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Y’all behave now: looking to Texas for appellate civility standards

California appellate courts and appellate bar organizations could easily modify, adopt, and perhaps improve on the templates set by the Seventh Circuit and Texas.

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Current events make clear that California is very different from Texas. But one way these states are similar is in having highly developed specialty bars devoted to appellate practice. Each state has numerous appellate courts and certified appellate specialists. (Appellate certification began in Texas in 1987 and in California in 1995.)

One way in which Texas stands out is that, in 1999 – a dozen years after the Texas State Bar began certifying appellate specialists – it became the first state to adopt professional guidelines specifically for appellate practice. *See* https://www.txcourts.gov/media/1437423/standards-for-appellate-conduct.pdf. (The first appellate jurisdiction to issue specific appellate civility standards appears to be the Seventh Circuit Court of Appeals, which adopted its Standards for Professional Conduct Within the Seventh Federal Judicial Circuit in 1992. *See* https://www.ca7.uscourts.gov/forms/seventh_circuit_standards_for_professional_conduct.pdf. No other circuit has done so.)

What was wrong in Texas? "Were appellate advocates on the former frontier so rowdy and rambunctious that in order to regain some sense of decency and decorum" they needed to be reined in? Kevin Dubose, "*Standards for Appellate Conduct Adopted in Texas*," 2 J. App. Prac. & Process 191, 192 (2000). No. Rather, as appellate practice took off as a specialty and appellate lawyers "developed their own practice identity, they realized that their relationships with clients, with judges, and with each other were decidedly different from the relationships typically experienced by trial lawyers." *Id.* at 193. Moreover, in the mid-1980s, Texas trial lawyers noticed a rise in overly aggressive "Rambo litigation tactics," leading some lawyers to "proudly tout their obstreperousness as a conscious strategy and marketing tool." Dubose & Watson, "*Why Does Conduct Matter? Why the Standards for Appellate Conduct Came Into Being 25 Years Ago and Remain Vital Today*," Conf. on State & Fed. Appeals (2020). Creating the appellate standards was meant as a step to reverse this obnoxious trend and to confirm and clarify the proper practices that had already evolved in appellate culture. *Id.*

The Texas Standards were not intended to be a basis for sanctions motions, civil liability, or further litigation. Nor do the Standards alter any existing duties under the Texas Disciplinary Rules of Professional Conduct, Texas Rules of Disciplinary Procedure, or the Code of Judicial Conduct. But if the Standards are not actually rules that can be enforced, what is the point? Well, first, the Standards are meant to "educate the Bar," especially younger lawyers or lawyers unaccustomed to appellate practice, "about the kind of conduct expected and preferred by the appellate courts." Dubose, *Standards*, at 197. Second, the Standards give appellate lawyers a tool to use with clients who demand unprofessional conduct. *Id.*

The Texas Standards consist of 40 directives (34 directed to lawyers, and 6 directed to appellate courts) divided into four parts: Lawyers' duties to clients (e.g., explain fees, explain the appellate process, do not foster unrealistic expectations, keep clients informed), lawyers' duties to appellate courts (e.g., file thoughtful, organized, clearly

written briefs; act professionally; be civil with judges and staff; don't misrepresent, misquote, or mischaracterize; cite controlling precedent, including adverse authorities), lawyers' duties to other lawyers (e.g., act respectfully; consent to reasonable requests), and the courts' duties to counsel (e.g., be courteous, respectful, and civil). Individually, each directive makes perfect sense; indeed, they should all be obvious. And yet this where and why the rubber meets the road: Most ethical guidelines seem plainly right, but arguably there is a need to catalog them in a single place, to spell them out, and to highlight that they exist.

Promulgating civility guidelines is nothing new. The American Bar Association has urged the use of civility codes twice since 1988 and its Litigation Section finally issued litigation Guidelines for Conduct in 2020. *See* https://www.americanbar.org/groups/litigation/policy/conduct_guidelines/.

In California, the State Bar Board of Trustees adopted the "California Attorney Guidelines of Civility and Professionalism" in July 2007 as a model set of guidelines for lawyers, voluntary bar associations, and courts to use. Numerous county bar associations have adopted civility standards (e.g., Los Angeles, Orange County, San Diego, Marin, Santa Clara, Santa Cruz, Ventura – just to name a few) as have other bar organizations (e.g., ABTL, ABOTA). *See* https://www.calbar.ca.gov/attorneys/conduct-discipline/ethics/attorney-civility-and-professionalism. And so have a few courts, e.g., the Northern District of California, the Central District of California (calling the Texas Lawyer's Creed and Seventh Circuit Standards "excellent models for professional behavior in the law"). But neither the Ninth Circuit nor any California appellate court has done so.

In 2021, a Civility Task Force, created jointly by the California Lawyers Association and California Judges Association, issued an initial report titled "*Beyond the Oath: Recommendations for Improving Civility*." The report cited a case from 1989, *Lossing v. Superior Court*, 207 Cal.App.3d 635, 641 (1989), in which the First District Court of Appeal reminded "members of the Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel." "*Beyond the Oath*," at 4. The report noted, however, that "[d]espite repeated calls for course correction … incivility has only increased." *Id.* at 5. The report concluded that restoring civility "must be done. And soon." *Id.* at 8.

To accomplish this goal, the Civility Task Force made four proposals: (1) require one hour of MCLE on civility; (2) provide civility training to judges; (3) modify State Bar disciplinary rules to enhance civility; and (4) require all lawyers to annually reaffirm that they will strive to conduct themselves "at all times with dignity, courtesy, and integrity." In November 2022, the State Bar invited public comment on proposals 1, 3, and 4. Therefore, efforts to promote civility, generally, are already underway. But there is no specific appellate focus to this.

Returning to the Texas Standards for Appellate Conduct, there is nothing uniquely "Texan" about them. They would apply equally well to any appellate practice in any state. Indeed, the key standards arguably are already covered to one extent or another in existing California law, either in professional rules or case law. For example, lawyers already have a duty not to pursue appeals for purposes of delay or harassment (e.g., *In re Marriage of Flaherty*, 31 Cal.3d 637 (1982) (citing Code Civ. Proc. § 907)); lawyers are not to misrepresent, misquote, or miscite facts or law in briefing (e.g., *Batt v. City & County of San Francisco*, 155 Cal.App.4th 65, 82, fn. 9 (2007)); lawyers have a duty to cite controlling (including adverse) authorities (*ibid.*); and, generally, lawyers are to conduct themselves professionally – or else face sanctions.

Is appellate civility really that much different from lawyerly professionalism generally, or litigation civility? Arguably not. Indeed, the Texas Standards contain sound directives for any lawyer or litigator, with only a few truly appellate-specific points relating to not taking frivolous positions on appeal, and educating clients about the appellate process (e.g., potential and likely outcomes, costs, timetables, ADR options). And, given that ordinary rules of professionalism and civility – and common sense – would seem to already address this topic to a large extent, are special appellate standards really useful? Won't the bad apples continue to misbehave anyway? And the "good" lawyers don't need standards, do they?

Those are all sound points. Yet, on the pro side, there also would seem to be no harm from asserting or adopting appellate civility standards, if for no other reason than to remind and refocus lawyers on the point that civility carries through on appeal – especially lawyers unfamiliar with appellate culture. Having specific guidelines all in one place is convenient. And lawyers who need help pushing back on aggressive clients or opposing counsel could point to the standards to help redirect movement toward civility.

A couple of decades after their promulgation, the Texas Standards reputedly "have faded from the consciousness of many Texas appellate practitioners." Dubose, "*Why Does Conduct Matter*," at 12. That's too bad, but not surprising. Yet just as rampant incivility in Texas appellate practice was not a motivating factor for creating the Texas Standards, there is no need for an epidemic of incivility in California appellate practice to prompt civility guidelines. Such standards very well may be of use. And much of the hard work has been done already. California appellate courts and appellate bar organizations could easily modify, adopt, and perhaps improve on the templates set by the Seventh Circuit and Texas. Surely we can and should emulate, if not beat out, Chicago and Texas for civility.