

ETHICS OF CRIMINAL APPELLATE PRACTICE

*2023 ROBERT O. DAWSON CONFERENCE
ON CRIMINAL APPEALS
Austin, Texas*

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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

client.

Rule 1.01. Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

(b) In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer; or

(2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

(c) As used in this Rule, "neglect" signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.

Rule 1.02. Scope and Objectives of Representation

(a) Subject to paragraphs (b), (c), (d), and (e), (f), and (g), a lawyer shall abide by a client's decisions:

(1) concerning the objectives and general methods of representation;

(2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law;

(3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.

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First appeared as part of the conference materials for the
2023 Robert O. Dawson Conference on Criminal Appeals session
"Ethics of Criminal Appellate Practice"