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**Ethics: An Appellate Attorney's Scope of  
Representation & Engagement**

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# **Ethics: An Appellate Attorney's Scope of Representation & Engagement**

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## **I. Introduction**

This paper focuses on the special considerations an appellate practitioner faces in defining and communicating the scope of the attorney's representation to a client, complying with the attorney's fiduciary duties to client and the attorney's law firm and partners, and maintaining the highest professional standards among co-counsel or a client's previous counsel. This paper does not address many other important elements of an engagement agreement, including, for example, hourly rates (and how they might change during the course of a representation), interest on trust account balances, responsibility for expenses in contingent fee cases (and other details on how a contingent fee will be calculated and paid), referral fees, withdraw as a consequence for nonpayment, use of a retainer, etc.

For more information about other ethical issues, engagement letters, and fee agreements generally, the author recommends the reader to the Texas Center for Legal Ethics website ([www.legalethictexas.com](http://www.legalethictexas.com)) and to the Texas Bar CLE online library ([www.texasbarcle.com/CLE/home.asp](http://www.texasbarcle.com/CLE/home.asp)). Both sites are well-organized, practical resources of helpful information on these and other related issues. The Texas Disciplinary Rules of Professional Conduct and the comments to those rules of course provide the touchstone for any discussion of these issues.

## **II. Scope of Engagement**

An attorney wears many hats during the course of representing a client. The Preamble to the Texas Disciplinary Rules of Professional Conduct describes five functions:

As **advisor**, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As **advocate**, a lawyer zealously asserts the clients position under the rules of the adversary system. As **negotiator**, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As **intermediary** between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a

spokesperson for each client. A lawyer acts as **evaluator** by examining a client's affairs and reporting about them to the client or to others.

Tex. Disciplinary R. Prof'l Conduct Preamble, ¶2, *reprinted in* Tex. Gov't Code, tit. 2, subtit. G app. A (Tex. State Bar R. art. X, § 9).

Although almost every engagement requires an attorney to perform all of these functions during the course of representation, the attorney and client may agree to limit the scope of the representation. Tex. Disciplinary R. Prof' Conduct 1.02 (b) ("A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation."). The comments provide a few examples of how representation may be limited: "a retainer may be for a specifically defined objective"; "representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles"; "when a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage." *Id.* at cmt. 2. The Rule thus allows some flexibility in how an attorney and client can define the scope of representation, as long as the engagement agreement is in compliance with the Rules and any other applicable law and that any limitations on the scope of representation do not violate Rule 1.01 (i.e., prohibiting a lawyer from neglecting the lawyer's responsibilities to the client and from accepting or continuing representation when the lawyer knows that matter is beyond the lawyer's competence).

#### **A. Limited by Phase of Appeal**

The comments to the Rule 1.02 also address an issue of particular importance to an appellate practitioner with a limited scope of representation—the termination of the representation. "If a lawyer's representation is limited to a specific matter or matters, the relationship terminates when the matter has been resolved." *Id.* at cmt. 6. To remove any doubt about the continuing status of a limited representation, the comment counsels that the attorney should clarify the status of the representation in writing. *Id.* The comment illustrates the importance of clarity when the scope of representation involves only a specific part of a multi-phase proceeding:

For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

*Id.*

For an appellate practitioner, carefully consulting with the client and then defining the scope of representation to clearly identify which phases of trial consultation, post-verdict motions, court of appeals' proceedings, and any petition to the Texas Supreme

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