

## IN THE SUPREME COURT OF THE STATE OF MONTANA

No. \_\_\_\_\_  
\_\_\_\_\_

IN RE THE APPLICATION OF THE )  
 AMERICAN BOARD OF TRIAL )  
 ADVOCATES (ABOTA), MONTANA )  
 CHAPTER, SEEKING ADOPTION AND )  
 IMPLEMENTATION OF ABOTA'S )  
 "CIVILITY MATTERS" PROGRAMS, )  
 TO INCLUDE: )

(1) An ABOTA sponsored "CIVILITY )  
 REFEREE/MENTOR" Program to Provide )  
 for Civility Mentoring and Mediation )  
 Assistance to members of the Bar; )

(2) Adoption of the ABOTA )  
 "PRINCIPLES OF PROFESSIONALISM )  
 AND CIVILITY" as the Montana Standards )  
 of Professionalism and Civility; and )

(3) Amendment of the written and oral oaths )  
 of admission to the Bar of the State of )  
 Montana, requiring all applicants to swear, )  
*inter alia*, to "faithfully observe the )  
 Montana standards of professionalism and )  
 civility . . ."

APPLICATION INVOKING )  
 THE ORIGINAL )  
 JURISDICTION OF THIS )  
 COURT PURSUANT TO )  
 SECTION VI, INTERNAL )  
 OPERATING RULES, TO )  
 REGULATE THE BAR OF )  
 MONTANA )

COMES NOW the Petitioner and Applicant, Donald C. Robinson, Esq., Butte, Montana, on behalf of both himself and the Montana Chapter of the American Board of Trial Advocates (ABOTA), and files this application pursuant to Section VI of the Internal Operating Rules of this Court, for its adoption and implementation of the above-referenced programs to regulate Montana's lawyers, as follows:

1. Your Applicant is a member of the Bar of the State of Montana. He is also a member of the Montana Chapter of the American Board of Trial Advocates (ABOTA), a national organization of a peer-selected group of the nation's most experienced jury trial lawyers. Petitioner and Applicant is a member of the Montana Chapter of that organization, plus is the Montana delegate to the National Board of Directors of ABOTA. The Montana Chapter consists of 50 experienced jury trial lawyers whose identities and contact information appear on Appendix "A" attached hereto.

2. The primary purposes of ABOTA are to protect the 7th Amendment right to trial by jury in civil actions; and to promote professionalism and civility of attorneys and judges in the nation's legal system. ABOTA prides itself on being a collegial group of jury trial attorneys who represent both plaintiffs and defendants, who have no parochial self-interest other than to make the legal profession and the public aware of the increasing importance to enhance trial by jury, and to promote

civility and professionalism among attorneys. ABOTA has also created, and maintains, a non-profit Foundation that has as its fundamental purpose the education of school children and the general public about the 7th Amendment right to a jury trial in civil actions.

3. Applicant is a member of the national ABOTA Professionalism and Civility Committee (“Committee”). The Committee has as its members experienced trial attorneys from many different states. The Committee has adopted, *inter alia*, Principles of Civility, Integrity, and Professionalism, and a Code of Professionalism which are apropos for the guidance of the conduct of all attorneys throughout the United States. A copy of those Principles and Code are attached as Appendices “B-1” and “B-2” and by this reference incorporated herein.

4. Although this Court has adopted the Rules of Professional Responsibility to regulate attorneys, there are no existing “rules” or “guidelines” that govern civility and professionalism. *See, Rules of Professional Conduct, Preamble, Sec. 8 (“Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers” (emphasis added)).* The proposed ABOTA Principles of Civility, Integrity, and Professionalism memorialize guidelines that may likely assist individual lawyers in developing their “professional conscience.” Adoption

of these Principles may also likely articulate “the approbation of professional peers” by their fellow Montana lawyers.

5. The ABOTA Civility Committee has found that a troubling deficiency which can often be found in our legal system is the lack of civility and professionalism between lawyers, and between lawyers and the Courts. Incivility gives rise to corrosive working relationships between attorneys who necessarily work within an adversarial system in which the stakes and emotions can run high. This corrosiveness is found in many contexts within the practice of law, and is a troublesome and disturbing problem which has been encountered by most attorneys and judges within the nation’s legal system.

6. To address this ever-increasing problem, the ABOTA Committee has created a program, “**CIVILITY MATTERS**,” which consists of videos, presentation outlines, and other teaching materials, which its members present to law schools, bar organizations, and recently graduated attorneys, to increase their understanding and awareness that civility matters greatly. Demonstration of civility not only reduces day-to-day strife between adversarial attorneys, it produces positive, demonstrable results for attorneys who choose to act in a professional and civil manner in their dealings within the legal and judicial system. A number of distinguished lawyers and judges across the United States have contributed to, and endorsed, the “**CIVILITY MATTERS**” program.

7. The “**CIVILITY MATTERS**” program which has been developed by ABOTA seeks the following action of this Court:

(a) Adoption of the ABOTA **PRINCIPLES OF CIVILITY, INTEGRITY, AND PROFESSIONALISM** as the Montana Standards of Civility and Professionalism, which can both serve to appropriately articulate the “personal conscience” of individual Montana lawyers, and also express the “approbation of (their) professional peers” as to how they should govern their conduct.

(b) Amendment of the written and oral oaths of admission to the Bar of the State of Montana, requiring all applicants to swear, *inter alia*, to “**faithfully observe the Montana standards of professionalism and civility.**” Inclusion of this obligation by all attorneys will affirm that the legal profession and the judiciary have elevated standards of professionalism and civility to a fundamental course of conduct that should serve as their “personal conscience” of individual attorneys. Current versions of the oral and written oaths of admission to the Bar of the State of Montana are attached hereto as Appendices “C-1” and “C-2.”

(c) Adoption of a **CIVILITY REFEREE/MENTOR** program sponsored by the Montana Chapter of ABOTA. This program will be a voluntary, self-executing program which will, upon request, provide civility mentoring and mediation assistance by Montana ABOTA members. These experienced attorneys will assist, at the request of any attorney or judge, in refereeing disputes among

attorneys or mediating problems that do not rise to the level of disciplinary, actionable or sanctionable conduct, but nevertheless are interfering with, or making more difficult, the day-to-day relationships of members of the bar and the courts of Montana, or interfering with the effective representation of clients. The details of this program are set out in the Proposed “Civility and Professionalism Referee, Mentor and Mediator Program” attached as Appendix “D” hereto.

8. The afore-mentioned programs will all contribute to the betterment of the Montana bar, and will provide positive alternatives to uncivil and unprofessional conduct that demeans the legal profession, and will provide assistance to attorneys who may encounter incivility and unprofessional conduct that is directed at them by other attorneys.

9. The adoption and implementation of ABOTA’s CIVILITY MATTERS programs by this Court will highlight the need for improving and maintaining a high level of professionalism and civility by both the bar and the judiciary, and will also provide effective tools and mechanisms for improving and enhancing civil and professional relationships and conduct. As a natural consequence of their adoption and implementation, all law graduates, law students, and new admitees of the State Bar of Montana will necessarily be educated and trained on the importance of civility and professionalism, and be taught that “Civility Matters.” As to current members of the State Bar, the adoption and

implementation of these programs will not only reinforce the importance of this aspect of their professional lives, but will also provide a meaningful mechanism to assist them--and their clients--in resolving civility disputes which may arise in their day-to-day activities.

RESPECTFULLY SUBMITTED this 1st day of July, 2010.

AMERICAN BOARD OF TRIAL  
ADVOCATES, Montana Chapter

By Donald C. Robinson  
Donald C. Robinson  
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## APPENDIX “A”

Members of Montana Chapter,  
American Board of Trial  
Advocates (ABOTA)



# 2010 National Membership Roster

*e-version*



American Board of Trial Advocates

*"The sacred privilege  
of trial by jury is the  
unadulterated voice  
of the people which  
should be heard in  
the sanctuaries of  
justice as fountains  
springing fresh  
from the lap*

*of the people  
Henry Hallam*

## Montana Chapter (Chartered 1989)

President: **Randy J. Cox**  
 President Elect: **Joe Bottomly**  
 Secretary: **David M. McLean**  
 Treasurer: **David M. McLean**

National Board Reps: **Robert J. Phillips**  
**Donald C. Robinson**

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## APPENDIX “B-1”

### ABOTA Principles of Civility, Integrity and Professionalism



American Board of Trial Advocates

**PRINCIPLES OF CIVILITY,  
INTEGRITY,  
AND PROFESSIONALISM**

## Preamble

These Principles supplement the precepts set forth in ABOTA's Code of Professionalism and are a guide to the proper conduct of litigation. Civility, integrity, and professionalism are the hallmarks of our learned calling, dedicated to the administration of justice for all. Counsel adhering to these principles will further the truth-seeking process so that disputes will be resolved in a just, dignified, courteous, and efficient manner.

These principles are not intended to inhibit vigorous advocacy or detract from an attorney's duty to represent a client's cause with faithful dedication to the best of counsel's ability. Rather, they are intended to discourage conduct that demeans, hampers, or obstructs our system of justice.

These Principles apply to attorneys and judges, who have mutual obligations to one another to enhance and preserve the dignity and integrity of our system of justice. As lawyers must practice these Principles when appearing in court, it is not presumptuous of them to expect judges to observe them in kind. The Principles as to the conduct of judges set forth herein are derived from judiciary codes and standards.

These Principles are not intended to be a basis for imposing sanctions, penalties, or liability, nor can they supersede or detract from the professional, ethical, or disciplinary codes of conduct adopted by regulatory boards.



*As a member of the American Board of Trial Advocates, I will adhere to the following Principles:*

1. Advance the legitimate interests of my clients, without reflecting any ill will they may have for their adversaries, even if called on to do so, and treat all other counsel, parties, and witnesses in a courteous manner.
2. Never encourage or knowingly authorize a person under my direction or supervision to engage in conduct proscribed by these principles.
3. Never, without good cause, attribute to other counsel bad motives or improprieties.
4. Never seek court sanctions unless they are fully justified by the circumstances and necessary to protect a client's legitimate interests and then only after a good faith effort to informally resolve the issue with counsel.
5. Adhere to all express promises and agreements, whether oral or written, and, in good faith, to all commitments implied by the circumstances or local custom.
6. When called on to do so, commit oral understandings to writing accurately and completely, provide other counsel with a copy for review, and never include matters on which there has been no agreement without explicitly advising other counsel.
7. Timely confer with other counsel to explore settlement possibilities and never falsely hold out the potential of settlement for the purpose of foreclosing discovery or delaying trial.
8. Always stipulate to undisputed relevant matters when it is obvious that they can be proved and where there is no good faith basis for not doing so.
9. Never initiate communication with a judge without the knowledge or presence of opposing counsel concerning a matter at issue before the court.
10. Never use any form of discovery scheduling as a means of harassment.
11. Make good faith efforts to resolve disputes concerning pleadings and discovery.
12. Never file or serve motions or pleadings at a time calculated to unfairly limit opposing counsel's opportunity to respond.

13. Never request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.
14. Consult other counsel on scheduling matters in a good faith effort to avoid conflicts.
15. When calendar conflicts occur, accommodate counsel by rescheduling dates for hearings, depositions, meetings, and other events.
16. When hearings, depositions, meetings, or other events are to be canceled or postponed, notify as early as possible other counsel, the court, or other persons as appropriate, so as to avoid unnecessary inconvenience, wasted time and expense, and to enable the court to use previously-reserved time for other matters.
17. Agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect my client's legitimate rights.
18. Never cause the entry of a default or dismissal without first notifying opposing counsel, unless material prejudice has been suffered by my client.
19. Never take depositions for the purpose of harassment or to burden an opponent with increased litigation expenses.
20. During a deposition, never engage in conduct which would not be appropriate in the presence of a judge.
21. During a deposition, never obstruct the interrogator or object to questions unless reasonably necessary to preserve an objection or privilege for resolution by the court.
22. During depositions, ask only those questions reasonably necessary for the prosecution or defense of an action.
23. Draft document production requests and interrogatories limited to those reasonably necessary for the prosecution or defense of an action, and never design them to place an undue burden or expense on a party.
24. Make reasonable responses to document requests and interrogatories and not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and nonprivileged documents.
25. Never produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.
26. Base discovery objections on a good faith belief in their merit, and not for the purpose of withholding or delaying the disclosure of relevant and nonprivileged information.
27. When called on, draft orders that accurately and completely reflect a court's ruling, submit them to other counsel for review, and attempt to reconcile any differences before presenting them to the court.
28. During argument, never attribute to other counsel a position or claim not taken, or seek to create such an unjustified inference.
29. Unless specifically permitted or invited, never send to the court copies of correspondence between counsel.



## When In Court I Will:

1. Always uphold the dignity of the court and never be disrespectful.
2. Never publicly criticize a judge for his or her rulings or a jury for its verdict. Criticism should be reserved for appellate court briefs.
3. Be punctual and prepared for all court appearances, and, if unavoidably delayed, notify the court and counsel as soon as possible.
4. Never engage in conduct that brings disorder or disruption to the courtroom.
5. Advise clients and witnesses of the proper courtroom conduct expected and required.
6. Never misrepresent or misquote facts or authorities.
7. Verify the availability of clients and witnesses, if possible, before dates for hearings or trials are scheduled, or immediately thereafter, and promptly notify the court and counsel if their attendance cannot be assured.
8. Be respectful and courteous to court marshals or bailiffs, clerks, reporters, secretaries, and law clerks.

## Conduct Expected of Judges

*A lawyer is entitled to expect judges to observe the following Principles:*

1. Be courteous and respectful to lawyers, parties, witnesses, and court personnel.
2. Control courtroom decorum and proceedings so as to ensure that all litigation is conducted in a civil and efficient manner.
3. Abstain from hostile, demeaning, or humiliating language in written opinions or oral communications with lawyers, parties, or witnesses.
4. Be punctual in convening all hearings and conferences, and, if unavoidably delayed, notify counsel, if possible.
5. Be considerate of time schedules of lawyers, parties, and witnesses in setting dates for hearings, meetings, and conferences. When possible, avoid scheduling matters for a time that conflicts with counsel's required appearance before another judge.
6. Make all reasonable efforts to promptly decide matters under submission.
7. Give issues in controversy deliberate, impartial, and studied analysis before rendering a decision.
8. Be considerate of the time constraints and pressures imposed on lawyers by the demands of litigation practice, while endeavoring to resolve disputes efficiently.
9. Be mindful that a lawyer has a right and duty to present a case fully, make a complete record, and argue the facts and law vigorously.
10. Never impugn the integrity or professionalism of a lawyer based solely on the clients or causes he represents.
11. Require court personnel to be respectful and courteous toward lawyers, parties, and witnesses.
12. Abstain from adopting procedures that needlessly increase litigation time and expense.
13. Promptly bring to counsel's attention uncivil conduct on the part of clients, witnesses, or counsel.

Ever wonder what happened to the ideals of civility, integrity, and professionalism to which you aspired in law school? They are alive and well in the American Board of Trial Advocates. Admittedly, these principles are difficult to define. Nevertheless, the legal profession as a whole and each individual lawyer and judge must adopt and practice these concepts so that the members of our profession will again be looked upon as the greatest protectors of our life, liberty, and property.

Please join ABOTA in making these principles a reality once again.



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# APPENDIX “B-2”

## ABOTA Code of Professionalism



AMERICAN BOARD OF TRIAL ADVOCATES

## *Code of Professionalism*

As a member of the American Board of Trial Advocates, I shall

Always remember that the practice of law is first and foremost a profession.

Encourage respect for the law, the courts, and the right to trial by jury.

Always remember that my word is my bond and honor my responsibilities to serve  
as an officer of the court and protector of individual rights.

Contribute time and resources to public service, public education, charitable and  
pro bono activities in my community.

Work with the other members of the bar, including judges, opposing counsel, and  
those whose practices are different from mine, to make our system of justice  
more accessible and responsive.

Resolve matters and disputes expeditiously, without unnecessary expense, and  
through negotiation whenever possible.

Keep my clients well-informed and involved in making decisions affecting them.

Achieve and maintain proficiency in my practice and continue to expand  
my knowledge of the law.

Be respectful in my conduct toward my adversaries.

Honor the spirit and intent, as well as the requirements of applicable rules or  
codes of professional conduct, and shall encourage others to do so.

# APPENDIX “C-1”

## MONTANA

### Written Oath of Admission to the Montana Bar

WRITTEN OATH OF ADMISSION  
TO THE BAR OF THE STATE OF MONTANA

I do affirm:

I will support the Constitution of the United States and the Constitution of the State of Montana;

I will maintain the respect due to the courts of justice and judicial officers;

I will not counsel or maintain any proceedings which shall appear to me to be taken in bad faith or any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by an artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with his business except from him or with his knowledge or approval;

I will be candid, fair, and courteous before the court and with other attorneys, and advance no fact prejudicial to the honor or reputation of the party or witness, unless required by the justice of the cause with which I am charged;

I shall faithfully discharge the duties of an attorney and counselor at law with fidelity to the best of my knowledge and ability;

I will strive to uphold the honor and to maintain the dignity of the profession to improve not only the law but the administration of justice, so help me God.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
Clerk of the Montana Supreme Court

# APPENDIX “C-2”

## MONTANA

### Oral Oath of Admission to State Bar of Montana

## **OATH OF ADMISSION TO THE MONTANA BAR**

I, (name), solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of Montana, and faithfully discharge the duties of an attorney and counselor of law to the best of my knowledge and ability. I accept and will faithfully follow, the Rules of Professional Conduct promulgated by the Supreme Court of Montana, so help me God.



# APPENDIX “D”

## ABOTA-SPONSORED Civility Referee/Mentor Program

**APPENDIX “D”**

***PROPOSED***

**CIVILITY AND PROFESSIONALISM  
REFEREE, MENTOR AND MEDIATOR PROGRAM**

**for the**

***STATE OF MONTANA***

**PROGRAM SPONSOR: Montana Chapter,  
American Board of Trial Advocates (ABOTA)**

**OUTLINE OF PROGRAM**

1. The Montana ABOTA Chapter (“Chapter”) will petition the Montana Supreme Court to approve and adopt the Principles of Civility and Professionalism (“Principles”). The Chapter will also make those principles and this Civility Referee, Mentoring and Mediator Program available on the ABOTA website.
2. Appended to the Principles will be the membership roster of the Montana ABOTA chapter (“Roster”), with contact information for each member (approximately 67 members).
3. The Montana ABOTA Chapter will petition the Montana Supreme Court to include this Program in the rules of the Court relating to the conduct and professionalism of all licensed Montana attorneys. It shall also request that the attorneys’ oath of office hereafter require them to “faithfully observe the Montana standards of professionalism and civility . . .”
4. Montana ABOTA Chapter members will agree to voluntarily act as Civility or Professionalism Referees, Mentors, or Mediators (“Civility Referees”), upon either an assignment by a court or tribunal, or by request of any attorney. The request may relate to litigation or pre-litigation matters, or to any other adversarial or transactional matter where the assistance of a Referee or Mentor is requested to resolve a problem or issue which arises from conduct that is alleged to be uncivil or unprofessional, as described in the Principles or the Rules of Professional Responsibility.

5. ABOTA members may opt out of the Referee program at any time, or reserve the right to recuse themselves on a case-by-case basis, or otherwise limit their involvement in the Program.
6. The ABOTA Civility Referee will be designated and assigned in the following instances:
  - (a) An order, assignment or suggestion or request by a court judge or other tribunal; or
  - (b) A request made either unilaterally, or jointly, by any member(s) of the Montana Bar (or counsel who have *pro hac vice* status in a Montana case).

The court or tribunal may designate a specific ABOTA Panel Member to act as the Civility Referee, or may require or suggest that the parties mutually agree upon who shall act as the Referee.

7. An attorney invoking the assistance of this Program may initially request that the role of the Civility Referee be limited to that of a confidential Mentor, to assist the attorney in dealing with the identified problem or issue on an *ex parte* basis. Only upon the consent of the requesting attorney, the ABOTA Mentor may transform his/her role to that of a Civility Referee and undertake communications with the other attorney(s) and thereafter engage in the role of a mediator or referee to resolve or assist in the matter.
8. If the bar member initially requests mentoring assistance of a Referee, and thereafter consents to the disclosure of the problem or issue to another attorney(s) for resolution, then the other attorney(s) will be expected to cooperate with the referee and opposing counsel to facilitate a resolution or conclusion of the civility or professionalism problem which has been raised or alleged.
9. If a court makes an assignment of a Civility Referee, the court may order that the attorneys and Referee resolve the problem(s) or issue(s) on an informal basis. If the court believes that the conduct of an attorney (or both attorneys) borders upon sanctionable conduct, or could lead to sanctionable conduct if not resolved or otherwise rectified by an early intervention of the Referee, the court may require the Referee to provide an in-chambers report, not for filing, describing the problem(s) or issue(s) which have arisen and his/her recommendations, if any, for resolution of those problem(s) or issue(s).

10. Communications and reports will not be filed of record or lodged with a court or tribunal unless so ordered by it, in which case any report or communication from the Referee will be designated as confidential “in-chambers” communications between the court, counsel, and the Referee.
11. Attorneys seeking the assistance of a Civility Referee will do so only in good faith and not to annoy, harass, or embarrass the non-invoking attorney(s), nor for the furtherance of tactical or strategic advantage. The Civility Referee will be required to report to the court any utilization of the process which he/she believes to have been invoked in bad faith or sought for an improper purpose.
12. The contents of any statement, communication, or reports by any participant in the program, made either orally or in writing, will be confidential and subject to the same rules of confidentiality and privilege as apply to mediation in the federal and state courts of Montana, including the Montana statutes governing mediation confidentiality and privilege, Mont. Code Ann. § 26-1-813. The Civility Referee shall enjoy the same judicial immunity as provided in Mont.R.App.P., Rule 7. The obligations of confidentiality apply to all who may be involved in a mentored or mediated matter, including the Civility Referee/Mentor.
13. The fact that an attorney or Court may invoke or utilize the Civility Referee program shall not be considered a disciplinary complaint or a public record that would give rise to public access to any documents or communications relating thereto. All such records and communications will be strictly confidential and shall not be disclosed for any purpose.
14. The Civility Referee selected will have complete discretion as to how he/she will conduct an investigation of the problems or issues raised. Adherence to formal rules of procedure or evidence will not be required. If the Referee recommends that a more formal investigative proceeding be undertaken, he/she shall make such a recommendation to the Judge who is assigned to the case, who may determine how the investigation should be undertaken.
15. The ABOTA Civility Referee will not be expected to engage in protracted disputes or problems that may impose an unreasonable burden upon the Referee. The Referee therefore reserves the right to discontinue his/her efforts, or limit his/her involvement in any matter, or seek the involvement of another ABOTA member to assist or assume the Referee’s role. Upon notice to all counsel, the Civility Referee may also terminate ABOTA’s involvement if it appears that the conduct at issue is more properly the subject of a formal disciplinary process or which may be sanctionable by a court or tribunal.

16. ABOTA members who participate in the program as a Civility Referee will submit a brief, confidential anecdotal report of the problem(s) or issue(s) which were raised and the resolution, or lack of same, which occurred. The identities of the parties and their counsel, or other identifying information, will not be disclosed in the report. This report will be used by ABOTA and the courts to assist in evaluating the program and suggestions for improvement. The report shall be made to the ABOTA Civility Referee Program, which report will be kept in confidential form, available only to judges on an as-needed basis, or an ABOTA member supervising this program. The Montana Supreme Court will be requested to designate one of its members to act as a judicial liaison to the ABOTA program.