

Ethics Handout: Defending the Judiciary & the Duty of Civility

**The Sedona Conference Working Group 1 Annual Meeting
Ethics Session: Defense of Judiciary and Duty of Civility Handout
Thursday, October 24 at 4-5**

I. APPLICABLE ETHICAL RULES

a. Defense of the Judiciary

ABA Model Rules Preamble: A Lawyer's Responsibilities

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen **having special responsibility for the quality of justice.**

...

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. **In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.** A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. **A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.**

[13] **Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system.** The Rules of Professional Conduct, when properly applied, serve to define that relationship. (Emphasis added)

ABA Rule 8.2: Judicial & Legal Officials: Maintaining the Integrity of The Profession

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

[1] Assessments by lawyers are relied on in evaluating the professional or personal

fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized. (emphasis added)

State Bar of California Rule 8.2 Comment

[3] To maintain the fair and independent administration of justice, lawyers **should** defend judges and courts unjustly criticized. Lawyers also **are obligated** to maintain the respect due to the courts of justice and judicial officers. (emphasis added)

State Bar of Massachusetts Rule 8.2 Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for appointment to judicial or legal offices. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice. **A lawyer violates this Rule by impugning the integrity of a judge or magistrate either by making an intentionally false statement or by making a false statement when the lawyer has no reasonably objective basis for the statement. (emphasis added)**

State Bar of North Carolina Rule 8.2 Comment

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized. **Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against such unjust criticism.**

[4] While a lawyer as a citizen has a right to criticize such officials publicly, the lawyer should be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified. (Emphasis added)

State Bar of Virginia Rule 8.2 Comment

[1] False statements by a lawyer concerning the qualifications or integrity of a

judge can unfairly undermine public confidence in the administration of justice. To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized. (emphasis added)

b. Duty of Civility

ABA Model Rules Preamble: A Lawyer's Responsibilities

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. **A lawyer 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.** While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process. (emphasis added)

...

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, **within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.** (emphasis added).

ABA Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;**
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules. (Emphasis added)

D.C. Bar Voluntary Standards of Civility in Professional Conduct

General Principles

1. In carrying out our professional responsibilities, we will treat all participants in the legal process, including counsel and their staff, parties, witnesses, judges, and court personnel, in a civil, professional, and courteous manner, at all times and in all communications, whether oral or written. We will refrain from acting upon or manifesting racial, gender, or other bias or prejudice toward any participant in the legal process. We will treat all participants in the legal process with respect.
2. Except within the bounds of fair argument in pleadings or in formal proceedings, we will not reflect in our conduct, attitude, or demeanor our clients' ill feelings, if any, toward other participants in the legal process.
3. We will not, even if called upon by a client to do so, engage in offensive conduct directed toward other participants in the legal process nor will we abuse other such participants in the legal process. Except within the bounds of fair argument in pleadings or in formal proceedings, we will abstain from disparaging personal remarks or acrimony toward such participants and treat adverse witnesses and parties with fair consideration. We will encourage our clients to act civilly and respectfully to all participants in the legal process.
4. We will not encourage or authorize any person under our control to engage in conduct that would be inappropriate under these standards if we were to engage in such conduct.
5. We will not bring the profession into disrepute by making unfounded accusations of impropriety or making ad hominem attacks on counsel, and, absent good cause, we will not attribute bad motives or improper conduct to other counsel.
6. While we owe our highest loyalty to our clients, we will discharge that obligation in the framework of the judicial system in which we apply our learning, skill, and industry in accordance with professional norms. In this context, we will strive for orderly, efficient, ethical, fair, and just disposition of litigation as well as disputed matters that are not, or not yet, the subject of litigation, and for the efficient, ethical, and fair negotiation and consummation of business transactions.
7. The foregoing General Principles apply to all aspects of legal proceedings, both

in the presence and outside the presence of a court or tribunal.

Maryland Attorneys' Rules of Professional Conduct, Appendix Ideals of Professionalism

Fairness, Civility, and Courtesy

An attorney should:

- (1) act fairly in all dealings as a way of promoting the system of justice;
- (2) understand that an excess of zeal may undermine a client's cause and hamper the administration of justice and that an attorney can advocate zealously a client's cause in a manner that remains fair and civil;
- (3) know that zeal requires only that the client's interests are paramount and therefore warrant use of negotiation and compromise, when appropriate, to achieve a beneficial outcome, understanding that yelling, intimidating, issuing ultimatums, and using an "all or nothing" approach may constitute bullying, not zealous advocacy;
- (4) seek to remain objective when advising a client about the strengths and weaknesses of the client's case or work;
- (5) not allow a client's improper motives, unethical directions, or ill-advised wishes to influence an attorney's actions or advice, such as when deciding whether to consent to an extension of time requested by an opponent, and make that choice based on the effect, if any, on the outcome of the client's case and not on the acrimony that may exist between the parties;
- (6) when appropriate and consistent with duties to the client, negotiate in good faith in an effort to avoid litigation and, where indicated, suggest alternative dispute resolution;
- (7) use litigation tools to strengthen the client's case, but avoid using litigation tactics in a manner solely to harass, intimidate, or overburden an opposing party; and
- (8) note explicitly any changes made to documents submitted for review by opposing attorneys, understanding that fairness is undermined by attempts to insert or delete language without notifying the other party or the party's attorney.

An attorney should understand that:

- (1) professionalism requires civility in all dealings, showing respect for differing points of view, and demonstrating empathy for others;
- (2) courtesy does not reflect weakness; rather, it promotes effective advocacy by ensuring that parties have the opportunity to participate in the process without personal attacks or intimidation;
- (3) maintaining decorum in every venue, especially in the courtroom, is neither a relic of the past nor a sign of weakness; it is an essential component of the legal process;
- (4) professionalism is enhanced by preparing scrupulously for meetings and court appearances and by showing respect for the court, opposing attorneys, and the parties through courteous behavior and respectful attire;
- (5) courtesy and respect should be demonstrated in all contexts, not just with clients and colleagues, or in the courtroom, but also with support staff and court personnel;
- (6) hostility between clients should not be a ground for an attorney to show hostility or disrespect to a party, an opposing attorney, or the court;

(7) patience enables an attorney to exercise restraint in volatile situations and to defuse anger, rather than elevate the tension and animosity between parties or attorneys; and
(8) the Ideals of Professionalism are to be observed in every kind of communication, and an attorney should resist the impulse to respond uncivilly to electronic communications in the same manner as he or she would resist such impulses in other forms of communication.

II. ADDITIONAL RESOURCES & AUTHORITIES

a. Defense of the Judiciary

[Defending the Judiciary | Bolch Judicial Institute \(duke.edu\)](#)

[American Board of Trial Advocates \(ABOTA\) Protocol for Responding to Unfair Criticism of Judges](#)

[ABOTA Response to Personal Attack Against Judge Catherine Mauzy](#)

[ABOTA Montana Judicial Independence Flyer](#)

[American College of Trial Lawyers Letter Condemning Unsubstantiated Accusations from Public Officials](#)

[Arizona Task Force on Countering Discrimination](#)

[Federal Bar Association Statement on the Importance of an Independent Judiciary – Federal Bar Association](#)

b. Duty of Civility

[Fed. R. Civ. P. 26\(g\)\(1\)\(B\)](#)

[W]ith respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) **not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;** and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action. (emphasis added)

[Civil Local Rules | United States District Court, Northern District of California](#)

11-4. Standards of Professional Conduct

(a) Duties and Responsibilities. Every member of the bar of this Court and any

attorney permitted to practice in this Court under Civil L.R. 11 must:

- (1) Be familiar and comply with the standards of professional conduct required of members of the State Bar of California;
- (2) Comply with the Local Rules of this Court;
- (3) Maintain respect due to courts of justice and judicial officers;**
- (4) Practice with the honesty, care, and decorum required for the fair and efficient administration of justice;**
- (5) Discharge all obligations to client(s) and the Court; and
- (6) Assist those in need of counsel when requested by the Court.
(emphasis added)

Discovery Guidelines of the United States District Court for the District of Maryland

Guideline 1(d): Conduct of Discovery

d. Attorneys are expected to behave professionally and with courtesy towards all involved in the discovery process, including but not limited to opposing counsel, parties, and non-parties. This includes cooperation and civil conduct in an adversary system. Cooperation and civility include, at a minimum, being open to, and reasonably available for, discussion of legitimate differences in order to achieve the just, speedy, and inexpensive resolution of the action and every proceeding. Cooperation and communication can reduce the costs of discovery, and they are an obligation of counsel.

Guideline 8: Making a Record of Improper Conduct During a Deposition

Upon request of any attorney, party unrepresented by an attorney, or the deponent if unrepresented by an attorney, the person recording the deposition in accordance with Fed. R. Civ. P. 30(b) should enter on the record a description by the requesting person of conduct of any attorney, party, or person attending the deposition which violates these Guidelines, the Federal Rules of Civil Procedure, or the Local Rules of the Court.

Loyalty to Institutions

Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 361–62 (D. Md. 2008), quoting Lon L. Fuller & John D. Randall, Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1162, 1216 (1958). (“The lawyer's highest loyalty is at the same time the most tangible. It is loyalty that runs, not to persons, but to procedures and institutions. The lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends.”)

The Cooperation Proclamation

The Sedona Conference Cooperation Proclamation (“a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery.”)