

Luvera's Practice Pointers

A PRIMER ABOUT CORRECT LAWYER COURTROOM CONDUCT AND THE TRIAL JUDGE

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“Good lawyers know the law; great lawyers know the judge” Author unknown

Many trial lawyers think they know and practice the fundamentals of proper conduct involving the judge and need no advice. However, visit a courtroom and observe lawyers arguing motions or interacting with the judge and court personnel. Too often we see even experienced lawyers demonstrating unprofessional conduct. Remember, the impression we make with the judge has consequences not only for the case at hand, but in the future. Our professional reputations are created among judges by how we act and communicate with them. Here are some basic essentials about professional conduct involving the trial judge.

1. Scout the Courtroom in Advance

When you know what court room you will be in for pretrial motions or trial, make a visit to the courtroom. Familiarize yourself with the courtroom and the set up. Find out where exhibits can be displayed, see if screens are available for projection of images and what media aids are available in the courtroom. Try to meet the court personnel. Remember to always exhibit courtesy to the staff. Remember that the court staff are likely going to report to the judge the conduct of lawyers. They are an important part of the courtroom procedure and often the “eyes and ears” of the judge. If possible, arrange to bring your witnesses to the courtroom when it is vacant. Have them sit in the witness box as well as become familiar with the layout. Advance knowledge of what to expect is a confidence builder for both you and your client.

2. Research the Judge

Observe the judge in action before your scheduled appearance. It is a very good way to develop an understanding of how you should conduct yourself. Sit in on motions, arguments, trials or other activity for insight. Ask plaintiff lawyers who have dealt with the judge what to expect. Find out if there are any things you should know about regarding the judge, including their style of conducting a trial. Check the internet for professional background information about the judge that might give helpful information. Knowing the judge's professional background such as the type of law they practiced before taking the bench will give important insight. Reviewing past decisions on the same issues involved in your case is always helpful in deciding how to adapt your strategies and presentations. The more you know about the judge's likes and dislikes as well as their preferences, the better your chance of making a good impression. When you know what to expect, you'll be much more relaxed about how to conduct yourself.

3. Know the Rules

It is obvious trial lawyers are expected to know the Civil Rules of Procedure, the Rules of Evidence and be familiar with the Pattern Jury Instructions. This also includes any local rules for that venue as well as the any rules of the individual judge in the courtroom involved. Judges create personal rules for their courtroom and expect them to be followed A failure to know and

comply with these rules can be devastating in some situations. These rules, in a sense, are the most important rules of all because they were created by the judge. Experience shows that too often, judges are exasperated by lawyers who do not know the basic rules that apply to the proceedings in their courtroom.

4. Know the Procedure for Introducing Exhibits

Marking, identifying and offering exhibits is one of the most fundamental procedure in a trial. When lawyers don't know the basics for introducing exhibits judges become exasperated by the waste of time involved. Worse, jurors resent the waste of time caused by a lawyer who doesn't look like they know how to proceed correctly. As a result, the credibility of the lawyer is damaged. Know the correct procedure. Be prepared. Have the exhibit ready to be marked for identification and have a copy for opposing counsel as well as the judge. Follow the correct procedure by having the document marked as exhibit, provide copies to opposing counsel and the judge, and have the witness identify the document as well as laying the foundation for its admission. Only then, offer the exhibit. Showing you know and follow correct procedures indicates your professionalism and creates a favorable impression with judge and jury.

5. Meet your Deadlines

From a judge's perspective, efficiency in the proceeding is paramount. Judges often measure knowledge and credibility on professional conduct. Knowing the deadlines and complying with significant deadlines demonstrates professionalism. Once a lawsuit has been filed there will be automatic deadlines created. These can include deadlines in not only the civil rules, but local rules as well as the individual judge's deadlines. Make sure you meet all important deadlines because the failure to do so will harm your case. Doing so will demonstrate your competence and professionalism to the judge.

6. Always Show Respect for the Judge

There is an ancient proverb "Do not insult mother alligator until you have crossed the river." You do not want a judge who doesn't trust you or is annoyed with you presiding during your case so make a favorable impression from the beginning of the relationship. Showing professional respect from the first contact with the judge throughout the proceedings is the best way to create a favorable impression. Aside from self-interest, as officers of the court, we owe to the judge professional respect and courtesy. This includes an awareness of appropriate conduct with judges. For example, irrespective of your friendship with a judge do not use their first name in talking to a judge around the courthouse or anywhere else where litigants or other lawyers or members of the public may overhear and get the wrong impression. Public overly friendly conduct with a judge can be misinterpreted and can be a source of embarrassment for the judge. In addition, avoid questionable ex parte contact with the judge which may raise ethical, as well as professional issues for you and the judge.

7. Stand up During Legal Proceedings at Appropriate Times

It is an indication of respect when we stand up whenever we are speaking to the judge in a legal setting. There are several times with we should stand. One would be when the judge or jury enters or leaves the courtroom. Anytime you are speaking to the judge or even when the judge speaks to you in open court, you should stand. Not all judges require you to stand on these occasions but doing so demonstrates professionalism and respect. You should stand when

examining witnesses unless there is a rule against doing so. Standing up is a more commanding position to be in while speaking.

9. Address the judge as “Your Honor”

Make it a habit to address the judge as “Your Honor” and not an informal “judge” as a matter of demonstrating respect. The jurors all believe the judge is the most important person in the courtroom. The jurors believe that the judge is entitled to respect, no matter what the circumstances. Using a title of respect is important. When issues arise remember to respect the judge by addressing him or her and not arguing with opposing counsel.

10. Phrases, Comments & Questions you Should Avoid

There are some phrases, comments and questions that you should avoid because they can be viewed as disrespectful or annoy the judge. Here are some basic examples of things to avoid saying.

- (1) **“With all due respect your honor”** When you use this phrase, the judge is likely to conclude that your state of mind is exactly the opposite of what you’re saying. The phrase implies the judge is in error and that’s obvious to everyone except the judge. Avoid using this phrase.
- (2) **“You’re wrong” (or words to that effect)** Never tell a judge that he or she is wrong or mistaken. You don’t convince someone to change their mind by telling them how clearly mistaken they are. Nor do you improve your ability have the judge consider your position by accusing them of committing reversible error. That’s a threat to the judge. Avoid unnecessarily making the judge annoyed by the defiant manner of how you state your position. Be an advocate rather than an aggravation. Respectfully explain what your position is and why you think your position is the right one.
- (3) **“Have you had a chance read my brief (other whatever document)?”** Questioning the judge in that manner creates an image of a parent demanding of their child whether they have done their homework. That’s not a challenge you want to demand of the person who is going to rule on the issue. It suggests you believe the judge is unprepared. Instead of challenging the judge, simply direct the judge’s attention to the document language you want to discuss. Remember, no school of advocacy recommends embarrassing the judge.

11. Always Exhibit Professional Conduct

Be calm, cool, and collected all times with the judge and your opponent. I know this is easier said than done when you feel the judge is being unfair or your opponent is a particularly annoying person. However, losing your composure with the judge all but guarantees that you have significantly harmed your client’s case. Also, remember that you will likely deal with this judge again in other cases. If you lose your cool in the courtroom, and the judge loses whatever respect he or she may have for you, then you will have set a negative tone for all future appearances in this judge’s courtroom. In the end, you can’t control how your opponent or a

judge behaves; you can only control how you react to the situation by being professional and courteous.

12. Advocate, not Argue, Your Position

Advocate but don't argue. Argue to the judge, not with the judge. Arguing with the judge is a losing proposition. There is a clear difference between being a persuasive advocate and just being argumentative. Advocate by advancing logical reasons and citing legal precedent. Note objectively the conflicts with the judge's position and the law. Explain the practical impact the court's ruling may have on your case and other similar cases. When you've made your points (and your record), quit. Don't persist until the judge turns angry or hostile. At all times ensure that your tone and body language remain respectful and professional.

Never talk over the judge or interrupt him or her. Interrupting is a sign of deep disrespect. Even if the judge is mistaken, keep quiet until he or she finishes and then ask permission to respond. Nor should you interrupt your opponent. It can be tough to sit quietly while your opponent implies you aren't being truthful. It's even worse when the judge makes light of your arguments. But, no matter how frustrated you get, you shouldn't interrupt anyone and especially not the judge. My friend Gerry Spence once described to me the importance of waiting for your chance to speak and not interrupting your opponent or the judge as the art of "watchful waiting." He explained that what he meant was respectfully waiting and listening, without making faces, shaking your head or rolling your eyes until the other person stops talking. Only then, he said, should you pause and then respond in a calm manner.

When you receive an adverse ruling making faces, muttering to yourself or slamming your papers down does not improve your legal position or your relationship with the judge. Be conscious of your tone of voice and your nonverbal communication when dealing with the judge. Avoid sarcasm, making faces or other disrespectful behavior. One trial judge has said in a seminar:

"I recall one senior trial counsel who scowled and pouted every time I ruled against him. It was the strangest sight. Was he expecting me to say: "Counsel, I see that you are upset with my ruling. I am very sorry. I will reverse myself immediately.".

By the same token avoid thanking the judge or other nonverbal approval after a favorable ruling. One Canadian judge has written about demonstrations of approval after favorable rulings:

"Do not bob or nod your head in agreement if I make a point which meets with your approval. A bobbing or nodding head belongs on the dashboard of one of those motor vehicles with oversized tires and a loud muffler."

You should avoid thanking judges after a ruling in your favor. It can be seen as suggesting the judge did you a personal failure by the ruling.

Conclusion

These observations are primarily intended for new lawyers who have limited trial experience. But, even experienced lawyers may benefit from a review of these basic outline of professional

conducts. Giving the judges the curtesy and respect their position merits should be expected of all great trial lawyers. They are, after all, the ultimate adjudicator in your client's case.