PLAYING WELL WITH OTHERS: SIMPLE PROFESSIONAL COURTESIES

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Presented to:
STATE BAR OF TEXAS APPELLATE BOOT CAMP
September 8, 2004

CHAPTER 9

CURRICULUM VITAE OF ANN CRAWFORD McCLURE

CERTIFICATION BY THE TEXAS BOARD OF LEGAL SPECIALIZATION

Board Certified in Family Law [1984]
Board Certified in Civil Appellate Law [1987]

EDUCATIONAL BACKGROUND

Juris Doctor, University of Houston, 1979
Bachelor of Fine Arts, Texas Christian University, 1974 [Magna Cum Laude]

HONORS AND AWARDS

2004 Jurist of the Year – American Academy of Matrimonial Lawyers/Texas Chapter
2004 Texas Center Professionalism Award – Texas Center for Legal Ethics and Professionalism
2004 Professionalism Award – El Paso Young Lawyers Association
2002 Judge Sam Emison Award B Texas Academy of Family Law Specialists
2000 Community Service Award, Black El Paso Democrats
2000 Dan T. Price Award B Family Law Section, State Bar of Texas
2000 Sarah T. Hughes Award B Women and the Law Section, State Bar of Texas
1999 Distinguished Alumna Award B Texas Christian University
1999 Civil Rights Award, NAACP B El Paso Local Chapter
1999 Honoree of Women in Law, Texas Tech University School Of Law
1998 State Bar of Texas Presidential Certificate of Merit
1998 State Bar of Texas Presidential Citation
1996 Extra Miler Award, Boy Scouts of America Yucca Council, Polaris District
1993 State Bar of Texas President=s Special Recognition

APPOINTMENTS

Governor=s Task Force on Indigent Defense
Member, Texas Judicial Council 2001-2005
Member, Texas Board of Legal Specialization Civil Appellate Law Advisory Commission 2001-2007
Supreme Court Rules Advisory Committee 1999-2002
Chair, Supreme Court Special Subcommittee on Implementation of Chapter 33, TEX.FAM.CODE 1999-2002
Member, Texas Board of Law Examiners 1991-1995
Member, Board of Disciplinary Appeals 1991-1993
Member, Family Law Specialization Exam Commission 1989-1993

LEGAL ASSOCIATION ELECTED POSITIONS

Vice President, El Paso Bar Association, 2004-2005
Chair, Judicial Section B Appellate Division B State Bar of Texas, 2001-2002
Chair, Appellate Section, State Bar of Texas 2000-2001
Chair, Family Law Section, State Bar of Texas 1997-1998
Director, El Paso Bar Association 1996-1999
President, Trans-Pecos Bar Association 1995-1997
Director, Texas Academy of Family Law Specialists 1992-1995

COURSE DIRECTORSHIPS

Course Director, 2005 New Frontiers in Marital Property Law [Scheduled]
Course Director, 2002 Advanced Civil Appellate Seminar
Course Director, 2000 Judicial Section Annual Conference [Appellate Track]
Course Director, 1995 Marriage Dissolution Seminar
Co-Course Director, The Ultimate Trial Notebook, 1994 State Bar of Texas Annual Meeting
Course Director, 1991 Law and Tactics Seminar
Assistant Course Director, 1990 Advanced Family Law Seminar
Course Director, 1989 Family Law for the Experienced Non-Specialist

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I. INTRODUCTION

When I first began the preparation of this article, I thought that the perfect title would be, "Is Civil Law an Oxymoron?" **oxymoron >noun** a figure of speech or expressed idea in which apparently contradictory terms appear in conjunction (e.g. *bittersweet*). ORIGIN from Greek *oxumMros* "pointedly foolish". I felt rather foolish myself when my research quickly revealed that at least three other commentators had already coined the phrase. *See* Justice Eugene A. Cook, *Professionalism and the Practice of Law*, 23 TEX.TECH L.REV. 967 (1992), *citing* Justice Arthur Gilbert, *Civility*, TRIAL, April 1991, at 106 ("The phrase 'civil law' is becoming an oxymoron."); Jeanette Ahlenius, *Do We Toss Them or Teach Them?*, 57 TEX.BAR J. at 1090 (November 1994) ("What is really at the root of the public's perception that 'professional lawyer' is an oxymoron?"). I shifted gears quickly. Perhaps we should focus as much on "courtesy" as we do "professionalism" and "civility".

I can remember the early lessons I was taught as a child: don't run with scissors, keep your elbows off the table, chew with your mouth closed, and play well with others. My mother wanted to raise a well-mannered daughter. How ironic that we need to be reminded even in our adult years. There are still schoolyard bullies among us. The bullies of the legal profession have been dubbed Rambo, although there are plenty of Rambettes in practice too.

II. WHAT DOES IT MEAN?

The concept of professionalism is amorphous; it means different things to different people. Thus, any rational discussion requires that we define our terms. Dean Roscoe Pound of Harvard Law School suggested: "The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood." Roscoe Pound, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953). Justice Sandra Day O'Connor described it as requiring "adherence to the highest ethical standards of conduct" in the representation of clients while tempering "bold advocacy . . . with a sense of responsibility to the larger legal system. . . . " Sandra Day O'Connor, *Meaning of Professionalism. . . ,* THE PROFESSIONAL LAWYER, Spring 1989 at 1. According to Justice Stephen H. Grimes of the Florida Supreme Court, a professional is knowledgeable, skillful, and ethical and treats fellow members of the bar with respect. THE BENCHER, THE NEWSLETTER OF THE AMERICAN INNS OF COURT FOUNDATION, May 1990 at 4. In its broadest sense, professionalism is "an aspirational standard of conduct that exceeds the mandates of the Disciplinary Rules of Professional Conduct." *Delta Air Lines, Inc. v. Cooker*, 908 S.W.2d 632 (Vance, J., dissenting), *citing* Jewel Arrington, *Everyday Professionalism*, 56 TEX. BAR. J. 232 (1993). Whether it is a function of my age, my experience, or his role as a mentor, I am most drawn to the definition enunciated by former Texas Supreme Court Justice Eugene A. Cook: "To me, professionalism is synonymous with common courtesy, civility, and the Golden Rule." Cook at 957. To many, the Golden Rule has Biblical implications; to others it simply means, "What goes around, comes around."

III. THE EMERGENCE OF RAMBO

Justice Cook identified several factors which contributed to the birth of the Rambo litigator: the tremendous increase in the number of attorneys; the increasing compensation; the increasing number of hours worked; the trend towards treating the practice as a business; and the negative perception of the legal community. Cook, at 961. Law schools continue to enroll and graduate the same number of students. The State Bar of Texas licenses more than 3000 lawyers per year. Some believe that the lawyer explosion feeds poor public perception. Competition is high – competition for jobs and competition for business. This in turn feeds the advertising crisis – what gets clients in the door? Full page color ads in the yellow pages. Television ads with audio and visual effects. Solicitations following car accidents. One Houston attorney noted that in the 1950's, practicing law was a calling; in the '70s, it was a profession; in the '80s, it became a business and now it is perceived as a racket. J.D. Bucky Allshouse, *Professionalism in Family Law*, STATE BAR OF TEXAS ADVANCED FAMILY LAW COURSE Chapter 1, p.1 (1993).

In my view, Rambo is an attitude – a belief that the rules don't apply to those who take litigation seriously. One Dallas firm has succinctly, and quite publicly, declared that "[c]lient loyalty shouldn't be sacrificed for

professional courtesy." Cook at 970, citing Loren Berger, *Waging 'Rambo' Litigation: Bickel & Brewer's Tactics Stir Resentment*, THE TEXAS LAWYER, May 16, 1988, at 1, col. 1. A former president of the American Bar Association explained that to Rambo, "litigation is war. The lawyer is a gladiator and the object is to wipe out the other side." Cook at 970, citing THE NEW YORK TIMES, Aug. 5, 1988, at 21. But once again, Justice Cook says it best: "A Rambo lawyer's meat ax approach is to the practice of law what date rape is to courtship." Cook at 979. It's a gloves-off, in-your-face, "gotcha" mentality: draw first blood; give no quarter; gain every advantage; make no concession; offer no compromise; play hardball and win at all costs.

The are many who believe that the death of civility coincided with sanctions and the civil death penalty – the ability to strike your pleadings. As a result, lawyers began to feel that if they accommodated their adversary, they were doing a disservice to their client. If you asked them, they would tell you the client expects Rambo; the client expects hardball; if I don't play hardball, they'll fire me, they'll file a grievance, they'll sue me for malpractice. So they did what they believed their clients expected. Is that an excuse? Maybe that really is what the clients expect. They complain about Rambo when Rambo represents the other side. But when they need to hire a lawyer, they want Rambo on their side. And then there are those clients who themselves play Rambo and want to hire a puppet. J. P. Morgan was once quoted as saying, "I don't want a lawyer to tell me what I can't do. I hire him to tell me how to do what I want to do."

A. Recognizing Rambo

Rambo tactics are like pornography – you know it when you see it. Robert N. Sayler, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., March 1, 1988. One humorist has offered the "Top 10 Ways to Spot a Rambo Litigator":

(1) Foams at the mouth during depositions;

(2) Traces of camouflage paint on the briefcase;

(3) Proudly displays tatoos of his favorite objections;

(4) Continually seeks clarification of difficult terms such as "you" and "when."

(5) Always signs a settlement agreement in disappearing ink;

(6) Office decor includes framed pictures of a spouse, children, and the family piranha;

(7) Refuses to join a firm whose medical insurance does not cover regular rabies shots;

(8) Affectionately refers to Attila the Hun and Genghis Khan as role models;

(9) Was voted "Most Likely to Harass, Delay, and Obfuscate" in high school;

(10) Look for the office building with the scorched earth in front.

John G. Browning, *Top 10 Ways to Spot a Rambo Litigator*, TEX. BAR J. October 1990 at 1094.

B. Recognizing the Problem

By 1987, the legal profession began to recognize that Rambo was a problem. The Dallas Bar Association was the first to adopt a mandate for professionalism, entitled "Lawyer's Creed" and "Guidelines of Professional Courtesy." The next year, the judges for the United States District Courts for the Northern District of Texas, sitting *en banc*, adopted the Dallas guidelines as standards of litigation conduct. *See Dondi Properties Corp. v. Commerce Savings & Loan Ass'n.*, 121 F.R.D. 284 (N.D. Tex. 1988).

While I have mentioned Justice Cook several times already, I have yet to say that in my view at least, he is the father of professionalism in Texas. When he became a justice on the Supreme Court, he spearheaded the creation of a Committee on Professionalism. With Justice Cook serving as chair, the committee drafted a statewide code of professionalism. On November 7, 1989, both the Texas Supreme Court and the Court of Criminal Appeals promulgated and adopted THE TEXAS LAWYER'S CREED – A MANDATE FOR PROFESSIONALISM. As a result, Texas became the first state to implement an official, albeit aspirational, policy of professional conduct. The courts were quick to embrace it. "Neither justice nor our fellow man is served until the principles stated in this creed become the moral fabric that all lawyers wear throughout their personal and professional lives." *Warrilow v. Norrell*, 791 S.W.2d 515, 531 n.3 (Tex.App.–Corpus Christi 1989, writ denied) (Nye, J., concurring).

With that impetus, the Texas Center for Legal Ethics and Professionalism was founded in 1989 to promote and enhance professionalism, ethics and civility

among lawyers. The first of its kind in the nation, it seeks to address unprofessional behavior with a multi-faceted and systematic strategy. It operates as a learning center, a resource center, and a mobilization center. *See* William B. Hilgers, *The Path of Professionalism*, TEX. BAR J. November 1994 at 1089. But Rambo isn't just a civil trial lawyer; he soon branched out into civil appellate practice.

C. Rambo "Appeals" to a Whole New Crowd

By the early 1990's, some appellate practitioners were noticing behavior that was "unnecessary, unprofessional and unlikely to make a favorable impression on the appellate court." Kevin Dubose, *Talking the Talk and Walking the Walk*, STATE BAR OF TEXAS ADVANCED CIVIL APPELLATE PRACTICE COURSE D, D-1 (1999). In that article, Dubose explained the history of the Standards for Appellate Conduct, which stemmed from a paper he had written for the 1993 Advanced Civil Appellate Practice Course, entitled *Ten Suggestions for a More Civilized Appellate Bar*. These Ten Commandments, if you will, are as follows:

(1) Do not make personal attacks on opposing counsel.

(2) Do not accuse opponents of lying unless you can prove it or it is a matter of substance and significance.

(3) Do not oppose motions for extensions of time, motions for leave to exceed the page limitations, or motions for leave to file post-submission briefs.

(4) Agree to the substitution of copies when original documents or exhibits have been lost.

(5) In briefing, do not fail to provide record references.

(6) Do not file last minute briefs.

(7) Do not argue outside the record.

(8) Avoid arguing frivolous positions.

(9) Do not distract the court during your opponent's argument.

(10) Communicate with opposing counsel throughout the appellate process.

When Dubose became the Chair of the Appellate Section in 1995, he appointed a committee, chaired by Charles R. "Skip" Watson of Amarillo, to draft an appellate version of the Texas Lawyer's Creed. Both Dubose and Justice Cook served on the committee, along with other appellate specialists. While the committee was hard at work, the Appellate Section conducted a survey in which appellate judges were asked, "What type of unethical or unprofessional conduct disturbs you most?" Here is their Top Ten list:

(1) Misrepresenting the law.

(2) Misrepresenting the record.

(3) Personal attacks on opposing counsel.

(4) Reference to matters outside the record.

(5) Taking "pot shots" at a prior opinion of the court that is against counsel's theory.

(6) Sarcastic, vitriolic, histrionic or emotional (jury) arguments.

(7) Physical reaction to opposing counsel's argument.

(8) Apparent lack of preparation.

(9) Frivolous requests for sanctions.

(10) Inappropriate demeanor (referring to the judges as "you guys", pointing, moving around, chewing gum, raising voice).

The Standards for Appellate Conduct were jointly approved by both the Texas Supreme Court and the Court of Criminal Appeals on February 1, 1999. As a result, Texas became the first jurisdiction in the United States to adopt standards of professional conduct directed toward appellate practice. Dubose at 1. Although the standards are applicable to both civil and criminal practice, one commentator has observed "that these issues arise almost entirely in the context of the civil justice system, not the criminal justice system. No one ever seems to ask why, but the question needs to be asked. I do not have an answer, but the implications of the question are at least interesting and perhaps even far-reaching." Judge Royal Ferguson, *Should the Federal Courts of Texas Adopt the Texas Lawyer's Creed?*, 57 TEX.BAR J. at 1110 (November 1994).

IV. STANDARDS FOR APPELLATE CONDUCT

As an appellate specialist, a former appellate practitioner, and a current appellate judge, I want to publicly thank Justice Cook, Kevin Dubose, and Skip Watson, whom I have affectionately referred to as the Three Musketeers, for the countless hours they spent ensuring passage of the Standards. "All for one, one for all," they have endeavored to advocate the code of chivalry. Alexandre Dumas, *The Three Musketeers* (1844).

A. Lawyer-Client

Professionalism has its greatest potential when the attorney-client relationship is established. Hilgers at 1089. The simple reason is that a client's expectations are formed during the initial interview. This is the time to explain how the judicial system works and how there is a proper role to be played by the litigant, the lawyer, and the judge. While we owe a duty to each other, we also owe a higher duty to the administration of justice. Clients must grasp this concept from the beginning.

1. THE STANDARDS

The Standards address not only the responsibilities of the attorney, but the attorney's expectations of the client. This section begins with the following preamble:

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. 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.

- Counsel will advise their clients of these Standards of Conduct when undertaking representation.
- Counsel will explain the fee agreement and cost expectation to their clients. Counsel will then endeavor to achieve the client's lawful appellate objectives as quickly, efficiently, and economically as possible.
- Counsel will maintain sympathetic detachment, recognizing that lawyers should not become so closely associated with clients that the lawyer's objective judgment is impaired.
- Counsel will be faithful to their clients' lawful objectives, while mindful of their concurrent duties to the legal system and the public good.
- Counsel will explain the appellate process to their clients. Counsel will advise clients of the range of potential outcomes, likely costs, timetables, effect of the judgment pending appeal, and the availability of alternative dispute resolution.
- Counsel will not foster clients' unreasonable expectations.
- Negative opinions of the court or opposing counsel shall not be expressed unless relevant to a client's decision process.
- Counsel will keep clients informed and involved in decisions and will promptly respond to inquiries.
- Counsel will advise their clients of proper behavior, including that civility and courtesy are expected.
- Counsel will advise their clients that counsel reserves the right to grant accommodations to opposing counsel in matters that do not adversely affect the client's lawful objectives. A client has no right to instruct a lawyer to refuse reasonable requests made by other counsel.
- A client has no right to demand that counsel abuse anyone or engage in any offensive conduct.
- Counsel will advise clients that an appeal should only be pursued in a good faith belief that the trial court has committed error or that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.
- Counsel will advise clients that they will not take frivolous positions in an appellate court, explaining the penalties associated therewith. Appointed counsel in criminal cases shall be deemed to have complied with this standard of conduct if they comply with the requirements imposed on appointed counsel by courts and statutes.

This last proviso refers to *Anders* cases. *See Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, reh. denied, 388 U.S. 924, 87 S.Ct. 2094, 18 L.Ed.2d 1377 (1967) (allowing court appointed counsel to withdraw after presenting a professional evaluation of the record and demonstrating why, in effect, there are no arguable grounds to be advanced). *Anders* has been extended to parental termination cases in Texas. *Porter v. Texas Dept. of Protective and Regulatory Services*, 105 S.W.3d 52 (Tex.App.–Corpus Christi 2003, no pet.); *In re K.M.*, 98 S.W.3d 774 (Tex.App.–Fort Worth 2003, no pet.)

2. CLIENT CONTROL

On many occasions, I have heard opposing counsel say that s/he can't agree to a continuance or an extension of time because "my client won't let me". This is an admission that the client is controlling the lawyer rather than the lawyer controlling the client. When an attorney told my husband that he would not agree to a continuance necessitated by my having surgery, I decided to start attaching the Texas Lawyer's Creed to my fee agreements. When I had a client demand that I raise certain points of error which I firmly believed to be frivolous and which I thought weakened legitimate arguments, I began inserting a contractual provision that I retained the authority to determine the issues for appeal, after discussion, of course. Had the Standards been in effect at the time I was in private practice, I would have attached them to every fee agreement.

Why is this important? If a client balks at signing the contract because of the Standards, you will know at the outset you have a problem client and you should decline to undertake representation. It isn't worth it.

3. SELF CONTROL

Litigators have a tendency to be possessed of a strong ego. There may be a desire to strut, puff up one's accomplishments and skills, even suggest a unique or special relationship with one of the judges. Perhaps there are months when the cash flow is depleted and the temptation arises to take an appeal that should not be pursued, or to bleed the case for financial gain. Resist the temptation. Integrity means doing the right thing simply because it's the right thing to do. But even if you don't buy that, inflating your client's expectations as a means of inflating your self-esteem can be counter-productive. Nothing like a malpractice case to burst your bubble. If you're so good, and the case is worth so much money, and you know the judges by their first names, how come you didn't win?

It's also important to set a good example for your client. Don't make disparaging comments about the judge, opposing counsel, or your client's trial counsel. Your client wants to appeal because s/he is dissatisfied with the outcome of the trial. To suggest that the judge is on the take, or that the judge is stupid, or that the other lawyer is known for offering bribes, only serves to discredit our system of justice. The client has already imagined these scenarios anyway. Offer a realistic and constructive analysis of the likelihood of success on appeal, as well as the expense of success. Clients seldom anticipate the length of time an appeal will take, nor do they comprehend that at best, they may only be paying to get a second bite at the apple.

B. Lawyer-to-Lawyer

This is the section that most resembles the Golden Rule. Treat other lawyers as you would want to be treated. Mistreat them and I guarantee they will never forget.

1. THE STANDARDS

Lawyers bear a responsibility to conduct themselves with dignity towards and respect for each other, for the sake of maintaining the effectiveness and credibility of the system they serve. The duty that lawyers owe their clients and the system can be most effectively carried out when lawyers treat each other honorably.

- Counsel will treat each other and all parties with respect.
- Counsel will not unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation by opposing counsel.
- Counsel will not request an extension of time solely for the purpose of unjustified delay.
- Counsel will be punctual in communications with opposing counsel.
- Counsel will not make personal attacks on opposing counsel or parties.
- Counsel will not attribute bad motives or improper conduct to other counsel without good cause, or make unfounded accusations of impropriety.

- Counsel will not lightly seek court sanctions.

- Counsel will adhere to oral or written promises and agreements with other counsel.

- Counsel will neither ascribe to another counsel or party a position that counsel or the party has not taken, nor seek to create an unjustified inference based on counsel's statements or conduct.

- Counsel will not attempt to obtain an improper advantage by manipulation of margins and type size in a manner to avoid court rules regarding page limits.

- Counsel will not serve briefs or other communications in a manner or at a time that unfairly limits another party's opportunity to respond.

2. YOUR WORD IS YOUR BOND

Your reputation for keeping your word is fundamental to integrity. Attorneys quickly learn who plays hardball and who negotiates in good faith.

> Professionalism imposes no official sanctions. It offers no official reward. Yet sanctions and reward exist unofficially. Who faces a greater sanction than the loss of respect? Who faces a greater reward than the satisfaction of doing right for right's own sake?

Chief Justice Harold G. Clarke, Supreme Court of Georgia, *The Rewards of Professionalism*, THE PROFESSIONAL LAWYER, August 1991 at 1.

3. CHOOSE YOUR MENTORS WELL

I mentioned earlier that Justice Cook was a mentor. I should explain how that happened. I began my practice in Houston in 1979, nearly 25 years ago. I practiced for a small firm that specialized in family law and as luck would have it, Justice Cook practiced family law as well. I worked with him through the Family Law Section of the Houston Bar Association and we served as officers of that organization together. I moved to El Paso and he ultimately moved to Austin when he was appointed to the Supreme Court. Dedicated to gender diversity, Justice Cook immediately took steps to expand the participation of women in State Bar activities. With his support, I was appointed to the Continuing Legal Education Committee and ultimately served as its vice chair. Justice Cook asked me to serve as his assistant course director in 1990 when he directed the Advanced Family Law Seminar. And he ultimately instigated my appointment to the Texas Board of Law Examiners and administered my oath of office. He was a leader, a role model, and a friend.

Over the course of my practice, I have observed young attorneys become associated with practitioners who regularly and purposefully walk right to the edge of the ethical line, and at times cross it. These young lawyers are learning the tricks, tactics and tantrums of their employers. Some realize it, some don't. But the integrity and credibility of a professional is often judged by the company s/he keeps. Bluntly put, you can't take a bath with a hog without getting dirty.

4. SELF REFLECTION

Analyze your methods. Do you oppose an extension of time because an adversary opposed yours? Have you handed your opponent a reply brief as you walked into the courtroom for oral argument? Have you argued that opposing counsel is lying when the brief contains a simple typographical error? Do you roll your eyes or shake your head during your opponent's argument? Do you misstate the facts or misquote the law? Have you argued outside the record? Do you do it occasionally when provoked, or has it become a habit?

C. Lawyer-to-Court

Judges are in the unique position of putting a stop to unethical and unprofessional behavior. *In the Matter of J.B.K.*, 931 S.W.2d 581, 583 (Tex.App.–El Paso 1996, orig. proceeding).

> Appellate judges hold the key to what appellate lawyers do. If counsel cannot derive any meaningful benefits from a given course of conduct, the conduct probably will not take place. That is, the bench can save us from ourselves.

David M. Gunn, *Why Appellate Law is so Appealing*, STATE BAR OF TEXAS ADVANCED CIVIL APPELLATE PRACTICE COURSE M, M-1 (1994).

1. THE STANDARDS

As professionals and advocates, counsel assist the Court in the administration of justice at the appellate level. Through briefs and oral submissions, counsel provide a fair and accurate understanding of the facts and law applicable to their case. Counsel also

serve the Court by respecting and maintaining the dignity and integrity of the appellate process.

- An appellate remedy should not be pursued unless counsel believes in good faith that error has been committed, that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.

- An appeal should not be pursued primarily for purposes of delay or harassment.

- Counsel should not misrepresent, mischaracterize, misquote, or miscite the factual record or legal authorities.

- Counsel will advise the Court of controlling legal authorities, including those adverse to their position, and should not cite authority that has been reversed, overruled, or restricted without informing the court of those limitations.

- Counsel will present the Court with a thoughtful, organized, and clearly written brief.

- Counsel will not submit reply briefs on issues previously briefed in order to obtain the last word.

- Counsel will conduct themselves before the Court in a professional manner, respecting the decorum and integrity of the judicial process.

- Counsel will be civil and respectful in all communications with the judges and staff.

- Counsel will be prepared and punctual for all Court appearances, and will be prepared to assist the Court in understanding the record, controlling authority, and the effect of the court's decision.

- Counsel will not permit a client's or their own ill feelings toward the opposing party, opposing counsel, trial judges or members of the appellate court to influence their conduct or demeanor in dealings with the judges, staff, other counsel, and parties.

2. VENT AND TOSS

It is only human nature to be upset when you lose. Depending on the personal investment one has in the case, "upset" can become "outrage". It's never a good idea to whip out a motion for rehearing in this frame of mind. Write it to vent if you must, but put it away for a day or two until you have cooled off. You will likely want to toss it and start over. Here are a few examples of attorneys who did not allow cooler heads to prevail and the price they had to pay. The first arises from the San Antonio Court's reaction to a plaintiff's motion for rehearing.

> Specifically, Maloney asserts in the motion that "[p]olitics should not win the day over incapacitated rape victims," and "Plaintiffs can think of no reason for this opinion other than politics." Maloney further contends that "[i]t must be embarrassing to take such a pro-rapist, pro-big-insurance-defense-firm position with so appallingly non-existent legal or logical basis," and "[the] Court should admit it is writing new law to assist the insurance companies of a sleazy nursing home that happen to be represented by an insurance defense firm." Finally, Maloney describes the court's reasoning as "specious" and states that the court "goes on to make some rather outlandish representations which are not supported by the record, the transcript,or by any matter before the court.

In re Maloney, 949 S.W.2d 385, 386 (Tex.App.–San Antonio 1997, orig. proceeding). The appellate court issued an order directing Maloney to show cause why the court should not sanction and refer her to the grievance committee. Drawing a distinction between respectful advocacy and judicial denigration, the court found the former to be a protected voice while the latter can only be condoned at the expense of public confidence in the judicial system. *Id.* at 388. Recognizing that a judge who receives information clearly establishing that a lawyer has violated the Texas Rules of Professional Conduct should take appropriate action, the court referred Maloney to the Office of the General Counsel for the State Bar of Texas. *Id. See also Cap Rock Electric Coop., Inc. v. Texas Utilities Electric Company*, 874 S.W.2d 92, 102 (Tex.App.–El Paso 1994, no writ).

Attacks upon the judiciary violate the rule requiring counsel to "demonstrate respect for the legal system and those who serve it, including judges . . . ." *Johnson v. Johnson*, 948 S.W.2d 835 (Tex.App.–San Antonio 1997, writ denied), *citing* TEX.DISCIPLINARY R. PROF. CONDUCT preamble ¶ ¶ 1, 4 (1989), *reprinted in* TEX.GOV'T CODE ANN., tit. 2, subtit G, app. A (Vernon Pamphlet 1997) (State Bar Rules art. X § 9). The

attorney in *Johnson* attacked not the appellate court but the trial judge: "The trial court's pathetic determination to 'take from the rich and give to the poor,' regarding the entire Record of the matter of [Mr. Johnson's] separate property, is a classic example of disregard for the law and the facts, by a man incompetent to comprehend the case at hand." 948 S.W.2d at 840, n. 1. The appellate court was not amused.

> In light of counsel's disparaging remarks about the trial court, his firm adherence to those remarks during oral argument, and his claims of error about matters that never occurred or were never presented to the trial court, a substantial question has been raised about counsel's honesty, trustworthiness, or fitness as a lawyer. Consequently, we are bound by Canon 3D(2) of the Code of Judicial Conduct to inform the State Bar of Texas of this matter.

Id. at 841. The court additionally imposed sanctions of $500 pursuant to Rule 84 of the Texas Rules of Appellate Procedure. It then vindicated the trial judge, a senior judge sitting by assignment who had served as a trial judge for four years, a justice of the court of appeals for fifteen years (the last ten years as chief justice), a justice of the Texas Supreme Court for eight years and the Dean of Baylor School of Law for eight years. *Id.* at 840, n.1.

Similar reprisals have been imposed by the Corpus Christi Court of Appeals. *See Sears v. Olivarez*, 28 S.W.3d 611 (Tex.App.–Corpus Christi 2000, no pet.). There, the attorney representing the appellants filed a motion to disqualify each of the justices on the court and to transfer the appeal to another appellate court. In his motion, counsel alleged:

> It is Mr. Condit's and his clients' belief that the Court will decide this case not on the well-established law cited in the briefs and not on the factual merits of ths case, but solely to promote the democratic agenda in order to assist the Court's democratic colleagues and/or to relatiate [sic] against him.

Id. at 613. He attached to his motion twenty-seven pages of material including campaign literature relating to his effort to unseat one of the justices on the court. Each justice determined that he or she was not disqualified and none of the justices chose to recuse. Finding that counsel had violated the disciplinary rules, and that as a judicial candidate, he had also violated the Code of Judicial Conduct, the court referred the him to the Judicial Conduct Commission and the Office of the General Counsel of the State Bar, but chose not to impose monetary sanctions. *Id.* at 617. *See also Merrell Dow Pharmaceuticals v. Havner*, 907 S.W.2d 565, 566 (Tex.App.–Corpus Christi 1994, opinion on motion). When *Havner* was appealed to the Supreme Court, counsels' conduct did not improve. After learning of the adverse ruling, counsel fired off another vitriolic motion for rehearing. The Supreme Court responded by issuing notice to counsel of their opportunity to respond as to why the court should not refer each of them to the appropriate disciplinary authorities; prohibit one of the attorneys from practicing in Texas courts; and impose monetary sanctions. *Merrell Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706, 732 (Tex. 1997).

The Supreme Court is not the only court to take a harsh view of unprofessional conduct. The Court of Criminal Appeals has also found it necessary to put the hammer down.

> Aside from the grounds for rehearing, the motions present a more serious matter. Each motion contains highly offensive, inappropriate, and scurrilous accusations against this Court. The motions accuse this Court of being sloppy, dishonest, and hypocritical. The motions charge this Court with being intentionally careless in order to achieve a desired result. The motions claim this Court treats the State as a second-class party. The motions question the lengths to which this Court is allegedly willing to go to cover for one of its own. The motions suggest the delivery of a per curiam opinion is cowardly. Finally, the motions accuse this Court of violating the Code of Judicial Conduct.
>
> Advocacy, whether in a trial court or appellate court, is not incompatible with due respect and civility. No attorney appearing in this Court furthers the cause of justice by filing a document designed to belittle, degrade, obstruct, interrupt, prevent, or embarrass this Court and the administration of justice. (Page references to motions deleted).

See Proctor v. State, 841 S.W.2d 1, 7 (Tex.Crim.App. 1992). What is most surprising is that the State had prevailed. One can only imagine the rhetoric if the State had lost! While the majority ordered the motions for rehearing stricken with prejudice, one justice believed the court should order the assistant district attorney to show

cause why he should not be held in contempt. Perhaps Judge Ferguson's observation that civility is not a problem in the criminal justice system is not altogether accurate. Or maybe much has changed in the ten years since he penned those words. *See also Davis v. State*, 2001 WL 951278 *1 n.1 (Tex.App.–Houston [14th Dist.] 2001, no pet.) (appellate counsel, misunderstanding the court's notice of submission and oral argument, filed a motion complaining that "[i]n light of the Court's order requiring that appointed counsel make certain that somebody appear for oral argument, this Motion is nothing but a complete waste of time, effort and energy not to mention a total waste of paper"; the court found his remarks demonstrated a lack of professionalism and respect for the court, and violated the Standards for Appellate Conduct).

3. *EX PARTE* COMMUNICATIONS

Improper conduct is not limited to a written harangue. The rules of disciplinary conduct prohibit *ex parte* communications with a court for the purpose of influencing the court or gaining an advantage. TEX. DISCIPLINARY R. PROF. CONDUCT 3.05(b)(3), *reprinted in* TEX.GOV'T CODE ANN. tit. 2, subtit. G, app. A (Vernon Supp. 1996). "Private communications between a lawyer in a pending action and a staff member of an appellate court before whom the case is pending concerning the merits of the then pending appeal are '*ex prte* communications' not authorized by law." *In the Matter of J.B.K.*, 931 S.W.2d 581, 584 (Tex.App.–El Paso 1996, orig. proceeding). There, J.B.K. served as appellate counsel and, following oral argument, called a staff attorney who was his acquaintance to inquire what his "chances" were and whether he should settle before the opinion issued. The appellate court issued notice to counsel to appear, finding that the allegations, if true, raised a substantial question as to counsel's honesty, trustworthiness, or fitness to practice law. Because the court does not act as a fact finder, it issued no finding that the allegations were true. Instead, the matter was forwarded to the Office of the General Counsel of the State Bar of Texas for investigation. *Id.* at 585.

D. Court-to-Counsel and Judge-to-Judge

Professionalism must start at the top; judges should be role models for attorneys. Allshouse at 3. Judges who berate, belittle and demean lawyers, and those who lose their tempers and yell in a tirade, do little to encourage civility in the courtroom.

1. THE STANDARDS

Unprofessionalism can exist only to the extent it is tolerated by the court. Because courts grant the right to practice law, they control the manner in which the practice is conducted. The right to practice requires counsel to conduct themselves in a manner compatible with the role of the appellate courts in administering justice. Likewise, no one more surely sets the tone and the pattern for the conduct of appellate lawyers than appellate judges. Judges must practice civility in order to foster professionalism in those appearing before them.

- Inappropriate conduct will not be rewarded, while exemplary conduct will be appreciated.
- The court will take special care not to reward departures from the record.
- The court will be courteous, respectful, and civil to counsel.
- The court will not disparage the professionalism or integrity of counsel based upon the conduct or reputation of counsel's client or co-counsel.
- The court will endeavor to avoid the injustice that can result from delay after submission of a case.
- The court will abide by the same standards of professionalism that it expects of counsel in its treatment of the facts, the law, and the arguments.
- Members of the court will demonstrate respect for other judges and courts.

Somewhat surprisingly, this section generated significant controversy. It was deleted from the version first approved by the Supreme Court and the Court of Criminal Appeals on October 30, 1997. The reticence was not entirely their own. Input and approval was sought from every Texas appellate judge, state and federal. Some felt the Code of Judicial Conduct sufficiently addressed the issue. Others had liability concerns. Inasmuch as the Texas Lawyer's Creed had not purported to address judicial civility and courtesy, some believed the Standards shouldn't either. On November 5, 1997, the Eighth District Court of Appeals adopted the Standards in their entirety by resolution entered upon the minutes of the court. On February 1,

1999, both the Supreme Court and the Court of Criminal Appeals adopted and promulgated the Standards, including this section.

2. BEHAVIOR ON THE BENCH

The Standards recognize that not only must attorneys treat the court with respect, the judge must be courteous in return. Those judges who fail to do so are often sanctioned by the Judicial Conduct Commission. For example, in *In re Davis*, 82 S.W.3d 140,142 (Tex.Spec.Ct.Rev., 2002), the trial judge drew a public reprimand for his treatment of an assistant district attorney. Calling her "sneaky and surreptitious," "treacherous," and ascribing to her the "compassion of an Auschwitz prison guard," Judge Davis demonstrated a lack of dignity, patience, and courtesy. Moreover, by calling a press conference and involving the media in this conflict, the judge cast public discredit on the judiciary and created reasonable doubt about his capacity to fairly judge criminal cases brought by the district attorney's office.

Another judge received a harsher sentence. Judge Barr was removed from the bench for his inappropriate sexual comments and gestures to female assistant district attorneys. *See In re Barr*, 13 S.W.3d 525, 531 (Tex.Rev.Trib.,1998). The opinion details the explicit nature of the misconduct. Throughout his tenure on the bench, Judge Barr periodically referred to female assistant district attorneys as "babes"; motioned to one from the bench, by crooking his index finger as if he wanted her to approach, and stating to her, "I just wanted to see if I could make you come with one finger;" and told another who sought to return to her office while a jury deliberated that "[Y]ou are so nice to look at, if you leave, all I'll have to look at all afternoon are swinging dicks." He also told an attorney to "go screw himself" in response to an attempt to reset a criminal case.

3. UNCIVIL APPELLATE OPINIONS

In a recent article, an appellate specialist opined that a Supreme Court opinion on jury argument actually encourages unprofessional conduct. Roger D. Townsend, *Improper Jury Argument and Professionalism: Rethinking Standard Fire v. Reese*, 67 TEX.BAR J. at 449 (June 2004). Some would say that many appellate opinions not only encourage unprofessionalism, they actually demonstrate incivility.

a. "Justice Delayed is Justice Denied"

- *In the Interest of L.M.I. and J.A.I.*, 119 S.W.3d 707, 730-31, 754 (Tex. 2003)(Hecht, J., dissenting).

"[T]his case," laments the Court, "has taken its excruciatingly slow course through our judicial system." Lamentably, a little more than a third of the excruciation has been in this Court. And just whose fault is that? Whose fault is it that this Court has taken 524 days to decide this case? Why, the parties', of course, says the Court. Who else could be to blame? Not us. We've tried our very best, but "appellate review has been greatly hampered by the shifting, indistinct focus of their complaints". Well, well. The facts here are a bit of a problem. We decided six parental rights termination cases last Term, and took, respectively, 199 days, 361 days, 387 days, 540 days, 584 days, and 646 days to issue an opinion in each. In none of the three cases that the Court took a week, eight weeks, and seventeen weeks longer to decide than it took to decide this case was "appellate review . . . greatly hampered" by poor briefing.

"[W]e still disagree about what the complaints are and whether they were preserved", the Court moans. And here again, the fault for our disagreement must in all fairness be laid squarely at the parties' feet. If only the briefing had been better, the Court's decision would have been prompt and unanimous. But before taking the Court's word for this, the reader may wish to know that the parties have filed about 88 pages of briefs and motions in this Court, the reporter's record of the one-day hearing in the trial court is 328 pages, and the clerk's record is 117 pages. All told, the record and briefs would not take any one of our law clerks more than half a day to master. Truth is, the Court knew what the issues were in this case from the time it was filed. What the Court has disagreed about for more than a year is not what the issues are, but whether these parents' rights in their children can be terminated some technical way without having to address their arguments.

* * * * *

[T]he evidence is overwhelming that [the father] has lost rights among the most precious guaranteed by law simply because he does not understand

> English. If [he] could read the Court's opinion, he would no doubt be surprised (and dismayed) to learn that he is not entitled to a decision on the only claim he has ever made because his lawyer in the trial court phrased it differently than his lawyer on appeal. The one benefit of [his] inability to understand English is that he will not be able to read of the injustice that has been done to him. He should at least have a paraphrase of the Court's opinion, however, just as his affidavit was paraphrased for him. I offer the following:
>
> *¡Peligro!*
> *Si usted no puede hablar Inglés,*
> *usted puede perder a sus niños.*

Id. at 730-31, 754 (footnotes deleted).

- *Delaney v. University of Houston*, 835 S.W.2d 56, 64-65 (Tex.. 1992) (Doggett, J., concurring).

> The delay in announcing the majority's opinion has been totally unnecessary and unjustified. It cannot be attributed to the complexity of the issues – this cause presents a single question for review – nor by the size of the record – we are asked to review a summary judgment transcript consisting of motions and a single three-page affidavit.
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> . . . They offer a standard bureaucratic response: (1) it's not really a problem; (2) it's not our fault; (3) it's classified; (4) it's always been that way; (5) take your complaint somewhere else.

Id. at 61. The majority responded:

> Certainly this case has pended longer in this Court than most of our causes. If the two concurring justices had, in lamenting this fact, addressed their remarks to the Court collectively, we would lodge no complaint. But the charges of the two concurring justices are leveled not at the Court as a body, but at the author of the opinion and all who join in it. Reluctantly we are compelled to respond.
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> To assist in realizing our purpose, this institution, like other deliberative bodies, has developed traditions which engender mutual tolerance and respect and enable its members to work together to accomplish their required tasks. . . . In leveling accusations against members of the Court to which they cannot ethically respond, the concurring opinion assaults these traditions, violating the spirit of professionalism which we endorsed in the Texas Lawyer's Creed. . . . ."

Id. at 64-65. The tensions apparent in *Delaney* re-emerged in *Greathouse.v. Charter National Bank-Southwest*, 851 S.W.2d 173, 177 (Tex. 1992) (Doggett, J., concurrring).

b. *Jane Doe*

Nowhere is the incivility of the judiciary better exemplified than in the *Jane Doe* cases. In 1999, the Texas Legislature amended the Texas Family Code to require parental notification for a minor to obtain an abortion. As the minors sought judicial bypass to notification, appeals from the trial courts' denial of applications began to percolate up to the Supreme Court. What follows are just a few highlights of the raw emotion that appears in *Jane Doe 1 (II)*. *See In re Jane Doe*, 19 S.W.3d 348 (Tex. 2000).

O'Neill, J.

> Abortion is a highly-charged issue that often engenders heated public debate. Such debate is to be expected and, indeed, embraced in our free and democratic society.
>
> * * * * *
>
> In deciding this case we squarely confront the question of whether, as judges, we should apply the Parental Notification Act as it is written by the Legislature or according to our personal beliefs. In reaching the decision to grant Jane Doe's application, we have put aside our personal viewpoints and endeavored to do our job as judges – that is, to interpret and apply the Legislature's will as it has been expressed in the statute.
>
> * * * * **
>
> [W]e recognize that judges' personal views may inspire inflammatory and irresponsible rhetoric. Nevertheless, the issue's highly-charged nature does not excuse judges who impose their own

> personal convictions into what must be a strictly legal inquiry. We might personally prefer, as citizens and parents, that a minor honor her parents' right to be involved in such a profound decision. But the Legislature has said that Doe may consent to an abortion without notifying her parents if she demonstrates that she is mature and sufficiently well informed. As judges, we cannot ignore the statute or the record before us. Whatever our personal feelings may be, we must "respect the rule of law."

19 S.W.3d at 349-350, 356 (O'Neill, J., writing for the majority).

Enoch, J.

> Long ago, I learned that the more my emotions influenced my decisions, the less I acted like a judge. A few years ago, Justice Hecht was so passionate about an issue that he branded his colleagues as dishonest. And it is obvious from his strident dissents in all four *Jane Doe* cases that Justice Hecht has, once again, succumbed to passion. For he now brands his colleagues as "activists" and pro-abortionists. He does this, not because there is truth to his charge, but simply because his passion overcomes reasoned discussion.
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> Apparently, because he mocks his colleagues' expression of their personal feelings about the issues in these cases, he believes that a judge is an activist if he or she **refuses** to succumb to those personal feelings. Yet it is he who, through his dissents, exemplifies the dangers present when a judge acts on passion.
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> Finally, I end by recalling that Justice Hecht began his attack on his colleagues in the very first *Jane Doe* case. Without any factual basis, he launched two rhetorical broadsides, broadsides that he used to establish the themes for his dissents. Those broadsides are that this Court's standard is so low that it is no standard at all, and that our standard opens the flood gates for judicial bypass. . . . But while to say a thing loud enough and long enough may convince some people to believe it, that does not make it true.
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> . . . In the end, Justice Hecht's explosive rhetoric will not have advanced the jurisprudential debate about the proper application of the Parental Notification Act. Instead, his intemperance has pushed political and social hot buttons that have discomfited citizens of this State and their elected officials, needlessly, with no opportunity to assess whether the Parental Notification Act was having its desired effect.
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> * * * * *
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> When influenced by emotions, a judge loses the judicial perspective, often overstating the case, and at times, resorting to writing that is unbecoming. My colleague's writings in these cases have been inappropriate. Deep convictions do not excuse a judge from respecting his colleagues, the litigants, or the law.

19 S.W.3d at 362, 363, 364 (Enoch, J., concurring) (footnotes deleted).

Gonzales, J.

> Only in this, an appeal after remand of the first of four *Jane Doe* cases, has the Court granted a minor's application to bypass notifying her parents before she consents to an abortion. Yet in each case, the Court has struggled to render the correct decision, and some members of the Court have strongly disagreed. The tenor of the opinions have been unmistakably contentious. It has been suggested that the Court's decisions are motivated by personal ideology. [Citation deleted] To the contrary, every member of this Court agrees that the duty of a judge is to follow the law as written by the Legislature. . . . Once we discern the Legislature's intent we must put it into effect, even if we ourselves might have made different policy choices.
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> . . . [P]arts of the statute's legislative history directly contradict the suggestions that the Legislature intended bypasses to be very rare. . . . Thus, to construe the Parental Notification Act so narrowly as to eliminate bypasses, or to create

> hurdles that simply are not to be found in the words of the statute, would be an unconscionable act of judicial activism. . . . While the ramifications of such a law and the results of the Court's decision here may be personally troubling to me as a parent, it is my obligation as a judge to impartially apply the laws of this state without imposing my moral view on the decisions of the Legislature.

19 S.W.3d at 365, 366 (Gonzales, J., concurring) (footnotes deleted).

Hecht, J.

> . . . The Senate and House sponsors of the legislation, together with eight other senators and forty-six other representatives, have informed the Court as amici curiae that its construction of the statute to date is incorrect, and they have provided citations to the hearings and debates on the statute to support their vew. . . .
>
> . . . The Court's utter disregard for the legislative history cited by fifty-six legislators in support of their view of the Parental Notification Act is an insult to those legislators personally, to the office they hold, and to the separation of powers between the two branches of the government. I cannot conceive of another context in which the Court would pay so little heed to legislators' statements concerning the meaning of a statute. The Court adamantly refuses to listen to all reason, and the only plausible explanation is that the Justices who comprise the majority . . . have resolved to impair the Legislature's purposes in passing the Parental Notification Act, which were to reduce teenage abortions and increase parental involvement in their children's decisions.
>
> The Court is well aware of the near-universal criticism of its construction of the Parental Notification Act, and the defensiveness of the majority and concurring opinions is striking. I cannot recall ever having seen a court or its members so abject in apologizing for their decision or so profuse in proclaiming their own integrity as this Court is today.
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> If the Court were construing any other statute, it would by now have conceded that it was wrong. Logic, law, and legislative history cited by the legislators themselves all argue against the Court's construction of the Parental Notification Act. Why would six Justices on this Court ignore fifty-six legislators if they were trying to follow the law rather than their own personal views? This is not merely a rhetorical question; if the Court has an answer, it should give it. Its refusal to do so is answer enough.
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> . . . I cannot conceive that most Members of today's majority would ever show such thorough disdain for the expressions of legislative will and purpose in any other context. I do not know what plausible conclusion can be drawn other than that the Justices in the majority are determined to construe the Parental Notification Act as they personally believe it *should* be construed and not as the Legislature intended.

19 S.W.3d at 366, 367, 368, 373 (Hecht, J., dissenting).

c. It's Contagious

Criminal cases have not been immune. When the Court of Criminal Appeals first adopted factual sufficiency review, the tension among the judges was palpable. *See Clewis v. State*, 922 S.W.2d 126 (Tex.Crim.App. 1996).

> Law-abiding Texans, hold on to your hats. We have another "run-away train" and it is again driven by a reckless, careless, and mischievous driver, Judge Maloney. After reviewing the decision of the Dallas Court of Appeals in the instant case, I find myself in agreement with the reasoning and analysis of Justice Lagarde.
>
> * * * * *
>
> Judge Meyers is disappointed in my dissent (see page 151 of his concurring opinion) because he says it is disrespectful to the Courts of Appeals. Does this guy blow smoke or what? Contrary to Judge Meyers' way of thinking, we should affirm a well-reasoned decision of the Dallas Court of Appeals which Judge Meyers and the aggressive and assertive majority have gone to great lengths to

> reverse. Who is disrespectful? In this case the opinion of the Court of Appeals was written by Justice Sue Lagarde, a well respected, very competent, outstanding jurist in this State. Who's knocking the Court of Appeals? See footnote 4 of my dissent. I for one am not taking the Courts of Appeals to task. I fully agree with the decision of the Dallas Court of Appeals. It is Judge Meyers who castigates the Dallas Court and casts the deciding vote to reverse it.
>
> In his concurring opinion, Judge Meyers goes to great lengths to cover his fanny in this case, but the Austin Tent and Awning Company does not have a large enough cover in stock. His concurring opinion should be carried in the funny paper section of every newspaper in this State. Judge Meyers suggests that my dissent will "generate hysteria." As I stated in my opening sentence, "Law-abiding Texans, hold on to your hats." The hysteria, if any, of course, will be with the victims of crime and the law-abiding Texans. After this opinion is handed down, the celebration by the dope dealers, robbers, rapists, murderers and Judge Meyers will overshadow that of the Dallas Cowboys' victory in Super Bowl XXX.

Id. at 158-59 and n.3. The "run-away train" comment refers to a previous opinion by Judge Maloney involving the admissibility of extraneous offense evidence at punishment. Judge White dissented in that case as well:

> It is difficult to imagine how the Legislature can successfully amend Art. 37.07 § 3(a) in order to convince the aggressive and assertive plurality of this Court that they intend for a jury to be permitted to review relevant unadjudicated criminal actions of a defendant during the assessment of punishment for a non-capital crime. Perhaps they will print the amendatory language in extra-large bold type, not unlike that of a grade school primer. Or perhaps they will, somehow, be able to find more direct language to use, much like a farmer would use a two-by-four across the nose of a recalcitrant mule in order to convince it that it is time to get off its hind quarter and pull the wagon. Whatever method the Legislature selects, it will be interesting, to say the least, to witness how the aggressive and assertive members of this Court rewrites it.

Grunsfeld v. State, 843 S.W.2d 521, 565 (Tex.Crim.App. 1992) (White, J., dissenting). The moral of the story is that we can agree to disagree and we can disagree without being disagreeable.

V. CONCLUSION

There is a natural tendency for lawyers to want to "get even" for what they perceive to be *Rambesque* behavior. A district judge in Amarillo has explained the scenario perfectly. During a hotly contested trial, one attorney announced his intention to call a particular witness. Opposing counsel was quick to object, telling the court that the witness had not been disclosed or designated. Judge Emerson told him that he had a perfectly valid objection and if he pursued it, the judge would have to sustain it. But he cautioned that such tactics often come back to haunt us – what goes around, comes around. The attorney just smiled and said, "I know, Judge. It's coming around right now."

THE TEXAS LAWYER'S CREED

A Mandate for Professionalism

Promulgated by The Supreme Court of Texas and the Court of Criminal Appeals November 7, 1989

I am a lawyer; I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that Professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this Creed for no other reason than it is right.

I. OUR LEGAL SYSTEM

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."

2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.

3. I commit myself to an adequate and effective pro bono program.

4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.

5. I will always be conscious of my duty to the judicial system.

II. LAWYER TO CLIENT

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 any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this Creed when undertaking representation.

2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.

3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.

4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.

5. I will advise my client of proper and expected behavior.

6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.

7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.

8. I will advise my client that we will not pursue tactics which are intended primarily for delay.

9. I will advise my client that we will not pursue any course of action which is without merit.

10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.

11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

III. LAWYER TO LAWYER

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.

2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.

3. I will identify for other counsel or parties all changes I have made in documents submitted for review.

4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.

5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are cancelled.

6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.

7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.

8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.

9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.

10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.

11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.

12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.

13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

14. I will not arbitrarily schedule a deposition, Court appearance, or hearing until a good faith effort has been made to schedule it by agreement.

15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

16. I will refrain from excessive and abusive discovery.

17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.

18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.

19. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

IV. LAWYER AND JUDGE

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.

2. I will conduct myself in court in a professional manner and demonstrate my respect for the Court and the law.

3. I will treat counsel, opposing parties, witnesses, the Court, and members of the Court staff with courtesy and civility and will not manifest by words or conduct bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation.

4. I will be punctual.

5. I will not engage in any conduct which offends the dignity and decorum of proceedings.

6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.

7. I will respect the rulings of the Court.

8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.

9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

Order of the Supreme Court of Texas and the Court of Criminal Appeals

The conduct of a lawyer should be characterized at all times by honesty, candor, and fairness. In fulfilling his or her primary duty to a client, a lawyer must be ever mindful of the profession's broader duty to the legal system.

The Supreme Court of Texas and the Court of Criminal Appeals are committed to eliminating a practice in our State by a minority of lawyers of abusive tactics which have surfaced in many parts of our country. We believe such tactics are a disservice to our citizens, harmful to clients, and demeaning to our profession.

The abusive tactics range from lack of civility to outright hostility and obstructionism. Such behavior does not serve justice but tends to delay and often deny justice. The lawyers who use abusive tactics, instead of being part of the solution, have become part of the problem.

The desire for respect and confidence by lawyers from the public should provide the members of our profession with the necessary incentive to attain the highest degree of ethical and professional conduct. These rules are primarily aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reenforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.

These standards are not a set of rules that lawyers can use and abuse to incite ancillary litigation or arguments over whether or not they have been observed.

We must always be mindful that the practice of law is a profession. As members of a learned art we pursue a common calling in the spirit of public service. We have a proud tradition. Throughout the history of our nation, the members of our citizenry have looked to the ranks of our profession for leadership and guidance. Let us now as a profession each rededicate ourselves to practice law so we can restore public confidence in our profession, faithfully serve our clients, and fulfill our responsibility to the legal system.

The Supreme Court of Texas and the Court of Criminal Appeals hereby promulgate and adopt "The Texas Lawyer's Creed -- A Mandate for Professionalism" described above.

In Chambers, this 7th day of November, 1989.

The Supreme Court of Texas

Thomas R. Phillips, Chief Justice
Franklin S. Spears, Justice
C. L. Ray, Justice
Raul A. Gonzalez, Justice
Oscar H. Mauzy, Justice
Eugene A. Cook, Justice
Jack Hightower, Justice
Nathan L. Hecht, Justice
Lloyd A. Doggett, Justice

The Court of Criminal Appeals

Michael J. McCormick, Presiding Judge
W. C. Davis, Judge
Sam Houston Clinton, Judge
Marvin O. Teague, Judge
Chuck Miller, Judge
Charles F. (Chuck) Campbell, Judge
Bill White, Judge
M. P. Duncan, III, Judge
David A. Berchelmann, Jr., Judge

STANDARDS FOR APPELLATE CONDUCT

On February 1, 1999, the Supreme Court of Texas and the Court of Criminal Appeals issued the following order pertaining to the Standards For Appellate Conduct:

At the request of the Council of the Appellate Practice and Advocacy Section of the State Bar and the Board of Directors of the State Bar of Texas, and based upon their submission to our Courts, the Supreme Court of Texas and the Texas Court of Criminal Appeals hereby adopt and promulgate the attached Standards of Appellate Conduct. Nothing in these standards alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure, or the Code of Judicial conduct.

STANDARDS FOR APPELLATE CONDUCT

Lawyers are an indispensable part of the pursuit of justice. They are officers of courts charged with safeguarding, interpreting, and applying the law through which justice is achieved. Appellate courts rely on counsel to present opposing views of how the law should be applied to facts established in other proceedings. The appellate lawyer's role is to present the law controlling the disposition of a case in a manner that clearly reveals the legal issues raised by the record while persuading the court that an interpretation or application favored by the lawyer's clients is in the best interest of the administration of equal justice under law.

The duties lawyers owe to the justice system, other officers of the court, and lawyers' clients are generally well defined and understood by the appellate bar. Problems that arise when duties conflict can be resolved through understanding the nature and extent of a lawyer's respective duties, avoiding the tendency to emphasize a particular duty at the expense of others, and detached common sense. To that end, the following standards of conduct for appellate lawyers are set forth by reference to the duties owed by every appellate practitioner.

Use of these standards for appellate conduct as a basis for motions for sanctions, civil liability or litigation would be contrary to their intended purpose and shall not be permitted. Nothing in these standards alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure or the Code of Judicial Conduct.

LAWYERS' DUTIES TO CLIENTS

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. 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.

1. Counsel will advise their clients of the contents of these Standards of Conduct when undertaking representation.

2. Counsel will explain the fee agreement and cost expectation to their clients. Counsel will then endeavor to achieve the client's lawful appellate objectives as quickly, efficiently, and economically as possible.

3. Counsel will maintain sympathetic detachment, recognizing that lawyers should not become so closely associated with clients that the lawyer's objective judgment is impaired.

4. Counsel will be faithful to their clients' lawful objectives, while mindful of their concurrent duties to the legal system and the public good.

5. Counsel will explain the appellate process to their clients. Counsel will advise clients of the range of potential outcomes, likely costs, timetables, effect of the judgment pending appeal, and the availability of alternative dispute resolution.

6. Counsel will not foster clients' unrealistic expectations.

7. Negative opinions of the court or opposing counsel shall not be expressed unless relevant to a client's decision process.

8. Counsel will keep clients informed and involved in decisions and will promptly respond to inquiries.

9. Counsel will advise their clients of proper behavior, including that civility and courtesy are expected.

10. Counsel will advise their clients that counsel reserves the right to grant accommodations to opposing counsel in matters that do not adversely affect the client's lawful objectives. A client has no right to instruct a lawyer to refuse reasonable requests made by other counsel.

11. A client has no right to demand that counsel abuse anyone or engage in any offensive conduct.

12. Counsel will advise clients that an appeal should only be pursued in a good faith belief that the trial court has committed error or that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.

13. Counsel will advise clients that they will not take frivolous positions in an appellate court, explaining the penalties associated therewith. Appointed appellate counsel in criminal cases shall be deemed to have complied with this standard of conduct if they comply with the requirements imposed on appointed counsel by courts and statutes.

LAWYERS' DUTIES TO THE COURT

As professionals and advocates, counsel assist the Court in the administration of justice at the appellate level. Through briefs and oral submissions, counsel provide a fair and accurate understanding of the facts and law applicable to their case. Counsel also serve the Court by respecting and maintaining the dignity and integrity of the appellate process.

1. An appellate remedy should not be pursued unless counsel believes in good faith that error has been committed, that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.

2. An appellate remedy should not be pursued primarily for purposes of delay or harassment.

3. Counsel should not misrepresent, mischaracterize, misquote, or miscite the factual record or legal authorities.

4. Counsel will advise the Court of controlling legal authorities, including those adverse to their position, and should not cite authority that has been reversed, overruled, or restricted without informing the court of those limitations.

5. Counsel will present the Court with a thoughtful, organized, and clearly written brief.

6. Counsel will not submit reply briefs on issues previously briefed in order to obtain the last word.

7. Counsel will conduct themselves before the Court in a professional manner, respecting the decorum and integrity of the judicial process.

8. Counsel will be civil and respectful in all communications with the judges and staff.

9. Counsel will be prepared and punctual for all Court appearances, and will be prepared to assist the Court in understanding the record, controlling authority, and the effect of the court's decision.

10. Counsel will not permit a client's or their own ill feelings toward the opposing party, opposing counsel, trial judges or members of the appellate court to influence their conduct or demeanor in dealings with the judges, staff, other counsel, and parties.

LAWYERS' DUTIES TO LAWYERS

Lawyers bear a responsibility to conduct themselves with dignity towards and respect for each other, for the sake of maintaining the effectiveness and credibility of the system they serve. The duty that lawyers owe their clients and the system can be most effectively carried out when lawyers treat each other honorably.

1. Counsel will treat each other and all parties with respect.

2. Counsel will not unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation by opposing counsel.

3. Counsel will not request an extension of time solely for the purpose of unjustified delay.

4. Counsel will be punctual in communications with opposing counsel.

5. Counsel will not make personal attacks on opposing counsel or parties.

6. Counsel will not attribute bad motives or improper conduct to other counsel without good cause, or make unfounded accusations of impropriety.

7. Counsel will not lightly seek court sanctions.

8. Counsel will adhere to oral or written promises and agreements with other counsel.

9. Counsel will neither ascribe to another counsel or party a position that counsel or the party has not taken, nor seek to create an unjustified inference based on counsel's statements or conduct.

10. Counsel will not attempt to obtain an improper advantage by manipulation of margins and type size in a manner to avoid court rules regarding page limits.

11. Counsel will not serve briefs or other communications in a manner or at a time that unfairly limits another party's opportunity to respond.

THE COURT'S RELATIONSHIP WITH COUNSEL

Unprofessionalism can exist only to the extent it is tolerated by the court. Because courts grant the right to practice law, they control the manner in which the practice is conducted. The right to practice requires counsel to conduct themselves in a manner compatible with the role of the appellate courts in administering justice. Likewise, no one more surely sets the tone and the pattern for the conduct of appellate lawyers than appellate judges. Judges must practice civility in order to foster professionalism in those appearing before them.

1. Inappropriate conduct will not be rewarded, while exemplary conduct will be appreciated.

2. The court will take special care not to reward departures from the record.

3. The court will be courteous, respectful, and civil to counsel.

4. The court will not disparage the professionalism or integrity of counsel based upon the conduct or reputation of counsel's client or co-counsel.

5. The court will endeavor to avoid the injustice that can result from delay after submission of a case.

6. The court will abide by the same standards of professionalism that it expects of counsel in its treatment of the facts, the law, and the arguments.

7. Members of the court will demonstrate respect for other judges and courts.