

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11

Date: 31 May 2013

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR v.
*UHURU MUIGAI KENYATTA***

Public

**Decision on the Defence application concerning professional ethics applicable
to prosecution lawyers**

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Counsel for Uhuru Muigai Kenyatta

Mr Steven Kay

Ms Gillian Higgins

Legal Representatives of Victims

Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Articles 42(2), 44, 54(1), 64(2) and 64(6)(f), 70 and 71 of the Rome Statute (“Statute”), Rules 6 and 9 of the Rules of Procedure and Evidence (“Rules”), Articles 1, 6, 7, 23, 24, 25, 27 and 29 of the Code of Professional Conduct for Counsel (“Code”), Regulation 29 of the Regulations of the Court (“Regulations”), Regulation 17 of the Regulations of the Office of the Prosecutor (“Prosecution Regulations”), Article X of the Staff Regulations, and Rules 101.9(a) and 110.1 of the Staff Rules, issues the following Decision on the Defence application concerning professional ethics applicable to prosecution lawyers.

I. Background and Submissions

1. On 30 December 2012, the defence teams for Mr Muthaura and Mr Kenyatta (together, “Defence”) ¹ submitted that the behaviour of the Office of the Prosecutor (“Prosecution”) in alleging negligence on the part of the defence ² violated professional ethics insofar as it “suggest[ed] or impl[ied] without proper foundation that anyone in the case, including the accused, has misbehaved”.³ The Defence requested that the Chamber order the disclosure of any evidence which supports the allegation or alternatively that it direct the Prosecution “to refrain from making unfounded and inappropriate allegations impugning the conduct of members of the Defence”.⁴

¹ Defence Response to “Lesser Redacted Version of the 5 November 2012 ‘Prosecution Application for delayed disclosure of witness identities’ (ICC-01/09-02/11-519-Conf-Exp; ICC-01/09-02/11-519-Red)”, ICC-01/09-02/11-585-Conf.

² The statement at issue appears in footnote 40 of the Lesser Redacted Version of the 5 November 2012 ‘Prosecution Application for delayed disclosure of witness identities’ (ICC-01/09-02/11-519-Conf-Exp; ICC-01/09-02/11-519-Red), 6 December 2012, ICC-01/09-02/11-519-Conf-Red2.

³ ICC-01/09-02/11-585-Conf, paras 11 – 13.

⁴ ICC-01/09-02/11-585-Conf, para. 14.

2. On 17 January 2013, the Defence filed the “Joint Defence Application for an Order to the Prosecutor for the provision of a list containing the bar memberships and good standing status of Prosecution trial lawyers expected to make submissions at trial and Request that the Trial Chamber promulgate a protocol of professional ethics applicable to Prosecution lawyers” (Application”).⁵ On 1 February 2013 the defence for Mr Muthaura filed an application for sanctions against an OTP staff member (“Defence Request for Sanctions”).⁶
3. On 11 March 2013, the Prosecution notified the Chamber of its withdrawal of the charges against Mr Muthaura.⁷ Subsequently, on 18 March 2013 the Chamber issued a decision granting the Prosecution permission to withdraw the charges and declaring all outstanding requests by the defence for Mr Muthaura to be moot, including the Defence Request for Sanctions.⁸ However, as the Application was filed jointly, it is not rendered moot by the termination of the case against Mr Muthaura.
4. In its Application, the Defence requests that the Chamber act pursuant to its Article 64(2) obligations to ensure that the trial is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses, and order the Prosecution to provide the Defence with a list containing the bar memberships of all lawyers expected to make submissions at trial and information as to whether they are in “good standing”.⁹ The Defence

⁵ ICC-01/09-02/11-603.

⁶ Application for Sanctions pursuant to Article 70 of the Statute against an OTP staff member and request for steps to be taken to ensure the protection of defence witnesses, ICC-01/09-02/11-617-Conf-Exp. A public redacted version was filed on 4 February 2013, ICC-01/09-02/11-617-Red.

⁷ Transcript of hearing on 11 March 2013, ICC-01/09-02/11-T-23-ENG, page 3, line 10 to page 5, line 24 and Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, ICC-01/09-02/11-687.

⁸ Decision on the withdrawal of charges against Mr Muthaura, ICC-01/09-02/11-696.

⁹ ICC-01/09-02/11-603, para. 1 and 13.

submits that the non-provision of this information will “erode the equality of the parties before the Court”.¹⁰

5. The Defence also submits that although defence counsel and other counsel practicing before the ICC must adhere to the Code, there is no code of professional conduct and ethics applicable to the Prosecution.¹¹ The Defence submits that particularly in view of paragraph 4 of the Witness Preparation Protocol,¹² which sets out that “[w]itness preparation is to be carried out in good faith and in keeping with the applicable standards of professional conduct and ethics”,¹³ the Chamber should promulgate a protocol of ethics for the Prosecution.¹⁴
6. The Defence submits that a code of professional conduct applicable to the Prosecution is necessary to ensure equality of treatment of all lawyers appearing before the Court.¹⁵ It argues that such a code of conduct is particularly necessary given that “the Defence has reason to believe that several Prosecution lawyers in the present case are not members of any professional body, bar association or law society” and may not have received training in professional ethics.¹⁶ Alternatively, the Defence submits that the Trial Chamber should “issue a directive requiring the OTP to comply and uphold the Code of Professional Conduct for counsel” with any necessary amendments.¹⁷
7. In its response, filed on 8 February 2013,¹⁸ the Prosecution argues that the Application should be denied. The Prosecution contends that the relief requested is

¹⁰ ICC-01/09-02/11-603, para. 15.

¹¹ ICC-01/09-02/11-603, paras 8 – 10.

¹² Annex to the Decision on witness preparation, 2 January 2013, ICC-01/09-02/11-588-Anx.

¹³ ICC-01/09-02/11-588-Anx, para. 4.

¹⁴ ICC-01/09-02/11-603, para. 2.

¹⁵ ICC-01/09-02/11-603, para. 18.

¹⁶ ICC-01/09-02/11-603, para. 20.

¹⁷ ICC-01/09-02/11-603, para. 13.

¹⁸ Prosecution Response to the “Joint Defence Application for an Order to the Prosecutor for the provision of a list containing the bar memberships and good standing status of Prosecution trial lawyers expected to make submissions at

unnecessary to enable the Court to evaluate the conduct of Prosecution lawyers,¹⁹ and that their general conduct is already sufficiently regulated by the Court's legal texts and the Staff Rules and Regulations.²⁰ The Prosecution observes that upon joining the Prosecution, each staff member is required to sign an undertaking to avoid actions which would reflect adversely on the "integrity, independence and impartiality" of the Prosecution as well as an oath of office to perform duties impartially and conscientiously and to respect the confidentiality of investigations and prosecutions.²¹

8. With regard to the Witness Preparation Protocol, the Prosecution argues that the Prosecution's conduct is already "comprehensively regulated" by the Chamber in the Protocol and the Statute.²² The Prosecution also submits that the request for the Chamber to promulgate a code of conduct lacks a legal basis, as the Chamber does not have the statutory authority to impose a code of conduct on all Prosecution lawyers in all cases.²³ Similarly, the Prosecution argues that the Chamber lacks the authority to order the Prosecution to comply with the Code, which is not applicable to the Prosecution, and can only be amended by the States Parties.²⁴ Finally, the Prosecution contends that the Chamber need not create a disciplinary regime to ensure compliance with the applicable standards, as Prosecution staff members face internal procedures for misconduct and because the Chamber has the power to sanction the Prosecution for misconduct.²⁵

trial and Request that the Trial Chamber promulgate a protocol of professional ethics applicable to Prosecution lawyers", ICC-01/09-02/11-635.

¹⁹ ICC-01/09-02/11-635, para. 3.

²⁰ ICC-01/09-02/11-635, para. 8.

²¹ ICC-01/09-02/11-635, para. 10.

²² ICC-01/09-02/11-635, paras 8 and 11.

²³ ICC-01/09-02/11-635, paras 5 and 6.

²⁴ ICC-01/09-02/11-635, para. 7.

²⁵ ICC-01/09-02/11-635, para. 12.

II. Analysis and Conclusion

9. As an initial matter, the Chamber notes that the defence bases its requests for (i) a list of the bar membership and “good standing” of Prosecution lawyers in the present case and (ii) a code of conduct for Prosecution lawyers or an order for Prosecution lawyers to obey the Code of Conduct on the reference to the “applicable standards of professional conduct and ethics” in the Witness Preparation Decision.²⁶ However, the Defence also submits that the requested relief will enable the Defence and the Chamber “to properly evaluate the actions of conduct of Prosecution lawyers undertaking witness preparation (and indeed out of court investigations, decisions on disclosure, and general conduct of OTP lawyers that usually and necessarily regulate the legal profession)”,²⁷ and appears to suggest that the need for the relief requested extends beyond concerns about the conduct of Prosecution lawyers during witness preparation.²⁸

10. In the Witness Preparation Protocol, in addition to setting out a number of specific guidelines to be followed when conducting witness preparation, the Chamber held that “[w]itness preparation is to be carried out in good faith and in keeping with the applicable standards of professional conduct and ethics”.²⁹ Although the Code does not apply to Prosecution counsel,³⁰ members of the Office of the Prosecutor are bound by the provisions in the Rome Statute, the Rules of Procedure and Evidence, the Regulations of the Court, the Prosecution Regulations, and the Staff Rules and Regulations relating to the relevant standards of professional conduct and ethics,

²⁶ See ICC-01/09-02/11-603, paras 4 and 12.

²⁷ ICC-01/09-02/11-603, para. 16.

²⁸ ICC-01/09-02/11-603, paras 17 – 20 and 25.

²⁹ ICC-01/09-02/11-588-Anx, para. 4.

³⁰ Article 1 of the Code of Conduct states that “[t]his Code shall apply to defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses practicing at the International Criminal Court”. The Chamber observes in this regard that the absence of a code of conduct applicable to the Prosecution constitutes “a major departure from the practice of the other international criminal tribunals”. Counsel Matters at the International Criminal Court: A Review of Key Developments Impacting Lawyers Practicing before the ICC, November 2012, International Bar Association Human Rights Institute, page 17.

including Articles 42(2), 44, 54(1), 70 and 71, Rule 6 of the Rules, Regulation 29 of the Regulations, Regulation 17 of the Prosecution Regulations, Rules 101.9(a) and 110.1 of the Staff Rules, Articles I and X and Regulations 1.1, 1.2, 1.3 and 1.4 of the Staff Regulations.

11. Bearing in mind these provisions, the Chamber considers that Prosecution lawyers in this case are bound by a number of general ethical principles. However, given that Defence counsel are bound by the Code of Conduct,³¹ in order to maintain equality between the parties and to ensure the fairness of the proceedings, the Chamber is of the view that further clarification as to the applicable standards of professional conduct and ethics to be observed by the Prosecution in the conduct of this case will be of assistance going forward.

12. As the Staff Regulations make clear, the authority to impose disciplinary measures on Prosecution staff for misconduct lies primarily with the Prosecutor.³² In addition, given that Article 42(2) of the Statute provides that the Prosecutor shall have full authority over the management and administration of the Office,³³ and because this Chamber is only seised of the present case, the Chamber agrees that it lacks the authority to promulgate a code of conduct which would apply to “all” Prosecution lawyers.

13. However, pursuant to Article 64(2) and 64(6)(f) the Chamber has the power to regulate the conduct of the proceedings in the case before it.³⁴ The Chamber also has the power, pursuant to Article 71, to order sanctions for misconduct. In the view of

³¹ Article 1 of the Code of Professional Conduct for Counsel.

³² See Article X of the Staff Regulations.

³³ Rule 9 of the Rules of Procedure and Evidence authorises the Prosecutor to adopt “regulations to govern the operation of the Office”.

³⁴ See paragraph 47 of *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, 8 October 2010, ICC-01/04-01/06-2582.

the Chamber, Article 71 is specifically directed towards conduct occurring within the courtroom referring as it does to “persons present before” the Court. This narrow interpretation is supported by reference to the French version of the provision which unambiguously refers to “l’inconduite à l’audience.” It is also consistent with the only Appeals Chamber decision to date in which the provision has been considered. In that decision, issued in the *Lubanga* case in October 2010, the Appeals Chamber reversed a decision of Trial Chamber I to stay the proceedings for failure of the Prosecution to follow its directions reasoning that the Trial Chamber should first have considered sanctions pursuant to Article 71.³⁵ Although the Appeals Chamber did not directly consider the question of whether Article 71 of the Statute is limited to misconduct committed during or in close connection with courtroom proceedings, it is significant that the directions in question had been given orally and in writing during the course of an ongoing trial. Finally, the Chamber notes that equivalent misconduct provisions at other international courts³⁶ are not limited to persons “present,” suggesting that an in-court requirement was purposefully included by the drafters.³⁷

14. The Chamber considers, however, that it has the power to address misconduct occurring outside the courtroom by having recourse to its broad discretionary powers to ensure a fair trial and uphold the interests of justice as provided for in Article 64(2) of the Statute and to rule on any other relevant matters in performing its functions as provided for in Article 64(6)(f) of the Statute. It is axiomatic that these provisions grant sufficient power to impose sanctions for breaches of its own

³⁵ ICC-01/04-01/06-2582, paras 59 – 60.

³⁶ Rule 46 of the ICTY Rules of Procedure and Evidence; Rule 46 of the ICTR Rules of Procedure and Evidence; Rule 46 of the SCSL Rules of Procedure and Evidence; Rule 38 of the ECCC Internal Rules and Rule 60 of the STL Rules of Procedure and Evidence.

³⁷ In their commentaries on the provision, Professors Triffterer and Schabas also support a narrow interpretation of Article 71. Otto Triffterer, *The Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes Article by Article* (2008) page 1353. William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), page 860 (“[t]he limitation of misconduct to misconduct in the courtroom stands in quite marked contrast to the law applicable before the *ad hoc* tribunals”).

orders as without such power it could not ensure a fair trial or otherwise perform its functions. The Appeals Chamber has emphasised the binding nature of Court orders stating, in the Lubanga case:

The Appeals Chamber fully endorses the statement of the Trial Chamber that “no criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations.” Orders of a Trial Chamber are binding orders to be implemented unless and until they are suspended.³⁸

15. These broadly framed provisions may indeed be seen as a codification of the concept of “inherent powers” which provide courts with authority to undertake all acts reasonably required to efficiently perform their functions. In the view of the Chamber this necessarily includes the ability to sanction breaches of its own orders and similar misconduct occurring outside the courtroom. This view is supported by Regulation 29 of the Regulations which includes a specific reference, in the context of non-compliance with the Regulations and orders of a Chamber, to the “inherent powers of the Chamber.”³⁹

16. In the Chamber’s view, the Code of Professional Conduct for Counsel should, where applicable and to the extent possible, also apply to members of the Prosecution, for purposes of the conduct of this case. Without limiting the generality of the foregoing, the Chamber sets out in Annex A with the necessary amendments several readily applicable provisions of the Code of Professional Conduct for Counsel that the Prosecution is expected to respect, not only in carrying out witness preparation, but throughout the conduct of this case. Reference is made to the Code of Conduct because these guidelines address a number of

³⁸ ICC-01/04-01/06-2582 at para. 48.

³⁹ Similarly at the *ad hoc* tribunals, the power to prosecute “contempt of court” which includes disclosure of information in knowing violation of a court order, is described as an “exercise of [...] inherent power.” Rule 77 (A) of the ICTY Rules of Procedure and Evidence; Rule 77 (A) of the ICTR Rules of Procedure and Evidence and Rule 77 (A) of the SCSL Rules of Procedure and Evidence.

relevant ethical issues. These provisions develop with more specificity the general ethical principles the Chamber expects both parties to observe in the present proceedings

17. In light of the above clarifications as to the ethical rules applicable to both witness preparation and the general conduct of counsel in the present case, and given that the Defence does not assert that only members of a national bar can exercise rights of audience,⁴⁰ the Chamber does not consider it necessary to order disclosure of the bar membership of Prosecution counsel.

18. Finally, as regards the Prosecution's footnote 40 of ICC-01/09-02/11-519-Conf-Red2, the Chamber directs both parties to refrain from making unsubstantiated allegations in the future. Additionally, the Chamber requests that the parties, the participants and the Registry refrain from filing submissions unless requesting specific relief.

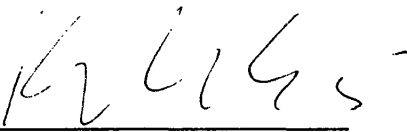
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence request for disclosure of the bar membership of Prosecution counsel.

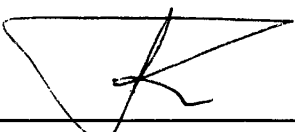
DIRECTS both parties to observe the abovementioned rules of ethical conduct during proceedings in the present case.

⁴⁰ In this regard, Rule 22 of the Rules, which sets out the necessary qualifications for defence counsel, contains no bar membership requirement. Similarly, Regulations 122 and 124 of the Registry, dealing with the Registry's maintenance of a list of counsel and associate counsel, do not mention bar membership as a necessary prerequisite.

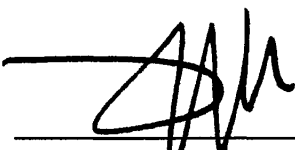
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding "



Judge Robert Fremr



Judge Chile Eboe-Osuji

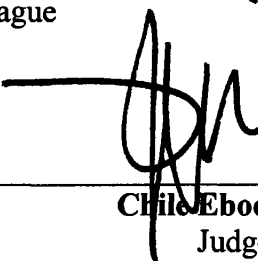
Dated 31 May 2013

At The Hague, The Netherlands

CONCURRING SEPARATE OPINION OF JUDGE EBOE-OSUJI

1. I fully concur with the decision of the Chamber, as far as it goes.
2. I do, however, consider it very important that Counsel who represent parties and participants on all sides should also modulate their professional conduct according to the standards of civility and professionalism for the legal profession. A useful set of such standards, as applicable, has been set out in the *California Attorney Guidelines of Civility and Professionalism*, attached as Annex A1.

Dated 31 May 2013 at The Hague



Chilo Eboe-Osuji
Judge

ANNEX A

Relevant Provisions from the Code of Professional Conduct for Counsel

Article 6

Independence of counsel

1. Counsel shall act honourably, independently and freely.
2. Counsel shall not:
 - (a) Permit his or her independence, integrity or freedom to be compromised by external pressure; or
 - (b) Do anything which may lead to any reasonable inference that his or her independence has been compromised.

Article 7

Professional conduct of counsel

1. Counsel shall be respectful and courteous in his or her relations with the Chamber, [...] the Registrar and the members of the Registry, [...], opposing counsel, accused persons, victims, witnesses and any other person involved in the proceedings.
2. Counsel shall maintain a high level of competence in the law applicable before the Court. He or she shall participate in training initiatives required to maintain such competence.
3. Counsel shall comply at all times with the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and such rulings as to conduct and procedure as may be made by the Court, including the enforcement of this Code.
4. Counsel shall supervise the work of his or her assistants and other staff, including investigators, clerks and researchers, to ensure that they comply with this Code.

Article 23

Communications with the Chambers and judges

- Unless the judge or the Chamber dealing with a case permits counsel to do so in exceptional circumstances, counsel shall not:
- (a) Make contact with a judge or Chamber relative to the merits of a particular case other than within the proper context of the proceedings; or
 - (b) Transmit evidence, notes or documents to a judge or Chamber except through the Registry.

Article 24

Duties towards the Court

1. Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.
2. Counsel is personally responsible for the conduct and presentation of the [Prosecution's] case and shall exercise personal judgement on the substance and purpose of statements made and questions asked.
3. Counsel shall not deceive or knowingly mislead the Court. He or she shall take all steps necessary to correct an erroneous statement

made by him or her or by assistants or staff as soon as possible after becoming aware that the statement was erroneous.

4. Counsel shall not submit any request or document with the sole aim of harming one or more of the participants in the proceedings.

5. Counsel shall [conduct the Prosecution's case] expeditiously with the purpose of avoiding unnecessary expense or delay in the conduct of the proceedings.

Article 25

Evidence

1. Counsel shall at all times maintain the integrity of evidence, whether in written, oral or any other form, which is submitted to the Court. He or she shall not introduce evidence which he or she knows to be incorrect.

[...]

Article 27

Relations with other counsel

1. In dealing with other counsel and their clients, counsel shall act fairly, in good faith and courteously.

[...]

3. When counsel does not expect particular correspondence between counsel to be confidential, he or she shall state clearly at the outset that such correspondence is not confidential.

Article 29

Relations with witnesses and victims

1. Counsel shall refrain from intimidating, harassing or humiliating witnesses or victims or from subjecting them to disproportionate or unnecessary pressure within or outside the courtroom.

2. Counsel shall have particular consideration for victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled.

Annex A1

California Attorney Guidelines of Civility and Professionalism



**The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639**

**Adopted by the Board of Governors on
July 20, 2007**

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**CALIFORNIA ATTORNEY
GUIDELINES OF CIVILITY AND PROFESSIONALISM**
(Adopted July 20, 2007)

INTRODUCTION

As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.

These are guidelines for civility. The Guidelines are offered because civility in the practice of law promotes both the effectiveness and the enjoyment of the practice and economical client representation. The legal profession must strive for the highest standards of attorney behavior to elevate and enhance our service to justice. Uncivil or unprofessional conduct not only disservices the individual involved, it demeans the profession as a whole and our system of justice.

These voluntary Guidelines foster a level of civility and professionalism that exceed the minimum requirements of the mandated Rules of Professional Conduct as the best practices of civility in the practice of law in California. The Guidelines are not intended to supplant these or any other rules or laws that govern attorney conduct. Since the Guidelines are not mandatory rules of professional conduct, nor rules of practice, nor standards of care, they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence.

The Guidelines are intended to complement codes of professionalism adopted by bar associations in California. Individual attorneys are encouraged to make these guidelines their personal standards by taking the pledge that appears at the end. The Guidelines can be applicable to all lawyers regardless of practice area. Attorneys are encouraged to comply with both the spirit and letter of these guidelines, recognizing that complying with these guidelines does not in any way denigrate the attorney's duty of zealous representation.

**SECTION 1
RESPONSIBILITIES TO THE JUSTICE SYSTEM**

The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice.

**SECTION 2
RESPONSIBILITIES TO THE PUBLIC AND THE PROFESSION**

An attorney should be mindful that, as individual circumstances permit, the goals of the profession include improving the administration of justice and contributing time to persons and organizations that cannot afford legal assistance.

An attorney should encourage new members of the bar to adopt these guidelines of civility and professionalism and mentor them in applying the guidelines.

**SECTION 3
RESPONSIBILITIES TO THE CLIENT AND CLIENT REPRESENTATION**

An attorney should treat clients with courtesy and respect, and represent them in a civil and professional manner. An attorney should advise current and potential clients that it is not acceptable for an attorney to engage in abusive behavior or other conduct unbecoming a member of the bar and an officer of the court.

As an officer of the court, an attorney should not allow clients to prevail upon the attorney to engage in uncivil behavior.

An attorney should not compromise the guidelines of civility and professionalism to achieve an advantage.

**SECTION 4
COMMUNICATIONS**

An attorney's communications about the legal system should at all times reflect civility, professional integrity, personal dignity, and respect for the legal system. An attorney should not engage in conduct that is unbecoming a member of the Bar and an officer of the court.

For example, in communications about the legal system and with adversaries:

- a. An attorney's conduct should be consistent with high respect and esteem for the civil and criminal justice systems.
- b. This guideline does not prohibit an attorney's good faith expression of dissent or criticism made in public or private discussions for the purpose of improving the legal system or profession.

- c. An attorney should not disparage the intelligence, integrity, ethics, morals or behavior of the court or other counsel, parties or participants when those characteristics are not at issue.
- d. Respecting cultural diversity, an attorney should not disparage another's personal characteristics.
- e. An attorney should not make exaggerated, false, or misleading statements to the media while representing a party in a pending matter.
- f. An attorney should avoid hostile, demeaning or humiliating words.
- g. An attorney should not create a false or misleading record of events or attribute to an opposing counsel a position not taken.
- h. An attorney should agree to reasonable requests in the interests of efficiency and economy, including agreeing to a waiver of procedural formalities where appropriate.
- i. Unless specifically permitted or invited by the court or authorized by law, an attorney should not correspond directly with the court regarding a case.

Nothing above shall be construed as discouraging the reporting of conduct that fails to comply with the Rules of Professional Conduct.

SECTION 5 PUNCTUALITY

An attorney should be punctual in appearing at trials, hearings, meetings, depositions and other scheduled appearances.

For example:

- a. An attorney should arrive sufficiently in advance to resolve preliminary matters.
- b. An attorney should timely notify participants when the attorney will be late or is aware that a participant will be late.

SECTION 6 SCHEDULING, CONTINUANCES AND EXTENSIONS OF TIME

An attorney should advise clients that civility and courtesy in scheduling meetings, hearings and discovery are expected as professional conduct.

For example:

- a. An attorney should consider the scheduling interests of the court, other counsel or party, and other participants, should schedule by agreement whenever possible, and should send formal notice after agreement is reached.

- b. An attorney should not arbitrarily or unreasonably withhold consent to a request for scheduling accommodations or engage in delay tactics.
- c. An attorney should promptly notify the court and other counsel of problems with key participants' availability.
- d. An attorney should promptly notify other counsel and, if appropriate, the court, when scheduled meetings, hearings or depositions must be cancelled or rescheduled, and provide alternate dates when possible.

In considering requests for an extension of time, an attorney should consider the client's interests and need to promptly resolve matters, the schedules and willingness of others to grant reciprocal extensions, the time needed for a task, and other relevant factors.

Consistent with existing law and court orders, an attorney should agree to reasonable requests for extensions of time that are not adverse to a client's interests.

For example:

- a. Unless time is of the essence, an attorney should agree to an extension without requiring motions or other formalities, regardless of whether the requesting counsel previously refused to grant an extension.
- b. An attorney should agree to an appropriate continuance when new counsel substitutes in.
- c. An attorney should advise clients that failing to agree with reasonable requests for time extensions is inappropriate.
- d. An attorney should not use extensions or continuances for harassment or to extend litigation.
- e. An attorney should place conditions on an agreement to an extension only if they are fair and essential or if the attorney is entitled to impose them, for instance to preserve rights or seek reciprocal scheduling concessions.
- f. If an attorney intends that a request for or agreement to an extension shall cut off a party's substantive rights or procedural options, the attorney should disclose that intent at the time of the request or agreement.

SECTION 7 SERVICE OF PAPERS

The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

For example:

- a. An attorney should serve papers on the attorney who is responsible for the matter at his or her principal place of work.
- b. If possible, papers should be served upon counsel at a time agreed upon in advance.
- c. When serving papers, an attorney should allow sufficient time for opposing counsel to prepare for a court appearance or to respond to the papers.
- d. An attorney should not serve papers to take advantage of an opponent's absence or to inconvenience the opponent, for instance by serving papers late on Friday afternoon or the day preceding a holiday.
- e. When it is likely that service by mail will prejudice an opposing party, an attorney should serve the papers by other permissible means.

SECTION 8 WRITINGS SUBMITTED TO THE COURT, COUNSEL OR OTHER PARTIES

Written materials directed to counsel, third parties or a court should be factual and concise and focused on the issue to be decided.

For example:

- a. An attorney should not make ad hominem attacks on opposing counsel.
- b. Unless at issue or relevant in a particular proceeding, an attorney should avoid degrading the intelligence, ethics, morals, integrity, or personal behavior of others.
- c. An attorney should clearly identify all revisions in a document previously submitted to the court or other counsel.

SECTION 9 DISCOVERY

Attorneys are encouraged to meet and confer early in order to explore voluntary disclosure, which includes identification of issues, identification of persons with knowledge of such issues, and exchange of documents.

Attorneys are encouraged to propound and respond to formal discovery in a manner designed to fully implement the purposes of the Civil Discovery Act.

An attorney should not use discovery to harass an opposing counsel, parties, or witnesses. An attorney should not use discovery to delay the resolution of a dispute.

For example:

- a. As to Depositions:

1. When another party notices a deposition for the near future, absent unusual circumstances, an attorney should not schedule another deposition in the same case for an earlier date without opposing counsel's agreement.
 2. An attorney should delay a scheduled deposition only when necessary to address scheduling problems and not in bad faith.
 3. An attorney should treat other counsel and participants with courtesy and civility, and should not engage in conduct that would be inappropriate in the presence of a judicial officer.
 4. An attorney should remember that vigorous advocacy can be consistent with professional courtesy, and that arguments or conflicts with other counsel should not be personal.
 5. An attorney questioning a deponent should provide other counsel present with a copy of any documents shown to the deponent before or contemporaneously with showing the document to the deponent.
 6. Once a question is asked, an attorney should not interrupt a deposition or make an objection for the purpose of coaching a deponent or suggesting answers.
 7. An attorney should not direct a deponent to refuse to answer a question or end the deposition without a legal basis for doing so.
 8. An attorney should refrain from self-serving speeches and speaking objections.
- b. As to Document Demands:
1. Document requests should be used only to seek those documents that are reasonably needed to prosecute or defend an action.
 2. An attorney should not make demands to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.
 3. If an attorney inadvertently receives a privileged document, the attorney should promptly notify the producing party that the document has been received.
 4. In responding to a document demand, an attorney should not intentionally misconstrue a request in such a way as to avoid disclosure or withhold a document on the grounds of privilege.
 5. An attorney should not produce disorganized or unintelligible documents, or produce documents in a way that hides or obscures the existence of particular documents.
 6. An attorney should not delay in producing a document in order to prevent opposing counsel from inspecting the document prior to or during a scheduled deposition or for some other tactical reason.

- c. **As to Interrogatories:**
1. **An attorney should narrowly tailor special interrogatories and not use them to harass or impose an undue burden or expense on an opposing party.**
 2. **An attorney should not intentionally misconstrue or respond to interrogatories in a manner that is not truly responsive.**
 3. **When an attorney lacks a good faith belief in the merit of an objection, the attorney should not object to an interrogatory. If an interrogatory is objectionable in part, an attorney should answer the unobjectionable part.**

SECTION 10 MOTION PRACTICE

An attorney should consider whether, before filing or pursuing a motion, to contact opposing counsel to attempt to informally resolve or limit the dispute.

For example:

- a. **Before filing demurrers, motions to strike, motions to transfer venue, and motions for judgment on the pleadings, an attorney should engage in more than a pro forma effort to resolve the issue.**
- b. **In complying with any meet and confer requirement in the California Code of Civil Procedure, an attorney should speak personally with opposing counsel and engage in a good faith effort to resolve or informally limit an issue.**
- c. **An attorney should not engage in conduct that forces an opposing counsel to file a motion and then not oppose the motion.**
- d. **An attorney who has no reasonable objection to a proposed motion should promptly make this position known to opposing counsel, who then may file an unopposed motion or avoid filing a motion.**
- e. **After opposing a motion, if an attorney recognizes that the movant's position is correct, the attorney should promptly advise the movant and the court of this change in position.**
- f. **Because requests for monetary sanctions, even if statutorily authorized, can lead to the destruction of a productive relationship between counsel or parties, monetary sanctions should not be sought unless fully justified by the circumstances and necessary to protect a client's legitimate interests and then only after a good faith effort to resolve the issue informally among counsel.**

SECTION 11 DEALING WITH NONPARTY WITNESSES

It is important to promote high regard for the profession and the legal system among those who are neither attorneys nor litigants. An attorney's conduct in dealings with nonparty witnesses should exhibit the highest standards of civility.

For example:

- a. An attorney should be courteous and respectful in communications with nonparty witnesses.
- b. Upon request, an attorney should extend professional courtesies and grant reasonable accommodations, unless to do so would materially prejudice the client's lawful objectives.
- c. An attorney should take special care to protect a witness from undue harassment or embarrassment and to state questions in a form that is appropriate to the witness's age and development.
- d. An attorney should not issue a subpoena to a nonparty witness for inappropriate tactical or strategic purposes, such as to intimidate or harass the nonparty.
- e. As soon as an attorney knows that a previously scheduled deposition will or will not, in fact, go forward as scheduled, the attorney should notify all counsel.
- f. An attorney who obtains a document pursuant to a deposition subpoena should, upon request, make copies of the document available to all other counsel at their expense.

SECTION 12 EX PARTE COMMUNICATION WITH THE COURT

In a social setting or otherwise, an attorney should not communicate ex parte with a judicial officer on the substance of a case pending before the court, unless permitted by law.

SECTION 13 SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

An attorney should raise and explore with the client and, if the client consents, with opposing counsel, the possibility of settlement and alternative dispute resolution in every matter as soon as possible and, when appropriate, during the course of litigation.

For example:

- a. An attorney should advise a client at the outset of the relationship of the availability of informal or alternative dispute resolution.
- b. An attorney should attempt to evaluate a matter objectively and to de-escalate any controversy or dispute in an effort to resolve or limit the controversy or dispute.

- c. An attorney should consider whether alternative dispute resolution would adequately serve a client's interest and dispose of the controversy expeditiously and economically.
- d. An attorney should honor a client's desire to settle the dispute quickly and in a cost-effective manner.
- e. An attorney should use an alternative dispute resolution process for purposes of settlement and not for delay or other improper purposes, such as discovery.
- f. An attorney should participate in good faith, and assist the alternative dispute officer by providing pertinent and accurate facts, law, theories, opinions and arguments in an attempt to resolve a dispute.
- g. An attorney should not falsely hold out the possibility of settlement as a means for terminating discovery or delaying trial.

SECTION 14 CONDUCT IN COURT

To promote a positive image of the profession, an attorney should always act respectfully and with dignity in court and assist the court in proper handling of a case.

For example:

- a. An attorney should be punctual and prepared.
- b. An attorney's conduct should avoid disorder or disruption and preserve the right to a fair trial.
- c. An attorney should maintain respect for and confidence in a judicial office by displaying courtesy, dignity and respect toward the court and courtroom personnel.
- d. An attorney should refrain from conduct that inappropriately demeans another person.
- e. Before appearing in court, an attorney should advise a client of the kind of behavior expected of the client and endeavor to prevent the client from creating disorder or disruption in the courtroom.
- f. An attorney should make objections for legitimate and good faith reasons, and not for the purpose of harassment or delay.
- g. An attorney should honor an opposing counsel's requests that do not materially prejudice the rights of the attorney's client or sacrifice tactical advantage.
- h. While appearing before the court, an attorney should address all arguments, objections and requests to the court, rather than directly to opposing counsel.

- i. While appearing in court, an attorney should demonstrate sensitivity to any party, witness or attorney who has requested, or may need, accommodation as a person with physical or mental impairment, so as to foster full and fair access of all persons to the court.

SECTION 15 DEFAULT

An attorney should not take the default of an opposing party known to be represented by counsel without giving the party advance warning.

For example an attorney should not race opposing counsel to the courthouse to knowingly enter a default before a responsive pleading can be filed. This guideline is intended to apply only to taking a default when there is a failure to timely respond to complaints, cross-complaints, and amended pleadings.

SECTION 16 SOCIAL RELATIONSHIPS WITH JUDICIAL OFFICERS, NEUTRALS AND COURT APPOINTED EXPERTS

An attorney should avoid even the appearance of bias by notifying opposing counsel or an unrepresented opposing party of any close, personal relationships between the attorney and a judicial officer, arbitrator, mediator or court-appointed expert and allowing a reasonable opportunity to object.

SECTION 17 PRIVACY

An attorney should respect the privacy rights of parties and nonparties.

For example:

- a. An attorney should not inquire into, attempt or threaten to use, private facts concerning any party or other individuals for the purpose of gaining an advantage in a case. This guideline does not preclude inquiry into sensitive matters relevant to an issue, as long as the inquiry is pursued as narrowly as possible.
- b. If an attorney must inquire into an individual's private affairs, the attorney should cooperate in arranging for protective measures, including stipulating to an appropriate protective order, designed to assure that the information revealed is disclosed only for purposes relevant to the pending litigation.
- c. Nothing herein shall be construed as authorizing the withholding of information in violation of applicable law.

SECTION 18 NEGOTIATION OF WRITTEN AGREEMENTS

An attorney should negotiate and conclude written agreements in a cooperative manner and with informed authority of the client.

For example:

- a. An attorney should use boilerplate provisions only if they apply to the subject of the agreement.
- b. If an attorney modifies a document, the attorney should clearly identify the change and bring it to the attention of other counsel.
- c. An attorney should avoid negotiating tactics that are abusive; that are not made in good faith; that threaten inappropriate legal action; that are not true; that set arbitrary deadlines; that are intended solely to gain an unfair advantage or take unfair advantage of a superior bargaining position; or that do not accurately reflect the client's wishes or previous oral agreements.
- d. An attorney should not participate in an action or the preparation of a document that is intended to circumvent or violate applicable laws or rules.

In addition to other applicable Sections of these Guidelines, attorneys engaged in a transactional practice have unique responsibilities because much of the practice is conducted without judicial supervision.

For example:

- a. Attorneys should be mindful that their primary goals are to negotiate in a manner that accurately represents their client and the purpose for which they were retained.
- b. Attorneys should successfully and timely conclude a transaction in a manner that accurately represents the parties' intentions and has the least likely potential for litigation.
- c. With client approval, attorneys should consider giving each party permission to contact the employees of the other party for the purpose of promptly and efficiently obtaining necessary information and documents.

SECTION 19 ADDITIONAL PROVISION FOR FAMILY LAW PRACTITIONERS

In addition to other applicable Sections of these Guidelines, in family law proceedings an attorney should seek to reduce emotional tension and trauma and encourage the parties and attorneys to interact in a cooperative atmosphere, and keep the best interest of the children in mind.

For example:

- a. An attorney should discourage and should not abet vindictive conduct.
- b. An attorney should treat all participants with courtesy and respect in order to minimize the emotional intensity of a family dispute.
- c. An attorney representing a parent should consider the welfare of a minor child and seek to minimize the adverse impact of the family law proceeding on the child.

SECTION 20 ADDITIONAL PROVISION FOR CRIMINAL LAW PRACTITIONERS

In addition to other applicable Sections of these Guidelines, criminal law practitioners have unique responsibilities. Prosecutors are charged with seeking justice, while defenders must zealously represent their clients even in the face of seemingly overwhelming evidence of guilt. In practicing criminal law, an attorney should appreciate these roles.

For example:

- a. A prosecutor should not question the propriety of defending a person accused of a crime.
- b. Appellate counsel and trial counsel should communicate openly, civilly and without rancor, endeavoring to keep the proceedings on a professional level.

SECTION 21 COURT PROCEEDINGS

Judges are encouraged to become familiar with these Guidelines and to support and promote them where appropriate in court proceedings.

California Attorney Guidelines of Civility and Professionalism

(Abbreviated Without Examples)



**The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639**

**Adopted by the Board of Governors on
July 20, 2007**

California Attorney Guidelines of Civility and Professionalism
(Abbreviated, adopted July 20, 2007)

INTRODUCTION. As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.

These are guidelines for civility. The Guidelines are offered because civility in the practice of law promotes both the effectiveness and the enjoyment of the practice and economical client representation. The legal profession must strive for the highest standards of attorney behavior to elevate and enhance our service to justice. Uncivil or unprofessional conduct not only disservices the individual involved, it demeans the profession as a whole and our system of justice.

These voluntary Guidelines foster a level of civility and professionalism that exceed the minimum requirements of the mandated Rules of Professional Conduct as the best practices of civility in the practice of law in California. The Guidelines are not intended to supplant these or any other rules or laws that govern attorney conduct. Since the Guidelines are not mandatory rules of professional conduct, nor rules of practice, nor standards of care, they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence.

The Guidelines are intended to complement codes of professionalism adopted by bar associations in California. Individual attorneys are encouraged to make these guidelines their personal standards by taking the pledge that appears at the end. The Guidelines can be applicable to all lawyers regardless of practice area. Attorneys are encouraged to comply with both the spirit and letter of these guidelines, recognizing that complying with these guidelines does not in any way denigrate the attorney's duty of zealous representation.

SECTION 1. The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilized nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice.

SECTION 2. An attorney should be mindful that, as individual circumstances permit, the goals of the profession include improving the administration of justice and contributing time to persons and organizations that cannot afford legal assistance.

An attorney should encourage new members of the bar to adopt these guidelines of civility and professionalism and mentor them in applying the guidelines.

SECTION 3. An attorney should treat clients with courtesy and respect, and represent them in a civil and professional manner. An attorney should advise current and potential clients that it is not acceptable for an attorney to engage in abusive behavior or other conduct unbecoming a member of the bar and an officer of the court.

As an officer of the court, an attorney should not allow clients to prevail upon the attorney to engage in uncivil behavior.

An attorney should not compromise the guidelines of civility and professionalism to achieve an advantage.

SECTION 4. An attorney's communications about the legal system should at all times reflect civility, professional integrity, personal dignity, and respect for the legal system. An attorney should not engage in conduct that is unbecoming a member of the Bar and an officer of the court.

Nothing above shall be construed as discouraging the reporting of conduct that fails to comply with the Rules of Professional Conduct.

SECTION 5. An attorney should be punctual in appearing at trials, hearings, meetings, depositions and other scheduled appearances.

SECTION 6. An attorney should advise clients that civility and courtesy in scheduling meetings, hearings and discovery are expected as professional conduct.

In considering requests for an extension of time, an attorney should consider the client's interests and need to promptly resolve matters, the schedules and willingness of others to grant reciprocal extensions, the time needed for a task, and other relevant factors.

Consistent with existing law and court orders, an attorney should agree to reasonable requests for extensions of time that are not adverse to a client's interests.

SECTION 7. The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

SECTION 8. Written materials directed to counsel, third parties or a court should be factual and concise and focused on the issue to be decided.

SECTION 9. Attorneys are encouraged to meet and confer early in order to explore voluntary disclosure, which includes identification of issues, identification of persons with knowledge of such issues, and exchange of documents.

Attorneys are encouraged to propound and respond to formal discovery in a manner designed to fully implement the purposes of the California Discovery Act.

An attorney should not use discovery to harass an opposing counsel, parties or witnesses. An attorney should not use discovery to delay the resolution of a dispute.

SECTION 10. An attorney should consider whether, before filing or pursuing a motion, to contact opposing counsel to attempt to informally resolve or limit the dispute.

SECTION 11. It is important to promote high regard for the profession and the legal system among those who are neither attorneys nor litigants. An attorney's conduct in dealings with nonparty witnesses should exhibit the highest standards of civility.

SECTION 12. In a social setting or otherwise, an attorney should not communicate ex parte with a judicial officer on the substance of a case pending before the court, unless permitted by law.

SECTION 13. An attorney should raise and explore with the client and, if the client consents, with opposing counsel, the possibility of settlement and alternative dispute resolution in every case as soon possible and, when appropriate, during the course of litigation.

SECTION 14. To promote a positive image of the profession, an attorney should always act respectfully and with dignity in court and assist the court in proper handling of a case.

SECTION 15. An attorney should not take the default of an opposing party known to be represented by counsel without giving the party advance warning.

SECTION 16. An attorney should avoid even the appearance of bias by notifying opposing counsel or an unrepresented opposing party of any close, personal relationships between the attorney and a judicial officer, arbitrator, mediator or court-appointed expert and allowing a reasonable opportunity to object.

SECTION 17. An attorney should respect the privacy rights of parties and non-parties.

SECTION 18. An attorney should negotiate and conclude written agreements in a cooperative manner and with informed authority of the client.

In addition to other applicable Sections of these Guidelines, attorneys engaged in a transactional practice have unique responsibilities because much of the practice is conducted without judicial supervision.

SECTION 19. In addition to other applicable Sections of these Guidelines, in family law proceedings an attorney should seek to reduce emotional tension and trauma and encourage the parties and attorneys to interact in a cooperative atmosphere, and keep the best interests of the children in mind.

SECTION 20. In addition to other applicable Sections of these Guidelines, criminal law practitioners have unique responsibilities. Prosecutors are charged with seeking justice, while defenders must zealously represent their clients even in the face of seemingly overwhelming evidence of guilt. In practicing criminal law, an attorney should appreciate these roles.

SECTION 21. Judges are encouraged to become familiar with these Guidelines and to support and promote them where appropriate in court proceedings.

ATTORNEY'S PLEDGE. I commit to these Guidelines of Civility and Professionalism and will be guided by a sense of integrity, cooperation and fair play.

I will abstain from rude, disruptive, disrespectful, and abusive behavior, and will act with dignity, decency, courtesy, and candor with opposing counsel, the courts and the public.

As part of my responsibility for the fair administration of justice, I will inform my clients of this commitment and, in an effort to help promote the responsible practice of law, I will encourage other attorneys to observe these Guidelines.