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Practical Guidelines for Ethical Practices

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A. Introduction

This paper explores the Standards for Appellate Conduct ("Standards"), which are the appellate counterpart to the Texas Lawyer's Creed. The Texas Supreme Court and the Texas Court of Criminal Appeals adopted the Standards in 1999 to "educate the Bar about the kind of conduct expected and preferred by the appellate courts." Kevin Dubose, *Standards for Appellate Conduct Adopted in Texas*, 2 J. App. Prac. & Process 191, 197 (2000). Like the Creed, the Standards are aspirational. They are not intended to provide a basis for civil liability, litigation, disciplinary action, or sanctions.[1]

Not only do the Standards provide important guidance for administrative lawyers who find themselves in the appellate courts when their cases undergo judicial review, they also have the potential to assist with the early development of an administrative record that will make a favorable impression as a case wends its way through a later appeal. Perhaps most importantly, they are a good general reminder of the lofty principles of professionalism that all Texas lawyers should strive to uphold. One appellate justice has described them as "a model code of conduct for the Bar as a whole." Gina M. Benavides & Joshua J. Caldwell, *The Texas Standards for Appellate Conduct: An Annotated Guide and Commentary*, 8 St. Mary's J. on Legal Malpractice & Ethics 224 (2018).

B. Preamble

The Standards begin with a Preamble that eloquently introduces their overarching theme. "[T]he Preamble recognizes the vital role that lawyers play in the big picture of our justice system and, more specifically, in the appellate arena." *Id.* at 227. It references the weighty notions that lawyers are "indispensable" players in the pursuit for justice and are responsible for "safeguarding" the law.[2] The Preamble also emphasizes the importance of carefully balancing lawyers' often competing duties to clients, courts, and other lawyers.

C. Lawyers' Duties to Clients

Following the Preamble, the first section of the Standards ("Section I") addresses lawyers' duties to clients. Section I begins with an introduction that parrots, almost word for word, the opening sentences in the analogous "Lawyer to Client" section of the Texas Lawyer's Creed:

> A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by a real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.[3]

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[1] Not surprisingly, however, courts have cited the standards in a number of cases involving the imposition of sanctions.

[2] TEX. STANDARDS FOR APP. CONDUCT pmbl. § 1.

[3] TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Clients.

But the Standards add a fourth sentence, and it is this addition that quickly sets the Standards apart from the Creed in a striking way:

> The 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.[4]

The message delivered by the final sentence is that lawyers' duties to clients cannot justify the type of untempered zealousness that has allowed the phrase "Rambo litigator" to become a commonplace metaphor that needs no explanation.

Several of the enumerated duties in Section I echo this message. Lawyers are instructed not only to be faithful to the objectives of their clients but also to remain "mindful of their concurrent duties to the legal system and the public good."[5] The Standards also direct lawyers to refrain from expressing negative opinions of opposing counsel or the court "unless relevant to a client's decision process."[6]

Communication is another important aspect of lawyers' duties to clients. It is a "key factor to competent, diligent, and ethical representation." Benavides & Caldwell, *supra*, at 232. Section I instructs lawyers with regard to communication with clients about the contents of the Standards themselves, fee agreements, several specified aspects of the appellate process, proper behavior on appeal, and a lawyer's right to grant accommodations to opposing counsel. And in a manner similar to Rule 1.03 of the Texas Disciplinary Rules of Professional Conduct, Section I requires that lawyers keep their clients informed, involve clients in decisions, and respond promptly to inquiries.[7]

Section I also addresses the important obligation to advise clients that a lawyer may not take a frivolous position on appeal. In *MEMC I LLC v. Town of Double Oak*, 2013 WL 626977, at *2 (Tex.App.—Fort Worth 2013, no pet.) (per curiam) (mem. op.), the Fort Worth Court of Appeals stopped short of imposing sanctions but noted that appellees' counsel "may have violated the spirit if not the letter of the Standards for Appellate Conduct" by opposing the reversal of a summary judgment where there was no question that the appellant was entitled to reversal. The summary judgment was based on res judicata, and it undeniably became subject to reversal after the same court of appeals overturned the judgment upon which the res-judicata defense was predicated. *Id.* The Court described both a lawyer's duty to advise clients that the lawyer will not take a frivolous position in an appellate court and the duty to respect and maintain the dignity of the court by only pursuing an appellate remedy in good faith (a duty which is set forth in the next section of the Standards).

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[4] TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Clients.
[5] TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Clients Standard 4.
[6] TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to Clients Standard 7.
[7] Rule 1.03(a) directs lawyers to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." TEX. DISCIPLINARY R. PROF. CONDUCT 1.03. Rule 1.03(b) requires lawyers to explain matters "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.*

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