

PRESENTED AT

2019 Robert O. Dawson
Conference on Criminal Appeals

May 1-3, 2019
Austin, TX

TIPS FOR EVERYDAY APPELATE PRACTICE

Enrico B. Valdez

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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.

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First appeared as part of the conference materials for the
2019 Robert O. Dawson Conference on Criminal Appeals session
"Tips for Everyday Appellate Practice"