

**ROBERT H. CLELAND
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**GUIDELINES FOR
COURTROOM CONDUCT OF TRIAL COUNSEL**

1. CIVILITY AND PROFESSIONALISM

- a) Counsel are expected at all times to be punctual and to conduct themselves with courtesy and professionalism, consistent with the Civility Rules adopted by the Eastern District of Michigan.
- b) Please rise and remain standing when addressing the court. This includes stating appearances, and making and responding to objections. Not only is it a matter of courtesy, but your voice is also much easier to hear when you stand.

2. FORMALITY

- a) Please rise when the jury is ushered in or out of court.
- b) All parties, witnesses, counsel, etc. should be addressed and referred to by title and last name (*Mrs.* Smith, *Mr.* Jones, etc.). Avoid using first names or nicknames unless reasonably required by trial circumstances (e.g. a witness knows only the first name or nickname of a party and can refer to him only on that basis). Repeated or wilful failure to adhere to this standard after being cautioned may result in significant embarrassment to counsel in the presence of the jury.
- c) Counsel and all others at the counsel table will remain seated at the counsel table during the course of the trial or hearing. Moving from the counsel table is permitted for the purpose of obtaining documents or exhibits, as long as it is not disruptive of the proceedings. However, neither counsel nor others at the counsel table may leave the courtroom while a trial or hearing is in session without the specific permission of the court.
- d) Counsel (and all others at counsel table) should avoid gestures, facial expressions, audible comments and the like as manifestations of approval, disapproval, or any other point of view in reaction to events in the courtroom, the argument of opposing counsel or testimony being adduced. Counsel are free to express verbally the necessary points of view when their turn comes.

3. **COURTROOM ATTIRE FOR ATTORNEYS** Counsel are expected to attend sessions of court in business attire. Generally, for men this will mean a suit, a business shirt and a tie cinched up to the neck. Although the court does not prohibit sport coats and slacks, counsel should be aware that jurors have commented negatively on some attorneys' informality and apparent "lack of respect" for the court in such apparel. Shirts that are obviously casual, and ties that are loosened significantly below the collar are not proper attire in court. Women traditionally have more flexibility in wearing apparel, however business attire would generally consist of a) a skirt, jacket and a reasonably businesslike blouse that is either buttoned or secured with a tie or scarf, or b) a dress or c) similar attire. The court does not prohibit tailored, business-oriented pants suits worn with a business blouse, but leisure wear, and blouses that are obviously casual (including any short-sleeve blouse worn without a jacket) are not good for court.
4. **STIPULATIONS** Please do not offer a stipulation within the hearing of the jury. Confer with opposing counsel quietly and decide if a stipulation is appropriate. Announce it only when agreed to (preferably--but not necessarily--in writing).
5. **EXHIBITS** Court time cannot be used for marking exhibits. Please attend to marking **in advance** of the court session, and when feasible please provide the court **in advance** copies of all such documentary exhibits.
6. **THE JURY**
 - a) Please maintain a respectful distance from the jury; avoid holding (indeed, even touching) the rail of the jury box; at no time invade the jury box.
 - b) When engaged in questioning a witness, please direct yourself to that witness. Do not face, gesture toward or otherwise dramatically play to the jury.
 - c) Do not use a juror's name, single out or otherwise directly address an individual juror in opening statement, trial presentation or closing argument.
8. **OPENING STATEMENT** There may be only a fine line separating factual presentations from "argument." Counsel should nonetheless endeavor to avoid argument in opening statement. Do not attempt to define the law; direct yourself to a concise summary of the important facts; avoid overly-detailed descriptions of what particular witnesses are expected to say. Except in unusually extended or complex cases, opening comments should be completed in 20 minutes.
9. **WITNESSES**

- a) **STAND AT THE LECTERN WHILE QUESTIONING** Please stand when questioning witnesses, and use the lectern (which you may move) and the microphone. You may leave the lectern for a particular purpose, such as retrieving or handling an exhibit, while questioning witnesses. If you wish to approach the witness or the bench, please seek consent of the court (eg. "permission to approach with an exhibit, Your Honor?"). As you position the lectern to suit your needs, please avoid blocking the view of opposing counsel.
- b) **EXHIBITS, DOCUMENTS, ETC.** To avoid delays, please have all documents with you before you start the examination of a witness concerning a group of documents. Whenever feasible, give the witness all exhibits before you begin questioning.
- c) **INSTRUCTIONS TO WITNESSES** The court has a prepared an "Instructions to Witness" sheet (attached) explaining a few mechanics of testimony in this courtroom. Please either provide a copy to the witnesses before each is to testify, or explain the substance of it. Please inform your witnesses as to general courtroom etiquette, and that they are expected to be on time for court sessions. When the examination of a witness is to be resumed after a recess or daily adjournment, that witness should be in court and at the witness box before court is called back in session. If a new witness is to be called at such a time, that witness should be in the courtroom.
- d) **WITNESS ATTIRE** Please inform witnesses that reasonably neat, clean attire is expected of them (as it is of jurors). In the event that your witness arrives wearing, for example, beach attire or a tee shirt with a political message on it, the witness may be excluded from the courtroom by court security. You may separately request the court's "Order on Courtroom Conduct of Spectators" for further information.
10. **FORM OF EXAMINATION; Fed.R.Evid. 611** Rule 611 is interpreted to limit examination to direct, cross examination on the same subject matter, and redirect concerning issues raised during cross. Specific permission supported by good cause is required to extend examination beyond these areas.
11. **LEADING QUESTIONS** The court encourages leading questions on direct for matters that are non-controversial (*i.e.*, those believed to be undisputed) and those there are merely introductory.
12. **COMMON PROBLEMS IN WITNESS EXAMINATION**

- **IMPEACHMENT WITH PRIOR, ALLEGEDLY INCONSISTENT STATEMENT**

There are frequent difficulties encountered in attempting to impeach a witness with a prior and allegedly inconsistent statement. Counsel very often begin by asking, "do you remember" testifying on an earlier occasion (e.g., a deposition). Assuming that the statement has been, or can be established by

a writing or transcript, it is irrelevant for these purposes whether or not the witness "remembers" testifying or making the statement. Delays in questioning are often experienced if a witness says "no;" the questioner is then off on a needless sidetrack trying to "refresh the witness's memory" about something only marginally relevant, i.e., the mere fact that the deposition took place. That an allegedly inconsistent statement was made is the substance of the intended impeachment. If the earlier statement has not been already established, it can be established through the witness's acknowledgment (e.g., "did you on that occasion make the following statement?" or, having the witness read along in the transcript while reciting the question and answer: "did I read the question and your answer correctly?").

- **MIXED NEGATIVE/AFFIRMATIVE**

Witnesses are too often asked whether they "agree" with a question phrased in the negative, and are forced by the question to give a confusing answer (e.g. "You did not see my client that day, am I right?" If the witness says "no," what is he saying: "no: I did see him" or, "no, you're right: I did not see him"? Similar confusion arises if the witness says "yes" (is he saying "yes, I did" or "yes, you're right"?).

- 13. OBJECTIONS** Please address all objections and case-related remarks to the court, not to opposing counsel. If you believe that a brief private conversation between counsel is needed while court is in session, please ask. When you object in the presence of the jury, the court expects that you will make your objection without unnecessary drama, to the point and clear as to the legal basis. When the court rules, do not argue the objection further in the hearing of the jury, and do not "thank" the court for ruling, whether it was favorable or adverse. Such matters as extended argument should be noted by counsel and may be raised at the first recess, or, if the issue is actually urgent, at sidebar. Repeated or wilful failure to adhere to this standard after being cautioned may result in significant embarrassment to counsel in the presence of the jury
- 14. SIDEBAR CONFERENCES** The court discourages extensive or frequent sidebar sessions with the jury in the box. Counsel should generally make a note of any objection or point of discussion and bring it up at the next break. Truly urgent matters will be taken up as needed on the record at sidebar. If there is a matter that requires the court's attention on the record before the session is to begin, please notify court staff as soon as you are aware of the need, and do not wait until the jury has been ushered into the courtroom.
- 15. FINAL ARGUMENT** Unless the case has been unusually extended or complex, arguments should be able to be delivered in about thirty minutes per side. You remain free in your argument to tie the facts to the law, or talk about principles you believe you have proved or responded to. However, please avoid reinterpreting or "explaining" the law to the jury.

INSTRUCTIONS TO WITNESS

1. Go directly to the court reporter's desk, to the right of the bench, next to the jury box. Give the reporter your name.
2. The reporter will then ask you to raise your right hand and the judge will have you swear to tell the truth.
3. If your religious beliefs do not allow you to "swear an oath," you must "affirm" that you will testify truthfully under the penalty of perjury. In this event, *you must notify the judge* by saying "Your Honor, I wish to affirm" after the reporter asks you to raise your hand.
4. After you are told to be seated, enter the witness box and sit down. The chair is bolted to the floor, but it will swivel and tilt back a little. Adjust the microphone to point about at your chin. Swing it out of the way for the next witness when you are leaving. Sit comfortably and speak in a normal voice.
5. You may use the bottled water near you if need a drink. Please use a disposable cup and put it in the waste basket in the witness box when you leave.