

TRIAL ADVOCACY

AMERICAN BOARD OF TRIAL ADVOCATES

CIVILITY CODE

I will remember that the practice of law is first and foremost a profession, and I will subordinate business concerns to the professionalism concerns.

I will encourage respect for the law and our legal system through my words and actions.

I will remember my responsibilities to serve as an officer of the court and protector of individual rights.

I will contribute time and resources to public service, public education, charitable, and pro bono activities in my community.

I will work with the other participants of the legal system, including judges, opposing counsel and those whose practices are different from mine, to make our legal system more accessible and responsive.

I will resolve matters expeditiously and without unnecessary expense.

I will resolve disputes through negotiation whenever possible.

I will keep my clients well-informed and involved in making the decisions that affect them.

I will continue to expand my knowledge of the law.

I will achieve and maintain proficiency in my practice.

I will be courteous to those with whom I come into contact during the course of my work.

I will honor the spirit and intent, as well as the requirements of the applicable rules or code of professional conduct for my jurisdiction, and will encourage others to do the same.

AMERICAN BOARD OF TRIAL ADVOCATES

CHAPTER PRESIDENTS' LEADERSHIP CONFERENCE
DENVER, COLORADO
FEBRUARY 12, 1994

CIVILITY, INTEGRITY & PROFESSIONALISM

DUTIES OWED TO MEMBERS OF THE BAR

1. Lawyers must remember that conflicts with opposing counsel are professional and not personal C vigorous advocacy is not inconsistent with professional courtesy.
2. Lawyers should treat adverse witnesses and litigants with fairness and due consideration.
3. Lawyers should not be influenced by ill feelings or anger between clients in their conduct, attitude, or demeanor toward opposing lawyers.
4. Lawyers should conduct themselves in discovery proceedings in the same manner as they would if a judicial officer were present.
5. Lawyers should not use discovery to harass the opposition or for any other improper purpose.
6. Lawyers should not intentionally make any misrepresentation to an opponent.
7. Lawyers should not arbitrarily or unreasonably withhold consent to a just and reasonable request for cooperation or accommodation.
8. Lawyers should not attribute to an opponent a position not clearly taken by the opponent.
9. Letters intended to make a record should be scrupulously accurate.
10. Lawyers should not propose stipulations in the presence of the trier of fact unless previously agreed to by the opponent.
11. Lawyers should ordinarily not interrupt an opponent's legal argument.
12. Lawyers in court should address opposing lawyers through the court.
13. Lawyers should not seek sanctions against or disqualification of another lawyer to obtain a tactical advantage or for any other improper purpose.
14. Lawyers should conduct themselves so that they may conclude each case with a handshake with the opposing lawyer.

COURTROOM CONDUCT: 50 TIPS FROM THE BENCH

1. Be On Time. Better yet C be early. This will not only satisfy compliance with your obligation of punctuality to the

court, but may have other side benefits (e.g., in certain circumstances this will get you to "the head of the line," and, sometimes you are able to learn things during those few minutes that will be of assistance once court goes into session). Where even a brief delay is inevitable, promptly communicate this fact to the court clerk. (Sec. II-4.)

2. Stand Up. Always stand when addressing the court; in the rarest of cases and for good cause (e.g., you have just broken your leg), request the court's permission to speak from a seated position. (Sec. II-1.)

3. Stating Your Appearance. Formally state your appearance C your name and the party you represent. (You may want to include your firm name, but this is optional.) Make sure you know exactly whom you are appearing for (without having to fumble with the caption). For example, "Good morning, Your Honor. Jones & Roe by Sally Smith, appearing for defendant ABC Company, the moving party." (Sec. I-4.)

4. Time Constraints. Recognize that the court has limited time to hear your matter. Be prepared to respond to a request for a time estimate C and be prepared to live with it. Make a good faith estimate. Be considerate of the court. Don't be greedy ("I want an hour") but don't short-change yourself. Once guidelines are given ("You have five minutes, counsel") make sure you comply. (There is a trend to imposing time limits for trials as well as motion hearings.) (Sec. I-1, I-4, II-2, II-4, II-5.)

5. Introductory Remarks. It is generally a good idea to begin every argument in the same way: "May it please the court, counsel. . ." (Sec. II-1.)

6. Beware of Forbidden Spaces. Entering the "well" (the area between counsel table and the bench), approaching a witness during examination, or, in some courts, even leaving the lectern. (No C it's not a "podium.") Be sensitive to the different requirements of each court, and adhere strictly unless relieved by express permission from the court. Even if "relieved" from any such constraints, you demonstrate competence by being aware that they exist. (Sec. II-1.)

7. Address the Court C Not Your Opponent. Address all remarks to the court (even those intended for your opponent). In rare circumstances where it is appropriate to address your opponent, be sure to obtain the court's advance permission to do so. However, in most cases the remark can, at least in form, be addressed to the court. (Sec. II-1, III-12.)

8. Properly Address the Court. It is usually safe to refer to "the Court." For example, "If the Court feels. . ." or "In light of the Court's ruling. . ." "Your Honor" should only be used as a form of address, not as a personal pronoun or a possessive. For example, do not say, "In light of Your Honor's ruling. . ." "Does Her Honor want to hear further argument on

this point? Never address the court as "Judge" in court; this form of address should be restricted to social occasions. Never address the court as "you" or refer to "your" ruling. In open court, absent jurors and witnesses, there are first persons and third persons (but no second persons). (Sec. I-4, II-1.)

9. Argue to the Court, Not With the Court. Take the maxim "Attack the argument, not the speaker" one step further. Point out the defects in the other party's position or arguments, not the failings in the court's tentative opinion. It is rarely productive of any good to challenge the court's reasoning abilities. (Sec. I-4, II-1, II-9.)

10. Don't Interrupt. While this seems obvious, many lawyers interrupt the court. Similarly, with few exceptions (e.g., to interpose an objection), don't interrupt opposing counsel during argument. (Sec. I-4, II-1, III-11.)

11. Accept Responsibility for Papers. Don't try and dodge responsibility for a defect in the papers by pointing at another person in the firm. If the court seems inclined to rule against you based on a defect in the papers, consider asking for a continuance so the papers can be put in proper order (apologizing to the court and counsel for any imposition), or, at a minimum, seek to have an adverse ruling entered "without prejudice." (Sec. I-4, II-2.)

12. "Invite" C Don't "Direct". If you want the court to look at something in the papers, proper form requires that you "invite the court's attention" rather than "directing" the court's attention. (Sec. II-1.)

13. Respond Directly to the Court's Question. Welcome questions, even though they appear unfavorable to your position. (If you have done a good job of preparation, you will have anticipated all of the hard questions, and honed your responses.) Do not put off the question (e.g., "I am going to get to that a little bit later, Your Honor. . . ." or, "The answer to that question really has no bearing on resolution of this motion. . ."). (Sec. II-1, II-2.)

14. Stop Arguing After the Court's Ruling. Don't persist in arguing a point after the court has ruled on the point. Once the court has ruled, it is considered discourteous to continue to argue. For this reason, try to make all your arguments, if possible, before the court rules; occasionally, a ruling is made before you complete getting what you wanted to get on the record, and appropriate explanatory remarks are required before you proceed. See generally *In re Grossman*, 109 Cal. App. 625 (1930) for the proposition that once the oral ruling has been made, it is the duty of counsel to acquiesce at least for the time being, reserving reargument for appeal (or a proper motion for reconsideration). (Sec. I-4, II-1.)

15. Be Prepared to Show Prejudice of Adverse Ruling. Frequently (e.g., when you represent a party opposing a TRO or

preliminary injunction) the court will ask, "How will the defendant be hurt if this TRO is granted?" Resist the temptation to respond, "Who cares? C the proper test is that the burden is on plaintiff, and plaintiff has not carried the burden." If you want to gently remind the court of this fact, a possible response might be, "Your Honor, if the law in California required that prejudice be shown by the defendant, we certainly could satisfy such a burden, in that. . ." Be also prepared for the flip side of this, when the court asks, "Why can't the plaintiff wait 10 days so this matter can be heard with a little more notice?" Finally, don't make representations about theoretical harm that appear to be representations of harm that in fact is likely to occur. (Sec. I-3, II-2.)

16. Listen and Learn. It is difficult for the lawyer when there is no tentative ruling and no hint as to what the ruling might be. Even without a tentative ruling, once the court asks a question (or says anything), listen intently C you can often get a hint as to what the court views as the key issues. Pay close attention and adapt your argument. Be flexible. Don't get so wrapped up in what you are about to say that you miss what is being said in the courtroom (by the court, or juror). (Sec. II-1.)

17. Be Delicate in Questioning the Court. Questions are intrusive. They can put one C especially a judge C in a defensive posture and possibly invite a rebuke (e.g., "I'm not here to answer your questions, counsel"). Be sensitive to this, and address questions C if any C delicately and indirectly (e.g., "Does the court have any questions on this point before I move on to the next point?"). (Sec. I-4, II-2.)

18. Clarification of Ruling. Sometimes you may feel you need clarification of the terms of a ruling; however, don't abuse court's willingness to respond by attempting to reargue merits or improperly forcing court to commit to something not part of ruling or not essential to court's order. (Sec. I-4, II-1, II-2.)

19. Bench Rulings C Further Requests. Be prepared for a ruling from the bench (favorable or unfavorable) and plot your corresponding course of action in advance (e.g., you may need to promptly ask for further relief, such as a stay, or, seek a certification of an issue for an interlocutory appeal). (Sec. II-5.)

20. Objections C Making a Record. Especially if you lose, you must be careful to make a record (unless there is little possibility that review will be sought). For example, it is your responsibility to ensure that oral or written objections have been ruled on. Consider requesting rulings on objections (tactics change, depending upon how you did at the hearing). If appropriate, consider "Are my client's written objections to be considered as having been overruled?" (Sec. II-5.)

21. Don't "Make A Record" Where Unimportant. Little good is done by insisting on making a record on trivial points or those clearly within the court's discretion and which rarely will serve as a basis for appeal. On the other hand, where

important, you may request permission to make an offer of proof. (Sec. II-5.)

22. Form of Formal Order. Understand if a formal order is required or if a minute order is sufficient. (Based on the ruling, decide what is best for you and be prepared to try to influence that result.) Understand who is to draft any order, when to submit it, and the approval procedure. In some cases, it is appropriate to have drafted an order in advance, so it can be presented at the hearing. Consider asking that an adverse ruling be "without prejudice" (e.g., if not on the merits, or, on limited record). If you draft an order, be punctilious C a sure way to damage your credibility and impair your effectiveness is to overreach in preparing an order. (Sec. I-3.)

23. Be Prepared C and Show It. Be able to put your hands on cases, record citations, documents, etc., without fumbling. Have the table in front of you neatly arranged so that it says to a viewer "This lawyer is prepared." Anticipate questions so as to be able to give a considered response C off-the-cuff remarks are seldom effective. Know the court's rules and be able to show you have followed them. (Sec. II-5.)

24. Be Civil. Be courteous and respectful to the court C but don't stop there. Civility should extend to courtroom attachJs, counsel, parties, and witnesses. Vigorous advocacy and civility are not inconsistent. (In fact, civility can enhance advocacy, whereas incivility usually detracts from persuasiveness.) (Sec. I-4, II-1.)

25. Avoid Visual Displays of Pique. Avoid frowns or gestures that could be construed as disapproval of the court or its rulings. (Some lawyers may even be unaware they are manifesting displeasure C learn to control what messages your expression and body language are sending.) Proper respect doesn't allow you to demonstrate your disapproval of a ruling with either word or gesture. Have some sort of a response (even when you have just had a dagger planted between your shoulder blades) that smoothes over the harm (e.g., "Very well, Your Honor") and move on to the next order of business. Don't forget that you will be before this judge on another day. (Sec. I-4, II-1.)

26. Avoid Unnecessarily Challenging the Court. Suggesting that the ruling is dumb is disrespectful and discourteous, as well as poor advocacy. Rather than arguing "No reasonable person could read the paragraph that way," consider an alternative, such as "That is certainly one way to read the paragraph (i.e., that is one possible interpretation) but let's examine the consequences of such a reading." (Sec. I-4, II-1.) Proper respect for the court doesn't require fawning. The judge has a job to do and you have yours C sometimes the court's goals and yours will be opposed (e.g., the judge want to minimize the prospects of having a challenged ruling reversed on appeal while your client's interests may be to maximize the same chances).

27. Be Properly Attired. The courtroom is not the place to "make a statement" with unorthodox or casual attire. (Sec.

II-3.)

28. Be Candid. Your word is C or should be C your bond. If you use the technique of inviting the court to interrupt you and ask for authority for anything you say, be prepared to instantly deliver. When asked a question, give a straight response. If for some reason you feel you cannot give a straight response (e.g., privileged communications are sought), explain why you cannot respond directly. If you haven't anticipated a question or otherwise don't know the answer, be candid C don't fake it C instead ask, "May I have a minute to consider that, Your Honor?" or, "I don't know but I can sure find out and respond," or, "Could I have permission to file a (short) response to that within one day?" Preserving and enhancing your long-term credibility and good reputation are far more important than the perceived immediate advantage of shading the truth. (Sec. I-3, II-2.)

29. Be Sparing With Emotion. Sparing use of emotion can sometimes be effective, but the court must be prepared for the emotion in order for the emotion to have a chance of being well received. While pace, tempo, and volume must be varied to hold a listener's attention, avoid any hint of "raising your voice" at the court. (Sec. II-1.)

30. Don't Attack Opposing Counsel. Demonstrating unpleasant feelings toward opposing counsel by disparaging remarks or gestures will usually damage you in the court's eyes and will usually invite (or escalate) a counter-attack. At a minimum, engaging in personal attacks will distract the court from the points you need to make. If your opponent attacks you, meet your opponent's unreasonable conduct with dignity and reason. (Sec. II-9, III-1, III-3.)

31. Meet and Confer C Honestly. Statutes and court rules often require that lawyers attempt to resolve, by agreement, discovery and other procedural disputes and objections. Don't merely go through the motions C try in good faith to resolve such disputes. Courts don't like getting involved, especially where it appears the disputed matters are such that good lawyers should be able to resolve. Make sure it is important before having the court resolve a discovery dispute. (Sec. II-6.)

32. Don't Seek Sanctions for an Improper Purpose. Be sparing with requests for sanctions. Many judges (especially the senior judges who didn't practice in such an environment) are offended by automatic sanctions requests (to say nothing of the amounts sought). (Sec. II-6, III-13.)

33. Don't Seek Disqualification for Improper Purpose. Carefully weigh a decision to move to disqualify opposing counsel, especially if the motivation is primarily designed to obtain a tactical advantage or create a diversion from litigating the merits. Don't make or threaten such a motion unless you have carefully considered that it is justified and in your client's best interest. (Sec. III-13.)

34. Concluding Remarks. Even if you have just been hammered, it is appropriate to conclude the hearing with a genuine "Thank you, Your Honor." You aren't thanking the court for its ruling, but thanking the court for its attention (if you had it), for the opportunity to present oral argument (oral argument is usually in the discretion of the court), or, at a minimum, for giving consideration to your papers. Judges know that one side will usually be unhappy with a ruling C they notice when their ruling is accepted with grace and style. (Sec. I-4, II-1.)

35. Don't Privately Disparage the Judge or Jury. Don't improperly blame or otherwise attack the court or jury to clients or witnesses when you receive an unfavorable result in an effort to absolve yourself of responsibility. Judges are particularly vulnerable, as they cannot properly respond or counter public attacks. (As a practical matter, even private and privileged communications sometimes come to light, and could haunt you in the future.) (Sec. I-2, I-4.)

36. Get Even, Not Emotional. Litigation often raises emotions C don't let yours show unless you want them to show (which is sometimes appropriate). Don't get mad C get even. Professionalism is not inconsistent with vigorous advocacy. (Sec. III-1.)

37. Disclose Clearly Relevant Authorities. If a case appears on point, disclose it and distinguish it or say it is wrong. Don't conceal it. (Sec. I-3, II-2.) Sometimes this can be difficult. On the other hand, most would agree that you needn't raise and then distinguish cases that aren't clearly relevant to the approach you are taking.

38. Shepardize Cited Authorities. A clear sign of sloppy C and untrustworthy C legal work is to cite cases that are no longer properly cited as authority. Almost nothing can get you off on the wrong foot quicker than citing an overruled case. (Sec. II-2, II-5.)

39. No Unauthorized Ex Parte Communications With the Court. Do not initiate ex parte communications with the court except as expressly authorized by court rules. Be particularly sensitive to not raising any pending matter with a judge in a social setting (or, for that matter, one that may come before the trial or appellate court). (Sec. II-8.)

40. No Letters to the Court. Avoid letters to the court except where specifically authorized by the court or court practice. (Federal rules include a specific proscription.) Only in rare cases are letters to the court appropriate C sending a copy to opposing counsel, while essential, doesn't necessarily cure the vice of such communications. Consider bringing procedural matters to the clerk's attention. In the rare instance of writing a letter to the court, there is a big difference between communicating an undisputed event (e.g., a later relevant decision bearing on a pending motion) as opposed to urging

contested facts or making additional legal arguments. When your opponent writes such a letter, you often are compelled to promptly respond. (Sec. II-8.)

41. Don't Unnecessarily Pick on a Party or Witness. In general, treat every witness with respect. In rare cases, it becomes necessary to personally attack a party or witness C but the judge or jury had better feel such an attack is justified or it is likely to backfire. (Sec. III-2.)

42. Use "Confirming Letters" Advisedly. Sometimes it is desirable C and even necessary under a court rule C to embody an agreement, disagreement, or action in writing. However, don't automatically do this as a routine C and, when you feel it necessary to do so, be scrupulously accurate C don't overreach. (Sec. III-8, III-9.)

43. Discuss Proposed Stipulations in Advance. Don't "propose" stipulations to opposing counsel for the first time in front of court or jury C especially on controversial matters. Instead, have advance discussion with opposing counsel to agree on terms. If you can't agree, that is the end of it C there is the stipulation (unless you have been ordered to reach agreement). (Sec. III-10.)

44. No "Rambo" Discovery. Avoid using discovery to harass or inundate your opposing party or counsel. (They rarely go away due to this tactic, and you usually receive "boomerang" discovery requests.) Conducting yourself professionally will save your client money as well as often yielding better discovery responses. A good rule of thumb is to conduct discovery as if a judicial officer were present C your conduct may later be reviewed by the court, so be proud of it. See *Hall v. Clifton Precision Products*, 150 F.R.D. 525 (E.D. Pa. 1993).

45. Don't Assert Meritless Claims. Don't permit yourself to be used as a foil for advancing meritless arguments or causes of action. When arguing for an extension of existing law, make very clear this is what you are doing, and explain why. (Sec. II-7.)

46. Don't Let Client's Feelings Override Professional Duties. Client's emotions are often high during litigation C often justly so. But don't let that interfere with your duties as an officer of the court. While it is often a good idea not to appear cozy with your opponent, zealous advocacy doesn't require C or permit C a lawyer to disregard professional duties, including civility in the guise of identifying with the client's feelings. (Sec. III-3.)

47. Honor Your Commitments. Even if it seems that they were unwise with the perspective of hindsight, honor your commitments. (Sec. I-1.) There may be rare situations where you may have to seek relief from an improvident stipulation, or other commitments, but don't confuse this with rewriting history by waffling on the commitment.

48. Consider Reasonable Requests for Accommodation. Don't refuse reasonable requests for accommodation simply to play "hard ball" where your client's rights are not prejudiced. This will get you off on the wrong foot with the court. (On the other hand, when your client's rights will be jeopardized, don't succumb to pleas veiled in the cloak of "professional courtesy.") (Sec. III-7.)

49. The Fair Play Test C Beware of Getting Too Close to the Edge. Be scrupulous of representations C and omissions. In matters of ethics, lawyers C and judges C often disagree. Accordingly, while your duty to the client requires pressing proper advantages, be mindful that your view of your conduct "close to the line" may be viewed as "across the line" by others. In testing close issues, ask, "Is it fair?" in addition to not appearing to violate the Rules of Professional Conduct. (Sec. I-5, III-6.)

50. The Handshake Test. While it is not always possible to accomplish, your goal should be to conduct yourself throughout the case C and inspire your opposing counsel to aspire to the same goal C so that you can conclude every matter with a handshake. (Sec. III-14.)

LITIGATION COST CONTAINMENT GUIDELINES

1. Avoid unnecessary motion practice. Consider submitting to opposing counsel a proposed responsive pleading with a letter in lieu of a motion setting forth any objections you may have to the adversary's pleadings which you would normally raise by motion. Determine if your objections can be resolved by mutual agreement or reserved until trial.

2. Seek early agreement of counsel for a voluntary exchange of information without the paper chase of motions.

3. Courts and attorneys should be encouraged to use telephone conferences to resolve matters which cannot be handled by mutual agreement.

4. Depositions:

a. Set depositions by mutual agreement with the aid of legal secretaries or assistants. Avoid the paper chase and time waste of noticing depositions at arbitrarily selected times.

b. Depositions should be to the point. A little preplanning can save time. Encourage associates taking depositions to set reasonable time constraints on depositions.

c. Consider electronic recording of depositions in certain cases, particularly in depositions that are not critical.

d. Consider telephone depositions where appropriate for witnesses for discovery or perpetuation, particularly where the cost of producing the party or witness is excessive. Consider also the use of telephone testimony at trial. Many Courts have current capability or equipment may be temporarily installed. "Live" telephone testimony can be effective and is much less expensive than video deposition testimony.

5. Multi-Party or Potential Multi-Party Cases:

a. Consider limiting the use of cross-claims and third party actions by using alternative procedures. Some suggested alternative procedures are:

(1) Stipulate to division of responsibility in the event of plaintiff's judgement.

(2) Coordinate defense without prejudice and stipulate that trial judge can decide indemnity and contribution issues, if necessary, based upon evidence submitted during primary trial and any additional evidence submitted by defendants or third party defendant.

b. In Multi-party cases attorneys should organize and coordinate discovery, research and the use of experts for the purpose of eliminating unnecessary trial preparation and costs.

6. Early evaluation by counsel is important. Frequently, a face-to-face conference between counsel even prior to filing the lawsuit, with an exchange of necessary information, can accomplish more than motions and depositions. Where appropriate, consider interviews of plaintiff, defendant or witnesses in lieu of depositions. In liability cases, early settlement conferences (which need not necessarily involve the court) can keep costs down.

7. Try to agree on discovery plans with opposing counsel so that the parties will be able to know at an early state whether the case is one to be tried or settled. Avoid the last minute flurry of discovery.

8. Seek court sanctions for discovery abuses if personal communication between counsel fails to resolve the problem. Seek protective orders where appropriate to shorten discovery procedures.

9. Avoid set-overs whenever possible. If you know you are going to need a set-over promptly notify the court and parties. Do not wait until the last minute as the case comes up for trial. Verify the availability of witnesses and counsel immediately upon receipt of a trial date and immediately notify all parties if set-overs are anticipated. A friendly, periodic check of adverse counsel's availability for trial is helpful and wise, especially in complex cases.

10. Create an office research bank and index it carefully. The same is true with jury instructions and unusual pleadings.

11. Consider the use of paralegals or law clerks when appropriate; but limit the number of and the time allowed for associates, clerks and paralegals to complete assignments. Unrestricted use of assistants frequently increases the cost of legal services for both sides.

12. Ask expert witnesses to be cost-effective and agree on fees in advance.

13. Consider voluntary, non-binding arbitration, in appropriate cases before experienced trial lawyers to be chosen by the parties; or, an alternative, in those cases in which arbitration would otherwise be required or available consider utilization (by stipulation) of less crowded dockets in the Districts Courts where a jury trial would be available.

Passed October 17, 1992, National Board Meeting, Palm Beach, Florida.