APPELLATE TIPS FROM THE EXPERTS

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I. Introduction

Like it or not, Appellate lawyers are held to a different standard than our criminal trial counterparts. Because of the unpredictable nature of a criminal trial, trial lawyers are lauded for their ability to think on their feet even if they don't get everything "perfect." We understand when they get a citation wrong or misconstrue an opinion's ultimate holding. We forgive them for not providing the judge with authority contrary to their position. And we even give them more leeway in expressing their frustrations. These indulgences, deserved or not, don't extend to those of us who practice law in the appellate world.

This isn't to say that we are all not held to the same ethical standards of conduct—the Rules of Professional Conduct apply equally to all lawyers. It just means that a criminal trial lawyer doesn't have to be the same kind of "perfect" as an appellate lawyer. What follows is a discussion of the Standards of Appellate Conduct along with some suggestions that will hopefully make you a more effective appellate advocate.

II. Rules of Professional Conduct

Since the rules of Professional Conduct apply equally to both trial and appellate lawyers, a quick review of Rules 3.01 and 3.03 is helpful. Rule 3.01 imposes a duty on all lawyers to not bring or defend a proceeding unless the attorney "reasonably believes that there is a basis for doing so that is not frivolous."[1] As the comments to the rule explain, frivolous is not a very high bar to clear. In determining the proper scope of advocacy, the attorney must take account of "the law's ambiguities and potential for change."[2] And a claim isn't frivolous "even though the lawyer believes that the client's position ultimately may not prevail."[3] Given that an accused is entitled to a constitutional presumption of innocence, it's hard to imagine a scenario in which a criminal defense attorney would run afoul of this rule.

Obviously, the Rules of Professional Conduct don't allow criminal lawyers to advance any argument just because it benefits the client. The comments to Rule 3.01 make clear that a

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[1] Tex. R. Prof. Conduct 3.01.
[2] Tex. R. Prof. Conduct 3.01, Comment 1.
[3] Tex. R. Prof. Conduct 3.01, Comment 3.

filing or contention that "contains knowingly false statements of fact" is frivolous.[4] In addition, Rule 3.03 prohibits making a false statement or material fact or law to the court[5] or offering evidence the lawyer knows is false.[6] The rule also imposes a duty on counsel to inform the court of controlling legal authority that they know of, that is adverse to the position of their client.[7] In addition to rules 3.01 and 3.03, the rules impose special duties on prosecutors.[8]

Because a violation of the rules requires knowing conduct, the rules unintentionally discourage criminal trial lawyers from fully researching the law or investigating the facts of the case. When this is combined with the realities of criminal trial practice, it's easy to understand why the lawyers are not expected to be "perfect" in the same way appellate attorneys are.

III. Standards for Appellate Conduct

The Rules of Professional Conduct are just the starting point for the appellate practitioner. We must also be mindful of the Standards for Appellate Conduct. And while the Standards for Appellate Conduct don't alter the "existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure or the Code of Judicial Conduct",[9] they are the standards under which appellate lawyers will be measured. For this reason, every attorney who practices in appellate courts should know the standards.

The standards begin by recognizing the critical role lawyers play in the appellate process. "The appellate lawyer's role is to present the law controlling the disposition of a case in a manner that clearly reveals the legal issues raised by the record while persuading the court that an interpretation or application favored by the lawyer's clients is in the best interest of the administration of equal justice under law."[10] The standards start with the assumption that appellate lawyers fully understand the competing duties we owe to the justice system, officers of the court, and our clients.[11] The problems occur when these duties conflict.[12] Such conflicts "can be resolved through understanding the nature and extent of a lawyer's respective duties, avoiding the tendency to emphasize a particular duty at the expense of others, and detached common sense."[13]

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[4] *Id.*
[5] Tex. R. Prof. Conduct 3.03(a)(1).
[6] Tex. R. Prof. Conduct 3.03(a)(5).
[7] Tex. R. Prof. Conduct 3.03(a)(4).
[8] Under Rule 3.09, the prosecutor should only prosecute cases supported by probable cause and timely disclose to the defense "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor… ." Tex. R. Prof. Conduct 3.09(a) & (d).
[9] Tex. R. App. P. Standard.
[10] Tex. R. App. P. Standard.
[11] *Id.*
[12] *Id.*
[13] *Id.*

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