

Principles *of* Civility



for
ADVOCATES



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INTRODUCTION

I am pleased to have been invited to write an introduction to The Advocates' Society Principles of Civility publication. The Society is to be congratulated for the production of a document with which every advocate should be familiar.

For decades, a significant segment of the public, often unfairly, has viewed lawyers as difficult, contentious individuals. The result is that lawyers and judges often become attractive political targets, a process that can undermine the very foundations of our democratic society which is, of course, an independent justice system that enjoys the confidence of the citizenry.

In my view, the level of civility at the Bar relates directly to the level of professionalism of the legal profession. The principles of civility are therefore of great importance to all members of the Bar.

The success of our greatest advocates has been characterized by civility. Among many, I think of the late John J. Robinette and the late G. Arthur Martin whose courtesy towards fellow advocates, the Judiciary and court staff played a major role in their effectiveness as advocates.

It is also important to remember that the paths of lawyers may cross and re-cross over and over again. Lawyers have long memories particularly about the conduct of colleagues and in my experience there can be nothing more important than the reputation enjoyed by an advocate amongst his or her colleagues.

Judges are entitled to expect that counsel will treat the court and each other with candour, fairness and courtesy. A failure to do so usually will create a much heavier burden of persuasion on an advocate which may well undermine the interests of his or her client.

The concluding section of the Principles of Civility for Advocates is entitled "What Counsel are Entitled to Expect of the Judiciary". This section is, of course, of particular interest to me as it will be to all members of the Judiciary. In my opinion, these principles represent very reasonable expectations on the part of the Bar and public. Indeed, they accurately reflect the "Principles of Judicial Ethics", which were recently published by the Canadian Judicial Council.

In conclusion, I strongly commend, endorse and support the opening sentence of the Preamble to the Principles of Civility for Advocates that "civility amongst those entrusted with the administration of justice is central to its effectiveness and to the public's confidence in that system".

– **The Honourable R. Roy McMurtry,**
Chief Justice of Ontario



PREAMBLE

Civility amongst those entrusted with the administration of justice is central to its effectiveness and to the public's confidence in that system. Civility ensures matters before the Court are resolved in an orderly way and helps preserve the role of Counsel in the justice system as an honourable one.

Litigation, however, whether before a Court or tribunal is not a "tea party". Counsel are bound to vigorously advance their client's case, fairly and honourably. Accordingly, Counsel's role is openly and necessarily partisan and nothing which follows is intended to undermine those principles. But Counsel can disagree, even vigorously, without being disagreeable. Whether among Counsel or before the Courts, antagonistic or acrimonious behaviour is not conducive to effective advocacy. Rather, civility is the hallmark of our best Counsel.

Although couched in terms of proceedings before the Courts, the principles which follow are, with necessary adjustments, applicable to all forms of dispute resolution proceedings, including administrative bodies, arbitrators and mediators. These principles are not intended as a code of professional conduct subject to enforcement by discipline or other sanction but as an educational tool for the encouragement and maintenance of civility in our justice system.



PART I - RELATIONS WITH OPPOSING COUNSEL

General Guidelines for Relations with Opposing Counsel

1. Counsel should always be courteous and civil to Counsel engaged on the other side of the lawsuit or dispute. It is the responsibility of Counsel to require those under their supervision to conduct themselves with courtesy and civility as well.
2. Ill feelings that may exist between clients, particularly during litigation, should not influence Counsel in their conduct and demeanour toward opposing Counsel.
3. Counsel should always be honest and truthful with opposing Counsel.
4. Counsel should conduct themselves similarly towards lay persons lawfully representing themselves or others.

Cooperating with Opposing Counsel

5. Counsel should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with opposing Counsel whenever practicable.
6. When Counsel is about to send written or electronic communication, or take a fresh step in a proceeding which may reasonably be unexpected, Counsel ought to provide opposing Counsel with some advance notice where to do so does not compromise a client's interests.

Communications with Opposing Counsel

7. Counsel should respond promptly to correspondence and communications, including electronic communications, from opposing Counsel.

Promises, Agreements, Undertakings and Trust Conditions Given to Opposing Counsel

8. Counsel should fulfill or comply with all promises to, or agreements with, opposing Counsel, whether oral or in writing.
9. Counsel should not give any undertaking that, to Counsel's knowledge or belief, cannot be fulfilled and should fulfill every undertaking given. Undertakings should be confirmed in writing and should be unambiguous in their terms. Undertakings should also be fulfilled as promptly as circumstances permit.
10. If Counsel giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that Counsel will honour it personally.

Cooperating with Opposing Counsel on Scheduling Matters

11. Counsel should consult opposing Counsel regarding scheduling matters in a genuine effort to avoid conflicts.
12. In doing so, Counsel should attempt to accommodate the calendar conflicts of opposing Counsel previously scheduled in good faith for hearings, examinations, meetings, conferences, vacations, seminars or other functions.
13. Counsel should agree to reasonable requests for scheduling changes, such as extensions of time, provided the client's legitimate interests will not be materially and adversely affected.
14. Counsel should not attach unfair or extraneous conditions to extensions of time. However, Counsel is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize. Counsel may also request reciprocal scheduling concessions but should not unreasonably insist on them.

15. Counsel should promptly notify opposing Counsel when hearings, examinations, meetings or conferences are to be cancelled or postponed.

Agreement on Draft Orders

16. When a draft order is to be prepared to reflect a Court ruling, Counsel should draft an order that accurately and completely reflects the Court's ruling. Counsel should promptly prepare and submit a proposed order to opposing Counsel and attempt to reconcile any differences before the draft order is presented to the Court.

Conduct Which Undermines Cooperation Among Counsel

17. Counsel should avoid sharp practice. Counsel should not take advantage of, or act without fair warning to opposing Counsel, upon slips, irregularities, mistakes or inadvertence.
18. Counsel should not falsely hold out the possibility of settlement as a means of adjourning a discovery or delaying a trial.
19. Subject to the Rules of Practice, Counsel should not cause any default or dismissal to be entered without first notifying opposing Counsel, assuming the identity of opposing Counsel is known.
20. Counsel should not record conversations with opposing Counsel without consent of all persons involved in the conversation.

Conduct at Examinations for Discovery

21. Counsel, during examination for discovery, should at all times conduct themselves as if a Judge were present. This includes avoiding inappropriate objections to questions, discourteous exchanges among Counsel and excessive interruptions to the examination process.

22. Counsel should not ask repetitive or argumentative questions or engage in making excessive or inappropriate self-serving statements during examination for discovery.
23. The witness who is being examined should be treated with appropriate respect and should not be exposed to discourteous comments by opposing Counsel or their clients.
24. Counsel should instruct their witnesses as to the appropriate conduct on examination and the requirement for courtesy and civility to opposing Counsel and their clients.
25. Counsel should not engage in examinations for discovery that are not necessary to elicit facts or preserve testimony but rather have as their purpose the imposition of a financial burden on the opposite party.

Comments Made About Opposing Counsel

26. Counsel should avoid ill-considered or uninformed criticism of the competence, conduct, advice, appearance or charges of other Counsel. However, Counsel should be prepared, when requested, to advise and represent a client in a complaint involving other Counsel.
27. Counsel should not attribute bad motives or improper conduct to opposing Counsel, except when relevant to the issues of the case and well-founded. If such improper conduct amounts to a violation of applicable disciplinary rules, however, Counsel should report such conduct to the appropriate professional disciplinary authority.
28. Counsel should avoid disparaging personal remarks or acrimony toward opposing Counsel.
29. Counsel should not ascribe a position to opposing Counsel that he or she has not taken, or otherwise seek to create an unjustified inference based on opposing Counsel's statements or conduct.

Accommodating Requests from Opposing Counsel

30. Counsel, and not the client, has the sole discretion to determine the accommodations to be granted to opposing Counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights. This includes, but is not limited to, reasonable requests for extensions of time, adjournments, and admissions of facts. Counsel should not accede to the client's demands that he or she act in a discourteous or uncooperative manner toward opposing Counsel.
31. Counsel should abstain from obstructing any examination or court process.
32. Subject to applicable practice rules, Counsel should give opposing Counsel, on reasonable request, an opportunity in advance to inspect all evidence or all non-impeaching evidence.

PART II - COMMUNICATIONS WITH OTHERS

Communications with Other Parties and Witnesses

33. Counsel should not communicate upon, attempt to negotiate or compromise a matter directly with any party who is represented by Counsel except through or with the consent of that Counsel.
34. Counsel may tell any witness that he or she does not have any duty to submit to an interview or to answer questions posed by opposing Counsel, unless required to do so by judicial or legal practice.

Communications with the Judiciary Outside of Court

35. As a general principle, unless specifically provided in the Rules of Practice, a Practice Direction or a Notice to the Profession, Counsel should not communicate directly with a Judge out of Court about a pending case, unless invited or instructed to do so by the Court.

36. Counsel should not contact a Judge in regard to administrative matters, unless otherwise invited or instructed by the Judge. Requests to schedule urgent matters should be made through the court office to the scheduling co-ordinator or an administrative Judge. Other matters such as management, scheduling etc. should be arranged through the Judge's secretary.
37. Prior to a hearing, when dealing with process and procedure, Counsel who wish to communicate with a Judge should do so through the Judge's secretary and advise whether opposing Counsel has been notified and whether consent to the communication has been obtained. The Judge will then determine the appropriate manner of receiving the communication and advise Counsel.
38. Counsel should not contact a presiding Judge about the case during the course of a hearing unless invited to do so.
39. Unless invited or permitted by the judiciary, correspondence, e-mail or voicemail between Counsel should not be copied to the Court.
40. Telephone conferences that include a Judge are Court proceedings and, while less formal, are subject to the same principles of civility as any other Court proceeding.

PART III - TRIAL CONDUCT

Trial Preparation

41. Counsel should not attempt to handle a trial or matter that he or she is not by experience or training competent to do. Nor should Counsel attempt to handle a trial or matter without preparation appropriate to the circumstances.
42. Counsel should cooperate with other Counsel in the timely preparation of a trial brief of documents to facilitate the management of documentary evidence at trial by the Court, witnesses and Counsel.

43. Counsel should cooperate in the timely exchange with opposing Counsel of any required witness lists and witness 'will-say' statements.
44. If adjournment is sought, Counsel should provide as much notice as possible to the Court and other Counsel, together with the reason the adjournment is requested.
45. Counsel should avoid hostile and intemperate communication among Counsel at all times, particularly close to trial when stress levels are high. Such communication will only deteriorate further during the trial and adversely affect the administration of justice in the case.

During Trial

46. Counsel should introduce themselves to the court staff at the opening of trial, if not already known to them. The court staff should be treated with appropriate courtesy and respect at all times.
47. During trial, Counsel should not allude to any fact or matter which is not relevant or with respect to which no admissible evidence will be advanced.
48. Counsel should not engage in acrimonious exchanges with opposing Counsel or otherwise engage in undignified or discourteous conduct that is degrading to their profession and to the Court.
49. During trial, Counsel should not make any accusation of impropriety against opposing Counsel unless such accusation is well-founded and without first giving reasonable notice so that opposing Counsel has an adequate opportunity to respond.
50. Objections, requests and observations during trial should always be addressed to the Court, not to other Counsel.

51. Objections during trial are properly made as follows:

(1) Counsel rises and calmly states “Your Honour, I have an objection”;

(2) When Counsel rises to make an objection or to address the Judge, other Counsel should be seated until the Judge asks for a response. Under no circumstances should two or more Counsel be addressing the Court at the same time;

(3) The basis for the objection should be briefly and clearly stated. Following a clear statement of the objection, Counsel should present argument in support of it and then sit down;

(4) Counsel opposing the objection shall in turn, or as directed by the Judge, rise and clearly state their position. They will then make their argument, if any, in support and sit down; and

(5) Usually, Counsel who made the objection will then be given an opportunity to reply. The reply should address only those points raised by opposing Counsel and avoid repetitious re-argument of the issues.

52. When the Court has made a ruling on a matter, Counsel should in no way attempt to re-argue the point or attempt to circumvent the effect of the ruling by other means.

53. In the absence of a jury, a question to a witness by Counsel should not be interrupted before the question is completed for the purposes of objection or otherwise, unless the question is patently inappropriate.

54. Counsel should never attempt to get before the Court evidence which is improper. If Counsel intends to lead evidence about which there may be some question of admissibility, then Counsel should alert opposing Counsel and the Court of that intention.

55. When addressed by the Judge in the courtroom, Counsel should rise. When one Counsel is speaking the other(s) should sit down until called upon. Counsel should never remain with his or her back turned when the Judge is speaking.
56. Counsel cannot condone the use of perjured evidence and, if Counsel becomes aware of perjury at any time, they must immediately seek the client's consent to bring it to the attention of the Court. Failing that, the Counsel must withdraw. Nothing is more antithetical to the role of Counsel than to advance the client's case before the Court, directly or indirectly, on the basis of perjured evidence.
57. Counsel, or any member of their firm, should not give evidence relating to any contentious issue in a trial.
58. In trials where they are acting as Counsel, Counsel should not take part in any demonstrations or experiments in which their own person is involved except to illustrate what has already been admitted in evidence.
59. Counsel should be considerate of time constraints which they have agreed to or which have been imposed by the Court.
60. Counsel should not communicate with a Judge following a hearing and during deliberation unless specifically invited or directed to do so. A request for consideration of additional factual or legal material should be brought by motion *on notice* to opposing Counsel.

Any additional legal authority may occasionally be brought to the attention of the Judge and opposing Counsel at the same time but without further comment by Counsel.

If there is a request to make further submissions, the Judge will determine whether further submissions are justified.

61. If you are successful in the case, shake the hand of your opponent if it is offered. Offer yours if it is not. If you lose the case, don't whine. However painful, offer your hand to your successful opponent. If the case is reserved and you have lost, call your opponent with your compliments.

PART IV - COUNSEL'S RELATIONS WITH THE JUDICIARY

What Judges Can Expect from Counsel

62. Judges are entitled to expect Counsel will treat the Court with candour, fairness and courtesy.
63. Judges are entitled to expect that Counsel appearing are by training and experience competent to handle the matter before the Court.
64. Notwithstanding that the parties are engaged in an adversarial process, Judges are entitled to expect that Counsel will assist the Court in doing justice to the case.
65. Judges are entitled to expect Counsel to assist in maintaining the dignity and decorum of the court room and their profession and avoid disorder and disruption.
66. Judges are entitled to expect Counsel to be punctual, appropriately attired and adequately prepared in all matters before the Courts.
67. Judges may expect Counsel to properly instruct their clients as to behaviour in the court room, and any court related proceedings. Counsel are expected to take what steps are necessary to dissuade clients and witnesses from causing disorder or disruption in the court room.
68. Judges are entitled to expect that Counsel, in their public statements, will not engage in personal attacks on the judiciary or unfairly criticize judicial decisions.

What Counsel Are Entitled to Expect of the Judiciary

69. Counsel are entitled to expect Judges to treat everyone before the courts with appropriate courtesy.
70. Counsel are entitled to expect that Judges understand that while settlement is always desirable, there are some cases that require judicial resolution, and that in balancing interests, neither Counsel nor the parties should be unduly urged to settle in such cases.
71. Counsel are entitled to expect Judges to maintain firm control of Court proceedings and ensure that they are conducted in an orderly, efficient and civil manner by Counsel and others engaged in the process.
72. Counsel are entitled to expect that Judges will not engage in unjustified reprimands of Counsel, insulting and improper remarks about litigants and witnesses, statements evidencing pre-judgment and intemperate and impatient behaviour.
73. Counsel are entitled to expect Judges, to the extent consistent with the efficient conduct of litigation and other demands on the Court, to be considerate of the schedules of Counsel, parties and witnesses when scheduling hearings, meetings or conferences.
74. Counsel are entitled to expect Judges to be punctual in convening all trials, hearings, meetings and conferences. If Judges are delayed, they should notify Counsel when possible.
75. Counsel are entitled to expect Judges to endeavour to perform all judicial duties, including the delivery of reserved judgments, with reasonable promptness.
76. Counsel are entitled to expect Judges to use their best efforts to ensure that court personnel under their direction act civilly towards Counsel, parties and witnesses.

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