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

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# 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.

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<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.

Neither of us has ever worked on a bar committee that was so engaged and committed across the board.

After almost a year of work, the Committee's final draft of the "Standards for Appellate Conduct" was submitted to the Council of the Appellate Practice and Advocacy Section of the State Bar of Texas, and the Council approved the draft in August 1996.

#### **D. The process of promulgating the *Standards***

The *Standards* were provided to, and comments solicited from, every judge in Texas, trial and appellate, state and federal, and all former appellate Chief Justices. They also were sent to representatives of every State Bar Section, to former members of the *Texas Lawyers Creed* Committee, the State Bar's General Counsel, and various local bar leaders. Comments were received from around the State. The majority of responses were favorable, if not enthusiastic. A few suggested minor amendments, which were considered, and some accepted.

After this thorough review process of communication and comments, the State Bar Board of Directors unanimously approved *the Standards for Appellate Conduct*, and submitted them to the Texas Supreme Court and the Texas Court of Criminal Appeals. Those courts then further studied and discussed the Standards. On February 1, 1999, the Texas Supreme Court and Texas Court of Criminal Appeals issued an order jointly promulgating the *Standards for Appellate Conduct*, applicable to all appellate courts in the State of Texas.

#### **E. The *Standards*' place in history**

The Standards for Appellate Conduct are the first ethical guidelines in the United States specifically targeting practice in the appellate courts. No other jurisdiction has followed suit, though appellate lawyers from other jurisdictions have requested copies of the *Standards* and have indicated an interest in adopting something similar.

## **II. The philosophy of the *Standards***

### **A. The appellate lawyer's unique role**

The Preamble to the *Standards* first focuses on the lawyer's unique role as an essential part of the appellate courts' quest to shape the law to the facts of each case. The necessity of integrity and accuracy from the appellate bar is paramount to the courts' ability to effectively dispense justice in each case and simultaneously craft the jurisprudence of the state. While still part of the adversary process, appellate lawyers are in more of a collaborative relationship with the justices they appear before than their trial court counterparts.

### **B. Balancing conflicting duties**

As previously mentioned, the drafters of the *Standards* recognized that unprofessional conduct often arises because of the tendency to overemphasize one duty to the exclusion of others. This principle is expressed in the second paragraph of the preamble to the *Standards*:

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.

*Standards for Appellate Conduct*, Preamble. To emphasize this balancing of equal duties, the *Standards* are structured according to the duties owed by counsel to clients, the courts, and other counsel, and the courts' duties to counsel.

### **C. Suggestions for civility, not a tool for sanctions**

The Committee felt strongly that the Standards should *not* be used as a hammer to enforce good behavior, lest they increase contentious bickering between appellate lawyers and perpetuate the problem rather than providing a solution. Accordingly, it included a provision in the preamble prohibiting the offensive use of the standards. "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."<sup>3</sup> This provision proved essential to the State Bar's endorsement and the willingness of the Supreme Court and the Court of Criminal Appeals to promulgate the *Standards*.

But just because the *Standards* are not intended to be used as a sword does not mean that they should be disregarded by counsel who practice in Texas appellate courts. The *Standards* have been embraced by those courts, and they eloquently communicate the level of professionalism and civility that is expected. Conduct that violates these expectations is likely to generate disfavor, consciously and unconsciously.

### **D. Duty to educate clients about the *Standards***

The drafters of the Standards wanted to avoid the possibility of appellate lawyers trying to justify unprofessional behavior by claiming to be acting under instructions from clients who are not aware of the Standards. So the section of the *Standards* entitled "Lawyers' Duties to Clients" contains numerous references to the duty of lawyers to inform their clients about the contents of the Standards.

The first standard in the section on Lawyers' Duties to Clients states this principle broadly: "Counsel will advise their clients of the contents of these Standards of Conduct when undertaking representation."<sup>4</sup> Lawyers are not directed to wait until a problem arises, but to advise their clients of the *Standards* "when undertaking representation." To eliminate any doubt, lawyers should include a copy of the *Standards* with the engagement letter or fee agreement confirming an appellate engagement.

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<sup>3</sup> *Standards for Appellate Conduct*, Preamble.

<sup>4</sup> *Standards for Appellate Conduct*, Lawyers' Duties to Clients at 1.

Four other standards in this section begin with the words “Counsel will advise their clients. . .” or “Counsel will advise clients. . .”<sup>5</sup> These standards address advising clients that civility and courtesy are expected, that reasonable requests by opposing counsel should be granted, that an appeal should only be taken upon a good faith belief that it is warranted, and that frivolous positions will not be taken.<sup>6</sup> By placing this pervasive emphasis on educating clients about the expectation of civility and professionalism, the *Standards* attempt to address the problem of clients insisting on unprofessional conduct.

### III. Structure and summary of the *Standards*

The *Standards for Appellate Conduct* are structured according to the duties that lawyers owe to the participants in the appellate process.

The *Standards*’ goal and approach are set forth in the **Preamble**, which addresses the critical role that lawyers play in the appellate process, and acknowledges the different duties owed by lawyers, and the need to balance them. It acknowledges that these duties “are generally well-defined and understood by the appellate bar.” It also cautions that the Standards are not intended to be grounds for sanctions or civil liability, and that they are not intended to alter existing ethical and professional guidelines like the Texas Disciplinary Rules of Professional Conduct or the Code of Judicial Conduct.

**Lawyers’ Duties to Clients** addresses the responsibility to keep clients informed about the Standards and their emphasis on civility, courtesy, cooperation and accommodation. It also instructs lawyers to inform clients about the appellate process in general so they will have reasonable expectations about timing, costs, and possible outcomes. This section also contains several admonitions that the appellate process should be used only in good faith to pursue legitimate legal positions.

**Lawyers’ Duties to the Court** emphasizes proper decorum, civility, and respect. This section repeats the admonition against using the appellate process to assert frivolous positions or for the purpose of delay. It also encourages thorough preparation to assist the court, scrupulous honesty so as not to mislead the court, and punctuality to avoid inconveniencing the court. It also emphasizes the duty to disclose relevant authority, even when it is adverse to the lawyer’s position.

**Lawyers’ Duties to Lawyers** addresses the importance of treating opposing counsel — and parties — with respect. It encourages lawyers not to oppose reasonable requests for cooperation or scheduling accommodations, and to refrain from personal attacks or the attribution of bad motives, improper conduct, or other impropriety.

**The Court’s Relationship with Counsel** is a recognition of the critical role lawyers play as officers of the court to enable the courts to recognize and decide the competing legal principles

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<sup>5</sup> See *Standards for Appellate Conduct*, Lawyers’ Duties to Clients at 9, 10, 12, 13.

<sup>6</sup> See *Standards for Appellate Conduct*, Lawyers’ Duties to Clients at 9, 10, 12, 13.



that must be resolved to apply the law to the unique facts of each case. There was some resistance to including this section from some judges who questioned whether a section of the Bar had authority to draft standards advising judges about their duties. But the drafters felt strongly that the *Standards* reflect an awareness that courtesy and respect between counsel and the courts is a two-way street, and that both the bench and the bar share responsibility for professionalism. This concern resulted this section's title being changed from "The Court's Duty to Counsel," which would have mirrored the other sections of the Standards, to "The Court's Relationship With Counsel."

This section encourages judges to show the same civility, respect, and courtesy to lawyers and other judges that are expected of lawyers. It also recognizes that the best way to encourage professional conduct among lawyers is for appellate judges to refrain from rewarding unprofessional conduct when it does occur, and to reward exemplary conduct. It encourages appellate judges to exercise integrity and professionalism in their treatment of the factual record, the applicable law, and the arguments of counsel. It even states that courts will "endeavor to avoid the injustice that can result from delay after submission of a case."<sup>7</sup>

#### **IV. The Standards expect more than the Disciplinary Rules of Professional Conduct**

Although it was never a conscious goal of the drafters of the *Standards*, the guidelines they drafted require more of Texas appellate lawyers than the *Disciplinary Rules of Professional Conduct*. There are two reasons for that. The first is that the *Rules* are codified attempts to regulate conduct, enforceable by grievance procedures and motions for sanctions. They describe mandatory minimum rules that all lawyers must follow for their conduct to be considered ethical. In contrast, the *Standards* are intended to be aspirational guidelines, and not enforceable rules. They establish aspirational guidelines for lawyers who want to satisfy more than minimum ethical rules, but instead want to reach higher levels of professionalism.<sup>8</sup>

Second, the *Rules* apply to all lawyers, and to the extent they apply to the litigation environment they primarily contemplate trial lawyers. Most of them were drafted before an appellate specialty practice became recognized.<sup>9</sup> The appellate culture that began to evolve as the specialty grew was, and remains, different from the litigation culture in terms of the level of professionalism that is practiced and expected. That is not because lawyers who are drawn to specialize in appellate law are nicer and less combative personality types — though it probably is true that appellate lawyers tend to have more of an academic and intellectual bent and are less likely to proudly embrace a warrior mentality.

The difference also is attributable to the different functions of the two layers of our court system. Trial lawyers are in the business of influencing the fact-finding process, often by

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<sup>7</sup> *Standards of Appellate Conduct*, The Court's Relationship With Counsel at 5.

<sup>8</sup> As the Preamble to the *Texas Lawyer's Creed* says: "I must 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."

<sup>9</sup> The watershed year for the recognition of appellate law as a specialty practice in Texas is 1987. That year was when the Appellate Practice and Advocacy Section of the State Bar of Texas was established. It also was the year when the Texas Board of Legal Specialization first offered an exam and specialization in Civil Appellate Law.

persuading groups of laypersons to believe their version of a story rather than the version offered by opposing counsel. That process often includes attacking the credibility of the person telling the opposing story. In contrast, by the time the parties reach the appellate courts, the facts already have been found, and the battlefield has shifted to legal principles and how they apply to the fact findings made in the trial court. That understandably becomes a more abstract and academic argument, one that is not nearly as likely to require an attack on opposing counsel. That climate creates a much more conducive atmosphere for civility than the trench warfare that often occurs in the trial court.

So, if appellate lawyers are noticeably more professional and civil toward each other than trial lawyers, why were the *Standards* necessary? As previously mentioned, the advocates for the *Standards* suggested that they were necessary for two target audiences: (1) trial lawyers who infrequently handle appeals and are unaware that different conduct is expected in appellate courts, and (2) clients who have great resentment toward their adversaries and expect their appellate lawyers to treat opposing counsel accordingly. Dubose, 2 J. App. Prac. & Process at 197-98. The *Standards* put trial lawyers on notice of the cultural difference, and gave ethical appellate lawyers ammunition to dissuade their contentious clients.

As a result, the *Standards* are more demanding than the *Rules* in the following ways.

#### **A. Balancing competing duties**

As previously mentioned, the *Standards* expressly recognize the need for lawyers to balance concurrent duties to their clients, the courts, and other lawyers.

The *Rules* do not address or recognize a need to balance these duties. Edward L. Wilkinson, *If One is Good, Two Must Be Better: A Comparison of the Standards for Appellate Conduct and the Texas Rules of Professional Conduct*, 41 St. Mary's L.J. 645, 657 (2010). Instead, the statement from the Preamble to the Rules that gets cited the most is: "a lawyer should zealously pursue clients interest within the bounds of the law." There may be a tendency to overemphasize "zealously pursu[ing] client's interest" while losing sight of "within the bounds of the law." To combat that perception, the *Standards* make clear that, "Counsel will be faithful to their clients' lawful objectives, while mindful of their concurrent duties to the legal system and the public good." Lawyer's Duties to Clients at §4.

#### **B. Accepting an engagement**

The differences between the *Standards* and the *Rules* begins with the decision to accept an engagement. The *Rules* merely provide that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous." Rule 3.01. The comments to that Rule explain that "A filing or contention is frivolous if it contains knowingly false statements of fact," and a contention is **not** frivolous "even though the lawyer thinks the client's position ultimately may not prevail." In other words, counsel should not agree to bring or defend an action or argument if it requires making knowingly false statements of fact.

The *Standards* contain a more rigorous bar for accepting an appellate engagement. They require the attorney to “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.” *See Standards, Lawyer’s Duties to the Client* §12. That same requirement of a “good faith” belief “that error has been committed” is repeated in the *Lawyers Duties to the Court* §1, and the next section forbids pursuing an appeal “primarily for purposes of delay or harassment.” *Id.* at §2.

### C. Required client communications

The *Standards* and *Rules* also differ in the timing and scope of client communications required at the inception of the attorney relationship. *Wilkinson*, 41 St. Mary’s L.J. at 650. The *Rules* require that lawyers inform clients as circumstances develop during the litigation: “A lawyer shall keep a client reasonably informed about the status of the matter and promptly comply with reasonable requests for information,” and “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” *Rules* 1.03(a), 1.03(b). The *Rules* also require lawyers to communicate with clients when they become aware that the client is contemplating criminal or fraudulent acts. *Rules* 1.02(c), 1.02(d); 3.03(b).

In contrast, the *Standards* require attorneys to advise clients of quite a bit upon engagement, including:

- that the *Standards* exist and what they require, *Lawyer’s Duties to Clients* §1;
- the fee agreement and cost expectations, *id.* at §2;
- the nature of the appellate process, the range of potential outcomes, timetables, effect of the appeal on the existing judgment, the availability of alternative dispute resolution, *id.* at §5;
- the expectation of proper behavior, civility and courtesy, *id.* at §9;
- the attorney’s right to agree to reasonable requests by opposing counsel, *id.* at §10;
- that an appeal should only be pursued with a good faith belief that error was committed, *id.* at §12;
- the attorney will not take frivolous positions in the appellate court, and the penalties associated with that conduct, *id.* at §13.

### D. Decorum toward opposing counsel

The *Standards* and *Rules* also differ in the level of respect and civility required toward opposing counsel. The *Rules* address conduct between lawyers only by prohibiting conduct “involving dishonesty, fraud, deceit or misrepresentation,” or “constituting obstruction of justice.” *Rules* at 8.04(a).

The *Standards* set a higher bar for behaving with respect and civility, and this sentiment is expressed in almost every part of the *Standards*.

- **Duties to Clients.** Lawyers are forbidden from expressing negative opinions about opposing counsel, and required to advise their clients that proper behavior, civility, and courtesy are expected. *Lawyer’s Duties to Clients* at §7, 9, 10. Clients have no right to demand that counsel be abusive or offensive. *Id.* at §10, 11.

- **Duties to the Court.** Lawyers are required to conduct themselves in a professional manner, respecting the decorum and integrity of the judicial process, and to be respectful to judges and staff. Lawyer’s Duties to the Court at §7, 8.
- **Duties to Lawyers.** Lawyers are required to:
  - treat each other and all parties with respect, Lawyer’s Duties to Lawyers at §1;
  - refrain from making personal attacks on counsel or parties, *id.* at §5;
  - refrain from attributing bad motives or improper conduct to other counsel or making unfounded accusations of impropriety, *id.* at §6;
  - refrain from ascribing to opposing counsel a position they have not taken, or creating an unjustified inference based on counsel’s statements or conduct, *id.* at §9.

#### **E. Client’s ability to dictate decorum toward opposing counsel**

The *Rules* provide more leeway for the client to dictate the relationship between counsel. Under the *Rules*, unless the increased cost, burden, or delay is unreasonable, counsel is obligated to abide by his client’s instructions. Wilkinson, 41 St. Mary’s L.J. at 664. Counsel may explain the matter so that the client may make an informed decision, and presumably advise the client that it may be in the client’s best interest in the long run to permit the accommodation. *Id.* The lawyer might even seek to limit the general methods of representation with the client’s permission; but, under the *Rules*, counsel is ultimately bound to follow the client’s decision. *Id.*

In contrast, the *Standards* provide that the lawyer reserves the right to grant reasonable accommodations to opposing counsel, Lawyer’s Duty to Client at §10, and clients have no right to instruct a lawyer to refuse reasonable requests. *Id.* at § 11.

#### **F. Decorum toward courts (and court’s staff)**

The *Rules* and *Standards* also differ in expressing expectations about the way that lawyers treat the courts and their staffs. The *Rules* merely prohibit counsel from “engag[ing] in conduct intended to disrupt the proceedings,” Rules at 3.04(c)(5), or from “disobey[ing] an obligation under the standing rules of or a ruling by a tribunal. . . .” *Id.* at 3.04(d).

The *Standards*, again, demand more, requiring that counsel:

- “conduct themselves before the Court in a professional manner, respecting the decorum and integrity of the judicial process,” Lawyer’s Duties to the Court at §7;
- be “civil and respectful in all communications with the judges **and staff**,” *id.* at §8 (emphasis added);
- be “prepared and punctual for . . . court appearances, and . . . to assist the court in understanding the record, controlling authority, and the effect of the court’s decision,” *id.* at §9; and
- refrain from permitting “a client’s or their own feelings toward the opposing party, opposing counsel, trial judges, or members of the appellate court to influence their conduct or demeanor in dealing with the judges, **staff**, other counsel, and parties,” *id.* at §10 (emphasis added).

## V. Reasons to comply with the *Standards*

### A. It's the right thing to do

In this instance, the old saying that “Virtue is its own reward,” has some truth. Treating other appellate lawyers in a more civilized and accommodating manner usually makes you feel better about yourself. It will certainly make opposing counsel feel better about you when they have to deal with you in other cases, or when considering people for appellate referrals. It will undoubtedly make the appellate court personnel feel better if they perceive that they are engaged in the dignified task of resolving disputes and meting out justice rather than refereeing a cat fight. As the preamble to the *Texas Lawyer's Creed* states: “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.”

### B. Compliance enhances the chances of achieving a favorable result.

Uniformly, appellate justices find the conduct cautioned against in the *Standards* to be offensive. Although those judges decide cases based on the law and the facts rather than on the behavior of the advocates, they are also human beings whose perception of the substantive message is inevitably influenced by their feelings about the messenger. Credibility plays a role in decision-making, and human beings do not place much credibility in those persons they consider to be offensive. Moreover, the judges may conclude, consciously or unconsciously, that persons who resort to unprofessional tactics are doing so in order to gain an unfair advantage because they lack the conviction in their substantive arguments to prevail if they play the game fairly. In short, in a profession where the ultimate goal is coming out on the right side of the delicate balance of persuasion, starting out with a negative perception can be the difference between success and failure.

Appellate courts really do expect a higher level of professionalism and ethical conduct than what is often seen in the trial courts. Any lawyer who comes into the appellate courts, ignoring the *Standards* and behaving in a manner that is perceived as overly adversarial, non-cooperative, or less than completely candid is likely to be noticed and remembered, to the detriment of their current client and future clients. Ethical conduct in the appellate courts is not only a good idea, it is undeniably expected by the appellate courts. And frustrating that expectation increases the likelihood of unfavorable results.

In an opinion by the Fourteenth Court of Appeals, **now** Chief Justice Kem Thompson Frost eloquently expressed the court's frustration with unethical conduct and the adverse impact it can have on the client's case:

When counsel misrepresent the facts on which their legal arguments are based, they not only delay the entire process by unnecessarily adding to the court's workload, but also render a tremendous disservice to their clients. It is also a very poor strategy to misrepresent the record because any material misstatements and/or omissions

will almost certainly be detected by opposing counsel, the appellate panel, and/or the court's alert and able staff.

*Schlaflly v. Schlaflly*, 33 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Thus, even if you are cynical enough to not be motivated to do the right thing simply because it is right, you should at least do the right thing because it is calculated to improve your client's chances of winning.

**C. The reasons to disregard the *Standards* are unconvincing.**

Appellate advocates may choose to disregard the *Standards* for a variety of reasons. The most common explanations, and the reasons that they are unconvincing are as follows:

***“My clients expect me to play hardball with their despised enemies.”***

Clients who are uneducated about the appellate process and the ethical standards of the profession may sincerely believe that their position is best served by an aggressive, combative, uncooperative posture in all aspects of the appeal. However, just as lawyers have a duty to educate their clients about the substantive law, they also have a duty to educate their clients about the way that the game is, or should be, played. The *Standards* recognize this problem of clients who want to vent their spleen through the conduct of their lawyer, and place the burden on the attorney to educate the client about the inappropriateness of these expectations.

The *Standards* approach this problem in two ways: (1) By specifying what an appellate attorney must advise their clients regarding professionalism, and (2) By limiting what clients have a right to expect from their attorneys. Attorneys must “advise their clients of the contents of the Standards of Conduct when undertaking representation.”<sup>10</sup> They must advise their clients “of proper behavior, including that civility and courtesy are expected,”<sup>11</sup> and that the attorney “reserves the right to grant accommodations to opposing counsel in matters that do not affect the client's lawful objectives.”<sup>12</sup> The client has no right to “instruct a lawyer to refuse reasonable requests made by other counsel,”<sup>13</sup> or to “demand that counsel abuse anyone or engage in any offensive conduct.”<sup>14</sup>

Thus, although the lawyer owes the client a duty to abide by the client's wishes, that duty does not override the concurrent duty to behave in a professional manner. If the client demands

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<sup>10</sup> *Standards for Appellate Conduct*, Lawyers' Duties to Clients at 1.

<sup>11</sup> *Standards for Appellate Conduct*, Lawyers' Duties to Clients at 9.

<sup>12</sup> *Standards for Appellate Conduct*, Lawyers' Duties to Clients at 10.

<sup>13</sup> *Standards for Appellate Conduct*, Lawyers' Duties to Clients at 10.

<sup>14</sup> *Standards for Appellate Conduct*, Lawyers' Duties to Clients at 11.

unprofessional conduct, and the attorney is unable to persuade the client otherwise, withdrawal may be the only alternative.<sup>15</sup>

***“They did it first.”***

This justification for misconduct often is heard when fighting breaks out between children. It is considerably more disappointing to hear a similar argument from grown professionals. The lawyer’s version of this whine usually goes something like, “I can be pretty easy to get along with as long as the other attorney plays fair with me, but if they mess with me, I have the right to respond in kind.”

As an initial emotional response to unprofessional conduct this is understandable. However, the temptation to respond in kind should be resisted. Wait a couple of days to cool off before firing off an angry response. Go ahead and compose the venomous retort, but then delete it or edit it severely when cooler reason prevails. When one party to a dispute stoops to unprofessional conduct, but the other party adheres strictly to the high standards that should be expected of a professional, the contrast is vividly apparent to the appellate court, which will be more impressed by the attorney who takes the high road. When it comes to professionalism, “turn the other cheek” is a better rule than “an eye for an eye, and a tooth for a tooth.”

**VI. Conclusion**

The *Standards* were neither written nor promulgated with the intention of reining in an appellate culture that had veered out of control on ethical practices. Instead, they were a confirmation and clarification of the practices that already had evolved in the Texas appellate culture. For the most part they continue to be observed and followed by the majority of appellate practitioners. But standards and guidelines are typically not adopted to regulate the usual practice, but to address and clarify proper behavior in the atypical situation. These *Standards* provide a valuable service in that regard.

It is probably accurate to say that over the years the *Standards* have faded from the consciousness of many Texas appellate practitioners. But they remain as vital and important today as when they were first drafted 25 years ago. Experienced appellate practitioners who were around when they were first promulgated should re-familiar themselves with them. And practitioners who have begun their appellate practice in the past 25 years, who may not be aware of the *Standards* at all, should do themselves a favor and spend some time getting to know them. If we all did this, the appellate bench and bar would both benefit.

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<sup>15</sup> See *Texas Disciplinary Rule of Professional Conduct* 1.02, cmt. 8.

## **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.