

**PRESENTED AT**

2020 Conference on State and Federal Appeals  
The University of Texas School of Law

June 4-5, 2020  
Austin, TX

**Why Does Conduct Matter? Why the Standards for Appellate  
Conduct Came Into Being 25 Years Ago and Remain Vital Today**

**Kevin Dubose  
Charles “Skip” Watson**

Charles Skip Watson  
Greenberg Traurig LLP  
300 W. 6th Street, Suite 2050  
Austin, Texas 78701  
[watsons@gtlaw.com](mailto:watsons@gtlaw.com)  
512-320-7237

Kevin Dubose  
Alexander Dubose & Jefferson LLP  
1844 Harvard Street  
Houston, Texas 77008  
[kdubose@adjtlaw.com](mailto:kdubose@adjtlaw.com)  
713-523-2358

## Table of Contents

<b>Why Does Conduct Matter? Why the Standards for Appellate Conduct Came Into Being 25 Years Ago and Remain Vital Today</b> .....	1
I. Origin and history of the <i>Standards for Appellate Conduct</i> .....	1
A. Historical backdrop of the <i>Standards</i> .....	1
B. The inception of the <i>Standards</i> .....	1
C. The process of drafting the <i>Standard</i> .....	2
D. The process of promulgating the <i>Standards</i> .....	3
E. The <i>Standards</i> ' place in history .....	3
II. The philosophy of the <i>Standards</i> .....	3
A. The appellate lawyer's unique role .....	3
B. Balancing conflicting duties .....	3
C. Suggestions for civility, not a tool for sanctions.....	4
D. Duty to educate clients about the <i>Standards</i> .....	4
III. Structure and summary of the <i>Standards</i> .....	5
IV. The Standards expect more than the Disciplinary Rules of Professional Conduct.....	6
A. Balancing competing duties.....	7
B. Accepting an engagement.....	7
C. Required client communications.....	8
D. Decorum toward opposing counsel.....	8
E. Client's ability to dictate decorum toward opposing counsel.....	9
F. Decorum toward courts (and court's staff) .....	9
V. Reasons to comply with the <i>Standards</i> .....	10
A. It's the right thing to do .....	10
B. Compliance enhances the chances of achieving a favorable result. ....	10

C. The reasons to disregard the <i>Standards</i> are unconvincing.....	11
VI. Conclusion .....	12

# **Why Does Conduct Matter? Why the Standards for Appellate Conduct Came Into Being 25 Years Ago and Remain Vital Today**

## **I. Origin and history of the *Standards for Appellate Conduct***

The efforts that culminated in the creation of the *Standards for Appellate Conduct* began 25 years ago this summer. To commemorate that anniversary we look back at the origin of the *Standards*, reflect on their significance, and address why they should guide our conduct today.

### **A. Historical backdrop of the *Standards***

In the mid-1980s, Texas trial lawyers began to notice a rise in overly aggressive and unprofessional litigation tactics, commonly referred to as “Rambo litigation tactics.” Although some of those practices had been around as long as there have been lawyers, they were largely swept under the rug. The difference in the 1980s was that some firms and individual lawyers began to proudly tout their obstreperousness as a conscious strategy and a marketing tool.

To reverse this trend, Supreme Court of Texas Justice Eugene Cook formed a committee to study these practices and draft a document to articulate aspirational goals to restore civility to the practice. Bipartisan support was generated by asking well-known and respected representatives of both the defense bar and the plaintiffs’ bar to co-chair the committee. The defense lawyer was James “Blackie” Holmes of Dallas, and the Plaintiffs’ lawyer was Fred Hagans of Houston.

The committee drafted a ground-breaking statement of how lawyers should strive to comport themselves, which was well-received and quickly embraced. In 1989, the Texas Supreme Court and Texas Court of Criminal Appeals jointly promulgated *The Texas Lawyer’s Creed – A Mandate for Professionalism*. It has been widely circulated and cited, and has become a vital part of the Texas legal culture. But it unquestionably is directed to a trial litigation practice.

At roughly the same time, appellate CLE courses in Texas began featuring occasional presentations on ethical issues unique to an appellate practice. The adoption of the *Texas Lawyer’s Creed* for trial lawyers and the treatment of similar issues in appellate CLE courses triggered discussions among appellate lawyers about whether it might be useful to have a similar body of guidelines aimed at an appellate practice. The initial reaction of many was that the appellate bar did not need a creed because it was not plagued by the same rampant unprofessionalism and Rambo tactics as the trial bar.

### **B. The inception of the *Standards***

When Kevin Dubose became Chair of the State Bar of Texas Appellate Practice and Advocacy Section in 1995, he appointed an “Appellate Lawyers’ Creed Committee,” charged with drafting standards for professional conduct in the appellate courts. The Committee was chaired by Charles “Skip” Watson, and also included: the Honorable Gene Cook (Justice, Supreme Court of Texas, 1998-92), the Honorable Ann McClure (Justice, El Paso Court of Appeals, 1995-2019), Jesse Amos (then Third Court of Appeals Staff Attorney), Stephen Tatum, David Gunn, David Hricik, and Shane Sanders.

The Committee began its task with the awareness that, unlike the *Texas Lawyer's Creed*, it was not reacting against or attempting to rein in a proliferation of unprofessional appellate practices. Rather, the Standards were a recognition and reflection of the culture of civility that had developed in the appellate bar. The goal was to create guidelines to educate attorneys who were not accustomed to the different culture that awaited them in the appellate courts, and to provide all appellate practitioners with shield to use against clients who expected overly aggressive, unprofessional behavior.

### C. The process of drafting the *Standard*.

The Committee began by considering the sources and motivations for unprofessional conduct, the reasons that conduct seems to be less prevalent in the appellate courts, examples of unprofessionalism in appellate courts, and how best to address the problem. The primary theme that emerged from those discussions was an awareness that unprofessional conduct is often justified by lawyers as fulfilling a duty to “zealously” represent their client.<sup>1</sup> This view fails to recognize that lawyers have multiple duties, not only to their clients, but also to the court system and to opposing counsel. The committee concluded that the essence of professionalism is the balancing of these conflicting duties.

The Committee studied approximately 40 creeds or professionalism standards adopted in other jurisdictions, which had been collected and were brought to the Committee by Justice Eugene Cook. These came from states, counties, and the Seventh Circuit. All of them existing standards targeted litigation in the trial courts; none specifically addressed professionalism issues unique to the appellate practice.

This review convinced the committee that standards were needed to assist appellate practitioners confronted with in each of the professional relationships inherent in the practice. This, the committee chair suggested that “standards for conduct” be drafted, rather than an appellate creed. This concept is articulated in the preamble to the *Standards* and is further underscored in the structure of the document, which is ordered around the separate duties owed by appellate counsel and the courts.

Thus, a structure for the new guidelines emerged that focused on the discrete relationships that require guidance in the appellate practice. Sections addressing those relationships were assigned to committee members for original drafting. Drafts were completed and circulated to all committee members for rigorous editing. The committee gathered for in-person meetings<sup>2</sup> in Austin every few months for lively and provocative discussions. Everyone pulled their weight.

---

<sup>1</sup> Nothing in the Texas Disciplinary Rules of Professional Conduct (TDRPC) contemplates that “zealous” means discourteous or disrespectful. The word “zealously” appears twice in the TDRPC Preamble: Paragraph 2 says, “a lawyer zealously asserts the client's position **under the rules of the adversary system**,” and Paragraph 3 says, “a lawyer should zealously pursue clients’ interests **within the bounds of the law**.” (emphasis added) Paragraph 4 adds that lawyers should “use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials.”

<sup>2</sup> This was long before Zoom videoconferences, and even before the widespread use on conference calls.

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 \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: Why Does Conduct Matter? Why the Standard for Appellate Conduct Came Into Being 25 Years Ago and Remain Vital Today

Also available as part of the eCourse

[Standards for Appellate Conduct](#)

First appeared as part of the conference materials for the  
30<sup>th</sup> Annual Conference on State and Federal Appeals session  
"Standards for Appellate Conduct"