

# CIVILITY AND ETHICS

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## I. What is Civility?

- A. Self-discipline produced by thought and practice that enable one to live in a community without offending others or violating established norms of behavior. New York Legal Ethics Reporter, Judge John L. Kane, Jr., *Civility & Professional Ethics – Part 1&2* <http://www.newyorklegalethics.com/civility-professional-ethics-part-1/> (last visited: May 12, 2016)
- B. Polite, reasonable, and respectful behavior. Merriam-Webster Dictionary <http://www.merriam-webster.com/dictionary/civility> (last visited: May 12, 2016)

## II. Rules of Professional Conduct

- A. 22 NYCRR § 1200
- B. Examples of Rules Pertaining to Civility
  1. Rule 3.3(f)(2) – In appearing as a lawyer before a tribunal, a lawyer shall not engage in undignified or discourteous conduct.
  2. Rule 3.3(f)(4) – In appearing as a lawyer before a tribunal, a lawyer shall not engage in conduct intended to disrupt the tribunal.
  3. Rule 3.4(d)(4) – A lawyer shall not ask any question that the lawyer has no reasonable basis to believe is relevant to the case and is intended to degrade a witness or other person.

4. Rule 4.4(a) – In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.
  5. Rule 5.3(a) – A law firm shall ensure that work of nonlawyers who work for the firm is adequately supervised, as appropriate...
  6. Rule 8.2 – A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.
  7. Rule 8.4(d) – A lawyer or law firm shall not engage in conduct that is prejudicial to the administration of justice.
- C. Sanctions for violating rules can include private reprimand, public censure, suspension, disbarment

### **III. The Standards for Civility**

- A. 22 NYCRR Part 1200, Appendix A
1. Preamble: As lawyers, judges and court employees, we are all essential participants in the judicial process. That process cannot work effectively to serve the public unless we first treat each other with courtesy, respect and civility.
  2. Aspirational in nature and not rules to be enforced by sanction or disciplinary action
  3. Avoid antagonistic or acrimonious behavior, including vulgar language or disparaging personal remarks
  4. Supervising employees to ensure they conduct themselves with courtesy and civility
  5. Avoid unnecessary motion practice through negotiation and agreement when practicable
  6. Respect the schedule and commitments of opposing counsel
  7. Allow sufficient time to resolve disputes by communicating with adversary's counsel

8. Avoid use of any aspect of litigation process as means of harassment or as vehicle to unnecessarily prolong the length or costs of litigation
9. Refrain from engaging in acts of rudeness and disrespect in depositions
10. Avoid disorder and disruption in the courtroom and maintain a respectful attitude toward the court
11. Treat court personnel with courtesy

#### IV. 22 NYCRR § 130-1.1 – Costs and Sanctions

(a) **The court, in its discretion, may award to any party or attorney in any civil action** or proceeding before the court, except where prohibited by law, **costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct** as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. This Part shall not apply to town or village courts, to proceedings in a small claims part of any court, or to proceedings in the Family Court commenced under article 3, 7 or 8 of the Family Court Act.

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either **an attorney or a party to the litigation or against both**. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party.

(d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case. [Emphasis added]

## **V. Appellate Courts Have Own Rules for Civility**

### **A. Appellate Division, First Department**

1. 22 NYCRR § 604.1(b) - Importance of decorum in court. The courtroom, as the place where justice is dispensed, must at all times satisfy the appearance as well as the reality of fairness and equal treatment. Dignity, order and decorum are indispensable to the proper administration of justice. Disruptive conduct by any person while the court is in session is forbidden.
2. 22 NYCRR § 604.1(c) - Disruptive conduct defined. Disruptive conduct is any intentional conduct by any person in the courtroom that substantially interferes with the dignity, order and decorum of judicial proceedings.
3. 22 NYCRR § 604.1(d) - The attorney is both an officer of the court and an advocate. It is his professional obligation to conduct his case courageously, vigorously, and with all the skill and knowledge he possesses. It is also his obligation to uphold the honor and maintain the dignity of the profession. He must avoid disorder or disruption in the courtroom, and he must maintain a respectful attitude toward the court. In all respects the attorney is bound, in court and out, by the provisions of the Rules of Professional Conduct (Part 1200 of this Title).

B. Appellate Division, Second Department

1. 22 NYCRR § 700.2 - The courtroom, as the place where justice is dispensed, must at all times satisfy the appearance as well as the reality of fairness and equal treatment. Dignity, order and decorum are indispensable to the proper administration of justice. Disruptive conduct by any person while the court is in session is forbidden.
2. 22 NYCRR § 700.3 - Disruptive conduct is any intentional conduct by any person in the courtroom that substantially interferes with the dignity, order and decorum of judicial proceedings.
3. 22 NYCRR § 700.4(a) - Attorneys are both officers of the court and advocates. It is their professional obligation to conduct each case courageously, vigorously, and with all the skill and knowledge they possess. It is also their obligation to uphold the honor and maintain the dignity of the profession. They must avoid disorder or disruption in the courtroom and must maintain a respectful attitude toward the court. In all respects attorneys are bound, in court and out, by the provisions of the Rules of Professional Conduct.

**VI. Case Examples**

A. Court conferences / Hearings

1. Zappin v. Comfort, 26 N.Y.S.3d 217 (S. Ct. N.Y. County 2015) – Attorney representing himself *pro se* in case involving custody and visitation: accused Judge of lying on the record during the case; engaged in pattern of delay by discontinuing case during trial then reinstating it; moving to disqualify expert, but then withdrawing motion and reporting expert to OPMC; sent taunting e-mails to opposing counsel; etc. Attorney sanctioned \$10,000 pursuant to 22 NYCRR § 130-1.3.
  - “There does not exist one set of standards for an attorney representing others and another set of standards for an attorney representing him or herself; in both instances an attorney must adhere to the same ethical prescriptions that guide the legal profession.”

2. In re Delio, 290 A.D.2d 61 (1<sup>st</sup> Dep't 2001) – Attorney said to Judge, “You’re so pompous on the bench. It’s ridiculous. You should remember what your jobs are ... I don’t have to respect you ...” After case dismissed, attorney moved to restore and wrote in papers “... the Court defends these rules with pomposity and arrogance rather than logic or substantive meaning ... irrational behavior is not justice or jurisprudence. The Court, when it suits it political temperament is quick to create standards that are unsupported in the law and are thereafter defended ...” Attorney was publicly censured.
3. In re Dinhofer, 257 A.D.2d 326 (1<sup>st</sup> Dep't 1999) – Attorney made following statements during telephone conference with Judge: “This is rampant corruption. I don’t know what else to say. This is a sham... This is blatantly corrupt. You are sticking it to me every way you can... I’m not rude to them [a reference to Court’s staff], I’m rude to you, because I think you deserve it. You are corrupt and you stink. That’s my honest opinion and I will tell it to your face.” Attorney was publicly censured and required to withdraw as counsel.
4. In re Teague, 131 A.D.3d 268 (1<sup>st</sup> Dep't 2015) – Attorney made patently offensive racial, ethnic, homophobic, sexist and other derogatory remarks to attorneys, and insulted an administrative law judge in Traffic Violations Bureau. Attorney was suspended for three months and ordered to continue anger management treatment for one year monitored by NYC Bar Associations’ Lawyer Assistance Program.
5. In re Sondel, 111 A.D.3d 168 (1<sup>st</sup> Dep't 2013) – Attorney engaged in contemptuous or otherwise obnoxious behavior at an immigration asylum hearing in California. First Department upheld six month suspension.

B. Depositions

1. In re Schiff, 190 A.D.2d 293 (1<sup>st</sup> Dep't 1993) – Plaintiff’s attorney made vulgar, obscene and sexist epithets toward defense counsel’s anatomy and gender. Monetary sanctions imposed upon plaintiff’s attorney and he was fired from his job and publicly censured.
2. Corsini v. U-Haul Int’l, 212 A.D.2d 288, 630 N.Y.S.2d 45 (1<sup>st</sup> Dep't 1995) – During deposition, *pro se* plaintiff, who was licensed attorney, said to defense attorney that “you practice at the lowest level of the profession and, unfortunately that is not even professional. Where that is, is in the sewer, in the basement... You are so scummy and so slimy and such a perversion of ethics or decency because you’re such a scared little man...” During hearing on motion, plaintiff said to judge “Don’t roll your eyes.

You didn't then. I'm saying don't do it, and the reason is I am going to establish to you that this man is a disgrace to the profession, and I called him exactly what he was." Appellate Court dismissed plaintiff's complaint as sanction.

C. Motions / Papers

1. In re Kavanagh, 189 A.D.2d 521 (1<sup>st</sup> Dep't 1993) – Attorney made allegations in motion papers that opposing counsel, who represented a construction company, had ties to organized crime. Attorney also wrote at top of an affidavit "Hi Joe – What do you hear from the 'mob'? Chiao! T. Kavanagh."

D. Trials

1. In re Holtzman, 78 N.Y.2d 184 (1991) – District Attorney of Kings County publicly disseminated a letter to media that stated the following:

Judge Levine asked the Assistant District Attorney, defense counsel, defendant, court officer and court reporter to join him in the robing room, where the judge then asked the victim to get down on the floor and show the position she was in when she was being sexually assaulted... The victim reluctantly got down on her hands and knees as everyone stood and watched. In making the victim assume the position she was forced to take when she was sexually assaulted, Judge Levine profoundly degraded, humiliated and demeaned her.

Court of Appeals found a violation that attorney had engaged in conduct that adversely reflected on her fitness to practice law in releasing a false accusation of misconduct against Judge.

2. In re Herman, 37 A.D.2d 315 (2<sup>nd</sup> Dep't 1971) – During two trials before two judges, attorney engaged in disorderly, contemptuous and insolent conduct in the view and presence of jury. Attorney was censured.
3. In re Mangiatordi, 123 A.D.2d 19 (1<sup>st</sup> Dep't 1987) – Public censure for attorney who engaged in contumacious courtroom behavior during the trial of a negligence action in Supreme Court, Queens County.

E. Other Communications

1. In re Golub, 190 A.D.2d 110 (1<sup>st</sup> Dep't 1993) – Attorney made reckless statements to press concerning Judge that were unprofessional, undignified, discourteous and degrading during an immediate outburst to the press after the Court decided against his client in a highly publicized case. Attorney was publicly censured.
2. In re McDonald, 241 A.D.2d 255 (2<sup>nd</sup> Dep't 1998) – Attorney left five recorded messages on answering machine of a representative of Oneida Indian Nation containing vulgar and threatening language. Attorney was publicly censured.

F. Monetary Sanctions for Abusive Conduct

1. Principe v. Assay Partners, 586 N.Y.S.2d 182 (S. Ct. N.Y. County 1992) – Attorney called opposing counsel “little girl” to demean lawyer, in addition to other conduct, and monetary sanction of \$1,000 was imposed.