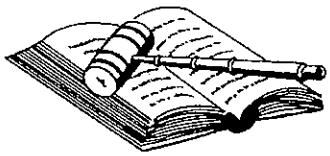
American College of Trial Lawyers



Code of Pretrial Conduct

Approved by the Board of Regents
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Introduction

The American College of Trial Lawyers recently adopted this Code of Pretrial Conduct as a companion to the Code of Trial Conduct first adopted in 1956.

Like the Code of Trial Conduct, this new Pretrial Code is part of a continuing effort to promote professionalism and courtesy among trial lawyers during all stages of litigation. It supplements existing rules of professional conduct, local court rules, and rules of procedure, and provides guidance to trial lawyers on proper conduct in pretrial proceedings. And, like the Code of Trial Conduct, this Code expresses only minimum standards.

As Chief Justice, a former trial lawyer, and an Honorary Fellow of the College, it is a pleasure to commend the Code to the trial bar, law schools, and judiciary of our nation.

William H. Rehnquist,
Chief Justice of the United States

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Preamble

The American College of Trial Lawyers seeks to promote professionalism and courtesy among trial lawyers. In light of recent widespread abuse of pretrial procedures, the College presents this Code of Pretrial Conduct, as a companion piece to its Code of Trial Conduct.

This Code is primarily applicable to civil cases and is not intended to supplant any local rules, procedural rules, or rules of professional conduct. Instead, it should merely supplement those rules, providing guidance to trial lawyers on proper professional conduct in handling discovery, motion practice, and other pretrial matters.

While trial lawyers owe undivided allegiance to their clients, they also owe important duties to the judicial system, to their colleagues, and to the public. Only by fulfilling these duties can trial lawyers help to ensure the proper administration of justice.

In pretrial proceedings, a trial lawyer owes opposing counsel duties of courtesy, candor, and cooperation in scheduling, serving papers, communicating in writing and in speech, conducting discovery, designating expert witnesses, and seeking to resolve cases without litigation.

Trial lawyers owe similar duties of courtesy, candor, and cooperation to judges during the pretrial stage. These duties include preserving judges' time by seeking to resolve disputes without court involvement, promptly communicating with judges about significant developments, and following all judicial directives. Further, trial lawyers should scrupulously protect the judiciary's dignity and independence by avoiding inappropriate informality and ex parte communications.

Finally, during pretrial proceedings, trial lawyers should exhibit courtesy, candor, and cooperation in dealing with the public and participating in the legal system. These duties extend to all aspects of a trial lawyer's pretrial interaction with nonclients, including opposing parties, nonparty witnesses, expert witnesses, and consultants.

In fulfilling these duties, of course, trial lawyers must act in a manner consistent with their clients' legal interests. But trial lawyers can protect those interests while still applying the highest standards of professionalism. And by doing so, they can generate respect from the public that they serve.

In furtherance of the concepts expressed above, the American College of Trial Lawyers suggests the following minimum standards for lawyers' pretrial conduct.

Standards For Pretrial Conduct

1. Scheduling

(a) Scheduling a Pretrial Event

(1) Before noticing or scheduling a deposition, hearing, or other pretrial event, a lawyer should consult and work with opposing counsel to accommodate the needs and reasonable requests of all witnesses and participating lawyers. In scheduling a pretrial event, lawyers should strive to agree upon a mutually convenient time and place, seeking to minimize travel expense and to allow adequate time for preparation.

(2) Depositions, hearings, and other pretrial events should be scheduled early enough during the pretrial phase to avoid the difficult scheduling problems that often result from last-minute requests.

(b) Rescheduling a Pretrial Event

(1) If a lawyer needs to reschedule a deposition or other pretrial event, the lawyer should give prompt notice to all other counsel, explaining the conflict or other compelling reason for rescheduling.

(2) A lawyer who receives a reasonable request for rescheduling should strive to accommodate the request.

(3) If the conflict or other reason for rescheduling is later resolved or eliminated, then the lawyer who rescheduled the event should give notice as soon as practicable to all other counsel. The lawyers should then decide which of the two possible schedules is more convenient.

(c) Seeking and Granting Extensions of Time

(1) Courts expect lawyers to grant other lawyers' requests for reasonable extensions of time to respond to discovery, pretrial motions, and other pretrial matters. Opposing such requests wastes resources and needlessly inconveniences courts, which are likely to grant such requests, even if opposed. Lawyers should explain these principles to their clients and should insist on adhering to them, unless the clients' legitimate interests will be adversely affected.

(2) A lawyer should request an extension only when additional time is actually needed, and never merely for purposes of delay. In requesting an extension of time, a lawyer should explain to opposing counsel the reasons for the request.

(3) A lawyer who receives a reasonable request for extension — especially an initial request — should grant the request unless it is clearly inconsistent with the legitimate interests of the lawyer's client.

2. Service of Process, Pleadings, and Proposed Orders

(a) The timing, manner, and place of serving process should not be calculated to disadvantage or embarrass the party being served.

(b) Unless applicable procedural rules require otherwise, papers should not be filed in a court before being delivered to opposing counsel. For example, if papers are hand-delivered or faxed to the court, then they should be hand-delivered or faxed to opposing counsel on the same day and at about the same time.

(c) Papers should not be served in a manner deliberately designed to shorten an opponent's time for response or to take other unfair advantage of an opponent. This may include service:

(1) when the opponent is known to be absent from the office;
(2) late on a Friday afternoon;
(3) the day before a secular or religious holiday;
(4) shortly before a hearing; or
(5) when the timing of service does not afford the opponent adequate time to respond to the paper or to prepare for the relevant pretrial event.

(d) Even if service by mail to opposing counsel does not technically violate the rules, such service sometimes prejudices the opposing party. If such prejudice is likely, then service should be made by hand or by facsimile, followed, if the applicable rules so require, by service by mail.

(e) Except when expressly ordered by a court, a proposed order on any substantive matter should not be delivered to the court without assurance that tendering counsel has complied with paragraph 6(e) of this Code.

3. Written Submissions to a Court

(a) Written briefs and memoranda should not refer to or rely on facts that are not properly a part of the record. A lawyer may, however, present historical, economic, or sociological data if the applicable rules of evidence support the data's admissibility.

(b) Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under the controlling substantive law.

(c) When legal opinions are highlighted and presented to the court, identical highlighting should be included on copies of the opinions furnished to opposing counsel.

4. Communication with Adversaries

(a) In their practice, lawyers should remember that their role is to zealously advance the legitimate interests of their clients, while maintaining appropriate standards of civility and decorum. In dealing with others, counsel should not reflect any ill feelings that clients may have toward their

adversaries. Lawyers should treat all other lawyers, all parties, and all witnesses courteously, not only in court, but also in other written and oral communication. Lawyers should refrain from acting upon or manifesting bias or prejudice toward any person based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.

(b) Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communication with adversaries.

(c) Letters intended only to make a record should be used sparingly and only when thought to be necessary under all the circumstances. Letters should not be written to ascribe to an adversary a position that he or she has not taken or to create a "record" of events that have not occurred.

(d) Unless specifically permitted or invited by the court, letters between counsel should not be sent to judges.

(e) Lawyers should strictly adhere 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.

(f) When practicable, lawyers should agree to reasonable requests for the waiver of procedural formalities.

5. Discovery Practice

(a) Discovery in General

In discovery, as in all other professional matters, a lawyer's conduct should be honest, fair, and courteous. In general, a lawyer should adhere to the following guidelines in conducting all forms of discovery:

(1) A lawyer should strictly follow all applicable rules in drafting and responding to written discovery and in conducting depositions.

(2) A lawyer should conduct discovery to elicit relevant facts and evidence, and not for an improper purpose, such as to harass, intimidate, or unduly burden another party or a witness.

(3) A lawyer should respond to written discovery in a reasonable manner and should not interpret requests in a strained or unduly restrictive way in an effort to avoid responding to them or to conceal relevant, nonprivileged information.

(4) Objections to interrogatories, document requests, and requests for admissions should be made in good faith and should be adequately explained and limited.

(5) When a discovery dispute arises, opposing lawyers should attempt to resolve the dispute by working cooperatively together. Lawyers should refrain from filing motions to compel or for sanctions unless they have genuinely tried, but failed, to resolve the dispute through all reasonable avenues of compromise and resolution.

(6) Lawyers should claim a privilege only under appropriate circumstances. They should not assert a privilege solely to withhold or suppress nonprivileged information or to limit or delay their response.

(7) Requests for additional time to respond to discovery should be made as far in advance of the due date as reasonably possible and should not be used for tactical or strategic reasons.

(8) Unless there are compelling reasons to deny a request for additional time to respond to discovery, an opposing lawyer should grant the request without necessitating court intervention. Compelling reasons to deny such a request exist only if the client's legitimate interests would be materially prejudiced by the proposed delay.

(b) Interrogatories

(1) Lawyers should avoid "boilerplate" interrogatories. Instead, they should carefully tailor interrogatories to elicit information that is relevant to the issues in the pending case or that is otherwise necessary to discover or understand those issues.

(2) Lawyers should not assert objections solely to avoid answering an appropriate interrogatory. If only part of an interrogatory is objectionable, then the responding lawyer should object only to that part and should answer the remainder of the interrogatory.

(c) Document Requests

(1) Lawyers should carefully tailor document requests to obtain documents that are relevant to the issues in the pending case or that are otherwise necessary to discover or understand those issues.

(2) Lawyers should not assert objections solely to avoid producing relevant documents. If only part of a request is objectionable, then the responding lawyer should object only to that part and should timely produce all documents responsive to the remainder of the request.

(3) In responding to document requests, lawyers should make reasonable accommodations for review and copying by opposing counsel. Documents being produced should be organized in a manner consistent with the applicable rules of procedure. A group of documents should never be arranged in a manner calculated to hide or obscure the existence of particular documents or discoverable information.

(4) If any responsive documents are withheld, then at the time of production, the producing lawyer should give notice of that fact and should explain the reason for withholding them. The producing lawyer should timely provide, in accordance with applicable rule, a log of all documents withheld, including, for each document: (a) its date; (b) the author's name; (c) a general description; (d) the addressee, if any; (e) its current location; (f) the basis

for withholding it; and (g) any other information that may be required by applicable rules of procedure.

(d) Requests for Admissions

(1) Lawyers should use requests for admissions only to ascertain the truth of matters within the scope of the pending case. Such requests should be carefully drafted to inquire only about matters of fact or opinion or the application of law to fact, including the genuineness of any documents properly described in the requests.

(2) Lawyers should not assert objections solely to avoid admitting or denying an appropriate request. If only part of a request is objectionable, then the responding lawyer should object only to that part and should admit or deny the remainder of the request or set forth in detail the reasons why the answering party cannot truthfully admit or deny the request.

(e) Depositions

(1) Lawyers should limit depositions to those that are necessary to develop the claims or defenses in the pending case or to perpetuate relevant testimony.

(2) In appearing for depositions, lawyers should arrive punctually at the time and place stated in the notice or subpoena or agreed upon by counsel. If a lawyer is unavoidably delayed, other participating lawyers should be promptly notified, should be told the reason for the delay, and should be advised when to expect the delayed lawyer's arrival.

(3) If a scheduled deposition must unavoidably be cancelled, the other participating lawyers should be notified as soon as possible and should be told the reason for the cancellation. The canceling lawyer should promptly seek to reschedule the deposition in a way that will minimize any inconvenience and expense caused by the cancellation.

(4) During a deposition, lawyers should conduct themselves with decorum and should never verbally abuse or harass the witness or unnecessarily prolong the deposition.

(5) During a deposition, lawyers should strictly limit objections to those allowed by the applicable rules. In general, lawyers should object only to preserve the record, to assert a valid privilege, or to protect the witness from unfair, ambiguous, or abusive questioning. Objections should not be used to obstruct questioning, to improperly communicate with the witness, or to disrupt the search for facts or evidence germane to the case.

(f) Exceptions to the General Guidelines Regarding Discovery

(1) A lawyer who has attempted to comply with these guidelines is justified in setting a hearing or deposition without agreement from opposing counsel if opposing counsel fails or refuses to promptly accept or reject a time offered for the hearing or deposition.

(2) If opposing counsel raises an unreasonable number of calendar conflicts, a lawyer is justified in setting a hearing or deposition without agreement from opposing counsel.

(3) If opposing counsel has consistently failed to comply with these guidelines, a lawyer is justified in setting a hearing or deposition without agreement from opposing counsel.

(4) When an action involves so many lawyers that compliance with these guidelines appears to be impracticable, a lawyer should nonetheless make a good-faith attempt to comply with their terms to the extent practicable.

(5) If a case involves an extraordinary remedy and the time associated with a scheduling agreement could harm a client's case, then a lawyer is justified in setting a hearing or deposition without agreement from opposing counsel, giving notice as prescribed in paragraph 8(b) of this Code.

6. Motion Practice

(a) Before setting a motion for hearing, a lawyer should make a reasonable effort to resolve the issue without involving the court.

(b) A lawyer who has no valid objection to an opponent's proposed motion should promptly make this position known to opposing counsel. Depending on the nature of the motion, such candor will enable opposing counsel either to file an unopposed motion or to avoid filing a motion altogether.

(c) If, after opposing a motion, a lawyer recognizes that the movant's position is correct based on the facts or the law, then the lawyer should promptly advise opposing counsel and the court of this change in position. Such candor will prevent the court and opposing counsel from participating in an unnecessary hearing and from addressing issues unnecessarily.

(d) After a hearing, the lawyer charged with preparing the proposed order should draft it promptly, striving to fairly and accurately articulate the court's ruling. The lawyer should submit the proposed order in compliance with the court's instructions. If no specific schedule is imposed by the court, the lawyer should strive either to tender a copy to opposing counsel, in accordance with paragraph 6(e), below, no later than the following day, excluding Saturdays, Sundays, and legal holidays, or to inform opposing counsel when he or she may expect such a tender.

(e) Before submitting a proposed order to a court, a lawyer should provide a copy to opposing counsel, who should promptly voice any objections. If the lawyers cannot resolve all objections, then the drafting lawyer should promptly submit the proposed order to the court, stating any unresolved objections.

7. Communication with Nonparty Witnesses

(a) In dealing with a nonparty who is a witness or potential witness, a lawyer must: (1) be truthful about the material facts and the applicable law; (2) disclose his or her interest or role in the

pending matter; (3) correct any misunderstanding expressed by the nonparty; (4) treat the nonparty courteously; and (5) avoid unnecessarily embarrassing, inconveniencing, or burdening the nonparty.

(b) If a lawyer knows that a nonparty witness is represented by counsel in the pending matter, then the lawyer should not contact the witness without permission from that counsel.

(c) If a lawyer knows that a nonparty witness is an employee or agent of an organization represented by counsel in the pending matter, then the lawyer should scrupulously follow the rules of the applicable jurisdiction governing such contacts. Absent such rules, the lawyer should not contact the witness without permission from that counsel if: (1) the witness has the power to compromise or settle; (2) the witness regularly consults with the organization's lawyers; (3) the witness's acts may be imputed to the organization for liability purposes; or (4) the witness's statements would bind the organization.

(d) Lawyers should show courtesy and civility to all nonparty witnesses.

(e) A lawyer should not obstruct another party's access to a nonparty witness or induce a nonparty witness to evade or ignore process.

(f) A lawyer should not issue a subpoena to a nonparty witness except to compel, for a proper purpose, the witness's appearance at a deposition, hearing, or trial or to obtain necessary documents in the witness's possession.

(g) If a lawyer issues a deposition subpoena for a nonparty witness, then the lawyer should simultaneously send all counsel in the pending matter a notice of the deposition and a copy of the subpoena.

(h) If a lawyer obtains documents through a deposition subpoena, the lawyer should, as soon as reasonably practicable, make copies of the documents available to all counsel at their expense, even if the deposition itself is cancelled or adjourned after the documents are produced.

8. Communication with the Court

(a) A lawyer should make no attempt to obtain an advantage in a pending case through ex parte communication with the presiding judge. A lawyer must avoid such communication on any substantive matter and on any matter that could reasonably be perceived as a substantive matter. Ex parte communication of this type is detrimental to the administration of justice and reflects adversely on the entire legal profession. Therefore, when a lawyer informally communicates with a court, the highest degree of professionalism is demanded.

(b) Even if the applicable law permits an ex parte communication with the court under certain circumstances, a lawyer — before approaching the court — should promptly and diligently attempt to notify opposing counsel, if known, and if not, the opposing party directly unless there is a bona fide emergency that threatens to materially prejudice the client's rights if regular notice is given. When giving such notice, the lawyer should advise the opponent of the basis for seeking immediate relief and should make reasonable efforts to accommodate the opponent's schedule so that the party affected may be represented.

(c) For communications with the court that are related to a pending case, a lawyer should provide opposing counsel with copies of all written communications and should notify opposing counsel of all oral communications.

(d) Any proposed order containing findings of fact or conclusions of law should be provided to opposing counsel for comment and objection before being submitted to the court. Local rules often govern whether other types of proposed orders must be provided to opposing counsel before submission to the court. In general, however, routine orders that merely reflect a particular ruling need not be provided to opposing counsel in advance. Similarly, if the contents of an order would be entitled to no deference on review, then the proposed order generally need not be furnished to opposing counsel in advance. Once an order has been submitted, there should be no ex parte communication with the court regarding the entry or the contents of the order.

(e) A lawyer should always show courtesy to and respect for a presiding judge. While a lawyer may be cordial in communicating with a presiding judge in court or in chambers, the lawyer should never exhibit inappropriate informality.

(f) A lawyer should avoid taking any action that is or appears to be calculated to gain any special personal consideration or favor from a presiding judge in a pending case.

9. Settlement and Alternative Dispute Resolution

(a) Lawyers should educate their clients early in the legal process about various methods of resolving disputes without trial, including mediation, arbitration, and neutral case evaluation.

(b) Lawyers should advise clients of the benefits of settlement, including savings to the client, greater control over the process and the result, and a more expeditious resolution of the dispute. The lawyer and the client should work together in formulating a settlement strategy designed to accomplish the client's realistic goals and expectations.

(c) At the earliest practicable time, a lawyer should provide the client with a realistic assessment of the potential outcome of the case so that the client may effectively assess various approaches to resolving the dispute. As new information is obtained during the pretrial phase, the lawyer should revise the assessment as necessary.

(d) When enough is known about the case to make settlement negotiations meaningful, a lawyer should explore settlement with the client and opposing counsel.

(e) Throughout the representation of a client in a case, the lawyer should pursue the possibility of settlement and should use all reasonable measures to engage opposing counsel in the settlement process.

(f) A lawyer should enter into settlement negotiations in good faith, should make proposals that are designed to achieve a resolution, and should recommend reasonable compromises consistent with the client's best interests.

(g) When requested by opposing counsel and authorized by the client, a lawyer should informally provide documents and other information that will promote and expedite settlement efforts.

(h) A lawyer should never make settlement proposals that are designed to antagonize or further polarize the parties.

(i) A lawyer should never engage in settlement negotiations for the purpose of delaying discovery or gaining an unfair advantage.

(j) In participating in settlement negotiations and alternative methods of resolving disputes, lawyers should practice the same courtesy, candor, and cooperation expected of them during other pretrial proceedings.

10. Pretrial Conferences

(a) A lawyer should carefully read and comply with an order setting pretrial deadlines or scheduling a pretrial conference. The lawyer should complete any required statement in full, seeking to reach agreement with opposing counsel when possible and thus to limit the issues to be addressed before and during trial.

(b) In advance of a final pretrial conference, it is desirable for discovery to be completed, for discovery responses to be supplemented, for discovery exhibits to be furnished, for evidentiary depositions to be concluded, and for settlement negotiations to be exhausted.

(c) A lawyer should determine in advance of a pretrial conference the trial judge's custom and practices in conducting such conferences.

(d) A lawyer should satisfy all directives of the court set forth in the order setting a pretrial conference and should consult and comply with all local rules and with any specific requirements of the trial judge.

(e) Before the initial pretrial conference, a lawyer should ascertain the client's willingness to participate in alternative dispute resolution.

(f) Unless unavoidable circumstances prevent it, a lawyer representing a party at a pretrial conference should be thoroughly familiar with each aspect of the case, including the pleadings, the evidence, and all potential procedural and evidentiary issues.

(g) Unless unavoidable circumstances prevent it, the pretrial conference should be attended by a lawyer who will actually try the case, and, in any event, by a lawyer who is familiar with the case.

(h) A lawyer should alert the court as soon as practicable to scheduling conflicts and travel considerations of clients, experts, and other essential witnesses.

(i) If stipulations are possible for uncontested matters, a lawyer should propose specific stipulations and work with opposing counsel to obtain an agreement in advance of the pretrial conference.

(j) At or before a final pretrial conference, a lawyer should alert the court to the need for any pretrial rulings or hearings on matters such as motions in limine and Daubert-type motions on expert-witness qualifications or expert testimony.

(k) At the final pretrial conference, a lawyer should be prepared to advise the court of the status of settlement negotiations and the likelihood of settlement before trial.

(l) During the final pretrial conference, a lawyer should confirm the trial judge's practices in the voir dire of potential jurors, the exercise of peremptory strikes, and the selection of replacement jurors.

11. Communication with Consultants and Expert Witnesses

(a) In retaining consultants for expert opinions, a lawyer should be familiar with the qualifications necessary for an expert witness to give opinion evidence at trial, as set forth in the Daubert decision in federal court and in state-court opinions establishing similar guidelines.

(b) In retaining an expert witness, a lawyer should respect the integrity of the expert's professional practices and procedures, and should refrain from asking or encouraging the expert to violate the integrity of those practices and procedures for purposes of the particular matter for which the expert has been retained.

(c) In general, an expert must be qualified based on the expert's specialized knowledge or expertise going beyond the general knowledge of lay persons. In retaining an expert witness, a lawyer should provide the expert with information that is believed to be relevant and material to the subject matter of the expert's proposed written report.

(d) In retaining an expert witness, a lawyer should respect the expert's integrity, knowledge, conclusions, and opinions. A retained expert should be fairly compensated for all work on behalf of the client. But a lawyer must not make compensation, or the amount of compensation, contingent in any way upon the substance of the expert's opinions or written report or upon the outcome of the matter for which the expert has been retained.

(e) A lawyer should not purposefully delay designating an expert witness or delivering an expert's report in an effort to postpone a trial setting or to preclude the taking of the expert's deposition at a reasonable time before trial.

12. Scope of the Code of Pretrial Conduct

This Code of Pretrial Conduct is intended to provide guidance for a lawyer's professional conduct except to the extent that any applicable law, code, rules of procedure, or rules of professional conduct in a particular jurisdiction require or permit otherwise. It is merely a guide for trial lawyers and should not give rise to any claim, create a presumption that a legal duty has been breached, or form the basis for disciplinary proceedings or sanctions not called for under the controlling law.