Professional Conduct

Building Credibility with the Court

by Jack J. Goldwood

A basic lesson that should be learned by every young lawyer is that courts notice and appreciate professional conduct by the lawyers who appear in their courts. Put simply, a lawyer who acts in a professional manner makes it easier for the court to do its job.

The dilemma for the young lawyer, however, is getting the experience to develop a sense of what, exactly, constitutes "professional conduct." Gaining an understanding of what the court expects from every lawyer, regardless of experience level, is therefore one of the most important lessons for a young lawyer to learn. The intent of this article is to explain how the court perceives certain behaviors by lawyers, and to suggest 20 practical steps that every young lawyer can take to build credibility with the court.

As basic as some of the "dos and don'ts" offered here may seem, be assured that a number of them are regularly disregarded. You will learn that heeding even a few of these suggestions will set you apart from many of your peers. Remain mindful, however, that every lawyer should be guided by local rules and customs, which may call for different tactics than are suggested here.

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Understanding Who Comprises "The Court"

Judges rely on a number of court employees to help keep their dockets moving. "The court," therefore, normally comprises a number of personnel with diverse responsibilities. Depending on the size of the jurisdiction and the particularities and preferences of each judge, the character and amount of assistance each judge receives may differ. Thus, the young defense lawyer needs to learn who has what role in each court in which he or she practices. Three of the most important responsibilities of court personnel are bailiff, law clerk, and scheduler.

Bailiff/Case Manager

Virtually every courtroom has a bailiff, who is usually the judge's most trusted team member and often serves as the judge's right hand. The bailiff performs the function of gatekeeper: judges are bombarded every day with numerous requests, and answering each would be an inefficient use of the judge's time. The bailiff is therefore entrusted with helping to prioritize the matters requiring the judge's attention. The young lawyer will learn that procedural and administrative questions should be directed to the bailiff or the law clerk, rather than the judge.

Law Clerk/Staff Attorney

Law clerks' responsibilities vary from one courtroom to another. The young lawyer who is bringing a matter to the court is likely to have considerable interaction with the law clerk, who is typically a licensed or soon-to-be licensed attorney. Never forget that the law clerk is a lawyer just like you, and probably has more knowledge of court procedures than you do. A distinction between law clerks and purely administrative clerical employees of the court should be kept in mind.

The traditional tasks assigned to law clerks are drafting opinions, writing memoranda, and performing research for the judge. In addition, they may do preliminary analysis of pleadings, and, where local rules allow, they may conduct pretrial proceedings. Law clerks will typically see every civil pleading before the judge reviews it. They will calculate a response date for the motions, and pull any cases and statutes that the judge will need in order to rule on a particular motion.

Sometimes the law clerk has considerable influence in the operation of the judge's dockets. The judge may occasionally ask him or her for a recommendation—either initially, or after the judge's review of all relevant materials. It is therefore just as important to cultivate a good working relationship with the clerk as with the judge.

Scheduler

The scheduler is the person who sets up the court's docket. If there is a scheduling issue, it is best to direct any concerns to the bailiff or law clerk; if they decide that the matter should be taken up directly with a scheduler, they will say so. Normally the scheduler is not granted much latitude in deciding *whether* a particular legal matter will require a hearing; his or her job is to schedule the hearing, acting on a request by another member of the court to set up a hearing that has already been deemed necessary.

The suggestions that follow are more helpful if you remember that all of the personnel working for the judge in his or her courtroom, individually and as a group, are considered "the court." Theirs is a team, with all players directly responsible to the judge. As a general rule of thumb, accord all members of the team

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the same courtesies that you would extend to the judge, and it will help many things fall right into place.

Twenty Ways to Build Credibility with the Court

While there is no magic formula for success, the following suggestions can help a young lawyer demonstrate that he or she understands the most basic steps and behaviors that every lawyer must heed. The primary concern should always be to do whatever is necessary to make it easier for the court to do its job.

1. Be Prepared.

The court and opposing counsel may treat the young lawyer differently than they would a more experienced attorney. In fact, some may assume that a young lawyer knows only how to perform research and write memoranda. Nonsense. Being prepared is the quickest way to gain credibility, and there are three vivid illustrations of how this can work.

First, knowing the requirements and various preferences of a particular judge and his or her team is absolutely critical for a lawyer at any level. Ask your colleagues about the tendencies of a particular judge, law clerk, and/or bailiff before you go to court. Even though every lawyer should take the time to understand what each courtroom expects, many do not do so. Consequently, your attention to detail could well be emphasized by your opponent's lack of attention to this area. For instance, many courts have detailed orders on paper, with information pertaining to timing and/or content of trial briefs, motions, pretrial statements, and the like. Make sure to obtain such orders or rules at the outset, as they may not always be offered; the court will expect you to be familiar with them regardless.

The young lawyer must also know the federal and state civil rules as well as local rules of court, and must know them cold. By doing so, you are going to be better prepared than most lawyers you will oppose, who may make motions or requests that are not allowed under the rules.

Knowing the facts of your case is another important way to be prepared. A young lawyer may be required to cover a status conference or other pretrial proceeding on very short notice. Yet there is no excuse for lacking an understanding of the facts. If nothing else, quickly review the pleadings and the most recent correspondence before going to court. If you announce that you are "really not very familiar with the case," you will have little or no say in the remainder of the proceeding.

2. Don't Ask the Court to Do Your Job.

Never ask a law clerk or other member of the judge's staff to do something that is your responsibility or, in any event, not the court's job. This is one of the biggest and most common blunders committed when working with law clerks and other court personnel. For example, there is absolutely no reason for counsel to ask the law clerk to make copies or to get someone on the telephone, but this sort of arrogant rudeness happens regularly. Unless instructed to do so, forwarding copies of pleadings to the law clerk for filing is another mistake, as clerical employees typically handle filings.

> **Accord all members of the team the same courtesies that you would extend to the judge, and it will help many things fall right into place.**

Law clerks can assist counsel with purely procedural issues or by advising what the judge does and does not prefer. Never forget, however, that they work for the judge, not the lawyers who come to court. Asking the law clerk to do work for you is inappropriate for a number of reasons. First, the clerk already has a full plate of work to do for the judge. Second, even if the law clerk had the time and was disposed to perform certain tasks for one lawyer, he or she loses the necessary neutrality in the case by helping one party and not the other. Asking the law clerk to perform counsel's tasks will get you off to a bad start with the court—including the judge who may well be notified about your inappropriate behavior.

3. Avoid Improper *Ex parte* Communication.

According to *Black's Law Dictionary*, a judicial proceeding or communication is *ex parte* "when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." An *ex parte* communication is improper when it involves the merits of the case, and it is made without informing the opposing counsel. Most attorneys know that *ex parte* communications are improper, but some nevertheless proceed to argue their case outside the presence of opposing counsel. A judge, of course, absolutely will not tolerate such behavior, nor will his or her law clerk. In fact, a judge or law clerk can usually anticipate such improper behavior: some lawyers will begin a sentence with "I don't want to get into *ex parte* matters, but…" and then they try to explain their side of the case. Other attorneys may simply start talking about the merits of the case without even realizing what they are doing. A law clerk is keenly aware of what is happening, and he or she is probably both uncomfortable and annoyed.

An *ex parte* discussion of the merits is improper not just because it is uncomfortable for the court, but also because it is prohibited by virtually every state's code of professional responsibility and the ABA Model Rules of Professional Conduct. Disciplinary Rule 7-110(B) ("Contact With Officials") commands in pertinent part that "[i]n an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except: (1) In the course of official proceedings in the cause; and (2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer."

Similarly, ABA Model Rule 3.5 ("Impartiality and Decorum of the Tribunal") specifies in pertinent part that "[a] lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; (b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order;…"

It is difficult to avoid *ex parte* communications entirely, as certain procedural and administrative matters often need to be clarified with court personnel. Instead, what must be avoided is any *ex parte* discussions about the merits of your case with the court. Stick to addressing purely procedural matters if opposing counsel is not present.

4. Deliver Copies to the Law Clerk.

The sooner you get pleadings to the court, the better. Thus, when filing pleadings, consider hand-delivering a separate, time-stamped copy directly to the law clerk's office. This is particularly helpful in a courtroom in which

you know that the clerk will be proofing the pleadings before forwarding them to the judge. Direct delivery speeds up the time it would otherwise take for the pleading to travel the bureaucratic trail from the filing clerk to the law clerk. Such short-circuiting is particularly important when filing a brief in opposition just before or on the due date, as it is better to send copies directly to the judge and/or law clerk than to worry that your opposing brief may be too late to be considered by the court.

5. Get the Caption Right.
The substance of your pleadings will, of course, be scrutinized by the judge, and perhaps the law clerk, too. Getting the caption on the pleading correct, including the judge's name and the docket number, is more important than many young lawyers realize. The law clerk will carefully inspect the caption every time, because (1) they need to know which of their hundreds of cases they are dealing with, and (2) pleadings are often shuttled to the wrong courtroom, and the law clerk needs to make sure that this case is indeed on his or her judge's docket. If counsel has the right case name with the wrong judge's name or the wrong case number, the person reading the motion will question whether other substantive matters in the motion may be incorrect.

It is easy to take the caption for granted. The young lawyer asks his or her assistant to prepare it when he dictates the pleading, and quite possibly, never examines it again. As with all types of written submissions, it is the lawyer's responsibility to make sure that this part of the pleading is correct. Be sure it is perfect, and avoid making a negative first impression with the court.

6. Don't Talk Down to Court Personnel.
The court's law clerk may be right out of law school, or otherwise less experienced than you. Do not attempt to use this to your advantage by "talking down" to the law clerk, or by attempting to explain how you think something "should be done," or by trying to unduly influence the clerk. As with *ex parte* communications about the merits, some lawyers begin behaving in this manner without even knowing it. The law clerk has likely been warned by the judge that certain lawyers try to "back door" the judge by trying to steer the law clerk. Whether it is done unwittingly or on purpose, it is yet another way to make a bad impression with the court.

7. Include References to Authority.
Pleadings should be accompanied by an index of authorities—statutes, regulations, decided cases, and other material. If unreported cases are cited, perhaps the full text of such opinions should be attached. Failure to do so creates extra work for the law clerk, who now must obtain a copy on his or her own. Also, such omission demonstrates that you are not paying attention to significant details.

When citing to a large number of cases and other authority in a particularly lengthy pleading, consider compiling a bound index for use by the court, with copies of all cases and statutes cited in the pleading. Most law clerks will perform all of the research required to explain a pleading for the judge's review, and this includes pulling copies of the relevant cases and statutes at the outset. As many law clerks have little or no administrative assistance at their disposal, providing an index of authorities for the court can save him or her a great deal of time. Remember that if you file the index with the clerk of courts, it should be provided to all parties, and not just the court.

8. Present Formal Requests in Writing.
Extensions, continuances, or other requests should usually be in writing or addressed in a formal court session directly to the judge. Particular courtrooms may be willing to consider requests that come via telephone. If this is allowed, keep the request simple in order to avoid generating extra work for the law clerk. Remember also that if opposing counsel does not agree with the extension you seek, it is inappropriate to ask for the extension by telephone; put your request in writing and allow the opposing counsel to respond.

9. Write Simply and Briefly.
Lawyers are encouraged all the time to write simply and briefly. See, for instance, the advice given each month in this magazine's "Writers Corner" column. Still, some lawyers just do not get it. The consequence is that many lengthy pleadings are not thoroughly studied by the court. Given the sheer volume of pleadings and other paperwork directed to the court each day, individual pleadings can only receive so much attention. Spend the extra time to make your pleadings and "briefs" not just short, but easy to understand. Use headings and subheadings, as they help the reader follow your arguments. Avoid lengthy string citations, large block quotations, and stilted vocabulary, as the reader will barely skim such material, if not skip it altogether.

10. Return Calls ASAP.
All lawyers—at least the successful ones—are busy almost all the time. Not every telephone call can be returned immediately. The young lawyers must, however, make every effort to immediately return calls from a court in which his or her case is pending. If the court seeks your input or needs additional information, and you take more than one day to return the call (or worse, fail to return the call at all), you can be sure that your failure will not go unnoticed. The court will move on without you, and you will have missed an opportunity to show the court that you are on the ball.

11. Avoid Discovery Battles.
Think twice before filing that motion to compel. Ask yourself, first, whether you have made every effort to resolve the issue with opposing counsel without enlisting the court's assistance. If you are positive that you cannot work things out, make sure that the information or documentation that you seek is really critical enough to warrant a motion to compel. Without question, some discovery issues must be taken up with the court. A good number of discovery issues, however, should never be brought to the court's attention. The court typically sees its role here as that of a babysitter, so make sure that its intervention in such matters is absolutely necessary before proceeding with your motion.

12. "Time is of the Essence."
The necessity for punctuality when dealing with court appointments should be obvious to every attorney. Try to arrive at the court early. That goes for all appointments, right? Punctuality is even more important with the court because it is not interested in why you were late for a court proceeding. It sees only that you did not find a way to arrive on time, and suddenly you look like the naïve young lawyer who is too green and disrespectful to appreciate the court's jam-packed daily docket. If you are running extremely late, the court may proceed with your case without your input. Imagine what sort of reaction your client may have!

13. Avoid Requests for Hasty Rulings.
Avoid the temptation to call the court to ask for the status of a motion that you have submitted or opposed, as not every motion can or

will be ruled on immediately. Getting a ruling on the Rule 12(B)(6) motion that you filed exactly ten days prior to your call may be at the top of your list, but keep in mind that the court is battling an endless sea of paperwork every day. Moreover, the court will sometimes wait an extra day or so to receive any arguments opposing a motion, to avoid deciding too hastily.

There are, of course, exceptions. For instance, if you have a motion for summary judgment pending, and just a few days prior to the final pretrial conference it appears that there has been no ruling on that motion, you may have to ask whether there will be a ruling before the conference. Typically, however, the court simply has not yet had time to address the motion, but has every intention of doing so before the conference. If you must call to inquire about the status of your case, be sure to at least check the court's online docket first (if it has one), to see whether there has been a ruling that you have yet to receive by mail.

14. Do Not Ask the Court for Advice.
If you seek information of any kind from a judge or law clerk, do not ask for a recommendation as to what course you should ultimately take. As a neutral party working for the court, the law clerk can tell you what your options are, or what the judge prefers procedurally. Any request for advice, however, puts you and the law clerk in an awkward and undesirable position.

15. Dress Properly
If you are one of those people who does not put a lot of stock in personal appearance, you may be shocked when you first walk into court. Like it or not, people notice what you wear to court. You do not need to be decked out in an ultra-expensive ensemble, but you do have to pay attention to your appearance. Most courts still require coat-and-tie, and its equivalent for women lawyers. If your office allows you to dress casually every day, keep proper courtroom attire in your office at all times. If a judge calls you to court for a conference one afternoon, or if one of your colleagues needs you to attend a matter on short notice, you cannot show up in a golf shirt and khakis. Some lawyers may be able to get away with business casual in a court-related matter, but taking liberties with courtroom appearance is not a wise move for a young lawyer who is trying to build credibility with the court. The safest bet for the young lawyer is to treat even the most informal matters, such as initial scheduling conferences, just as formally as matters that are conducted in the courtroom.

16. Turn off, Tune in to the Court.
By now, lawyers should not need a sign on the courtroom door to remind them to turn off all cellular telephones, pagers, or other electronic devices that beep, buzz, or blink before entering the courtroom. If you are bringing clients to court, remind them about this point; it is probably not an automatic response for them to turn everything off before entering a courtroom. Get rid of your chewing gum, too; save it for the golf course or softball. Even if the judge has not posted something to this end, it does not mean the court is not cognizant of it.

Extend courtesy to your opposing counsel, not just to the court—even if your adversary fails to extend courtesy to you.

17. Respect Your Adversaries.
Extend courtesy to your opposing counsel, not just to the court—even if your adversary fails to extend courtesy to you. For example, never address negative or argumentative remarks directly to other counsel, whether standing in open court before the judge or conducting an initial case management conference. The impression given by this bad habit is the same in every setting: that of two children bickering. Instead, address any and all remarks to the court.

You should also think twice about constantly taking the hard line, telling opposing counsel that you are unwilling to consent to a continuance or unwilling to give an extension on a deadline. There will come a time when you must ask for a break from opposing counsel, and you are unlikely to catch a break if you are unwilling to give one.

18. Make it Easy to Grant Continuances.
Lawyers of all experience levels encounter time conflicts; when you juggle multiple cases, it is inevitable. Most judges were practicing attorneys before they became judges, and therefore may understand your plight, but you must go about requesting a continuance of trial (or new case management dates) in the right way.

First, before filing your request for a continuance, confer with all opposing counsel to get consent to the new dates; if any lawyers will not consent to or join the request, try to get them to at least indicate that they are not opposed. The court will always want to know whether all of the attorneys are in agreement. Second, suggest new dates for the court to consider, so that the court does not have to calculate them for you. Finally, if you can obtain the extension or new dates without affecting the final pretrial order or trial, then say so, as the court will often be more willing to adjust the current schedule if it knows that the most important dates will not be affected.

19. Meet and Greet.
Make an effort to meet the personnel of the courts in which you practice, in less formal settings. You can do this by attending functions that allow you to spend time with them outside the courthouse. Watch for judges giving speeches, attending charity events, or presenting at continuing legal education sessions, and then attend these programs. Once you have introduced yourself to a judge outside the courthouse, you may be able to foster a less formal relationship. The goal is not to attempt to obtain special treatment, but to become a recognized face, which will give you more confidence when appearing before a court that knows who you are. There is a clear line that must be drawn here: be absolutely sure not to mention pending litigation in these more casual settings.

20. Tell the Court What You Seek.
You must clearly state the relief that you are requesting in all pleadings. As obvious as this may seem, it is overlooked with alarming frequency. The problem sometimes may be that it is so clear to you that you forget to state it in plain English for the court, and then the court is left wondering what you want it to do. If the court has to read beyond the first page of text to figure out what you are ultimately seeking, you have not done your job.

Conclusion

Your professional conduct will be appreciated by the court. You will not receive congratulations from the court for doing things correctly, but you will undoubtedly be notified if you make elementary errors. The best ways to shed

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the label of inexperience are to avoid generating unnecessary work for the court, and whenever possible, to make its job easier.

Every communication with court personnel, be it on paper, on the telephone, or in person, is important because it gives you the opportunity to build credibility. Understanding and consistently heeding the basic expectations of every judge, bailiff, and law clerk or staff attorney will put you well on your way to establishing that credibility with the court. FD