



CANADIAN CODE OF CONDUCT FOR
TRIAL LAWYERS INVOLVED IN CIVIL ACTIONS
INVOLVING UNREPRESENTED LITIGANTS

Approved by the Board of Regents
May 2009

AMERICAN COLLEGE OF TRIAL LAWYERS

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.



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CANADIAN CODE OF CONDUCT FOR TRIAL LAWYERS INVOLVED IN CIVIL ACTIONS INVOLVING UNREPRESENTED LITIGANTS

These Guidelines are directed to trial lawyers and the proper conduct of trial lawyers in the civil justice process involving unrepresented litigants. While they necessarily refer to the conduct of the Court or unrepresented litigants they do so only for the purpose of placing the trial lawyer's conduct in context. These guidelines are designed and intended to complement local rules of procedure, local rules of professional conduct and ethics, rules of evidence, and substantive law, all of which may help guide a trial lawyer at a trial involving an unrepresented litigant. The term "unrepresented litigant" as we have used it in this Code is intended to include litigants who are self-represented by choice or by necessity. In the United States, such parties are often referred to as "pro se litigants" or "litigants in pro per." These Guidelines are intended to be complementary to the Statement of Principles on Self-Represented Litigants and Accused Persons of the Canadian Judicial Council.

1. Duty to the Court

(a) Trial Lawyers and Litigants, regardless whether represented by counsel, have a duty to the court to act with honesty, civility and with reasonable dispatch and not to prosecute or defend frivolous claims. This duty is the foundation of the relationship between the trial lawyer and the unrepresented litigant.

(b) The unrepresented litigant has the same duty to the court; the duty is no different than that of the trial lawyer or represented client. However, this duty may be more difficult for the unrepresented litigant to recognize than the lawyer due to lack of training or experience.

2. The Right to Represent Oneself

(a) Subject to any applicable statutory requirements, such as capacity and non-insolvency, a natural person litigant has a right to represent himself or herself in a proceeding regardless whether he or she can afford legal counsel.

(b) A trial lawyer should be respectful of an unrepresented litigant and must not criticize an unrepresented litigant for the reason that he or she is unrepresented.

(c) It is appropriate for a trial lawyer to say to an unrepresented litigant that he or she may wish to retain independent counsel.

3. Rules of Civil Procedure Apply

(a) The trial lawyer is entitled to proceed on the basis that an unrepresented litigant is subject to the rules of procedure governing conduct in that jurisdiction and forum. It is appropriate for trial counsel to seek directions from the Court with respect to compliance by the unrepresented litigant with such rules.

(b) If an unrepresented litigant is granted an exception from or leniency in the application of the rules of procedure, the litigant represented by a trial lawyer may seek an equivalent exception or leniency to ensure that fairness is achieved.

(c) A trial lawyer seeking an exception from the rules of procedure should avoid leaving any impression with the court that the procedural request or anomaly is neutral to the parties' rights or interests if it is not. For example, a trial lawyer may have an obligation to the Court to tell or advise to the court, in the presence of the unrepresented litigant, the implications of the lawyer calling witnesses out of order or of requesting to recall a witness.

4. Rules of Professional Conduct and Ethics Apply to the Trial Lawyer but not to the Unrepresented Litigant

(a) Local rules of professional conduct and ethics apply to govern a trial lawyer's conduct at a trial involving an unrepresented litigant, even though the rules do not govern the conduct of the unrepresented litigant.

(b) The trial lawyer should be mindful of the consequences of the non-application of these rules to the unrepresented litigant for the conduct of the proceeding. For example, an unrepresented litigant cannot give a lawyer's undertaking, and it may be difficult to hold him or her to any undertaking. Furthermore, because an unrepresented litigant is neither an officer of the court nor bound by professional confidentiality rules, safeguards may be required to protect against the outside use of disclosure materials.

(c) As an officer of the court, a trial lawyer is under a duty of candour, fairness, courtesy and respect to the court whether the opposing party is represented or not. That duty to the court requires that the trial lawyer facilitate a fair and impartial process for all parties, represented and unrepresented.

(d) The trial lawyer's duty to present unfavourable authority on an issue when it applies may be of particular importance when the opposing party is an unrepresented party. The trial lawyer may also assist the court in drawing attention to legislative provisions of which the court should be made aware and the unrepresented litigant may be unaware.

(e) In light of duties owed to the client, a trial lawyer is entitled to raise every argument he or she believes may advance the client's case, and is not required to assist or extend indulgences to an unrepresented litigant if by doing so it would compromise the rights and interests of the trial lawyer's client.

(f) A trial lawyer should decline any request by the bench or anyone else involved in the action that could put the trial lawyer in a conflict of interest with his or her client by favouring or assisting the unrepresented party.

5. Application of Law and Treatment of Evidence

(a) As an officer of the court, the trial lawyer may have to assist the court in the application of the law, including the law of evidence. Therefore, during an action involving an unrepresented litigant, the trial lawyer may have to alert the court about legal and evidentiary issues that might normally be brought to the court's attention by opposing counsel.

(b) While trial lawyers have a duty to ensure the court is not left with an erroneous or misleading view of the law or evidence, this duty does not otherwise require a trial lawyer to volunteer other facts, information or evidence favourable to the unrepresented litigant.

(c) A trial lawyer has no obligation to rescue an unrepresented litigant, and has no obligation to intervene if an unrepresented litigant is presenting information that is not helpful to his or her case.

(d) A trial lawyer should draw the court's attention to purported evidence that is irrelevant to the scope of pleadings.

6. Objections to Evidence

(a) A trial lawyer is entitled to make the same objections to evidence at trial as he or she would if dealing with another trial lawyer, keeping in mind the possibility of an appeal. In the conduct of either direct or cross-examination, a trial lawyer is under no obligation to sacrifice a client's legitimate rights and interests due to the participation of an unrepresented litigant.

(b) A trial lawyer may wish to limit his or her interventions during the unrepresented litigant's cross-examination of the trial lawyer's client, but a trial lawyer is entitled to object to irrelevant, harassing, intimidating or repetitive questions or statements.

7. Advising the Unrepresented Litigant

(a) A trial lawyer should never advise an unrepresented litigant and, within reason, a trial lawyer should generally refrain from giving information or explanations to an unrepresented litigant. Instead, the trial lawyer should refer the unrepresented litigant to court staff or appropriate legal resources, or tell the unrepresented litigant to raise the issue with the judge.

(b) While there is no prohibition on a trial lawyer providing information to the unrepresented litigant when it would assist the efficient and fair trial process, a trial lawyer is not obliged to do so unless directed by the judge or otherwise required by the Rules of Practice and Procedure.

8. Submissions and Evidence from the Unrepresented Litigant

(a) An unrepresented litigant may make submissions from the counsel table.

(b) As with any other witness, an unrepresented litigant may only give evidence under oath or affirmation. A trial lawyer should be alert to ensure that an unrepresented litigant does not give evidence from the counsel table without oath or affirmation, and should seek a ruling if necessary.

9. No Imposition of Undue Disadvantage on the Unrepresented Litigant

(a) A trial lawyer must not attempt to derive benefit for his or her client at trial with an unrepresented litigant from the fact that the litigant is unrepresented, and a trial lawyer should avoid imposing unnecessary disadvantage, hardship, or confusion on the unrepresented litigant.

(b) A trial lawyer should be aware of his or her duty to the court in considering reasonable requests for adjournments or waivers of procedural formalities when there is no real prejudice to the rights or interests of the client.

(c) A trial lawyer has an obligation not to set traps which could not be reasonably anticipated by an unrepresented litigant and which would have the effect of eliminating or diminishing the unrepresented litigant's rights. There is no obligation, however, to provide an unrepresented litigant with additional indulgences over those that would be given to a represented party.

(d) A trial lawyer is entitled to raise proper and legitimate technical and procedural objections but should not take advantage of technical deficiencies in the pleadings, procedural steps, or presentation of the case against an unrepresented party that do not go to the merits of the case or the legitimate rights and interests of the client.

10. Communication with the Client

(a) A trial lawyer should prepare his or her client for the challenges of conducting a trial against an unrepresented litigant and explain the duty of the trial lawyer to the court in this setting.

(b) A trial lawyer should discuss with his or her client the personal and emotional challenges that may be involved in dealing with the unrepresented litigant at trial and should discuss the legitimate expectations of the client regarding the level of intervention the trial lawyer is able to, and believes he or she should, provide. The need to discuss expected questions and reactions in the courtroom is heightened when the client and the unrepresented litigant are personal adversaries or when emotions and personalities are a factor in the dispute.

11. Communication with the Unrepresented Litigant

(a) A trial lawyer at trial with an unrepresented litigant should avoid leaving any impression that the trial lawyer is non-partisan, and should clearly communicate to the unrepresented litigant that the trial lawyer has a responsibility as the advocate for the client.

(b) During proceedings in open court, a trial lawyer should seek to avoid direct communication with the unrepresented litigant and should direct all comments and answers through the judge.

(c) A trial lawyer must communicate unambiguously with an unrepresented litigant. When dealing with an unrepresented litigant, a trial lawyer should make an effort to avoid using legal terminology in all written and oral communications and in the courtroom. When possible to capture legal concepts and requirements in everyday language a trial lawyer should do so.

(d) A trial lawyer should draw the court's attention to the apparent need of the unrepresented litigant for translation services if there are language issues or the unrepresented litigant clearly does not understand the communication, and a trial lawyer should alert the court about an unrepresented litigant's need for access to any devices or machines required to review different mediums or formats of communications.

(e) A trial lawyer should not insist or seek to persuade an unrepresented litigant to use or adopt legal terminology.

(f) A trial lawyer should avoid discussion alone with the unrepresented litigant in person. The unrepresented litigant should be advised by the trial lawyer in open court that the trial lawyer will report conversations to the trial judge where material information has been sought or provided to the unrepresented litigant by the trial lawyer, so that there will be no doubt about any material conversations between the parties.

(g) A trial lawyer should strive to put all material communications to the unrepresented litigant in writing or to record them in writing and request that everything communicated to the lawyer by the unrepresented litigant be in writing, in order to protect against complaints and avoid allegations of induced error.

(h) A trial lawyer should provide fair warning and be clear in explaining timelines to an unrepresented litigant.

(i) A trial lawyer should confirm in writing any undertakings given to the unrepresented litigant, or any oral understandings, trust agreements or conditions reached with the unrepresented litigant. Depending on the experience and sophistication of the unrepresented litigant, the trial lawyer may use this opportunity to communicate the consequences of non-action or non-response.

(j) A trial lawyer should send an unrepresented litigant a copy of any orders made to facilitate compliance. Before bringing any non-compliance or contempt motions a trial lawyer should notify the unrepresented litigant in writing of all alleged outstanding orders or undertakings (including those by former counsel) as well as the consequences and cost implications of non-compliance.

12. Communication with the Bench

(a) A trial lawyer retained in an action in which the opposing party is unrepresented should communicate with the judge with formality.

(b) If there are unrepresented parties, a trial lawyer should not engage in *ex parte* communications, whether formal or informal, with the judge unless such communications are otherwise permissible under the trial lawyer's Code of Professional Conduct or his or her duty to the court.

(c) The trial lawyer should advise the court of all material communications, and all agreements reached, with the unrepresented litigant.

(d) A trial lawyer should not purport to characterize the nature of an unrepresented litigant's case. A trial lawyer as an advocate is under no duty to explain the other party's case, and thus a trial lawyer's response to any such request from a judge should be dictated by that lawyer's professional judgment in the circumstances. The trial lawyer's comments about these sorts of matters in his or her opening statement should be brief.

13. Awareness of the Obligations of the Court

(a) A trial lawyer should be up to date on the growing body of law regarding what assistance from the bench is required, permissible, and impermissible in the presence of an unrepresented litigant at trial.

(b) A trial lawyer should appreciate that judges have a discretionary obligation to provide appropriate information and assistance to an unrepresented litigant.

(c) A trial lawyer should be aware that in some cases the judge may have a heightened responsibility to ensure substantive legal tests or conditions are met. For example, in custody cases more dialogue may be required with an unrepresented litigant or witness to determine the best interests of the child. This may include recalling expert witnesses, and a trial lawyer should be prepared to accommodate this approach if the judge deems it appropriate.

14. Caution Regarding Settlements or Plea Bargains

(a) A trial lawyer should properly document settlement negotiations and terms with the unrepresented litigant. At a minimum, detailed notes should be made.

(b) At a formal or informal settlement negotiation a trial lawyer should if possible have a neutral witness present.

(c) If the matter settles after the trial has begun, the trial lawyer should request the judge to enter the terms of the settlement on the record in the presence of the unrepresented litigant and ensure that the unrepresented litigant understands and agrees to the terms on the record.

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