



Appellate Ethics: Avoiding the Dreaded “Personal and Confidential” Envelope From the State Bar



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Appeals

Competence and Diligence

- Disciplinary Rule 1.01(a) provides that a lawyer should not agree to handle any matter beyond his or her level of competence.
- Rule 1.01(b) says that a lawyer shall not neglect any matter or fail to complete all services owed to the client.
- Rule 1.01(c) defines neglect as “inattentiveness involving a conscious disregard for the responsibilities owed.”
- In criminal appellate law, competence usually is assessed under 6th Amendment IAC.

Strickland v. Washington

- “**First**, the defendant must show that counsel’s performance was deficient. This requires that counsel made errors so serious that counsel was not functioning as the ‘counsel guaranteed the defendant by the Sixth Amendment.’
- **Second**, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable.”

11.071, CCP

- Provides for effective assistance of habeas counsel in capital cases (even though 6th Amendment doesn’t require it).
- Capital habeas counsel should be aware of 11.071’s pleading requirements.
- Sub-standard filings and failure to meet filing deadlines demonstrate incompetence and neglect.

Ex Parte Medina, 361 S.W.3d 633
(Tex.Crim.App. 2011)

Capital habeas counsel

- ☐ waited until the last possible date
- ☐ to intentionally file a “bare bones” habeas application
- ☐ with absolutely no facts alleged that would entitle his client to relief
- ☐ without his client’s consent
- ☐ and said his reason for doing so was to provoke a dispute in the convicting court as to the level of pleading specificity required by 11.071.
- ☐ This earned him a referral to the Disciplinary Counsel.

Communication

- ☐ Rule 103 requires adequate attorney-client communication.
 - ☐ Client must be kept “reasonably informed.”
 - ☐ Counsel must respond promptly to a client’s information request.
- ☐ Duty to inform client of the outcome of an appeal and the right to file a *pro se* PDR

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