

ETHICS OF CRIMINAL
APPELLATE PRACTICE

2024

*ROBERT O. DAWSON CONFERENCE
ON CRIMINAL APPEALS
Austin, Texas*

Stephanie L. Stevens
2507 NW 36th Street
San Antonio, Texas 78228
(210) 431-5710
sstevens@stmarytx.edu

Table of Contents

| | | |
|-------------|---|---|
| I. | THE SCOPE OF THIS PAPER | 1 |
| II. | TEXAS STANDARDS FOR APPELLATE CONDUCT | 1 |
| III. | COMPETENCE | 1 |
| A. | The Rules | 1 |
| | <i>Preamble: Terminology</i> | 1 |
| | <i>Rule 1.01. Competent and Diligent Representation</i> | 2 |
| | <i>Rule 1.02. Scope and Objectives of Representation</i> | 2 |
| | <i>Rule 1.15. Declining or Terminating Representation</i> | 3 |
| B. | Commentary | 4 |
| | <i>Rule 1.01, n. 6</i> | 4 |
| | <i>Rule 1.01, n. 8</i> | 4 |
| | <i>Rule 1.02, n. 2</i> | 5 |
| IV. | HONESTY AND INTEGRITY | 5 |
| A. | The Rules | 5 |
| | <i>Rule 3.01: Meritorious Claims and Contentions</i> | 5 |
| | <i>Rule 3.03. Candor Toward the Tribunal.</i> | 5 |

| | | |
|-----------|---|----|
| | <i>Rule 3.04. Fairness in Adjudicatory Proceedings</i> | 6 |
| | <i>Rule 3.05. Maintaining Impartiality of Tribunal</i> | 8 |
| | <i>Rule 3.06. Maintaining Integrity of Jury System</i> | 8 |
| | <i>Rule 4.02: Communication with One Represented by Counsel</i> | 9 |
| | <i>Rule 4.04. Respect for Rights of Third Persons</i> | 10 |
| | <i>Rule 5.04: Professional Independence of a Lawyer</i> | 10 |
| | <i>Rule 5.08. Prohibited Discriminatory Activities</i> | 11 |
| | <i>Rule 8.02 Judicial and Legal Officials</i> | 12 |
| | <i>Rule 8.03. Reporting Professional Misconduct</i> | 12 |
| B. | Commentary | 13 |
| | <i>Rule 3.01, n. 3</i> | 13 |
| | <i>Rule 3.03, n. 3</i> | 13 |
| | <i>Rule 3.03, n. 9</i> | 14 |
| | <i>Rule 3.03, n. 10</i> | 14 |
| | <i>Rule 3.03, n. 11</i> | 14 |
| | <i>Rule 3.03, n. 12</i> | 14 |
| | <i>Rule 4.02, n. 2</i> | 15 |
| | <i>Rule 4.02, n. 3</i> | 15 |
| C. | Case Law | 15 |
| | 1. Appointed counsel’s duty on appeal | 15 |

| | | |
|-----|---|----|
| a. | <i>The Anders brief</i> | 15 |
| b. | <i>Anders in practice</i> | 16 |
| 2. | Retained counsel’s duty on appeal. | 17 |
| 3. | The limits of zealous advocacy | 17 |
| 4. | Ex parte discussions under Rule 3.05(b) | 18 |
| 5. | The duty to cite adverse authority | 18 |
| 6. | The duty not to mislead | 18 |
| 7. | The duty to preserve the integrity of the judicial process | 19 |
| 8. | Threatening criminal prosecution | 19 |
| 9. | Do not split fees with your investigator | 20 |
| V. | CONFIDENTIALITY | 20 |
| A. | The Rules | 20 |
| | <i>Rule 1.05. Confidentiality of Information</i> | 20 |
| B. | TEX. R. EVID. 503 | 22 |
| C. | EXPERTS | 25 |
| 1. | TEX. CODE CRIM. PROC. ANN. 39.14(b) | 25 |
| | Rule 4.02(b) | 25 |
| | Rule 4.02(b), n. 3 | 25 |
| VI. | CONFLICTS | 26 |
| A. | The Rules | 26 |

| | | |
|--------------|---|----|
| | <i>Rule 1.06. Conflict of Interest: General Rule</i> | 26 |
| | <i>Rule 1.08. Conflict of Interest: Prohibited Transactions</i> | 27 |
| | <i>Rule 3.08. Lawyer as Witness</i> | 28 |
| B. | Case Law | 28 |
| VII. | FEES | 30 |
| A. | The Rules | 30 |
| | <i>Preamble: A Lawyer’s Responsibilities</i> | 30 |
| | <i>Rule 6.01. Accepting Appointments by a Tribunal.</i> | 31 |
| | <i>Rule 1.04. Fees.</i> | 31 |
| B. | Commentary | 33 |
| | <i>Rule 6.01, n. 1</i> | 34 |
| | <i>Rule 6.01, n. 2</i> | 34 |
| | <i>Rule 6.01, n. 4</i> | 34 |
| | <i>Rule 6.01, n. 5</i> | 35 |
| VIII. | SPECIAL OBLIGATIONS OF PROSECUTORS. | 35 |
| A. | The Rules | 35 |
| | <i>Rule 3.09. Special Responsibilities of a Prosecutor</i> | 36 |
| B. | Proposed Amendments to Rule 3.09 | 36 |
| C. | The Constitutional Obligation To Disclose Exculpatory Evidence ... | 37 |
| D. | The Texas Code Of Criminal Procedure | 37 |

I. THE SCOPE OF THIS PAPER

This paper presents selected rules of professional conduct that – in my admittedly subjective view – are particularly relevant to criminal appellate lawyers. These rules can be found in their entirety in the Texas Government Code, Title II, Subtitle G, Appendix A, Article X, § 9. The paper also refers to case law which interprets the rules and related concepts, and to the commentary to the rules.

II. TEXAS STANDARDS FOR APPELLATE CONDUCT

The Supreme Court of Texas and the Texas Court of Criminal Appeals adopted Standards for Appellate conduct on February 1, 1999. “The Standards were created to educate the Bar about the kind of conduct expected and preferred by the appellate courts.” Edward L. Wilkinson, *If One is Good, Two Must Be Better: A Comparison of the Texas Standards for Appellate Conduct And The Texas Disciplinary Rules Of Professional Conduct*, 41 ST. MARY’S L.J. 645, 645 (2010). The Standards do not alter or amend the current rules state in the Texas Disciplinary Rules of Professional Conduct. Furthermore, the Standards themselves not that it shall not be permitted to use the Standards as a basis for motions for sanctions, civil liability or litigation. *Id.* at 646.

The Texas Standards for Appellate Conduct are to provide guidance to appellate practitioners in their interactions with clients, opposing counsel, and the courts to encourage professionalism in appellate courts. The Texas Disciplinary Rules of Professional Conduct, however, are more broadly aimed at discouraging behavior which substantially undermines justice in all courts. “While only violations of the Disciplinary Rules are subject to sanction by the State Bar, violations of the Standards will undermine a lawyer's credibility and persuasiveness with courts and fellow counsel.” *Id.* at 699.

III. Competence

A. The Rules

Preamble: Terminology

"Competent" or "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Ethics of Criminal Appellate Practice

Also available as part of the eCourse

[First Friday Ethics \(December 2024\)](#)

First appeared as part of the conference materials for the
2024 Robert O. Dawson Conference on Criminal Appeals session
"Ethical Issues in Criminal Appeals Practice"