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Austin, TX**Bombshells In The Record And Other  
Ethical Dilemmas For The Appellate Attorney**

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## **Ethics And the Appellate Record**

An attorney new to the appellate practice may believe that his or her command of rhetoric and precedent alone will be enough to bring victory. It will not take the attorney long to realize a most mundane truth: the most important variable in every appeal is the quality and content of the appellate record that was created in the trial court.

The record and the applicable law are the clay with which both the practitioner and the appellate court work. Because it handles hundreds of cases at any one time, an appellate court reviewing a proceeding in a trial court generally knows only those facts that the parties place before it. The appellate advocate, therefore, must ensure that an accurate representation of the record is presented to the appellate court in the record, in the briefing, and during oral argument.

Ethical dilemmas can and do arise. On rare occasions, a review reveals no viable basis in law or fact to support the client's position. Or the record may uncover malpractice by the trial-court attorney. Or what if the appellate attorney learns that a fact statement in the record is not true?

This paper will attempt to address several of these issues, focusing on the Texas Disciplinary Rules of Professional Conduct (Texas Disciplinary Rules) and the American Bar Association Model Rules of Professional Conduct (ABA Model Rules).<sup>1</sup> A significant number of case decisions have addressed some of these issues, particularly the appellate advocate's duty of candor before the appellate court in citing to the record.

## **Issues With No Basis in Law or Fact**

The phone rings. On the line is an attorney whose client has just been hit with a large judgment. The attorney assures you that there is at least one or more viable issues on appeal and trusts that

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<sup>1</sup> The ABA Model Rules form the foundation of many state disciplinary rules, with 43 states adopting codes of ethics based on the content of the ABA Model Rules, as amended in 2000. Five more states, including Texas, have circulated proposed rules based on these Model Rules.

[http://www.abanet.org/cpr/pic/ethics\\_2000\\_status\\_chart.pdf](http://www.abanet.org/cpr/pic/ethics_2000_status_chart.pdf).

you, an appellate specialist, will be able to file a brief asserting grounds for reversal.

Time is of the essence, because the notice of appeal is actually due within a few days. After an extensive interview with trial counsel and those working on the case, you work out an appropriate engagement agreement and accept the case.

Of course, after accepting the case, the next issue is to determine whether to pursue the appeal. You then pour through pages and pages of pleadings, discovery, testimony, and documentary evidence trial counsel has provided to you to determine whether a viable appeal exists. Based upon the trial counsel's memory, certain rulings were made that were clearly erroneous and harmful.

The briefing timetable has started and you have just received the entire appellate record. Although you are reading and summarizing the trial transcript as thoroughly, but as quickly, as possible, you immediately read the testimony of those witnesses the trial counsel says are important and the trial-court rulings on such evidence. But you do not find what you are looking for, and so you review the remainder of the record and discover that what you thought were viable issues for appeal apparently do not exist. In your efforts to locate reversible error, you begin to believe that pursuit of the appeal would be frivolous. What are your options?

### **The Attorney's Duties**

Texas Disciplinary Rule 3.01 provides a good-faith objective test for this situation:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.<sup>2</sup>

Tex. Disciplinary Rules Prof'l Conduct R. 3.01, *reprinted in* Tex. Gov't Code Ann. tit. 2, subtit. G app. A (West 2005) (Tex. State Bar

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<sup>2</sup> The ABA Model Rule 3.1 is identical, but continues with the phrase "which includes a good argument for an extension, modification or reversal of existing law." ABA Model Rules of Prof'l Conduct R. 3.1 (2002).

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"Hidden Bombshells on Appeal: What You Must Do, and What You Should Do When Things Don't Go as Planned"