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A CODE OF TRIAL CONDUCT:

PROMULGATED BY THE COLLEGE OF TRIAL LAWYERS*

PREAMBLE

Lawyers who engage in trial work have a specific responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation. The American Bar Association has promulgated Canons of Professional Ethics for the legal profession as a whole. The American College of Trial Lawyers, because of its particular concern for the improvement of litigation proceedings and trial conduct of counsel, presents this Code of Trial Conduct for trial lawyers, not to supplant but to supplement and stress certain portions of the Canons of Professional Ethics. Generally speaking, the purposes and objectives of this Code are embodied in the following considerations:

To his client, the lawyer owes undivided allegiance, the application of the utmost of learning, skill and industry, and the employment of all honest and appropriate means within the law to protect and enforce legitimate interests. In the discharge of this duty, the lawyer should not be deterred by any real or fancied fear of judicial disfavor or public unpopularity, nor should he be influenced, directly or indirectly, by any considerations of self-interest.

To opposing counsel, the lawyer owes the duty of courtesy, candor in the pursuit of the truth, co-operation in all respects not inconsistent with his client's interests and scrupulous observance of all mutual understandings.

To the office of judge, the lawyer owes respect, diligence, candor and punctuality, the maintenance of the dignity and independence of the judiciary, and protection against unjust and improper criticism and attack.

To the administration of justice, the lawyer owes the maintenance of professional dignity and independence and conformity to the highest principles of professional rectitude, notwithstanding the desires of his client or others.

* Meeting in Dallas, Texas, last August, the American College of Trial Lawyers adopted a "Code of Trial Conduct" which is published on these pages. The Code is the result of more than three years' effort by the members of the College, and, like the trial drafts that preceded it, was scrutinized by trial lawyers from all parts of the United States. The College of Trial Lawyers is aware of the fact that there are imperfections in the Code and requests that readers send their suggestions and criticisms to the national headquarters of the College, at 921 Westwood Boulevard, Los Angeles 24, California.

This Code expresses only minimum standards and should be construed liberally in favor of its fundamental purpose, consonant with the fiduciary status of the trial lawyer, and so that it shall govern all situations whether or not specifically mentioned herein.

1. ACCEPTANCE OF EMPLOYMENT IN CIVIL CASES.

In civil litigation, the lawyer should decline to prosecute a cause or assert a defense obviously devoid of merit, or which is intended merely to inflict harassment or injury, or to procure an unmerited settlement, or in which he, his firm or associates have conflicting interests.

2. CONTINUANCE OF EMPLOYMENT IN CIVIL CASES.

After acceptance of employment the lawyer, unless discharged, should diligently conduct the cause to an expeditious conclusion. He may not withdraw except at a time or in circumstances when the withdrawal will not adversely affect the interests of the client. He may withdraw at any time with the consent of the client or with the approval of the court if a procedure for obtaining approval exists, or if his continuance in the representation of the client will involve his knowing participation in the perpetration of a fraud. Upon withdrawal after receipt of retainer, the lawyer should refund any portion thereof that has not been earned.

3. EMPLOYMENT IN CRIMINAL CASES.

Every person accused of crime has a right to a fair trial, including persons whose conduct, reputation or alleged violations may be the subject of public unpopularity or clamor. This places a duty of service on the legal profession and, even though the lawyer is not bound to accept particular employment, requests for service in criminal cases should not lightly be declined or refused merely on the basis of the lawyer's personal convenience or opinion concerning the guilt of the accused, or repugnance to the accused or to the crime charged.

4. CONDUCT OF CRIMINAL CASES.

(a) Having accepted employment in a criminal case, the lawyer's duty, regardless of his personal opinion as to the guilt of the accused, is to invoke the basic rule that the crime must be proved beyond a reasonable doubt by competent evidence, to raise all valid defenses and, in case of conviction, to present all proper grounds for probation or mitigation of punishment. A confidential disclosure of guilt alone does not require a withdrawal from the case. How-

ever, after a confidential disclosure of facts clearly and credibly showing guilt, the lawyer should not present any evidence inconsistent with those facts. He should never offer testimony which he knows to be false.

(b) The crime charged should not be attributed to another identifiable person unless evidence introduced or inferences warranted therefrom raise at least a reasonable suspicion of that person's probable guilt.

(c) The prosecutor's primary duty is not to convict, but to see that justice is done. Credible evidence that might tend to prove the accused's innocence should not be suppressed.

5. ACQUIRING INTEREST IN LITIGATION.

A lawyer should never purchase or otherwise acquire, directly or indirectly, any interest in the subject matter of the litigation which he is conducting, provided, however, that nothing herein shall prohibit a just and reasonable contingent fee contract.

6. LAWYER AS WITNESS.

When a lawyer knows, prior to trial, that he will be a necessary witness, except as to merely formal matters such as identification or custody of a document or the like, neither he nor his firm or associates should conduct the trial. If, during the trial, he discovers that the ends of justice require his testimony, he should, from that point on, if feasible and not prejudicial to his client's case, leave further conduct of the trial to other counsel. If circumstances do not permit withdrawal from the conduct of the trial, the lawyer should not argue the credibility of his own testimony.

7. PERSONAL EXPERIMENTS.

A lawyer should never conduct or engage in experiments involving any use of his person or body except to illustrate in argument what has been previously admitted in evidence.

8. DISCRETION IN CO-OPERATING WITH OPPOSING COUNSEL.

The lawyer, and not the client, has the sole discretion to determine the accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments and admission of facts.

9. RELATIONS WITH OPPOSING COUNSEL.

(a) A lawyer should adhere strictly to all express promises to and agreements with opposing counsel, whether oral or in writing,

and should adhere in good faith to all agreements implied by the circumstances or by local custom. When he knows the identity of a lawyer representing an opposing party, he should not take advantage of the lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to proceed.

(b) A lawyer should avoid indulgence in disparaging personal remarks or acrimony toward opposing counsel, and should remain wholly uninfluenced by any ill feeling between the respective clients. He should abstain from any allusion to personal peculiarities and idiosyncracies of opposing counsel.

10. WITNESSES.

(a) A lawyer should thoroughly investigate and marshal the facts. Subject to the provisions of Paragraph 11 hereof, he may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of the opposing counsel or party. He should avoid any suggestion calculated to induce any witness to suppress evidence or deviate from the truth. He should avoid taking any action calculated to secrete a witness. However, except when legally required, it is not his duty to take affirmative action to disclose any evidence or the identity of any witness.

(b) A lawyer should not participate in a bargain with a witness either by contingent fee or otherwise as a condition of his giving evidence, but this does not preclude the payment of reasonable and non-contingent compensation for actual loss of time and expenses of persons who cannot afford to attend or will not appear and testify for the statutory fees; nor does it preclude payment of non-contingent fees to expert witnesses.

(c) A lawyer may advertise for witnesses to a particular event or transaction but not for witnesses to testify to a particular version thereof.

(d) A lawyer should never be unfair or abusive or inconsiderate to adverse witnesses or opposing litigants, or ask any question intended only to insult or degrade the witness. He should never yield, in these matters, to suggestions or demands of his client or allow any malevolence or prejudice of the client to influence his actions.

(e) A lawyer should not ask questions which affect the witness' credibility only by attacking his character, except those encompassed in recognized impeachment procedures.

11. COMMUNICATIONS WITH OPPOSITE PARTY.

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. He should avoid everything that might tend to mislead a party not represented by counsel, and he should not undertake to advise him.

12. RELATIONS WITH THE JUDICIARY.

A lawyer should never show marked attention or unusual hospitality to a judge, uncalled for by the personal relations of the parties. He should avoid anything calculated to gain or having the appearance of gaining special personal consideration or favor from a judge.

13. TRIAL CONDUCT TOWARD JUDGE.

(a) During the trial, the lawyer should always display a dignified and respectful attitude toward the judge presiding, not for the sake of his person, but for the maintenance of respect for the confidence in the judicial office. It is both the right and duty of the lawyer fully and properly to present his client's cause and to insist on an opportunity to do so. He should vigorously present all proper arguments against rulings he deems erroneous and see to it that a complete and accurate case record is made. In this regard, he should not be deterred by any fear of judicial displeasure or even punishment. The lawyer, regardless of fear, threat or imposition of punishment, should not reveal the confidences of his client.

(b) A lawyer should not discuss a pending case with the judge without the opposing lawyer's presence, unless, after notice, or request, the opposing lawyer fails or refuses to attend and the judge is so advised.

(c) Except as provided by rule or order of court, a lawyer should never deliver to the judge any letter, memorandum, brief or other written communication without concurrently delivering a copy to opposing counsel.

(d) Subject to the foregoing, a lawyer may advise the judge of any reason for expediting or delaying the decision.

14. JURY.

(a) A lawyer should scrupulously abstain from all acts, comments and attitudes calculated to curry favor with any juror, such as fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience, or the like. Before and during the trial, he

should avoid conversing or otherwise communicating with a juror on any subject whether pertaining to the case or not.

(b) A lawyer should disclose to the judge and opposing counsel any information of which he is aware that a juror or a prospective juror has or may have any interest, direct or indirect in the outcome of the case, or is acquainted or connected in any manner with any lawyer in the case or any partner or associate or employee of the lawyer, or with any litigant, or with any person who has appeared or is expected to appear as a witness, unless the judge and opposing counsel have previously been made aware thereof by *voir dire* examination or otherwise.

(c) It is the lawyer's right, after the jury has been discharged, to interview the jurors to determine whether their verdict is subject to any legal challenge.

(d) Before the jury is sworn to try the cause, a lawyer may investigate the prospective jurors to ascertain any basis for challenge, provided there is no communication with them, direct or indirect, or with any member of their families.

(e) A lawyer should, immediately upon his discovery thereof, make full disclosure to the court of any improper conduct by any person toward the jury or any member thereof.

15. COURTROOM CONDUCT.

(a) In the *voir dire* examination of the jury, a lawyer should not state or allude to any matter not relevant to the case or which he is not in position to prove by admissible evidence.

(b) A lawyer should not state as fact in his opening statement any matter unless he has reason to believe that it will be substantiated by the evidence.

(c) A lawyer should never misstate the evidence or state as fact any matter not in evidence, but otherwise has the right to argue in the matter he deems effective, provided his argument is mannerly and not inflammatory.

(d) A lawyer should not include in the content of any question the suggestion of any matter which is obviously inadmissible.

(e) A question should not be interrupted by an objection unless the question is then patently objectionable or there is reasonable ground to believe that matter is being included which cannot properly be disclosed to the jury.

(f) A lawyer should conduct the *voir dire* examination and the

examination of all witnesses either from the counsel table or other suitable distance except when handling documentary or physical evidence or when a hearing impairment or other disability requires that he take a different position.

(g) In all cases in which there is any doubt about the propriety of any disclosure to the jury, requests should be made for leave to approach the bench and to obtain a ruling out of the jury's hearing, either by making an offer of proof or by propounding the question and obtaining an immediate ruling.

(h) A lawyer should not assert in argument his personal belief in the integrity of his client or of his witnesses or in the justice of his cause, as distinct from a fair analysis of the evidence touching those matters.

(i) A lawyer should not engage in exchange of banter, personalities, argument or controversy with opposing counsel. His objections, requests and observations should be addressed to the judge.

16. COURTROOM DECORUM.

(a) A lawyer should rise when addressing, or being addressed by, the judge, except when making brief objections or incidental comments.

(b) While the court is in session a lawyer should not smoke assume an undignified posture, or, without the judge's permission, remove his coat in the courtroom. He should always be attired in a proper and dignified manner and abstain from any apparel or ornament calculated to attract attention to himself.

17. PUNCTUALITY AND EXPEDITION.

(a) A lawyer should be punctual in all appearances and, whenever possible, should give prompt notice to the court and to all other counsel in the case, of any circumstances requiring his tardiness or absence.

(b) A lawyer should make every reasonable effort to prepare himself fully prior to court appearances. He should promptly inform the court of any settlement, whether partial or entire, with any party, or the discontinuance of any issue.

(c) A lawyer should see to it that all depositions and other documents required to be filed are filed promptly, should stipulate in advance with opposing counsel to all non-controverted facts, should give opposing counsel, on reasonable request, an opportunity in advance to inspect all non-impeaching evidence of which the law per-

mits inspection, and, in general, should do everything possible to avoid delays and to expedite the trial.

18. CANDOR AND FAIRNESS.

(a) The conduct of the lawyer before the court and with other lawyers should at all times be characterized by candor and fairness.

(b) A lawyer should never knowingly misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or, with knowledge of its invalidity, cite as authority a decision that has been vacated or overruled, or a statute that has been repealed; or in argument assert as a fact that which has not been proved, or, in those jurisdictions in which a side has the opening and closing arguments, mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

(c) A lawyer should be extraordinarily careful to be fair, accurate and comprehensive in all *ex parte* presentations and in drawing or otherwise procuring affidavits.

(d) A lawyer should not offer evidence which he knows is inadmissible, and he should not endeavor to get the same before the jury in any manner. Neither should he include in an argument, addressed to the court, remarks or statements intended improperly to influence the jury or the public.

(e) A lawyer should not propose a stipulation in the jury's presence unless he knows or has reason to believe the opposing lawyer will accept it.

(f) A lawyer should never employ dilatory tactics of any kind to procure more fees.

(g) A lawyer should never file a pleading or any other document he knows to be false in whole or in part or which is intended only for delay.

19. ADVERSE AUTHORITIES.

A lawyer should not attempt to mislead the court by citations of authorities he knows have been overruled or distinguished.

20. PUBLICATIONS RE PENDING LITIGATION.

A lawyer should not publish, cause to be published, or aid or abet in any way, directly or indirectly, the publication in any newspaper or other documentary medium, or by radio, television or other

device, of any material concerning a case on trial or any pending or anticipated litigation calculated or which might reasonably be expected to interfere in any manner or to any degree with a fair trial in the courts or otherwise prejudice the due administration of justice. If extreme circumstances of a particular case require a statement to the public, it should not be made anonymously and no reference to the facts should go beyond quotation from the records and papers on file in court or other official documents, and no statement should be made which indicates intended proof or what witnesses will be called, or which amounts to comment or argument on the merits of the case.

21. DISCOVERY OF IMPOSITION OR DECEPTION.

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court, a party, or other counsel, he should promptly endeavor to rectify it.

22. APPLICABILITY.

This Code of Trial Conduct applies to all lawyers, whether engaged in private practice or public employment.

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