to not offer false or fabricated evidence."); Nix v. Whiteside, 475 U.S. 157, 169 (1986) ("It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct.").

36. *See, e.g.*, TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(c) ("A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent."); TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(d) ("When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act . . . the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud."); TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(b) ("If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence.").

37. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03(b).

38. *Id.*

39. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 399 (1999).

The second standard under "Lawyers' Duties to Clients" requires that counsel explain her fees and possible expenses to the client.[40] The wording of this standard implies that a lawyer may not begin representation until after she has explained the fee agreement and cost expectations.[41] The standard does not mandate that the fee be reasonable, much less suggest what the fee may be based upon, or that it be reduced to writing.[42]

Once fees and costs have been explained, an appellate lawyer must then "endeavor to achieve the client's lawful appellate objectives as quickly, efficiently, and economically as possible."[43] The lawful objective of appellate representation, as defined by the introduction to the Standards,

> 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.[44]

The Disciplinary Rules

The preamble to the Disciplinary Rules outlines a lawyer's representation more broadly than the Standards. The Disciplinary Rules provide:

> As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.[45]

Rule 1.04(c) provides that "[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee shall be

40. *Id.*

41. *See id.* (stating counsel will first make costs and fees clear to the client and then work zealously to attain the client's lawful goals).

42. *See id.* (omitting any reference to fees except insofar as costs and fees should be explained to clients).

43. *Id.*

44. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 399 (1999) (emphasis omitted).

45. TEX. DISCIPLINARY R. PROF'L CONDUCT pmbl. ¶ 2.

communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation."[46] Unlike the Standards, the rule thus permits a lawyer, in his discretion, to begin work on a client's case before advising him of fees and costs. The rule also urges that the communication of fees be in writing.[47]

In addition to fee issues such as the requirements of a contingent fee and the division of fees, Rule 1.04 differs from the Standards in that it requires that counsel not "charge, or collect an illegal . . . or unconscionable fee."[48] As the comment to the rule acknowledges, determining whether a fee is reasonable "can be a difficult question."[49] Because "a standard of 'reasonableness' is too vague and uncertain," the rule casts the prohibition in terms of "unconscionable" rather than "unreasonable," and defines the term "in a way to eliminate factual disputes as to a fee's reasonableness."[50]

"A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable."[51] The rule sets out eight "[f]actors that may be considered in determining the reasonableness of a fee."[52] These include: the time, labor, and skill involved; "the novelty and difficulty of the questions involved"; the likelihood that the attorney will be unable to take on other employment; customary fees within the locality; the "amount involved and the results obtained"; any time limitations; the nature and duration of the lawyer-client relationship; the experience and ability of the lawyer; and "whether the fee is fixed or contingent."[53] However, whether a fee may be unconscionable is not limited to the listed factors.[54]

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46. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(c).

47. *See id.* (declaring that the communication of the basis of the fee in writing is only a preference and is not required).

48. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(a).

49. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04 cmt. 1.

50. *Id.*; *see also* 48 ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS: ATTORNEY TORT STANDARDS, ATTORNEY ETHIC STANDARDS § 6:4 (2008) (discussing the drafting committee's adoption of an unconscionable standard and recent court interpretations).

51. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(a).

52. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(b)(1)–(8).

53. *Id.*

54. *See* Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 561–63 (Tex. 2006) (holding a fee agreement unconscionable where it contracted around established remedies

Echoing the importance of early communication between lawyer and client embodied both by subsection (c) of Rule 1.04 and the Standards, the comments warn that a "factor[] in otherwise borderline cases [that] might indicate a fee may be unconscionable . . . is a failure of the lawyer to give at the outset a clear and accurate explanation of how a fee was to be calculated."[55] At the other end of the spectrum, "a fee arrangement negotiated at arm's length with an experienced business client would rarely be subject to question."[56]

Depending upon the circumstances, a fraudulent or unreasonable fee might violate other disciplinary rules, such as Rule 8.04(a)(3) ("A lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation");[57] Rule 8.04(a)(2) ("A lawyer shall not . . . [engage in conduct] that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer");[58] Rule 5.08(a) (A lawyer shall not manifest bias or prejudice);[59] Rule 3.02 ("A lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter");[60] Rule 3.01 (A lawyer shall not bring or maintain a frivolous claim or defense);[61] Rule 1.06(b)(2) (A lawyer shall not continue representation where it becomes adverse to lawyer's own interests);[62] Rule 1.03(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed

for fee collection); *see also* Gray Law LLP v. Transcon. Ins. Co., 560 F.3d 361, 370 (5th Cir. 2009) (Jolly, J., concurring) (declaring unconscionable the practice of deducting contingency fees from gross settlement rather than net settlement after liens are paid); Lee v. Daniels & Daniels, 264 S.W.3d 273, 280–81 (Tex. App.—San Antonio 2008, pet. denied) (stating that "[u]nconscionability has no single legal definition and must be determined on a case by case basis" and finding attorney's fees related to withdrawing from representation against client's wishes unconscionable); Eureste v. Comm'n for Lawyer Discipline, 76 S.W.3d 184, 196–97 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (concluding that a lawyer's practice of charging a monthly fee to review files when no one in the office actually performed a review is unconscionable).

55. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04 cmt. 8.
56. *Id.*
57. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(3).
58. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(2).
59. TEX. DISCIPLINARY R. PROF'L CONDUCT 5.08(a).
60. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.02.
61. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.01.
62. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)(2).

decisions regarding the representation");[63] and Rule 1.03(a) ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information").[64] In addition, fiduciary duties and contract principles may also constrain billing practices and subject an

63. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03(b).

64. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03(a); *see also In re* Beckner, 778 N.E.2d 806, 811 (Ind. 2002) (holding that a lawyer's fee scheme violated disciplinary rules prohibiting unreasonable fees and conduct involving deceit or misrepresentation); Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Tofflemire, 689 N.W.2d 83, 92 (Iowa 2004) (concluding that an attorney's bills were so inaccurate as to violate disciplinary rules against misrepresentation and the attorney's billing practices so questionable as to "constitute[] conduct prejudicial to the administration of justice" adversely reflecting on her fitness to practice law); *In re* Kellogg, 50 P.3d 57, 64 (Kan. 2002) (determining a lawyer's bill padding constituted "conduct involving dishonesty, fraud, deceit, or misrepresentation," thus violating rules of ethics); Att'y Grievance Comm'n of Md. v. Braskey, 836 A.2d 605, 623 (Md. 2003) (declaring an attorney who delayed disbursement of settlement funds while disputing an unreasonable fee violated prohibitions against failing to disburse settlement funds, charging unreasonable fees, and conduct involving fraud, deceit, dishonesty, or misrepresentation); Toledo Bar Ass'n v. Shousher, 861 N.E.2d 536, 536–40 (Ohio 2007) (declaring an attorney's billing for work not performed for multiple clients violated disciplinary rule against "clearly excessive" fees and rule "prohibiting conduct involving fraud, deceit, dishonesty, or misrepresentation"); Cincinnati Bar Ass'n v. Washington, 847 N.E.2d 435, 436 (Ohio 2006) (holding that an attorney's billing for work not performed for a single client violated disciplinary rule against "clearly excessive" fees and rule "prohibiting conduct involving fraud, deceit, dishonesty, or misrepresentation"); Disciplinary Counsel v. Carroll, 831 N.E.2d 1000, 1002–03 (Ohio 2005) (asserting that an attorney's filing of false time sheets for salaried position on the state board while actually representing private clients constituted conduct reflecting adversely upon lawyer's fitness to practice law and conduct involving fraud, deceit, dishonesty, or misrepresentation); State *ex rel.* Okla. Bar Ass'n v. Leigh, 914 P.2d 661, 666 (Okla. 1996) (stating a lawyer who had failed the Certified Public Accountant exam but nevertheless used "CPA" on his statements for services to justify billing rates violated rules against charging unreasonable fees, making false or misleading statements, and prohibiting conduct involving fraud, deceit, dishonesty, or misrepresentation); *In re* Jennings, 468 S.E.2d 869, 874 (S.C. 1996) (finding an attorney's practice of arbitrarily doubling associate's fee to reflect supervisory work and arbitrarily assigning overhead to specific clients violated rules prohibiting unreasonable fees, false and misleading communications, and conduct involving fraud, deceit, dishonesty, or misrepresentation); *In re* Disciplinary Proceedings Against Winkel, 706 N.W.2d 661, 665–66 (Wis. 2005) (asserting a supervising lawyer's doubling of associate hours in fee application to Social Security Administration violated disciplinary rule prohibiting dishonesty, fraud, deceit, or misrepresentation); *In re* Disciplinary Proceedings Against Glasbrenner, 695 N.W.2d 291, 293 (Wis. 2005) (holding an associate who over-billed public defender's office violated rules prohibiting "unreasonable" fees and conduct involving dishonesty, fraud, deceit, or misrepresentation); Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problems of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63, 71–73 nn.48–59 (2008) (examining ethics rules that apply to billing practices, as opposed to fees).

attorney to discipline or civil liability.[65]

There is no specific disciplinary rule that requires a lawyer to work "quickly, efficiently, and economically."[66] Arguably, the requirement in Rule 1.04 that a fee not be unconscionable implies that counsel perform his duties in such a manner.[67] Rule 1.01(b) similarly mandates that "a lawyer shall not . . . neglect a legal matter entrusted to the lawyer," which, though not suggesting that counsel work quickly, implies that counsel should not procrastinate.[68] In addition, the preamble to the rules maintains that "a lawyer should be competent, prompt and diligent."[69]

The Standards

> 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."[70]
> 4. "Counsel will be faithful to their clients' lawful

65. McGuire, Craddock, Strother & Hale, P.C. v. Transcon. Realty Investors, Inc., 251 S.W.3d 890, 896 (Tex. App.—Dallas 2008, pet. denied) (explaining that in light of fact issues surrounding firm's billing practices, the trial court erred in finding that the fees breached "fiduciary duty as a matter of law"); *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.8, at 176–84 (1986) (examining lawyer's fiduciary duties regarding fees, billing, and bailment); Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problems of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63, 78–79 (2008).

66. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 399 (1999). The Disciplinary Rules do require that a lawyer "not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(a).

67. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(a) (listing time and labor as factors to be considered when determining whether a fee is unconscionable).

68. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(b)(1) & cmt. 7.

69. TEX. DISCIPLINARY R. PROF'L CONDUCT pmbl. ¶ 3. A lawyer is subject to discipline only for a violation of the Disciplinary Rules and not for transgressing the preamble or comments to the Disciplinary Rules. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT pmbl. ¶ 10 ("The Comments do not, however, add obligations to the rules and no disciplinary action may be taken for failure to conform to the Comments."); *see also* Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199, 224–33, 228 n.198 (2007) (discussing ethical and legal implications of billing and reviewing cases in which lawyers have been prosecuted either criminally or through the grievance process).

70. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 399–400 (1999).

> objectives, while mindful of their concurrent duties to the legal system and the public good."[71]

Acknowledging that sympathy for a client is not only unavoidable, but can be beneficial, the third standard of the "Lawyers' Duties to Clients" casts emotion, within limits, as a positive good, stating that "counsel will maintain *sympathetic* detachment."[72] The standard further acknowledges the inherent danger in identifying too closely with one's client, warning that a lawyer "should not become so closely associated with clients that the lawyer's objective detachment is impaired."[73]

In addition to requiring counsel to balance his sympathy toward his client against the client's need for independent analysis, the Standards also require a lawyer to balance the client's singular and private objectives against the larger requirements of the legal system as a whole and the greater public good.[74] The fourth standard under "Lawyers' Duties to Clients" specifically articulates the necessity of balancing the client's benefit against that of the legal system and society, though it does not indicate in which direction the balance should tip.[75] The standard does not cast the prescription in terms of a lawyer's zeal in his representation of a client, but instead speaks only of being faithful to a client's "lawful [appellate] objectives."[76]

In addition, by specifically limiting a lawyer to faithfully pursuing her client's "lawful [appellate] objectives," but at the same time cautioning that she owes concurrent duties to the legal system and the wider public good, the standard implies that a client's goals may conflict with either the legal system or the wider public good even though they may nevertheless be lawful.[77] This contrasts with the accepted view in the legal community "that a lawyer may represent any client—no matter how outrageous, illegal, or immoral the client's past or future conduct might be—so

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71. *Id.* at 400.

72. *Id.* at 399 (emphasis added).

73. *Id.* at 400.

74. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.3, at 578–81 (1986) (examining a lawyer's fiduciary duties regarding fees, billing, and bailment).

75. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

76. *Id.*

77. *Id.*

long as the lawyer will not be required in the course of the representation to violate any law or applicable lawyer code."[78]

Taken together, Standards 3 and 4 require lawyers to faithfully pursue a client's goals while maintaining an emotional distance from them in order to offer candid advice and balance competing duties placed upon them by their responsibilities to their clients, the legal system, and the community.

The Disciplinary Rules

The Disciplinary Rules do not strike the sensitive balances that the Standards attempt. Rule 2.01 merely declares: "In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice."[79] The comment to the rule explains that a client is entitled to "straightforward advice" that may "often involve[] unpleasant facts and alternatives that a client may be disinclined to confront."[80] The comment further emphasizes that "a lawyer should not be deterred from giving candid advice" even if the client will find it unpalatable.[81]

Rule 2.01 also requires counsel to "exercise independent professional judgment."[82] As the comment observes, narrow, strict legal analysis of a client's problem may sometimes be of "little value . . . where practical considerations, such as costs or effects on other people, are predominant."[83] The thrust of the

78. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.2.1, at 569 (1986); *see also* Nix v. Whiteside, 475 U.S. 157, 169 (1986) ("[T]he legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct . . . .").

79. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

80. TEX. DISCIPLINARY R. PROF'L CONDUCT 2.01 cmt. 1; *see, e.g.*, Nix v. Whiteside, 475 U.S. 157, 169 (1986) ("It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct.").

81. TEX. DISCIPLINARY R. PROF'L CONDUCT 2.01 cmt. 1. The same theme is echoed in one of the justifications put forth for the adoption of the Standards: "Behaving in a professional manner is not only a nice idea, it is a smart idea that advances the interests of your client in incalculable ways." Kevin Dubose, *Standards of Appellate Conduct: Insight into Their Creation and Purpose*, 62 TEX. B.J. 558, 560 (1999).

82. TEX. DISCIPLINARY R. PROF'L CONDUCT 2.01.

83. TEX. DISCIPLINARY R. PROF'L CONDUCT 2.01 cmt. 2.

rule and comment is that a lawyer must view a case in more than purely legal terms.[84] Counsel must advise on the possible effects of the outcome of a particular course of action, as well as the manner or approach in which to achieve that outcome and as the comment declares: "It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice."[85] Even when a client expressly asks for mere technical advice, the "lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations."[86]

The preamble to the Disciplinary Rules states that "a lawyer should zealously pursue clients' interests within the bounds of the law."[87] This admonition appears to adopt the principles of professional detachment and zealous partisanship, the idea that "once a lawyer has accepted a client the lawyer is bound to use all of the lawyer's professional knowledge and skills to advance the legal interests of [his] client, regardless of the lawyer's private reservations about the client's course of action based on moral, social, political, or economic reasons."[88] The Disciplinary Rules themselves do not explicitly adopt these two principles. However, their silence regarding the necessity of balancing a client's interests against outside concerns, other than a violation of the law or the ethics rules themselves, suggests that, unlike the Standards, the Disciplinary Rules embrace both philosophies.[89]

The Standards

> 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

84. TEX. DISCIPLINARY R. PROF'L CONDUCT 2.01 & cmt. 2.

85. TEX. DISCIPLINARY R. PROF'L CONDUCT 2.01 cmt. 2.

86. TEX. DISCIPLINARY R. PROF'L CONDUCT 2.01 cmt. 3.

87. TEX. DISCIPLINARY R. PROF'L CONDUCT pmbl. ¶ 3.

88. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.2.1, at 569 (1986); *see also id.* § 10.3, at 578–83 (summarizing the duty of lawyers to pursue a client's interests, as defined by the client, with "energy, intelligence, skill, and personal commitment").

89. *See* Thomas v. City of N. Las Vegas, 127 P.3d 1057, 1067 (Nev. 2006) ("Zealous advocacy is the cornerstone of good lawyering and the bedrock of a just legal system. However, zeal cannot give way to unprofessionalism, noncompliance with court rules, or, most importantly, to violations of the ethical duties of candor to the courts and to opposing counsel.").

> alternative dispute resolution."[90]
> 6. "Counsel will not foster clients' unrealistic expectations."[91]
> 7. "Negative opinions of the court or opposing counsel shall not be expressed unless relevant to a client's decision process."[92]
> 8. "Counsel will keep clients informed and involved in decisions and will promptly respond to inquiries."[93]
> 9. "Counsel will advise their clients of proper behavior, including that civility and courtesy are expected."[94]

Standards 5 through 9 of "Lawyers' Duties to Clients" set out specific advice and warnings appellate counsel must give to his clients.[95] In addition to a general explanation of the appellate process—including "the range of possible outcomes, likely costs, timetables, [the] effect of the judgment pending appeal, and the availability of alternative dispute resolution"—a lawyer is obligated under the Standards to keep his clients informed and involved in decisions, to respond to inquiries, and to advise the client "of proper behavior, including that civility and courtesy are expected."[96]

The sixth standard cautions counsel "not to foster clients' unrealistic expectations," though the standard does not define what an unrealistic, as opposed to a realistic, expectation might be.[97] If it were actually to be enforced, the standard would probably be found unconstitutionally vague.[98]

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90. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

96. *Id.*

97. *Id.*

98. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1048–51 (1991) (holding "safe harbor" provision of Nevada Disciplinary Rule 177(l) was void for vagueness); Comm'n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 440 (Tex. 1998) (finding the term "embarrass" as used in Texas Disciplinary Rule 3.06(d) too vague to withstand constitutional scrutiny).

Similarly, the seventh standard, though laudatory in its goal, would also present constitutional problems if it were ever to be enforced. The standard declares: "Negative opinions of the court or opposing counsel shall not be expressed unless relevant to a client's decision process."[99] The standard of negative opinions is most likely too vague to withstand constitutional scrutiny.[100] Moreover, even if it were not, a rule banning all "negative opinions" in private communications between counsel and his clients would run afoul of the First Amendment.[101]

The Disciplinary Rules

The Disciplinary Rules contain no analogous rules that require a lawyer to explain specific aspects of the appellate process to her clients. Rule 1.03(b) mandates that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[102] The comment to Rule 1.03 observes that "[i]n litigation a lawyer should explain the general strategy and prospects of success[,] . . . [though he] ordinarily cannot be expected to describe trial or negotiation strategy in detail."[103] In light of how basic the information required under the fifth standard is for making informed decisions about appellate representation, Rule 1.03(b) almost certainly encompasses similar information, though it does not specifically mandate what information must be provided.

Disciplinary Rule 1.03(a) requires a lawyer to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."[104] The rule thus mirrors the eighth appellate standard that requires counsel to keep his client "informed and involved in decisions" and to

99. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

100. *See Gentile*, 501 U.S. at 1048–51 (determining the "safe harbor" provision of Nevada Disciplinary Rule 177(l) to be unconstitutionally vague); *Benton*, 980 S.W.2d at 440 (striking the term "embarrass" in Texas Disciplinary Rule 3.06(d) as unconstitutionally vague).

101. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.").

102. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03(b).

103. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt. 2.

104. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03(a).

"promptly respond to inquiries."[105] "The guiding principle [under the Disciplinary Rules] is that the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client's best interests . . . ."[106]

In addition to violating both the Standards and Disciplinary Rule 1.03, an appellate counsel's failure to apprise his client of any remaining applicable deadlines upon withdrawing from a criminal case will constitute ineffective assistance of counsel.[107]

The Standards

> 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."[108]
> 11. "A client has no right to demand that counsel abuse anyone or engage in any offensive conduct."[109]

Standards 10 and 11 under "Lawyers' Duties to Clients" outline clients' ethical duties toward their appellate counsel.[110] The tenth standard states, "[a] client has no right to instruct a lawyer to refuse reasonable requests made by other counsel."[111] Standard 11 declares that "[a] client has no right to demand that counsel abuse anyone or engage in any offensive conduct."[112] Curiously, neither standard is cast as an imperative, as in "a client shall not." Instead, both standards are cast in a negative extreme: "a client has no right to." By casting the responsibility in the negative, the

105. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

106. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 cmt. 2.

107. *See Ex parte* Lozada-Mendoza, 45 S.W.3d 107, 109–10 (Tex. Crim. App. 2001) (restating an appellate attorney's obligation to notify his client "of his right to pursue further appellate review of his case").

108. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

two standards limit a client's ability to insist on a course of conduct after an attorney has declined to follow an unethical instruction. Thus, they limit an attorney's invocation of a "Nuremberg defense" in response to any attempt to discipline the prohibited conduct.[113] Oddly perhaps, when strictly interpreted, a client who merely asks his lawyer to engage in the underlying prohibited conduct or who has merely acquiesced in the conduct cannot be sanctioned under the Standards, though his lawyer could be.

Another oddity of the two standards is that Standard 10, which states that "[a] client has no right to instruct a lawyer to refuse reasonable requests" for accommodation, requires counsel to advise his client that he "reserves the right to grant accommodations to opposing counsel in matters that do not adversely affect the client's lawful objectives."[114] Standard 11, on the other hand, states that the "client has no right to demand that counsel abuse anyone," but does not require counsel to so advise his client.[115] Presumably, the latter standard does not specifically require counsel to provide notice at the outset of representation because it is unlikely that a client will immediately demand abusive or offensive conduct, though it is more readily conceivable that a client might insist at the outset that counsel not agree to any proposal by the opposing party.

Finally, Standard 10 appears internally inconsistent. The standard requires counsel to advise a client that he may unilaterally grant an accommodation "in matters that do not adversely affect the client's lawful objectives."[116] Yet the standard goes on to declare that "[a] client has no right to instruct [his] lawyer to refuse reasonable requests made by other counsel."[117] Thus under Standard 10, a client may not demand that his lawyer refuse a reasonable request, while counsel may grant any accommodation, no matter how seemingly unreasonable

113. *Cf.* Edward L. Wilkinson, *Supervising Lawyers, Supervised Lawyers, Nonlawyer Assistants: Ethical Responsibilities Under the State Bar Rules*, 64 TEX. B.J. 452, 455 (2001) ("The Rules of Professional Conduct do not recognize a 'Nuremberg defense' to ethical violations.").

114. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

115. *Id.*

116. *Id.*

117. *Id.*

to the client, so long as it does not "adversely affect the client's . . . objectives."[118]

The Disciplinary Rules

The Disciplinary Rules do not expressly limit a client's rights to demand certain conduct by counsel. To the contrary, the Disciplinary Rules mandate that a lawyer "abide by a client's decisions . . . concerning the objectives and general methods of representation."[119] The Disciplinary Rules do provide that "[a] lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation."[120] The Disciplinary Rules also prohibit a lawyer from assisting or counseling "a client to engage in conduct that the lawyer knows is criminal or fraudulent."[121] Finally, upon learning "that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer [must] consult with the client regarding the relevant limitations on the lawyer's conduct."[122]

The only limitation regarding accommodation to opposing counsel, Rule 3.02, prohibits a lawyer from taking "a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter."[123] Under the rule, unless the increased cost, burden, or delay is unreasonable, counsel is obligated to abide by his client's instructions.[124] Counsel may explain the matter so that the client may make an informed decision[125]—and presumably advise the client that it may be in the client's best interest in the long run to permit the accommodation. The lawyer might even seek to limit the general methods of representation with the client's permission,[126] but counsel is ultimately bound, under the Disciplinary Rules, to follow the client's decision.[127] Thus, under the Disciplinary Rules, upon her client's instruction, a lawyer would be obligated to object

118. *Id.*
119. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a)(1).
120. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(b).
121. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(c).
122. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(f).
123. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.02.
124. *Id.*
125. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03.
126. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(b).
127. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a)(1).

to opposing counsel's motion for extension of time, a supplementation of the record to which the party is clearly entitled, or any similar accommodation, so long as such instruction does not unreasonably increase costs, delay resolution of the case, or otherwise unreasonably burden opposing counsel or his client.[128]

Rule 3.04 prohibits counsel from "engag[ing] in conduct intended to disrupt the proceedings" and from knowingly disobeying "an obligation under the standing rules of or a ruling by a tribunal."[129] This provision has been broadly interpreted to include conduct that could be construed as abusive or offensive.[130]

128. *Compare* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02 (delineating instances in which "a lawyer shall abide by a client's decisions"), *with* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.02 (prohibiting a lawyer from taking positions that increase costs, burdens, or unreasonable delays).

129. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04(c)(5), (d).

130. *See* People v. Clough, 74 P.3d 552, 561 (Colo. 2003) (asserting that counsel intentionally disrupted the tribunal by engaging in a verbal altercation with a State's witness in the courthouse lobby and afterward leaving the courthouse before the client's case had been called); Miss. Bar v. Lumumba, 912 So. 2d 871, 880–81 (Miss. 2005) (finding that an attorney intentionally disrupted proceedings by stating repeatedly to the judge that if he had "to pay for justice" he would "pay [the judge] too"); *In re* Neal, 81 P.3d 47, 50–52 (N.M. 2003) (stating that counsel intended to disrupt the tribunal by refusing to appear for trial by falsely claiming that he had been ordered to trial in another court and by entering into a dispute with a jail transport officer outside the courtroom); *In re* Disciplinary Action Against Garaas, 652 N.W.2d 918, 927 (N.D. 2002) (explaining that "disruptive, belligerent, and disrespectful" questioning of the court to determine the basis of its ruling was intended to disrupt a tribunal); Lawyer Disciplinary Bd. v. Turgeon, 557 S.E.2d 235, 239 (W. Va. 2000) (declaring that an attorney who intentionally made reference before the jury to a nonexistent polygraph test and called the prosecutor a "coke dealer," intended to disrupt tribunal); *In re* Disciplinary Proceedings Against Eisenberg, 675 N.W.2d 747, 751 (Wis. 2004) (finding a lawyer's "rude, abusive, controlling, and disrespectful" conduct toward hearing examiner was intended to disrupt the tribunal). *But see* Paramount Commc'ns Inc. v. QVC Network, Inc., 637 A.2d 34, 53–56 (Del. 1994) (asserting an attorney's conduct during deposition, such as instructing client not to answer legitimate questions, calling opposing counsel names, and characterizing questions as "stupid," was "extraordinarily rude, uncivil, and vulgar," and constituted "unprofessional behavior" that was "outrageous and unacceptable," and thus subject to sanctions); Att'y Grievance Comm'n of Md. v. Hermina, 842 A.2d 762, 768–70 (Md. 2004) (finding insufficient evidence to establish that an attorney's failure to comply with discovery orders was intended to disrupt the proceedings where the attorney's representation that he had not received the discovery request at issue was negligent rather than deliberate); *In re* Disciplinary Proceedings Against Ray, 651 N.W.2d 727, 731 (Wis. 2002) (explaining that, although attorney interrupted opposing counsel repeatedly with comments such as "Oh, brother," and "Oh, what crap," there was no evidence that counsel intended to disrupt the proceedings).

The Standards

> 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."[131]
> 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."[132]

The last two standards under the "Lawyers' Duties to Clients" require appellate counsel to advise his clients that appeals are to be made in good faith and may not be pursued without a reasonable basis, and that positions taken before an appellate court must not be frivolous.[133]

Standard 12 under this subsection tracks Standard 1 under "Lawyers' Duties to the Court."[134] Both standards caution that an appeal should be undertaken only if there is a good faith belief that error has been committed or that "there is a reasonable basis for the extension, modification, or reversal of existing law."[135] The two standards also permit an appeal if otherwise warranted, though neither outlines what might warrant an appeal that lacks a good faith basis that the trial court has committed error, and no reasonable belief for a change in the law.[136]

Surprisingly, though Standard 13 under "Lawyers' Duties to Clients" requires counsel to advise his clients that he will not take frivolous positions on appeal, there is no corresponding duty to

131. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

reject frivolous positions under the section "Lawyers' Duties to the Court."[137] Standard 13 observes that appointed counsel in criminal cases who "comply with the requirements imposed on appointed counsel by courts and statutes" are deemed to have complied with the requirements of the standard.[138] Yet the "requirements imposed on appointed counsel by courts" do not bar taking frivolous positions in an otherwise meritorious brief, but only prohibit pursuing appeals that are "wholly frivolous"—a very different thing.[139]

The use of the term "frivolous" in Standard 13, and not in Standard 12, suggests that there is a difference between a "good faith belief that the trial court has committed error or that there is a reasonable basis" for a change in the law and a "frivolous" argument on appeal, though what that difference may be is left unclear.[140] In the light of this implied difference, Standard 13 curiously does not define "frivolous." The United States Supreme Court has defined "frivolous" in the context of ethical briefing as not "arguable" on its merits[141] or "lack[ing] any basis in law or fact."[142] Presumably, "frivolous" under Standard 13 encompasses a similar definition.

The Disciplinary Rules

Rule 3.01 of the Disciplinary Rules mandates 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."[143] Neither Rule 3.01 nor any other Rule of Professional Conduct requires counsel to provide a client with specific advice or warnings regarding an appeal. Under Rule 1.03(b), of course, a lawyer is obligated to explain matters reasonably necessary for "the client to make

137. *See id.* (detailing a lawyer's duties to courts but omitting language that provides that a lawyer should not take a frivolous position on appeal).

138. *Id.*

139. *In re* Schulman, 252 S.W.3d 403, 406 (Tex. Crim. App. 2008) (quoting Anders v. California, 386 U.S. 738, 744 (1967)).

140. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

141. *Anders*, 386 U.S. at 744.

142. McCoy v. Ct. App. of Wis., Dist. 1, 486 U.S. 429, 438 n.10 (1988).

143. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.01.

informed decisions," which would necessarily include a warning that the lawyer and client are prohibited from pursuing meritless appeals or points of error, and that on the civil side, both counsel and the client could be penalized under the Rules of Appellate Procedure for pursuing a frivolous appeal.[144]

III. LAWYERS' DUTIES TO THE COURT

The Standards

> 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."[145]

The first standard under "Lawyers' Duties to the Court" prohibits counsel from pursuing an appellate remedy "unless counsel believes in good faith that [an] error has been committed" or has a reasonable basis for arguing a change in the law.[146] The Standards fail to define either "good faith" or "reasonable basis." Presumably, both are based on an objective standard of a reasonable lawyer.[147] The standard's specific reference to an appellate remedy, as opposed to mere appeal, indicates that the standard also applies to ancillary appellate actions such as mandamus or habeas corpus.[148]

Since the term "frivolous" is used elsewhere in the Standards, a

144. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03(b); TEX. R. APP. P. 45.

145. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

146. *Id.*; *see also* Sossi v. Willette & Guerra, 139 S.W.3d 85, 89–90 (Tex. App.—Corpus Christi 2004, no pet.) (citing a standard prohibiting mischaracterization of the record, but sanctioning appellant for filing an appeal when he had "no reasonable expectation" that the court "would assume jurisdiction" over his interlocutory appeal); *In re* Lerma, 144 S.W.3d 21, 26 (Tex. App.—El Paso 2004, orig. proceeding) (applying the Standards to mandamus, but finding no violation in filing of mandamus); *Ex parte* Lafon, 977 S.W.2d 865, 868 (Tex. App.—Dallas 1998, no pet.) (stating that a lawyer's filing of "an appeal in which there was no appealable issue, [] for the sole purpose of delaying the imposition of [his client's] sentence," violated the Standards).

147. *Cf.* TEX. DISCIPLINARY R. PROF'L CONDUCT terminology (defining "reasonable conduct" as the "conduct of a reasonably prudent and competent lawyer").

148. *See In re Lerma*, 144 S.W.3d at 26–27 (applying the Standards to a mandamus proceeding).

belief in good faith that an error has been committed would not appear to be synonymous with a reasonable belief that a point of error is not frivolous.[149] Nevertheless, although Standard 13 under "Lawyers' Duties to Clients" requires counsel to advise their clients that they "will not take frivolous positions in an appellate court," there is no specific parallel standard under "Lawyers' Duties to the Court."[150]

The right to appeal has been characterized as "a most sacred and valuable one"; abuse of the privilege therefore threatens to undermine the judicial system:

> [W]e will not permit spurious appeals, which unnecessarily burden parties and our already crowded docket, to go unpunished. Such appeals take the court's attention from appeals filed in good faith, wasting court time that could and should be devoted to those appeals. No litigant has the right to put a party to needless burden and expense or to waste a court's time that would otherwise be spent on the sacred task of adjudicating the valid disputes of Texas citizens.[151]

The Disciplinary Rules

Rule 3.01 of the Disciplinary Rules provides 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."[152] The comments to the rule

149. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

150. *Id.*

151. Lookshin v. Feldman, 127 S.W.3d 100, 106 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (quoting Bradt v. West, 892 S.W.2d 56, 79 (Tex. App.—Houston [1st Dist.] 1994, writ denied)); *see also* Chem. Eng'g Corp. v. Marlo, Inc., 754 F.2d 331, 335 (Fed. Cir. 1984) ("An appeal clearly hopeless and unquestionably without any possible basis in fact or law . . . 'wastes the time of the court and of opposing counsel, and imposes unnecessary costs on the parties and on fellow citizens whose taxes support this court and its staff.'" (quoting Amstar Corp. v. Envirotech Corp., 730 F.2d 1476, 1486 (Fed. Cir. 1984))); *In re* Lincoln, 114 S.W.3d 724, 728 (Tex. App.—Austin 2003, orig. proceeding) ("Both the trial and appellate dockets of this State are overcrowded as the courts struggle to adjudicate cases fairly and efficiently. Relentlessly pursuing such vexatious litigation unduly burdens the other parties involved and the judicial system itself.").

152. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.01. For a historical overview of frivolous appeals in Texas, see David Lopez, *Why Texas Courts Are Defenseless Against Frivolous Appeals: A Historical Analysis with Proposals for Reform*, 48 BAYLOR L. REV.

imply that an appeal or point of error may be frivolous on either a legal or factual basis. A contention is legally frivolous, the comment suggests, if (1) "it is made primarily for the purpose of harassing or maliciously injuring a person," or (2) "the lawyer is unable either to make a good faith argument that the action taken is consistent with existing law or that it may be supported by a good faith argument for an extension, modification or reversal of existing law."[153] A contention is factually frivolous "if it contains knowingly false statements of fact."[154]

Some courts, in weighing whether to assess penalties for a frivolous appeal, have examined whether the offending party turned a blind eye to controlling precedent or displayed a "conscious indifference to settled rules of law."[155] Parties that "have not discussed existing law that defeats some of their contentions, and have not argued that those rules of law should be

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51, 55–89 (1996).

153. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.01 cmt. 2; *see also In re Lerma*, 144 S.W.3d at 27 ("[D]enial of mandamus relief due to the existence of an adequate remedy by appeal does not automatically establish that the mandamus is so clearly groundless as to warrant sanctions."); *In re Lincoln*, 114 S.W.3d at 727 (sanctioning counsel after finding "that there is no legal or factual basis to arguably justify the filing of [party's] groundless petition for writ of mandamus"); *cf.* Am. Paging of Tex., Inc. v. El Paso Paging, Inc., 9 S.W.3d 237, 240–41 (Tex. App.—El Paso 1999, pet. denied) (stating that an appeal is frivolous for purposes of Rule 45 of the Texas Rules of Appellate Procedure "if the record clearly shows the appellant has no reasonable expectation of reversal, and the appellant has not pursued the appeal in good faith" and noting that a court may "look at the record from the viewpoint of the advocate and determine whether it had reasonable grounds to believe the judgment should be reversed").

154. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.01 cmt. 3; *see also* Bridges v. Robinson, 20 S.W.3d 104, 116 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (sanctioning counsel for affirmatively representing that there were no material disputed facts in the case although counsel was aware of contrary testimony in the record).

155. *See* Parker v. State Farm Mut. Auto. Ins. Co., 4 S.W.3d 358, 365 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (concluding that appellant had failed to raise "well-researched, arguable issues" and had shown a "conscious indifference to settled rules of law"); Bradt v. West, 892 S.W.2d 56, 79 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (identifying multiple examples of well-established law that defeat[ed]" the appellants' contentions and toward which the appellants turned a "'blind eye'"); Tex. Employers' Ins. Ass'n v. Armstrong, 774 S.W.2d 755, 756–57 (Tex. App.—Houston [1st Dist.] 1989, no writ) (declaring that appellant had turned a blind eye to precedent and concluding that the record reflected a "conscious indifference to settled rules of law"); Bullock v. Sage Energy Co., 728 S.W.2d 465, 469 (Tex. App.—Austin 1987, writ ref'd n.r.e.) (sanctioning state comptroller after his office turned a blind eye to controlling unpublished precedent and required defendant "to run the administrative gantlet and to seek judicial review, all at an expense and inconvenience that statutory interest on the judgment hardly compensates").

changed" may be sanctioned for pursuing a frivolous appeal.[156]

Under the Disciplinary Rules, both retained and appointed counsel in criminal cases are obligated to refuse to prosecute a frivolous appeal.[157] "If an[y] attorney believes in good faith that there are no arguments he can make on his client's behalf he is required to so advise the appellate court and seek leave to withdraw as counsel."[158] However, under the Sixth Amendment, both retained and appointed counsel must make a diligent and thorough evaluation of the case before concluding that an appeal is frivolous.[159] The appellate lawyer must "master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal."[160] Only appointed counsel in a criminal case, however, is required to file an *Anders* brief, referring to anything in the record that might arguably support the appeal, along with his motion to withdraw.[161]

Prosecutors do not represent clients, and thus have no formal obligation under the Sixth Amendment to make a "diligent and thorough evaluation" of a case before deciding not to appeal the cause.[162] Article 2.03 of the Texas Code of Criminal Procedure,

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156. *Bradt*, 892 S.W.2d at 79.

157. *See Ex parte* Lafon, 977 S.W.2d 865, 868 (Tex. App.—Dallas 1998, no pet.) (determining that a lawyer violated "the spirit and letter" of Rule 3.01 by filing a motion to quash that he believed "had no merit whatsoever" and pursuing an appeal for the "sole purpose of obstructing the implementation of a criminal sentence"); *see also* McCoy v. Ct. App. of Wis., Dist. 1, 486 U.S. 429, 436 (1988) (relying upon the ABA Standards of Justice in finding that "[a]n attorney ... [has] an ethical obligation to refuse to prosecute a frivolous appeal"); Pena v. State, 932 S.W.2d 31, 32 (Tex. App.—El Paso 1995, writ denied) (holding counsel has an ethical duty under Rule 3.01 to refuse to file a frivolous appeal).

158. *Pena*, 932 S.W.2d at 32 (quoting *McCoy*, 486 U.S. at 436); *see Am. Paging of Tex., Inc.*, 9 S.W.3d at 241 (stating that when determining whether an appeal is frivolous for purposes of awarding damages in a civil case under Rule 45 of the Texas Rules of Appellate Procedure, the courts may consider four factors that tend to indicate an appeal is frivolous: "(1) the unexplained absence of a [reporter's record]; (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").

159. *McCoy*, 486 U.S. at 436.

160. *Pena*, 932 S.W.2d at 32 (citing *McCoy*, 486 U.S. at 438).

161. *Id.* at 33.

162. *Cf. McCoy*, 486 U.S. at 436 (stating that only retained counsel must file an *Anders* brief); TEX. CODE CRIM. PROC. ANN. art. 2.01 (Vernon 2005) ("Each district attorney shall represent the State in all criminal cases ....").

however, stipulates that it is the duty of "the attorney representing the [S]tate . . . to so conduct [herself] as to insure a fair trial for both the [S]tate and the defendant."[163] Arguably, this duty, as well as counsel's obligation not to pursue a meritless appeal, requires the State's appellate counsel to perform a diligent and thorough evaluation of a case before electing to pursue or not to pursue a State's appeal.[164]

Rule 3.01 also prohibits a party from advancing or defending an issue unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.[165] This can place an appellate attorney in the difficult position of having to weigh whether the courts might be open to reconsidering previously rejected arguments or unpreserved error against the possibility that their position will be deemed frivolous.[166]

Prosecutors are under an additional obligation not to pursue a meritless appeal or adopt a meritless position as an appellee.[167] Under article 2.01 of the Code of Criminal Procedure, it is the "primary duty [of all prosecutors] not to convict, but to see that justice is done."[168] A prosecutor enjoys a special status as a representative of a sovereignty "'whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'"[169] He "is more than a mere advocate, but a fiduciary to fundamental principles of fairness."[170] An appeal of an obviously correct pre-trial ruling, or the refusal to confess obvious error,

163. TEX. CODE CRIM. PROC. ANN. art. 2.03(b) (Vernon 2005).

164. *See also* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.01 ("A lawyer shall not bring or . . . assert . . . [a frivolous] issue . . . .").

165. *Id.*

166. *See* Brent E. Newton, Almendarez-Torres *and the* Anders *Ethical Dilemma*, 45 HOUS. L. REV. 747, 789–95 (2008) (showing that a particular legal issue may be deemed frivolous at a particular point in time, yet the same issue may subsequently become nonfrivolous); *cf. In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999) ("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.").

167. TEX. CODE CRIM. PROC. ANN. art. 2.01 (Vernon 2005) ("It shall be the primary duty of all prosecutors . . . not to convict, but to see that justice is done.").

168. *Id.*

169. Strickler v. Greene, 527 U.S. 263, 280 (1999) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

170. Duggan v. State, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989).

would violate both Rule 3.01 and article 2.01.

The Standards

> 2. "An appellate remedy should not be pursued primarily for purposes of delay or harassment."[171]

In addition to requiring counsel to pursue an appeal only in good faith, the Standards prohibit counsel from pursuing even a valid appeal for an inappropriate reason. Standard 2 under "Lawyers' Duties to the Court" warns that "[a]n appellate remedy should not be pursued primarily for purposes of delay or harassment."[172] By the use of the term "appellate remedy," rather than "appeal," the standard encompasses not only a direct appeal, but appellate processes such as abatement, mandamus, and writs of habeas corpus.

The standard limits its scope to the pursuit of remedies that are "primarily for [the] purpose[] of delay or harassment"; implicitly, remedies that are sought for other purposes, but that might result in delay or harassment, are not barred.[173] Thus, delays caused by an attorney's work load, or the necessity for more time to prepare, do not violate the standard. In contrast, a defendant's appeal for the sole purpose of delaying the finality of a conviction so that it could not be used in another case or to delay implementation of a sentence, or a prosecutor's appeal, or contravention of an appeal, for the purpose of keeping the defendant in jail or on bond would violate the standard.[174]

Nevertheless, following the courts' interpretation of an earlier civil rule[175] that permitted the award of damages against an appellant who had "taken an appeal for delay and *without*

171. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

172. *Id.*

173. *Id.*

174. *See Ex parte* Lafon, 977 S.W.2d 865, 868 (Tex. App.—Dallas 1998, no pet.) (maintaining that a lawyer's pursuit of an appeal for the "sole purpose of obstructing the implementation of a criminal sentence" violated the standard).

175. The former rule, Rule 84 of the Texas Rules of Civil Procedure, was replaced as of September 1, 1997, by Rule 45 of the Texas Rules of Appellate Procedure. TEX. R. APP. P. 45, cmt. to 1997 change.

sufficient cause,"[176] an appellant need not have benefitted in some specific way, financial or otherwise, in order to have violated the prohibition.[177] "It is the fact of delay that is important, not the reason."[178]

The term "harassment" potentially presents a constitutional problem because of its vagueness.[179] The courts' interpretation of the term in criminal statutes provides sufficient guidance, however, to overcome constitutional objections.[180] In light of the definition the Texas Court of Criminal Appeals has adopted, however, it is difficult to envision how appellate counsel might harass an opponent through the pursuit of an appellate remedy.[181]

The Disciplinary Rules

Rule 3.02 of the Disciplinary Rules of Professional Conduct echoes the second standard under "Lawyers' Duties to the Courts." The Disciplinary Rules provide that "a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter."[182] Comment one to Rule 3.02 acknowledges that tactics that delay the resolution of a matter "are frequently an appropriate way of achieving the legitimate interests of the

176. Smith v. Brown, 51 S.W.3d 376, 380 n.4 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (emphasis added).

177. *See* Bradt v. West, 892 S.W.2d 56, 79 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Dallas County Appraisal Dist. v. Leaves, Inc., 742 S.W.2d 424, 431 (Tex. App.—Dallas 1987, writ denied).

178. *Leaves*, 742 S.W.2d at 431; *see also Bradt*, 892 S.W.2d at 79 (concluding that counsel was "simply putting off the final disposition of th[e] litigation" and rejecting his "specious" reasons therefore); Dolenz v. A__B__, 742 S.W.2d 82, 86 (Tex. App.—Dallas 1987, writ denied) (sanctioning the attorney for filing an appeal to simply delay final disposition).

179. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1048–51 (1991) (declaring the "safe harbor" provision of Nevada Disciplinary Rule 177(l) void for vagueness); Comm'n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 440 (Tex. 1998) (finding the term "embarrass" as used in Texas Disciplinary Rule 3.06(d) too vague to withstand constitutional scrutiny); *see also* Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (holding that the term "annoy" rendered disciplinary rule void for vagueness).

180. *Benton*, 980 S.W.2d at 439–40 (maintaining the term "harass" in Rule 3.06(d) is not void for vagueness if viewed consistently with criminal stalking statutes).

181. *See id.* (stating that "harass" as used in Rule 3.06(d) includes: "(1) a course of conduct, (2) directed at a specific person or persons, (3) causing or tending to cause substantial distress, and (4) having no legitimate purpose").

182. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.02.

client."[183] Thus, the rule proscribes only unreasonable costs or delays.[184] According to the comments, a dilatory practice merely for the lawyer's convenience is unreasonable, unless the delay is sought to permit "the competent discharge of a lawyer's multiple obligations" to different clients or to serve "the legitimate interests of the client" in preparing for a case.[185] In contrast, delay "for the purpose of harassing or maliciously injuring another" is never acceptable under the rule.[186] "The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay undertaken for the purpose of harassing or malicious[ly] injuring."[187] In the criminal context, a defense attorney who delays an appeal merely so that his client can stay out on bond, or a prosecutor who stalls an appeal simply to keep a defendant in jail, would violate the rule as such delays would be unreasonable or unwarranted.[188]

The rule also bans "tak[ing] a position that unreasonably increases the costs or other burdens of [a] case."[189] The comment suggests that an example of impermissible conduct regarding increasing the costs of litigation "is a lawyer who counsels or assists a client in seeking multiplication of the costs or other burdens of litigation as the primary purpose" in the hope of gaining "an advantage in resolving the matter unrelated to the merits of the client's position."[190] Appellate counsel who seek repeated extensions merely to gain a financial or emotional advantage over the opposing party in order to facilitate a settlement, for example, would violate the rule.

The Standards

> 3. "Counsel should not misrepresent, mischaracterize, misquote, or miscite the factual record or legal

183. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.02 cmt. 1.
184. *Id.*
185. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.02 cmts. 3–4.
186. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.02 cmt. 5.
187. *Id.*
188. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.02 cmt. 1.
189. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.02.
190. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.02 cmt. 7.

> authorities."[191]
> 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."[192]
> 5. "Counsel will present the court with a thoughtful, organized, and clearly written brief."[193]
> 6. "Counsel will not submit reply briefs on issues previously briefed in order to obtain the last word."[194]

Taken together, Standards 3, 4, 5, and 6 under "Lawyers' Duties to the Court" constitute the requirements for ethical briefing and argument in Texas appellate courts. The standards require counsel to not "misrepresent, mischaracterize, misquote, or miscite" the facts or law; to inform the court if cited authority "has been reversed, overruled, or restricted"; to "advise the court of controlling legal authorit[y]"; to present a brief that is "thoughtful, organized, and clearly written"; and not to file reply briefs simply "to obtain the last word."[195]

The Fourteenth Court of Appeals has declared that counsel who mischaracterize or misrepresent the record

> impose a tremendous hardship on the reviewing court and its staff. The voluminous case load and the sheer size of the appellate records in many cases often make for a very time-consuming appellate

191. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*; *see also In re* ADT Sec. Servs., No. 04-08-00799-CV, 2009 WL 260577, at *4 (Tex. App.—San Antonio Feb. 4, 2009, orig. proceeding) (mem. op.) (quoting the Standards in examining whether to sanction a party who sought mandamus but misleadingly omitted portions of the record that explained the trial court's ruling); Twist v. McAllen Nat'l Bank, 248 S.W.3d 351, 365 (Tex. App.—Corpus Christi 2007, orig. proceeding) (quoting the Standards in analysis of counsel's misstatements of case law and record); Sossi v. Willette & Guerra, 139 S.W.3d 85, 89 (Tex. App.—Corpus Christi 2004, no pet.) (citing the Standards and sanctioning appellant's counsel for misrepresenting trial court's ruling in seeking to file an interlocutory appeal); Schlafly v. Schlafly, 33 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (quoting the Standards in analysis of attorney's misrepresentation of the record and failure to disclose material facts).

> 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. It is also very poor strategy to misrepresent the record because any material misstatements and/or omissions will almost certainly be detected by opposing counsel, the appellate panel, and/or the court's alert and able staff.[196]

Because the standards are not modified by such terms as "knowingly" or "reasonable," they appear absolute: counsel's honest error violates the standard just as much as reckless or intentional misconduct.[197] Similarly, since the standards are not limited to any specific type of appellate action, they apply to all.[198] Finally, Standard 4 does not define controlling legal authority or authority adverse to counsel's position in a case; potentially, counsel could be responsible for citing authority from other jurisdictions that are adverse, but not necessarily directly against, the client's contention.[199]

The requirement under Standard 6 that counsel not file a reply brief on issues previously briefed narrows the parallel rule of

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196. *Schlafly*, 33 S.W.3d at 873.

197. *See In re* City of Lancaster, 228 S.W.3d 437, 440 n.4 (Tex. App.—Dallas 2007, no pet.) (quoting the Standards in analyzing whether to sanction counsel for inadvertent failure to apprise the court of factual changes since filing mandamus and declining to impose sanctions after counsel apologized to court and assured it that their failure was unintentional).

198. *See In re ADT Sec. Servs.*, 2009 WL 260577, at *4 (relying on the Standards in determining whether to sanction party for omitting portions of the record when presenting petition for writ of mandamus); *Twist*, 248 S.W.3d at 365 (applying the Standards to combined direct appeal and mandamus); *In re* Lerma, 144 S.W.3d 21, 26 (Tex. App.—El Paso 2004, orig. proceeding) (applying the Standards to misleading appendix filed with a petition for writ of mandamus); *In re* Goldblatt, 38 S.W.3d 802, 805 n.2 (Tex. App.—Fort Worth 2001, orig. proceeding) (citing the Standards in action seeking writ of mandamus, writ of prohibition, and writ of habeas corpus).

199. *See* Jones v. WKB Value Partners, L.P., No. 04-07-00865-CV, 2008 WL 2261192, at *2 n.1 (Tex. App.—San Antonio June 4, 2008, no pet.) (mem. op.) (citing the Standards in criticizing a party for failing to acknowledge previous cases from that court "as well as several of [its] sister courts" that characterized missing documentation as a defect); *see also* Bridges v. Robinson, 20 S.W.3d 104, 116–17 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (finding an appeal "objectively frivolous" where appellant mischaracterized the record and portrayed a dissenting opinion as a controlling decision); Dallas County Appraisal Dist. v. Leaves, Inc., 742 S.W.2d 424, 431 (Tex. App.—Dallas 1987, writ denied) (criticizing appellant for appealing in face of controlling precedent located in an unpublished opinion); *cf.* Tyler v. State, 47 P.3d 1095, 1104–05 (Alaska Ct. App. 2001) (rejecting a narrow interpretation of the ABA standard); *In re* Greenberg, 104 A.2d 46, 49 (N.J. 1954) (interpreting the ABA standard broadly).

Appellate Procedure, Rule 38.3, which states that an appellant "may file a reply brief addressing any matter in the appellee's brief."[200]

The Disciplinary Rules

Under the Disciplinary Rules, the conduct of a lawyer "should be characterized at all times by honesty, candor, and fairness."[201] Rule 3.03 of the Disciplinary Rules outlines counsel's broad duty of candor to a tribunal.[202] The rule covers five different aspects of truthfulness, two of which parallel Standards 3, 4, and 5: (1) making false statements of law or fact and (2) the failure to disclose controlling precedent.[203]

1. The duty not to make false statements of law or fact

Under Rule 3.03(a)(1), counsel is prohibited from knowingly making "a false statement of material fact or law to a tribunal."[204]

200. TEX. R. APP. P. 38.3; *see also* Dreamlite Holdings, Ltd. v. Kraser, 890 F.2d 1147, 1148–49 (Fed. Cir. 1989) (underscoring the frivolity of an appeal noting that appellants' reply brief "improperly repeat[ed] the arguments in their main brief and ignore[d] rather than counter[ed] [appellee's] assertions on the facts and the applicable law").

201. *In re* J.B.K., 931 S.W.2d 581, 583 (Tex. App.—El Paso 1996, no writ).

202. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03.

203. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(1), (4).

204. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(1); *see also* Twist v. McAllen Nat'l Bank, 248 S.W.3d 351, 366–68 (Tex. App.—Corpus Christi 2007, orig. proceeding) (sanctioning an attorney for creating a non-existent quotation purportedly from a Supreme Court of Texas opinion and misrepresenting the holding of the opinion, as well as counsel's "failure to cite and analyze" the applicable law and his "refusal to accept [the] Court's disposition of arguments previously presented"); Bond v. State, 176 S.W.3d 397, 401 n.3 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (concluding that "[c]ounsel's argument [went] beyond the limits of zealous advocacy" because he "misrepresented the facts, distorted the record, and falsely accused the trial court of highly unprofessional and unethical conduct"); *In re* Lerma, 144 S.W.3d 21, 26 (Tex. App.—El Paso 2004, orig. proceeding) (explaining that counsel violated Rule 3.03(a)(1) by filing an appendix to his petition for mandamus that included a copy of an order that he knew had been withdrawn by the trial court); Sossi v. Willette & Guerra, 139 S.W.3d 85, 89–90 (Tex. App.—Corpus Christi 2004, no pet.) (citing Rule 3.03(a)(1) in sanctioning appellant for mischaracterizing the trial court's ruling in order to file an interlocutory appeal); *In re* Guevara, 41 S.W.3d 169, 172–73 (Tex. App.—San Antonio 2001, no pet.) (sanctioning counsel who "grossly misstated an obviously important and material fact" that was "dispositive" of the litigation); *In re* Goldblatt, 38 S.W.3d 802, 805 n.2 (Tex. App.—Fort Worth 2001, orig. proceeding) (explaining that counsel violated Rule 3.03(a)(1) where a statement made during oral argument flatly contradicted a representation in counsel's petition for mandamus); Schlafly v. Schlafly, 33 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (stating that an attorney violated Rule 3.03(a)(1) by misrepresenting the

Misleading statements of fact as well as affirmative falsehoods are subject to sanctions.[205] The rule applies only to material facts or law, however.[206] Materiality in the context of the rule encompasses matters represented to a tribunal "that the judge would attach importance to and would be induced to act on in making a ruling."[207] Material matters include rulings that might delay or impair proceedings or increase the costs of litigation, and

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trial court's ruling and failing to disclose facts "essential to a proper determination of the case"); *see also* Lawyer Disciplinary Bd. v. Turgeon, 557 S.E.2d 235, 239 (W. Va. 2000) (concluding that a lawyer's sidebar reference to witnesses' purported polygraph examination when the witnesses had never submitted to a polygraph violated the rule against making a false statement of material fact).

205. *See* SMS Data Prods. Group, Inc. v. United States, 900 F.2d 1553, 1558 (Fed. Cir. 1990) (sanctioning a party for misleadingly suggesting that attached exhibits, which were themselves misleading, had been presented before an administrative board); *Dreamlite Holdings Ltd.*, 890 F.2d at 1149 (citing, with other violations, appellant's claim that he had "cooperated with discovery" because he had been "examined four times," when the record "clearly establishe[d] that four examinations were required precisely because of [appellant's] repeated and continued-to-this-day refusals to answer proper questions and to produce discoverable documents"); Amstar Corp. v. Envirotech Corp., 730 F.2d 1476, 1486 (Fed. Cir. 1984) ("Distortion of the record, by deletion of critical language in quoting from the record, reflects a lack of candor required by . . . Rule 3.3."); Comm. on Legal Ethics of the W. Va. State Bar v. Farber, 408 S.E.2d 274, 281 (W. Va. 1991) (concluding that a lawyer violated duty of candor where he used ellipses in quoting affidavit in a way that altered the meaning of the document, even though counsel attached entire affidavit to motion).

206. *See also* Am. Airlines, Inc. v. Allied Pilots Ass'n, 968 F.2d 523, 528 (5th Cir. 1992) (upholding trial court's sanctions for false and misleading statements made during a hearing for temporary restraining order); Burton v. Mottolese, 835 A.2d 998, 1030–31 (Conn. 2003) (stating attorney made false statement of material fact in affidavit in support of motion to recuse when counsel declared third party had commented on judge's purported gender bias); Att'y Grievance Comm'n of Md. v. Hermina, 842 A.2d 762, 769 (Md. 2004) (finding attorney violated duty not to mislead the court when he represented to the court that he had been enjoined from proceeding with discovery, when a sister court had issued only a protective order); *In re* Neal, 81 P.3d 47, 50–51 (N.M. 2003) (explaining that counsel made repeated false statements of material fact to the trial court in attempts to secure postponement of scheduled trials); Cohn v. Comm'n for Lawyer Discipline, 979 S.W.2d 694, 698 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (holding attorney violated Rule 3.03(a)(1) by representing during docket call that bankruptcy court had reopened the case and automatic stay was in effect); Cap Rock Elec. Coop., Inc. v. Tex. Utils. Elec. Co., 874 S.W.2d 92, 98 (Tex. App.—El Paso 1994, no writ) (affirming trial court's sanctions for false and misleading statements made to the court during discovery dispute). *Compare* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(1) (discussing statements "of material fact or law"), *with* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(5) (prohibiting the use or offering of evidence an attorney knows to be false).

207. *Cohn*, 979 S.W.2d at 698; *see also* Daniels v. Alander, 844 A.2d 182, 190 (Conn. 2004) (finding facts material because they were pivotal to the issue of whether to grant temporary custody).

are not limited simply to facts which might control or determine the outcome of the case.[208] The rule applies not just to written statements but to declarations in oral argument as well.[209]

Though Rule 3.03(a)(1) only states that "[a] lawyer shall not knowingly . . . make a false statement . . . to a tribunal," comment two suggests that the rule may be interpreted broadly to include statements made by implication or even silence.[210] The comment vaguely warns that there may be "circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation," but does not specify of what such circumstances might be composed.[211] The Committee on Professional Ethics (Committee) has addressed the issue of whether silence may constitute a statement for the purposes of Rule 3.03(a)(1).[212]

The facts at issue in the Committee's Opinion 504 were straightforward. During a punishment hearing, the State mistakenly declared to the court that the defendant had no prior felony convictions, implying that he was eligible for probation.[213] The prosecutor then turned to defense counsel and asked, "Right?" Counsel made no reply, though the defendant had previously informed him of his prior convictions.[214] The court subsequently erroneously granted the defendant probation.[215]

The Committee concluded that a lawyer is prohibited under Rule 3.03(a)(1) from making a false statement to a court if asked specifically about a fact.[216] The Committee further speculated that if "the question by the court to the defendant's lawyer follows an inaccurate statement in court by another person," the lawyer "must correct the inaccurate information . . . or make some other

208. *Cohn*, 979 S.W.2d at 698; *see also In re* Kalal, 643 N.W.2d 466, 474 (Wis. 2002) (sanctioning attorney for false statements during oral argument before state supreme court regarding how often he had been sanctioned for filing late briefs).

209. *See In re Kalal*, 643 N.W.2d at 474 (declaring an attorney's false statements before the court sanctionable).

210. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03 & cmt. 2 ("There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.").

211. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03 cmt. 2.

212. *See* Tex. Comm. on Prof'l Ethics, Op. 504, *reprinted in* 58 TEX. B.J. 718 (1995) (discussing the impact of counsel's silence regarding her client's misrepresentation towards the tribunal).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 719.

statement to the court indicating that the lawyer refuses to corroborate the inaccurate statement."[217] In the alternative, the lawyer "may ask the court to excuse him from answering the question," so that "the court is at least alerted to a problem and presumably will inquire further to discover the truth."[218] Because the question directly addressed to defense counsel was posed by the prosecutor, not the court, and since neither the defendant nor his counsel used evidence as contemplated by Rule 3.03(a)(5), the Committee concluded that Rule 3.03(a) had not been violated.[219]

Opinion 504, then, outlines the circumstances under which the "failure to make a disclosure is the equivalent of an affirmative misrepresentation."[220] A failure to disclose will violate Rule 3.03(a)(1) when the failure occurs during examination—either direct or indirect—by the court.[221] Silence in any other situation does not appear to clearly run afoul of the rule,[222] except in an ex parte proceeding.[223] Under Rule 3.03(a)(3), a lawyer appearing in an ex parte proceeding is required to disclose any "unprivileged fact which the lawyer reasonably believes should be known" for the court "to make an informed decision."[224]

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217. Tex. Comm. on Prof'l Ethics, Op. 504, *reprinted in* 58 TEX. B.J. 718, 719 (1995).

218. *Id.*

219. *Id.*

220. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03 cmt. 2 (discussing when silence is an affirmative misrepresentation in violation of Rule 3.03).

221. *See* Tex. Comm. on Prof'l Ethics, Op. 504, *reprinted in* 58 TEX. B.J. at 719 (concluding that because the prosecutor and not the court had questioned defense counsel, defense counsel's silence did not violate Rule 3.03).

222. *Compare* Crayton v. Super. Ct., 211 Cal. Rptr. 605, 610 (Cal. Ct. App. 1985) (holding defense attorney's silence during plea hearing on misdemeanor charge that barred prosecution on dual felony charge did not violate rules of ethics), *with* Duran v. Carris, 238 F.3d 1268, 1272 (10th Cir. 2001) (admonishing attorney for failing to notify the court that ostensibly pro se brief was actually written by attorney), *In re* Alcorn, 41 P.3d 600, 611 (Ariz. 2002) (finding counsel's failure to disclose agreement was "tantamount to an affirmative misrepresentation"), *and* AIG Haw. Ins. Co. v. Bateman, 923 P.2d 395, 402 (Haw. 1996) ("The failure to make disclosure of a material fact to a tribunal is the equivalent of affirmative misrepresentation.").

223. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03 cmt. 4; *see* Daniels v. Alander, 844 A.2d 182, 191 (Conn. 2004) (concluding that a lawyer's silence in an ex parte proceeding would reasonably lead a court to believe that it possessed all needed information in order to make a just and informed decision, and if that is not the case, a reply by the lawyer would be necessary).

224. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(3); *see* Me. Audubon Soc'y v. Purslow, 907 F.2d 265, 268–69 (1st Cir. 1990) (upholding sanctions for failure to reveal, during an ex parte hearing, that plaintiff had not given required notice before seeking injunctive relief); Jorgenson v. County of Volusia, 846 F.2d 1350, 1352 (11th Cir. 1988)

Rule 3.03(a)(1) not only requires that a lawyer not knowingly "make a false statement of material fact . . . to a tribunal," it also restricts counsel from making false statements of *law* as well.[225] A "[l]egal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal" subject to discipline under Rule 3.03(a)(1).[226] The rule is ambiguous as to whether it applies only to material law as well as material facts, or whether even non-material misstatements of the law violate the rule.

2. The duty to disclose controlling adverse precedent

Rule 3.03(a)(4), unlike subsection (a)(1), specifically outlines the circumstances under which a lawyer's silence may violate the rule.[227] The rule declares that an attorney "shall not knowingly . . . fail to disclose to the [court] authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."[228]

Comment three to Rule 3.03 acknowledges that a lawyer "is not

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(upholding sanctions against attorney who, in seeking an ex parte temporary restraining order, failed to cite controlling authority from the state supreme court in which counsel had previously represented one of the parties); *Daniels*, 844 A.2d at 190 (upholding sanction against a second chair attorney who was aware that lead counsel had not correctly recited the facts during an ex parte hearing, but did not correct counsel or inform the court of true facts).

225. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(1) (emphasis added).

226. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(1) cmt. 3; *see also* Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1349 (Fed. Cir. 2003) (criticizing a Department of Justice appellate attorney for using an ellipses in a quotation to make an opinion appear broader than it actually was); Kho v. Pennington, 846 N.E.2d 1036, 1043 n.6 (Ind. Ct. App. 2006) (admonishing counsel for mischaracterizing statute as prohibiting suit when the statute explicitly authorized the suit); Federated Mut. Ins. Co. v. Anderson, 920 P.2d 97, 103–04 (Mont. 1996) (sanctioning attempt to mislead a court by citing authority in support of a proposition actually repudiated by the source, and for citing a case that had long since been overruled); Sobol v. Capital Mgmt. Consultants, Inc., 726 P.2d 335, 337 (Nev. 1986) (discussing counsel who misquoted dissent as though it were controlling and misrepresented stipulated fact); Lieber v. ITT Hartford Ins. Ctr., Inc., 15 P.3d 1030, 1038–39 (Utah 2000) (pointing out that appellant implied in its brief that the legislature had adopted a decision, in subsequently amending statute when it actually rejected the decision and criticizing counsel for misrepresenting the state of the law in other jurisdictions); Comm. on Legal Ethics of W. Va. State Bar v. Farber, 408 S.E.2d 274, 280–81 (W. Va. 1991) (suspending a lawyer for misrepresenting a paraphrase as though it were a quotation, as well as other ethical violations).

227. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03 cmt. 2 (stating that under certain circumstances, silence can be the equivalent of making a false statement).

228. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(4).

required to make a disinterested exposition of the law," but emphasizes that he "should recognize the existence of pertinent legal authorities."[229] The underlying concept, the comment explains, "is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case."[230] Thus, "[l]egal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal."[231]

Since the focus of the rule is on the discussion of the legal premises of a case, citing adverse authority, but for a different proposition, is not sufficient to comply with the rule.[232] Similarly, withholding the discussion of adverse authority from the opening brief in the hope that it can be discussed much later in a reply brief does not comply with the spirit, and maybe not even the letter, of the rule.[233]

The courts have sometimes found it difficult to differentiate between subsections (a)(1) and (a)(4).[234] Several courts of appeals have found that counsel's failure to cite precedent from their own court or a higher court violates Rule 3.03(a)(4).[235] Such

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229. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03 cmt. 3.

230. *Id.*

231. *Id.*

232. *See* Tyler v. State, 47 P.3d 1095, 1108 (Alaska Ct. App. 2001) (holding that the duty of candor under Rule 3.03 extends to the disclosure of authorities the court should consider in order to render a fair decision, even if such authority is adverse to the position of the party in question); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03 cmt. 3 (emphasizing that counsel should recognize pertinent, albeit unhelpful, authorities).

233. *See Tyler*, 47 P.3d at 1108 (stating that in addition to their role as advocates for their clients, attorneys are officers of the court and owe the courts in which they appear a duty of candor); *see also* White v. Carlucci, 862 F.2d 1209, 1213 (5th Cir. 1989) (admonishing counsel for failure to cite controlling precedent, which opposing counsel later cited, and of which counsel was aware because he had participated in the earlier appeal).

234. *See, e.g.*, HL Farm Corp. v. Self, 820 S.W.2d 372, 375 n.2 (Tex. App.—Dallas 1991) (stating that an attorney who knowingly failed to disclose contrary authority violated Rule 3.03(a)(4), when in all likelihood the violation was a purposeful misstatement of the law, as the attorney knew of the existence of the adverse ruling and thus purposefully misstated the law violating Rule 3.03(a)(1)), *rev'd on other grounds*, 877 S.W.2d 288 (Tex. 1994).

235. *See* Ibarra v. State, 782 S.W.2d 234, 235 (Tex. App.—Houston [14th Dist.] 1989, no writ) (finding violation of State Bar Rules where counsel filed "identical briefs" in separate causes and subsequently failed to cite or distinguish first case in second case when court of appeals decided the issue in a published opinion); *see also Tyler*, 47 P.3d at 1097–1102 (sanctioning lawyer who failed to cite decision from Alaska Supreme Court that was "directly adverse" to defendant's position and which lawyer had argued before the supreme court); *In re* Thonert, 733 N.E.2d 932, 933–34 (Ind. 2000) (reprimanding lawyer

holdings are consistent with the specific wording of the rule, which mandates that counsel bring to the court's attention "authority in the controlling jurisdiction known to the lawyer to be directly adverse."[236]

At least one Texas court, however, has chastised an attorney for failing to cite a case from a sister intermediate court which was directly contrary to his position.[237] Though the court cited Rule 3.03(a)(4), the actual theory underpinning the court's decision appears to be that counsel's failure to discuss authority which is directly on point from a sister court constitutes a false statement of law in violation of Rule 3.03(a)(1).[238] That is, like the failure to make a factual disclosure which will mislead a court, a discussion or representation of the law as though the issue presented were undecided, or decided in the party's favor, without disclosure of court opinions to the contrary, "is the equivalent of an affirmative misrepresentation" and violates Rule 3.03(a)(1).[239] Otherwise, the court's opinion would appear to be a misapplication of Rule 3.03(a)(4), as subsection (a)(4) requires an attorney to disclose only "authority in the controlling jurisdiction."[240]

The drawback with such an interpretation is that it wholly subsumes Rule 3.03(a)(4).[241] Moreover, under such an approach, it becomes difficult in particular cases to distinguish where the line should be drawn regarding the disclosure of contrary decisions: Opinions of intermediate Texas courts? Supreme courts of other states? Intermediate courts of other states? Given these practical

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for failing to disclose directly adverse authority from state supreme court); State v. Somerlot, 544 S.E.2d 52, 54 n.2 (W.Va. 2000) (criticizing lawyers for failing to discuss a controlling supreme court decision on an important issue and upon which the lower court had relied).

236. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(4).

237. *See HL Farm Corp.*, 820 S.W.2d at 375 n.2 (citing Rule 3.03 in condemning counsel's omission of an adverse case in his brief).

238. *See id.* (concluding that the attorney's conduct violated Rule 3.03(a)(4) by failing to disclose contrary authority adverse to his client's position, but acknowledging that the attorney was aware of the decision and was therefore in essence a purposeful misstatement of the law in violation of Rule 3.03(a)(1)).

239. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(1) & cmt. 2.

240. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(4); *see* TEX. CODE CRIM. PROC. ANN. art. 4.03 (Vernon Supp. 1999) ("The Courts of Appeals shall have appellate jurisdiction coextensive with the limits of their respective districts in all criminal cases . . . .").

241. *See* TEX. GOV'T CODE ANN. § 311.026(a) (Vernon Supp. 1999) ("[P]rovisions shall be construed, if possible, so that effect is given to both.").

difficulties of applying a broad interpretation of Rule 3.03(a)(1), the correct interpretation should most likely be that an attorney is ethically bound to cite only decisions from the United States Supreme Court, the Supreme Court of Texas, the Texas Court of Criminal Appeals, the courts of appeals, or even, where applicable, the district court opinions for the district in which the case is being appealed.[242] Authority, of course, may also include statutes, administrative rules, codes, ordinances, regulations, and rules.[243]

The American Bar Association and a number of courts have also interpreted the rule broadly to require counsel to cite not merely controlling authority—authority which is dispositive of the litigation—but a "broader range of cases and statutes."[244] Focusing on the phrase "directly adverse," courts and commentators have concluded that

> a court decision can be "directly adverse" to a lawyer's position even

242. *See* Pannell v. McBride, 306 F.3d 499, 502 n.1 (7th Cir. 2002) (discussing failure to disclose two cases from same federal circuit); Douglass v. Delta Air Lines, Inc., 897 F.2d 1336, 1344 (5th Cir. 1990) (rejecting argument that a decision is not authority simply because it arises from trial court); Piambino v. Bailey, 757 F.2d 1112, 1131 n.44 (11th Cir. 1985) (observing that counsel had failed to inform court that, a month earlier a United States district court had dismissed with prejudice the same claim that counsel had brought); Shelton v. S. Energy Homes, Inc., 420 F. Supp. 2d 579, 583 n.1 (S.D. Miss. 2006) (reprimanding counsel for failing to cite Supreme Court case and case from governing judicial district in an effort to manipulate the forum); Chew v. KPMG, LLP, 407 F. Supp. 2d 790, 802 n.13 (S.D. Miss. 2006) (showing failure to cite case from controlling judicial district); Schoofield v. Barnhart, 220 F. Supp. 2d 512, 522 n.10 (D. Md. 2002) (discussing failure to disclose case from same circuit); United States v. Crumpton, 23 F. Supp. 2d 1218, 1219 (D. Colo. 1998) (stating that counsel failed to disclose a case from same judicial district); Schutts v. Bently Nev. Corp., 966 F. Supp. 1549, 1563 (D. Nev. 1997) (failing to cite cases from controlling judicial circuit); Massey v. Prince George's County, 907 F. Supp. 138, 141–43 (D. Md. 1995) (failing to cite case from same federal circuit); Time Warner Entm't Co. v. Does Nos. 1–2, 876 F. Supp. 407, 415 (E.D.N.Y. 1994) (stating as improper the failure to cite case from same federal circuit); *In re* Thonert, 733 N.E.2d 932, 933–34 (Ind. 2000) (reprimanding a lawyer for failing to disclose directly adverse authority from the state supreme court); Shank v. Newman, 69 Pa. D. & C.4th 48, 57 n.3 (Pa. Com. Pl. 2004) (stating the failure to reveal decision by the same state court judge was improper); State v. Somerlot, 544 S.E.2d 52, 54 n.2 (W. Va. 2000) (criticizing lawyers for failing to discuss controlling Supreme Court decision on an important issue and upon which the lower court had relied).

243. *See* Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc., 464 N.W.2d 551, 556–58 (Minn. App. 1990) (discussing a lawyer who failed to disclose applicable statute), *aff'd in part, rev'd in part*, 482 N.W.2d 771 (Minn. 1992); *see also* Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 355 (Fla. Dist. Ct. App. 1997) (concluding that counsel had a duty to disclose that the statute immunizing the defendant from liability did not become effective until after the accident at issue).

244. Tyler v. State, 47 P.3d 1095, 110 (Alaska Ct. App. 2001).

> though the lawyer reasonably believes that the decision is factually distinguishable from the current case or the lawyer reasonably believes that, for some other reason, the court will ultimately conclude that the decision does not control the current case.[245]

The ABA has therefore suggested that a lawyer has the duty to bring to the court's attention

> decisions adverse to his case which opposing counsel has not raised if the decision is one which the court should clearly consider in deciding the case, if the judge might consider himself misled by the attorney's silence, or if a reasonable judge would consider an attorney who advanced a proposition contrary to the undisclosed opinion lacking in candor and fairness to him.[246]

Though no court has completely adopted this expansive definition of directly adverse precedent, a number of courts and commentators have cited it approvingly.[247] Thus, though the

245. *Id.* at 1105–06; *see also* Jorgenson v. County of Volusia, 846 F.2d 1350, 1352 (11th Cir. 1988) (characterizing efforts to distinguish cases as "inapposite" in explaining why they were not cited as "post hoc efforts to evade" sanctions); *In re* Greenberg, 104 A.2d 46, 48–49 (N.J. 1954) (stating "controlling authority" applies to any decision by the state court, or "with respect to federal questions, to decisions of the courts of the United States," that are "directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case"). *But see In re* Colonial Pipeline Co., No. 13-97-808-CV, 1998 WL 1021722, at *1 (Tex. App.—Corpus Christi Jan. 22, 1998, orig. proceeding) (not designated for publication) (withdrawing sanctions against party for failing to cite controlling authority after counsel distinguished case, but observing that "[t]he far better practice would have been for relators to put the two opinions in juxtaposition one to another and contrast them, distinguishing the one not supporting their claim for relief, rather than ignoring unfavorable authority").

246. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 280 (1949).

247. *See* Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533, 539–40 (W.D. Pa. 2001) (acknowledging the ABA's interpretation of the rule set forth in Formal Opinion 280); *Tyler*, 47 P.3d at 1104–05 (describing the appropriate test as one where counsel must ask if the overlooked decision is "one which the court should clearly consider in deciding the case"); *In re Greenberg*, 104 A.2d at 49 (stating the correct question for an attorney to ask is whether the decision he is overlooking would be necessary for the court to decide the case, and whether a "reasonable judge [would] properly feel that a lawyer who advanced . . . a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him"); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 84-1505 (1984) ("We would not confine the Opinion to 'controlling authorities'—i.e., those decisive of the pending case—but . . . would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case."); GEOFFERY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 3.3:206, at 592 (2d ed. 1998) (confirming the correctness of the interpretation of Formal Opinion 280 that attorneys must disclose all decisions that the judge might consider important to his decision); RONALD D. ROTUNDA, PROFESSIONAL

outer reaches of what may constitute directly adverse authority have not been definitively set, a lawyer will do well "not [to] ignore potentially dispositive authorities"[248] applicable to "any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case."[249]

The Standards

7. "Counsel will conduct themselves before the court in a professional manner, respecting the decorum and integrity of the judicial process."[250]
8. "Counsel will be civil and respectful in all communications with the judges and staff."[251]
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."[252]
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."[253]

RESPONSIBILITY 163–64 (3d ed. 1992) (stating that some courts have taken the broad interpretation and require counsel to disclose any decisions that the judge might consider important in deciding the case).

248. *Tyler*, 47 P.3d at 1106 ("[A]n attorney should not ignore potentially dispositive authorities; the word 'potentially' deliberately include[s] those cases arguably dispositive." (quoting Mannheim Video, Inc. v. County of Cook, 884 F.2d 1043, 1047 (7th Cir. 1989))); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 84-1505 (1984) (concluding that doubt as to whether or not potentially adverse precedent exists and should be disclosed is best resolved by disclosure).

249. *Tyler*, 47 P.3d at 1106 (quoting RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 163 (3d ed. 1992)); *see also Smith*, 170 F. Supp. 2d at 539 (stating that courts rely on lawyers who appear before them to present a full and correct statement of the law to assist the court in avoiding erroneous decisions); *In re Greenberg*, 104 A.2d at 49 (holding that if counsel intentionally withholds important decisions from the court, she "must meet with severe disciplinary action").

250. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

251. *Id.*

252. *Id.*

253. *Id.*

Standards 7 through 10 under "Lawyers' Duties to the Court" prescribe counsel's interpersonal interaction with the court and its staff.[254] Three of the standards (Standards 7, 8, and 10) address counsel's demeanor, requiring counsel's manner to be professional, respectful, civil, and controlled.[255] The rules reflect not the desire to protect judges from unwarranted criticism or personal insult, but the need to protect the court as a public institution. As the Fourth Court of Appeals in San Antonio has observed:

> A distinction must be drawn between respectful advocacy and judicial denigration. Although the former is entitled to a protected voice, the latter can only be condoned at the expense of the public's confidence in the judicial process. Even were this court willing to tolerate . . . personal insult . . . we are obligated to maintain the respect due this Court and the legal system we took an oath to serve.[256]

"Conduct that offends the dignity of the legal process undermines the image of our justice system and compromises its credibility in the eyes of the public."[257]

The remaining standard, Standard 9, demands that counsel "be prepared and punctual for . . . court appearances, and . . . be [ready] to assist the court in understanding the record, controlling authority, and the effect of the court's decision."[258] The preamble

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254. *Id.*

255. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999); *see also* Davis v. State, No. 14-00-00166-CR, 2001 WL 951278, at *3 n.1 (Tex. App.—Houston [14th Dist.] Aug. 23, 2001, no pet.) (not designated for publication) (quoting Standard 8 and warning counsel to "conduct himself in a professional manner in future dealings with this court"); Metzger v. Sebek, 892 S.W.2d 20, 38–39 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (declining to find error where counsel's "antics" during trial "contributed to a very large degree to the state of mind that produced the judge's sometimes sharp rebukes").

256. *In re* Maloney, 949 S.W.2d 385, 388 (Tex. App.—San Antonio 1997, orig. proceeding) (en banc) (per curiam).

257. Gleason v. Isbell, 145 S.W.3d 354, 358 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (Frost, J., concurring and dissenting); *see also* Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 REV. LITIG. 301, 327–47 (2004) (examining parameters of lawyers' criticisms of court decisions).

258. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 400 (1999).

to the Standards echoes this duty:

> 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 the law.[259]

The Disciplinary Rules

No Disciplinary Rules directly correspond to the duties outlined by Standards 7 through 10.[260] Arguably, the final subparagraph of Rule 3.04(c), which mandates that a lawyer not "engage in conduct intended to disrupt the proceedings," addresses counsel's demeanor to the court.[261] A lawyer's responsibility under Rule

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259. *Id.* at 399.

260. *See* Fortier v. State, 105 S.W.3d 697, 702 n.6 (Tex. App.—Amarillo 2003, pet. ref'd) (warning that "language that is caustic, condescending, sarcastic, petty, or [the] like . . . evince[s] disrespect for the tribunal and the legal system" (citing TEX. DISCIPLINARY R. PROF'L CONDUCT pmbl. ¶ 4)); *Davis*, 2001 WL 951278, at *5 n.1 (stating that a lawyer "should demonstrate respect for the legal system and for those who serve it" (quoting TEX. DISCIPLINARY R. PROF'L CONDUCT pmbl. ¶ 4)).

261. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04(c)(5). *Compare* People v. Clough, 74 P.3d 552, 561 (Colo. 2003) (stating that counsel intentionally disrupted tribunal by engaging in a verbal altercation with a State's witness in the courthouse lobby and afterward leaving the courthouse before client's case had been called), Miss. Bar v. Lumumba, 912 So. 2d 871, 875, 880 (Miss. 2005) (describing an attorney's intentional disruption of proceedings by stating repeatedly to the judge that "if he had to pay for justice" he would "pay [the judge] too"), *In re* Neal, 81 P.3d 47, 50, 52 (N.M. 2003) (determining that counsel intended to disrupt the tribunal by refusing to appear for trial by falsely claiming that he had been ordered to trial in another court and by entering into a dispute with a jail transport officer outside the courtroom), *In re* Disciplinary Action Against Garaas, 652 N.W.2d 918, 927 (N.D. 2002) (finding that counsel's "disruptive, belligerent, and disrespectful" questioning of the court for the basis of its ruling was intended to disrupt a tribunal), Lawyer Disciplinary Bd. v. Turgeon, 557 S.E.2d 235, 239 (W. Va. 2000) (observing that an attorney's intentional reference before the jury to a polygraph test that was never performed, and his reference to the prosecutor as a "coke dealer," intended to disrupt tribunal), *and In re* Disciplinary Proceedings Against Eisenberg, 675 N.W.2d 747, 751 (Wis. 2004) (concluding that a lawyer's "rude, abusive, controlling, [and] disrespectful" conduct toward a hearing examiner was intended to disrupt the tribunal), *with* Att'y Grievance Comm'n of Md. v. Hermina, 842 A.2d 762, 768 (Md. 2004) (finding insufficient evidence to establish that attorney's failure to comply with discovery orders was intended to disrupt the proceedings where attorney's representation that he had not received the discovery request at issue was negligent rather than deliberate), *and In re* Disciplinary Proceedings Against Ray, 651 N.W.2d 727, 731 (Wis. 2002) (concluding that although the attorney interrupted opposing counsel repeatedly with comments such as "Oh, brother," and "Oh, what crap," there was no evidence that counsel

3.04(c) not to disrupt the proceedings is a "corollary of the advocate's right to speak on behalf of litigants."[262] The rule requires that the lawyer intend to disrupt the proceedings;[263] conduct which may have been disruptive, but which counsel did not intend to be so, will not violate the rule, even if counsel is "completely in the wrong."[264]

Conduct which violates the rule will generally involve something more than mere accusations of bias against a judge.[265] Though by no means clear, conduct is disruptive only if it in some way creates an obstruction which blocks the judge in the performance of his judicial duty.[266] The comment observes that the obligation applies even in the face of abuse by a tribunal; though counsel may stand firm against the abuse, he should avoid reciprocation.[267]

Rule 3.04(c) extends not simply to disruption of formal proceedings.[268] In *Love v. State Bar of Texas*,[269] the attorney appeared an hour late for docket call and attempted to set a trial

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intended to disrupt the proceedings).

262. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04 cmt. 5.

263. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04(c)(5).

264. *In re Disciplinary Proceedings Against Ray*, 651 N.W.2d at 732 (indicating that a lawyer's interruption and courtroom antics, prompted by her frustration with "the entire situation," did not violate the rule because she did not intend to disrupt the proceedings, though she was "completely in the wrong").

265. *See In re* Little, 404 U.S. 553, 555 (1972) ("Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." (quoting Brown v. United States, 356 U.S. 148, 153 (1958))); *cf. Ex parte* Curtis, 568 S.W.2d 363, 366–67 (Tex. Crim. App. 1978) (dismissing a criminal contempt citation because the prosecutor's repeated charges of bias outside the presence of the jury were not sufficient to establish disruptive behavior).

266. *Cf. Ex parte Curtis*, 568 S.W.2d at 366–67 (interpreting the standard for criminal contempt of court (citing *In re* McConnell, 370 U.S. 230, 236 (1962))).

267. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04 cmt. 5; *see also* TEX. CODE JUD. CONDUCT, Canon 3B(4) ("A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control."); Shaw v. Greater Houston Transp. Co., 791 S.W.2d 204, 211 (Tex. App.—Corpus Christi 1990, no writ) (warning counsel that lawyers "have the responsibility to conduct themselves with respect for the tribunal and the legal system" even where a judge has "failed to act in a manner appropriate for a member of the judiciary").

268. *In re* Thomas, 976 So. 2d 1245, 1246, 1254 (La. 2004) (deciding that an attorney's shouting confrontation with another attorney in the anteroom of a judge's chambers, forcing the judge to interrupt regular docket proceedings, was intended to disrupt tribunal).

269. Love v. State Bar of Tex., 982 S.W.2d 939 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

date.[270] The court informed him that he needed to confer with the prosecution first, but the lawyer left the courtroom without doing so.[271] The trial judge, after concluding docket call, reset the cause before retiring to his chambers.[272] The attorney returned two hours after he had left, and upon being informed that the case had been reset, became angry and abusive toward court personnel and made anti-Semitic remarks about the judge.[273] On review, the court of appeals held that the evidence was "more than sufficient" to establish that the attorney had violated the Disciplinary Rules.[274]

Standards 7 through 10 are also encompassed, loosely, by Rule 3.04(d), which requires an attorney not to "knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal."[275] The rule imposes two duties: (1) the duty to obey the standing rules or individual rulings of a court, and (2) the duty to counsel clients to obey standing rules and orders.[276] The rule prohibits knowing violations of standing rules and orders, not just intentional violations.[277]

At least one commentator has asserted that the obligation to obey standing rules of a tribunal includes not only local rules of court, but also more widely applicable standards such as rules of procedure or evidence.[278] But Rule 3.04(c)(1) specifically prohibits only habitual violations of "established rule[s] of procedure or of evidence," and comment three declares that the rule was purposely limited.[279] If the drafters had wished to subject a single, knowing violation of general rules of procedure or evidence to disciplinary action, logically subparagraph (c)(1) would not have been drafted as it was.

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270. *Id.* at 941.

271. *Id.*

272. *Id.*

273. *Id.* at 941, 944.

274. *Love*, 982 S.W.2d at 944.

275. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04(d).

276. *Id.*; *see also* Att'y Grievance Comm'n of Md. v. Hermina, 842 A.2d 762, 771 (Md. 2004) (pointing out an attorney's failure to participate in court-ordered pre-trial conference violated the duty to obey court orders).

277. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04(d).

278. Robert P. Schuwerk & John F. Sutton, *Commentary on the Texas Disciplinary Rules of Professional Conduct*, *in* TEXAS LAWYERS' PROFESSIONAL ETHICS 1-76 (3d ed. 1997).

279. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04(c)(1) & cmt. 3.

The only exception to either Rule 3.04(c)(1) or Rule 3.04(d) lies in an open refusal to obey that is "based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience."[280] The rule implicitly prohibits disobedience that is not open, regardless of the basis for the claim.[281] A lawyer must openly acknowledge non-compliance or run afoul of the rule.[282]

The comments to the rule note that "[i]n order to assure due regard for formal rulings and standing rules of practice or procedure," a lawyer who asserts that he has no obligation to obey an order or rule must base his assertion "on a reasonable belief."[283] The rule thus does not appear to penalize a good faith refusal, even if the basis for the refusal later proves incorrect.

The second exception may actually apply to prosecutor's actions in a criminal case, even though it is drafted in terms of a client's willingness to suffer sanction. The comments offer, as an illustration of the principle, a criminal case in which "the court orders disclosure of the identity of an informant."[284] If "the government decides that it would prefer to allow the case to be dismissed rather than to make that disclosure," the State's attorney would not be subject to discipline under the rule for his refusal to comply with the court's order of disclosure.[285]

The Disciplinary Rules also address the need for lawyers to respect the decorum and integrity of the judicial process by prohibiting false or reckless statements "concerning the qualifications or integrity of a judge."[286] Traditionally courts have "justified a broad prohibition against criticism of judicial officers on the need to maintain public confidence in the judicial system."[287]

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280. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04(d).

281. *See id.* (stating a narrow exception for openly acknowledging disobedience).

282. *See id.* (requiring open acknowledgement of disobedience).

283. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04 cmt. 7; *see also In re* Disciplinary Action Against Garaas, 652 N.W.2d 918, 925 (N.D. 2002) ("An attorney's free speech rights do not authorize unnecessary resistance to an adverse ruling.... Once a judge rules, a zealous advocate complies, then challenges the ruling on appeal; the advocate has no free-speech right to reargue the issue, resist the ruling, or insult the judge." (quoting *In re* Coe, 903 S.W.2d 916, 917 (Mo. 1995))).

284. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.04 cmt. 7.

285. *Id.*

286. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.02(a).

287. *See* Miss. Bar v. Lumumba, 912 So. 2d 871, 883 (Miss. 2005) ("The majority of state and federal courts have found First Amendment protection arguments unpersuasive

But lawyers and judges, as much as anyone else, enjoy the protections of the First Amendment.[288] The United States Supreme Court has therefore curbed the scope of the regulation of criticism of the judiciary by rejecting attempts to penalize lawyer criticism based upon express concerns for the public confidence in the judiciary.[289] The Court has consistently held that truthful criticism is subject to regulation only to the extent that it might present a clear and imminent threat to the fair administration of justice, or if it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding.[290] In addition, of course,

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because the state's interest is in protecting and defending its public officials and in maintaining a respect for the judiciary."); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 8.02 cmt. 1 ("Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices . . . ."); Robert P. Schuwerk & John F. Sutton, Jr., *Commentary on the Texas Disciplinary Rules of Professional Conduct*, *in* TEXAS LAWYERS' PROFESSIONAL ETHICS 1-137 (3d ed. 1997); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 11.3.2, at 602–03 (1986) (describing a "current that runs through some judicial opinions" which advocates the view that "all lawyer criticism of judges creates public disrespect for the law or the judiciary").

288. *See* Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (noting that judges enjoy First Amendment protection); Gentile v. State Bar of Nev., 501 U.S. 1030, 1039 (1991) (explaining that First Amendment protections encompass lawyers' statements); Comm'n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 429–30 (Tex. 1998) (recognizing First Amendment protection for lawyers' statements).

289. *See In re* Snyder, 472 U.S. 634, 646–47 (1985) (emphasizing the need for civility in the adversarial process but noting that "a single incident of rudeness or lack of professional courtesy . . . does not support a finding of contemptuous or contumacious conduct"); Craig v. Harney, 331 U.S. 367, 378 (1947) ("The thought apparently is that the range of permissible comment is greater where the pending case generates a public concern. . . . But, the rule of the [*Bridges*] and [*Pennekamp*] cases is fashioned to serve the needs of all litigation, not merely select types of pending cases."); Pennekamp v. Florida, 328 U.S. 331, 348–50 (1946) (curbing the scope of the regulation of criticism of the judiciary by rejecting attempts to penalize lawyer criticism based upon express concerns for the public confidence in the judiciary).

290. *See Gentile*, 501 U.S. at 1034–37 (giving an overview of First Amendment precedent regarding public comment on pending cases); *Craig*, 331 U.S. at 376 ("The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice."); *Pennekamp*, 328 U.S. at 347 ("For circumstances to create a clear and present danger to judicial administration, a solidarity of evidence should be required."); *see also* United States v. Cooper, 872 F.2d 1, 3 (1st Cir. 1989) (stating an attorney may not "seek refuge within his own First Amendment right of free speech to fill a courtroom with a litany of speculative accusations and insults"); *In re* Wilkins, 782 N.E.2d 985, 986 (Ind. 2003) ("Lawyers are completely free to criticize the decisions of judges. As licensed professionals, they are not free to make recklessly false claims about a judge's integrity."); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 11.3.2, at 602–03 (1986) (commenting that the state's interest in protecting and defending

the Court has held that statements concerning public officials which are made with knowledge that they are false, or with reckless disregard of whether they are false, are not constitutionally protected and may be subject to civil or criminal liability.[291]

Texas's disciplinary rule governing criticism of the judiciary, Rule 8.02(a), falls within acceptable constitutional parameters.[292] It prohibits a lawyer from making any statement "that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office."[293] The rule precisely

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public officials and in maintaining a respect for the judiciary often overrides an attorney's First Amendment rights).

291. N.Y. Times v. Sullivan, 376 U.S. 254, 279–80 (1964); *see also* Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 429 (Ohio 2003) ("The First Amendment does not shield an attorney from discipline for falsely suggesting 'unseemly complicity' by the judiciary in unlawful or unethical practices.... Such false statements... enjoy no constitutional protection when they are made with knowledge of their falsity or reckless disregard for their truth." (citation omitted)).

292. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.02(a).

293. *Id.*; *see also In re* Riley, 691 P.2d 695, 703–07 (Ariz. 1984) (censuring a deputy county attorney for making derogatory public statements about a judge); Burton v. Mottolese, 835 A.2d 998, 1030–31 (Conn. 2003) (determining that an attorney's accusation of gender bias against the presiding judge, based upon knowing misrepresentations of material facts, violated the rule against making statements which are "either knowingly false or made with 'reckless disregard [of their] truth or falsity'"); *In re* Wilkins, 782 N.E.2d 985, 986 (Ind. 2003) (sanctioning attorney for including a footnote in appellate brief that "ascribe[d] bias and favoritism to the judges authoring and concurring in the majority opinion... and [implied] that the[] judges manufactured a false rationale in an attempt to justify their pre-conceived desired outcome"); Att'y Grievance Comm'n of Md. v. Hermina, 842 A.2d 762, 772 (Md. 2004) (concluding that a written complaint accusing a judge and opposing counsel of having conducted inappropriate ex parte communications violated the rule against making false statements concerning the integrity of a judge); Miss. Bar v. Lumumba, 912 So. 2d 871, 884–86 (Miss. 2005) (noting that an attorney's accusations during trial that he was ready to "buy justice" from the presiding judge and the attorney's statement to the media that the judge was a "barbarian," violated Rule 8.02(a)); Welsh v. Mounger, 912 So. 2d 823, 825–28 (Miss. 2005) (sanctioning an attorney for falsely alleging in a motion to recuse that the opposing party was the highest donor to justice's election campaign, and repeating the argument even after informed by the court that the accusation was false); *In re* Holtzman, 577 N.E.2d 30, 33 (N.Y. 1991) (disciplining an assistant district attorney for publicizing allegations of judicial misconduct that were later held to be unproven); *Gardner*, 793 N.E.2d at 430 (sanctioning counsel for accusing appellate court "of affirming a conviction out of prosecutorial bias and corruption"); Office of Disciplinary Counsel v. Price, 732 A.2d 599, 605–06 (Pa. 1999) (establishing that the defendant violated the rules prohibiting knowingly false or reckless allegations against a judge when he filed various motions and objections to the presiding judge based upon

tracks the standard of actual malice delineated by the Supreme Court as the boundary between protected speech and speech which may be regulated or punished.[294] The rule, of course, does not prohibit truthful criticism of a judge's qualifications or integrity.[295]

The comment to Rule 8.02 suggests that, commensurate with the responsibility not to make false statements about the judiciary, which can "unfairly undermine public confidence in the administration of justice[,]" lawyers should "continue traditional efforts to defend judges and courts unjustly criticized."[296] Defending judges unjustly attacked, the comment explains, helps "[t]o maintain the fair and independent administration of justice."[297] The comment does not define what constitutes unjust criticism.

Moreover, the suggestion appears unnecessary. A judge is prohibited from public comment on pending or impending proceedings only when the manner of comment may "suggest[] to a reasonable person the judge's probable decision on any particular case."[298] Furthermore, the rule "does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of

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claims of bias without investigating the claims and relying instead upon "rumor, innuendo and his own perceptions"); Lawyer Disciplinary Bd. v. Turgeon, 557 S.E.2d 235, 242–43 (W. Va. 2000) (concluding that an accusation in a lawyer's motion to disqualify a judge that the judge had conspired with the prosecutor to convict the defendant on "false, misleading and perjured evidence" without having actually investigated the case, violated the rule against making false statements against a judge).

294. *See* State Bar v. Semaan, 508 S.W.2d 429, 432–33 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (noting the seeming applicability of *Sullivan* to old disciplinary rules but cautioning that "it has not [yet] been authoritatively determined as to the extent of any attorney's protection from imposition of discipline by the Bar"). *Compare Sullivan*, 376 U.S. at 283 (requiring proof of "actual malice" in libel actions relating to the official conduct of public officials), *with* TEX. DISCIPLINARY R. PROF'L CONDUCT 8.02(a) (prohibiting lawyers from making both knowingly false statements and statements made with reckless disregard for truth or falsity when referring to public officials).

295. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 8.02(a) (limiting the rule's application to knowingly false statements or statements made with reckless disregard for the truth).

296. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.02 cmts. 3–4.

297. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.02 cmt. 3.

298. TEX. CODE JUD. CONDUCT, Canon 3B(10); *see also* Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (invalidating, under the First Amendment, a Minnesota canon of judicial conduct that prohibited judges from expressing "their views on disputed legal or political issues").

the court."[299] The courts would appear, then, to be able to defend themselves.[300]

IV. LAWYERS' DUTIES TO LAWYERS

The Standards

1. "Counsel will treat each other and all parties with respect."[301]
2. "Counsel will not unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation by opposing counsel."[302]
3. "Counsel will not request an extension of time solely for the purpose of unjustified delay."[303]
4. "Counsel will be punctual in communications with opposing counsel."[304]
5. "Counsel will not make personal attacks on opposing counsel or parties."[305]
6. "Counsel will not attribute bad motives or improper conduct to other counsel without good cause, or make unfounded accusations of impropriety."[306]

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299. TEX. CODE JUD. CONDUCT, Canon 3B(10).

300. Interestingly, Rule 8.02(a) is not limited to criticism of judges or the judiciary. It also prohibits false or reckless statements "concerning the qualifications or integrity of a . . . public legal officer." TEX. DISCIPLINARY R. PROF'L CONDUCT 8.02(a). A "public legal officer" includes a district attorney, but not his assistants. *Id.* Thus, derogatory remarks about the qualifications or integrity of a district attorney, though not his assistants, may be sanctionable under the rule. *See* Powell v. State, 898 S.W.2d 821, 825 (Tex. Crim. App. 1994) ("An assistant district attorney acts subject to the control and supervision of the district attorney. In our view, an assistant district attorney is not a public officer, but rather a public employee."); State *ex rel.* Hill v. Pirtle, 887 S.W.2d 921, 931 (Tex. Crim. App. 1994) (orig. proceeding) ("[A] public 'officer' is authorized by law to independently exercise functions of either an executive, legislative, or judicial character, and the exercise of this power by the officer is subject to revision and correction only according to the standing laws of this state. A public employee, in contrast, is a person in public service whose duties are generally routine, subordinate, advisory, and as directed.").

301. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 401 (1999).

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62

7. "Counsel will not lightly seek court sanctions."[307]
8. "Counsel will adhere to oral or written promises and agreements with other counsel."[308]
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."[309]
10. "Counsel will not attempt to obtain an improper advantage by manipulations of margins and type size in a manner to avoid court rules regarding page limits."[310]
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."[311]

The standards under the section of "Lawyers' Duties to Lawyers" emphasize the same decorum and professionalism in interpersonal relations that characterize the "Lawyers' Duties to the Court" and "Lawyers' Duties to Clients," though curiously none of the eleven standards uses the words "courtesy," "civility," "decorum," or most surprisingly, "professionalism."[312] The standards in general require counsel to treat opposing attorneys and parties with respect, and discourage gamesmanship and abusive tactics.[313]

Seven of the eleven standards (1, 2, 3, 4, 8, 10, and 11) address direct interaction between opposing counsel.[314] The four remaining standards (5, 6, 7, and 9) address counsels' treatment of each other indirectly through the courts.[315] The former set of standards require counsel to cooperate in scheduling deadlines and similar requests; to adhere to agreements; to be punctual; and not

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TEX. B.J. 399, 401 (1999).

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 401 (1999).

312. *Id.* at 399–401.

313. *Id.* at 401.

314. *Id.*

315. *Id.*

to manipulate briefing rules to gain an unfair advantage.[316] The first standard nicely encapsulates the thrust of the group as a whole: "Counsel will treat each other and all parties with respect."[317] The latter four standards attempt to control the manner in which appellate counsel portrays his opponent before the court.[318] The standards reject direct personal attacks,[319] the use of "strawmen" arguments, and allegations of impropriety without cause.[320] Standard 7 further cautions counsel not to seek sanction lightly.[321]

The Disciplinary Rules

The Disciplinary Rules do not directly attempt to prescribe conduct between lawyers, except in the most extreme circumstances. Rule 8.04(a) prohibits a lawyer from engaging in conduct "involving dishonesty, fraud, deceit or misrepresentation," or "constituting obstruction of justice."[322] Similarly, Rule 3.02 requires a lawyer not to "take a position that unreasonably increases costs or other burdens of the case or that unreasonably delays resolution of the matter."[323] In addition, under Rule 3.03(a)(1), "[a] lawyer shall not . . . make a false statement of

316. *See In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 401 (1999) (listing the expected standards of conduct for attorneys in the adversarial process).

317. *Id.*

318. *See id.* (controlling the manner in which an attorney may portray opposing counsel in open court).

319. *Id.*; *see also* Gleason v. Isbell, 145 S.W.3d 354, 360 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (Frost, J., concurring and dissenting) ("[P]ersonal attacks on other litigants and their lawyers also demonstrate a lack of respect for the legal system and the administration of justice.").

320. *See In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 401 (1999) (prohibiting attorneys from making "unfounded accusations of impropriety" against opposing counsel); *see also Gleason*, 145 S.W.3d at 360 (Frost, J., concurring and dissenting) ("Litigants should not assail the intelligence, ethics, morals, upbringing, or integrity of others involved in the case unless such matters are legitimately at issue and within the bounds of fair argument. Even then, litigants should avoid the use of inappropriate language and inflammatory rhetoric.").

321. *In the Supreme Court of Texas Misc. Docket No. 99-9012: Order of the Supreme Court of Texas and the Court of Criminal Appeals: Standards for Appellate Conduct*, 62 TEX. B.J. 399, 401 (1999).

322. TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(a)(3)–(4).

323. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.02.

material fact or law to a tribunal."[324] Although the rules do not attempt to regulate attorneys' conduct within these extremes, courts have, on occasion, directly penalized a party for inappropriate behavior.[325]

The drafters of the rules, of course, recognized the importance of civility and professionalism in the practice of law. The preamble to the rules stresses that "[a] lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."[326] The preamble also declares that counsel "should demonstrate respect for the legal system and those who serve it, including judges, other lawyers and public officials."[327] The rules merely set out the "minimum disciplinary standards,"[328] and do not purport to "exhaust the moral and ethical considerations that should guide a lawyer."[329]

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324. TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a)(1).

325. *See* Lookshin v. Feldman, 127 S.W.3d 100, 107 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) ("[T]his Court will not allow the appeals process to be used by a litigant to make ad hominem attacks on an opposing party and subject that party to 'needless burden and expense.'"); Johnson v. Johnson, 948 S.W.2d 835, 841 (Tex. App.—San Antonio 1997, writ denied) ("When an attorney engages in misconduct before our court . . . we retain the inherent power to discipline such behavior when reasonably necessary and to the extent deemed appropriate."); *see also* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 54–55 (Del. 1994) (denouncing the conduct of an attorney who, during deposition, called opposing counsel an "asshole," declared that the attorney "could gag a maggot off a meat wagon," and accused the opposing attorney of asking "stupid questions" in order to earn a "full day's fee"); *Gleason*, 145 S.W.3d at 361 (Frost, J., concurring and dissenting) ("The frequency, number, and intensity of appellant's verbal onslaughts against opposing parties and their counsel, the lower court, and this court signal more than a mere lapse in judgment. Rather, they constitute a pattern of abusive and inappropriate behavior. . . . This unacceptable behavior is an affront to the administration of justice. We should protect the effectiveness and credibility of this court and the legal process from any further recurrence of this conduct."); Douglas R. Richmond, *The Ethics of Zealous Advocacy: Civility, Candor and Parlor Tricks*, 34 TEX. TECH L. REV. 3, 6–26 (2002) (examining cases of incivility between lawyers and applicable ethics rules). *But see In re* Disciplinary Action Against Garaas, 652 N.W.2d 918, 926 (N.D. 2002) (acknowledging that an attorney's "conduct in accusing opposing counsel of lying to the court was reprehensible" but concluding that "in light of the totality of the circumstances," no violation of the disciplinary rules occurred).

326. TEX. DISCIPLINARY R. PROF'L CONDUCT pmbl. ¶ 4.

327. *Id.*

328. TEX. DISCIPLINARY R. PROF'L CONDUCT pmbl. ¶ 8.

329. TEX. DISCIPLINARY R. PROF'L CONDUCT pmbl. ¶ 11.

V. CONCLUSION

The Texas Standards for Appellate Conduct and the Texas Disciplinary Rules of Professional Conduct differ in scope and purpose. The former are narrowly drawn to provide guidance to appellate practitioners in their everyday interactions with clients, opposing counsel, and the courts in order to ensure decorum and the appearance of propriety. In contrast, the Disciplinary Rules are cast more broadly and are primarily aimed at prohibiting practices which substantially undermine the pursuit of justice. Both sets of rules are important to the functioning of appellate practice, and violation of either brings the practice of appellate law into disrepute. While only violations of the Disciplinary Rules are subject to sanction by the State Bar, violations of the Standards will undermine a lawyer's credibility and persuasiveness with courts and fellow counsel.