ATTORNEY CIVILITY AND PRACTICE GUIDELINES

PREAMBLE

The San Diego County Bar Association is committed to ensuring, endorsing, and encouraging the highest standards of civility, integrity, and professionalism. These guidelines remind lawyers of these standards and the propriety of exhibiting courtesy to everyone involved in the practice of law and the judicial process. Although these guidelines are not a basis for discipline, sanctions, or ancillary litigation, it reflects acceptable standards of conduct for lawyers who practice in San Diego County. These guidelines are in addition to the mandatory requirements for lawyers' conduct, including the California Rules of Professional Conduct and the State Bar Act, especially Business and Professions Code section 6068. Lawyers are expected to be readily familiar with and must observe all such rules of law. Lawyers are also expected to adhere to both the letter and spirit of Rules of Professional Conduct that prohibit discrimination, harassment, or retaliation in the practice of law.

I.

DUTIES OWED TO THE COURT

A. We expect lawyers to be courteous and respectful to the court and all court and court-related personnel.

B. We expect lawyers arguing for an extension of existing law to clearly state that fact and state why.

C. We expect lawyers appearing in court to dress neatly and appropriately, and encourage their clients to do the same.

D. We expect lawyers to be on time and adhere to time constraints.

E. We expect lawyers to be prepared for all court appearances.

F. We expect lawyers to attempt to resolve disputes promptly, fairly, and reasonably, with resort to the court for judicial relief only if necessary.

G. We expect lawyers to discourage and refuse to accept a role in litigation that is meritless or designed primarily to harass or drain the financial resources of the opposing party.

H. We expect lawyers to honor and maintain the integrity of our justice system, including by not impugning the integrity of its proceedings, or its members.

II.

DUTIES OWED TO OTHER LAWYERS, PARTIES, AND WITNESSES

A. We expect lawyers to address legal arguments with other lawyers professionally, and not personally.

B. We expect lawyers to treat adverse witnesses, litigants, and opposing counsel with courtesy, fairness, and respect.

C. We expect lawyers to conduct themselves in the discovery process as if a judicial officer were present.

D. We expect lawyers to not arbitrarily or unreasonably withhold consent to a reasonable request for cooperation or accommodation.

E. We expect lawyers to refrain from attributing to an opponent a position the opponent has not clearly taken.

F. We expect lawyers to be accurate in written communications intended to make a record.

G. We expect lawyers to refrain from proposing a stipulation in the presence of the court or trier of fact unless the other parties have previously agreed to it.

H. We expect lawyers to refrain from interrupting an opponent's legal argument unless making an appropriate objection for a legitimate basis.

I. We expect lawyers in court to address opposing lawyers through the court.

J. We expect lawyers to seek sanctions sparingly, and not to obtain a tactical advantage or for any other improper purpose.

K. We expect lawyers to refrain from seeking to disqualify opposing counsel for any improper purpose or for any reason not supported by fact or law.

L. We expect lawyers to encourage other lawyers to conform to the standards in these guidelines.

M. We expect lawyers to conduct themselves so that they may conclude each case amicably with the opposing lawyer or party.

COMMENTS

SERVING THE CAUSE OF JUSTICE

1. Do Not Assert Meritless Claims. Do not permit yourself to be used as a foil for advancing frivolous arguments, defenses or causes of action. When arguing for an extension of existing law, make very clear this is what you are doing, including explaining why. (§ I-G.)

2. Honor Your Commitments. Your word is your bond. There may be rare situations where you have to seek relief from an improvident stipulation, or other commitment. Do not confuse this with rewriting history or reneging on a commitment. (§ I-H; II-M.)

3. Do Not Allow Your Client's Feelings to Override Professional Duties. Client's emotions are often high during litigation, often justly so. You should advise clients that professional courtesy, fair tactics, civility, and adherence to the rules and law are compatible with vigorous advocacy

and representation. You should not allow the emotions of clients to affect your own conduct, attitude, demeanor toward other parties, witnesses, or opposing counsel, or duties as an officer of the court. (§ II-A.)

4. Control Your Emotions and Curb Your Anger. Litigation often raises emotions; do allow anger to impair your effectiveness. While vigorous advocacy is consistent with professionalism, incivility is not; win-at-any-cost tactics are inconsistent with professionalism. (§ II-A.)

5. Be Sparing with Requests for Sanctions. Reflexive sanctions requests may be counterproductive. (§§ II-A, II-J.)

6. Do Not Seek Disqualification of Opposing Counsel for an Improper Purpose. Carefully weigh any decision to move to disqualify opposing counsel. Do not make or threaten such a motion unless you have carefully considered it and are satisfied that it is both warranted and in your client's best interests, rather than primarily designed to obtain a tactical advantage or create a diversion. (§§ II-A, II-K.)

7. The Fair Play Test; Avoid Getting Too Close to the Edge. In analyzing ethical dilemmas, do not simply ask yourself if it violates any law; also ask yourself if it is fair and if it is the right thing to do. If you have to ask yourself if you are too "close to the line" consider whether others would view the conduct as "over the line." (§§ I-F, II-M.)

CONDUCT IN THE COURTROOM

8. Be Candid and Prepared. Be prepared to provide authority for anything you say. 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 any observer, "This lawyer is prepared." Anticipate questions to ensure you will be able to give a considered response; off-the-cuff remarks are seldom effective. Know the court's rules, and be able to show you have followed them. If you cannot respond immediately to a question from the court, ask for a moment to formulate a proper response, or, if circumstances warrant, ask for time to file a short written response. (§§ I-B, I-F.)

9. Disclose Relevant Authorities. Cite any controlling legal authority. If it is contrary to your position you may distinguish or argue why it is wrong, if appropriate. Do not conceal authority that is contrary to your position. (§§ I-B, I-E.)

10. Be On Time. As officers of the court, lawyers must not be late for any court appearance. It is good practice to be early. Doing so not only ensures compliance with the obligation of punctuality, it also has other benefits (e.g., in certain circumstances it will enable lawyers to get their matters heard before other matters, and lawyers often can learn something useful from others in the courtroom before their matters are called). Any lawyer who cannot avoid being tardy should notify the court clerk in advance. (§ II-D.)

11. Stand Up. If possible, unless otherwise directed by the court, lawyers should always stand when addressing the court. (§ I-D.)

12. Dress Appropriately. The courtroom is not a place for unorthodox or casual attire. You and your clients should appear in court dressed neatly and appropriately. (§ I-C.)

13. State Your Appearance. Formally state your appearance—your name and the party you represent. (You may want to include your firm name, but this is optional.) Make sure you know exactly who 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." (§ I-A.)

14. Adhere to Time Constraints. Recognize that the court has limited time to hear your matter. Be prepared to respond to a request for a time estimate—and be prepared to live up to it. Make a good faith estimate. Be considerate of the court. Do not be greedy ("I want an hour") but do not shortchange yourself. Once guidelines are given ("You have five minutes, counsel") make sure you comply. (§§ I-A, I-D.)

15. Use a Traditional Introductory Remark. Every argument should begin in an appropriate way at the appropriate time. For example, when it is your turn, state your appearance and say, "May it please the court, counsel, ..." (§ I-A.)

16. Do Not Tread in Forbidden Space. Many courts prohibit counsel from entering the "well" (the area between counsel table and the bench), approaching a witness during examination, or even leaving the lectern or counsel table. Understand and follow the different requirements of each court, and adhere strictly unless the court gives you permission. Even if the court grants permission to tread in forbidden spaces, you demonstrate competence by being aware that they exist. Before a court appearance, it is wise to ask the court clerk which areas of the courtroom, if any, are off limits without the court's permission. (§ I-A.)

17. Address the Court, 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 directly, 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. (§§ I-A, II-I, II-M.)

18. Properly Address the Court. It is usually safe to refer to "the Court." For example, "If the Court is indicating . . ." 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 . . ." or "Does Her Honor want to hear further argument on this point?" Never address the court as "Judge," or as "you," or refer to "your" ruling. (§ I-A.)

19. Be Respectful in Questioning the Court. Address questions to the court in an appropriate manner and tone. 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. (§§ I-A.)

20. 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. (§ I-A.)

21. Do not Interrupt. Unless an appropriate objection is required, never interrupt the court, opposing counsel, or a witness. Be particularly sensitive to the court's need to clearly articulate rulings and supportive reasoning by not interrupting the court. (§§ I-A, II-I.)

22. Accept Responsibility for Papers. Do not 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." (§§ I-D, II-B.)

23. Respond Directly to the Court's Question. Welcome questions, even if they appear unfavorable to your position. (If you have prepared well, you will have anticipated all of the hard questions, and will have honed your responses.) Do not put off the question. For example, do not say, "I am going to get to that a little bit later" or, "The answer to that question really has no bearing on resolution of this motion." (§§ I-A, I-B, I--E.)

24. Stop Arguing After the Court's Ruling. Do not persist in arguing a point after the court has ruled on it. Once the court has ruled, it is considered discourteous to continue to argue. (§ I-A.)

25. Listen and Learn. It may be difficult for the lawyer when there is no tentative ruling. But even without a tentative ruling, you can often get a hint as to what the court views as the key issues by listening intently to the court's questions or statements. Pay close attention and adapt your argument. Be flexible. Be observant. Do not get so wrapped up in what you want to say that you miss what is being said in the courtroom (by the court, opposing counsel, or a witness) or how the judge or jury is reacting to it. (§ I-A.)

26. Be Careful in Seeking Clarification of a Ruling. Sometimes you may feel you need clarification of the terms of a ruling. Don't confuse the need for clarification with a desire to reargue a point or seek to force the court to commit to something that is not part of the ruling or essential to its order. (§ I-A.)

27. Anticipate Bench Rulings and Possible Further Requests. Be prepared for a ruling from the bench (favorable or unfavorable) and plan your 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). (§§ I-A, I-E.)

28. Seize the Opportunity to Make a Record If It's Important. 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 "Were my client's written objections overruled?" Ask permission to make the record if you believe it is necessary. (§ I-E.)

29. Do Not "Make a Record" If It's Unimportant. Little if anything is accomplished 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. (§§ I-A, I-D, I-E.)

30. Consider in Advance When and How to Obtain a Formal Order. Be sure you understand whether a formal order is required or if a minute order is sufficient. 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, include only what the court ordered; it will damage your credibility and impair your effectiveness if you overreach in preparing an order. (§§ I-A, I-E.)

31. Avoid Visual Displays of Pique. Avoid frowns, eye rolls, gestures, or body language that could be construed as disapproval of the court or its rulings. (Some lawyers may be unaware they are manifesting displeasure; learn to control what messages are communicated by your facial expressions and body language.) Respond respectfully even when a ruling goes against you (e.g., "Very well, Your Honor") and move on to the next order of business. (§ I-A.)

32. Offer Gracious Concluding Remarks. Even if the court has ruled against you, conclude the hearing with a genuine "Thank you, Your Honor." You aren't thanking the court for its ruling; you are thanking the court for its attention, for the opportunity to present oral argument (which is usually in the discretion of the court), or, at a minimum, for giving consideration to your papers. (§ I-A.)

33. Do Not Disparage the Judge or Jury. When you receive an unfavorable result, do not blame or otherwise attack the court or jury in discussing the case with anyone. (§§ I-A, I-H.)

34. Shepardize and/or KeyCite Your Cases. Courts distrust lawyers who cite cases that are no longer good law. Such lawyers appear to be sloppy if not disingenuous, and they are likely to acquire a reputation for being unreliable and unprofessional. Few things get you off on the wrong foot with a judge faster than citing an overruled case. (§§ I-B, I-E.)

35. Avoid Ex Parte Communication 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 (including one that may come before the trial or appellate court). (§ I-H.)

36. Letters to the Court. Avoid sending letters to the court except where specifically authorized by the court. Only in rare cases are letters to the court appropriate; sending a copy to opposing counsel, while essential, does not necessarily vitiate the impropriety of such communications. In the rare instance of writing a letter to the court, there is a 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. If your opponent writes an inappropriate letter, a prompt, polite response from you is appropriate. (§ I-H.)

CONDUCT TOWARD OPPOSING COUNSEL, PARTIES AND WITNESSES

37. Do Not Personally 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/jury from the points you need to make. If your opponent attacks you, meet your opponent's unreasonable conduct with dignity and reason. (§§ I-H, II-A, II-C, II-M.)

38. Meet and Confer in Good Faith. Statutes and court rules often require that lawyers attempt to resolve, by agreement, discovery and other procedural disputes and objections. Do not merely go through the motions; try in good faith to resolve such disputes. Meet and confer in person or over the telephone whenever practical, even if doing so is not required by the applicable statute(s) or rule(s). Make the effort to avoid involving the court, rather than attempting to position yourself with an eye toward involving the court. Make sure it is necessary and important before seeking a ruling from the court to resolve a discovery dispute. (§§ I-H, II-A, II-C, II-M.)

39. Do Not Personally Attack a Party or Witness. In general, treat every witness with respect. Impeachment may be warranted and appropriate under some circumstances, but avoid personal attacks on parties or witnesses. (§ II-B.)

40. Use "Confirming Letters" Judiciously. Sometimes it is desirable and even necessary to embody an agreement, disagreement, or action in writing. But do not automatically do so. When and if you feel it necessary to send such a letter, be accurate. Do not overreach. (§ II-F.)

41. Discuss Proposed Stipulations in Advance. It is generally inappropriate to propose a stipulation for the first time in front of court or jury, especially on a controversial matter. Discuss proposed stipulations with opposing counsel in advance and agree upon the terms. If you can't agree, that is the end of it—there is no stipulation (unless the court has ordered you to reach an agreement). (§ II-G.)

42. Avoid Hostility in Discovery. Conduct discovery as if a judicial officer were present. Do not use discovery as a tactic to harass or inundate your opposing party or counsel. Opponents rarely go away as a result of this tactic, and "boomerang" discovery requests are foreseeable. Unreasonably obstructive tactics and uncivil behavior during depositions to gain unfair tactical or strategic advantages is professional misconduct warranting sanctions. Make any appropriate objections, but do not instruct your witness not to answer unless it is legally appropriate to do so, such as to preserve a privilege or to enforce a limitation ordered by the court. Conducting yourself professionally will save your client money and often yield better discovery responses. (§§ I-H, II-A, II-C, II-M.)

43. Consider Reasonable Requests for Accommodation. Do not refuse reasonable requests for accommodation simply to play "hardball" where your client's rights are not prejudiced. Doing so will get you off on the wrong foot with your opposing counsel and with the court. (On the other hand, you need not succumb to requests made by opposing counsel, premised on "professional courtesy" if the request will jeopardize your client's rights). (§ II-D.)

44. The Handshake Test. Your goal in every case should be to conduct yourself professionally at all times—and to inspire and encourage opposing counsel to do likewise—so you may conclude the matter with a handshake. (§ II-M.)