Navigating the Courtroom

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This piece is for those who've never been in a courtroom. We'll start with the very basics, for that target audience.

1. **How do I address people?**

The trial judge should be addressed as "Your Honor," and not as "Judge" in open court. Don't ask me why, but that is protocol. Address your opponent as "Mr." or "Ms." and never by first name in open court.[1] And don't speak to your opposing counsel directly in open court, except as to very minor matters. This form of communication is called "triangular," and most judges will find it very unprofessional and annoying for counsel to engage in direct communication in arguing motions or objections.

2. **What's the "bar"? The "well"? The "bench"? A "sidebar"? The "stand"?**

The "bar" is the rail that separates the counsel tables from the audience. Some judges are very particular on who gets to come "before the bar"– for example, some will not allow anyone except attorneys, paralegals, and clients to sit at counsel table or in the seats in front of the bar. The "bench" is, of course, the elevated platform where the judge sits. The "well" is the courtroom space between the bench and the lectern. Again, some judges are very territorial about this area, and will not allow counsel into it without permission. The "stand" is where the witness sits, "stand" being a carryover from the British practice where the witness does, in fact, *stand*

[1]See www.fjcadr.com for many other papers on the basics of trial practice.

while testifying. A "sidebar" is a conversation between the judge and counsel at the bench, out of the hearing of the jury. (We hope.)

The "chambers" are simply a fancy word for the judge's office. Many events during a trial take place "in chambers," and most newer courtrooms are set up with a video recording device there. It is your duty– not the judge's-- to make sure that a proper record is made both in chambers and in sidebar conferences.

The "box," or more commonly, "jury box" refers to the separate area for the jurors to sit.

3. **Courtroom personnel**.

The courtroom judicial assistant (formerly "clerk) is an employee of the state, just like the judge, and has the responsibility of answering the telephone, handling exhibits, and managing the calendar. The bailiff[2] is typically an employee of the County Sheriffs' Department who provides the security for the courtroom.[3] He/she and the courtroom J.A. are the ones most knowledgeable about the judge's preferences in certain matters, such as where to set up computer screens or oversize exhibits. The bailiff also has the important duty of taking charge of the jury and preventing anyone from speaking with them. The court reporter, if you have one,[4] has the responsibility of stenographically making the record. Unlike in depositions, she does not handle exhibits; in trials, the J.A. does that.

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[2]A United States Marshal in federal court.

[3]Except in the Fourth District, where the bailiffs are lawyers who have received security training.

[4]Only in federal court. All state proceedings are recorded by an audio system without the use of a court reporter, except for certain high-level felony trials.

4. **Where do I sit?**

Believe it or not, disputes happen on the seating arrangements for trial. It is traditional for the plaintiff in a civil action to sit at the counsel table closest to the jury box, but there is no rule that says this, and many judges are unaware of it. In my opinion, counsel attach undue importance to this, some going so far as to send their juniors very early to court to claim the "prized" seating. My view is that it makes no difference, and is yet another silly attempt at ingratiation with the jury.

5. **When do we sit and when do we stand?**

Always stand when the judge enters the courtroom. Always stand when addressing the judge, unless you are asked not to do so. Always stand when making an objection, or responding to one. Stand when the jury enters or leaves the courtroom. All of this is to affirm the importance and dignity of the proceedings, and the judge and the jury will appreciate it.

6. **Courtroom movement**.

Forget what you've seen on TV– most judges will require you to remain behind the lectern during examination of witnesses, with exceptions for handing an exhibit to a witness. And if you do that, ask the court's permission to approach the witness. You will *not* be allowed to hover over the witness as you might imagine from the movies or TV.

A recent affectation of standing off to the side by the jury box has developed among some counsel, probably based on "wisdom" conveyed at seminars. I don't know if this works or not; having sat in mock trials as a juror, I found it manipulative and a bit offensive. My co-jurors and the trial judge felt the same: we felt that our space was being invaded. Prominent consultants, like David Ball, tell us it is a good thing, so I reserve judgment. But I *will* tell you that with a

video or audio record, the cameras or microphones may not be covering you if you stand off to the side away from the podium.

And expect at least half of your trial judges to object to this. People are very particular about their space, so it's very important not to hover over the jury during opening statements or closing argument. Larger men, like me, need to stand back a foot or two more than would be the case with a woman or smaller man. There's a sweet spot to stand in jury argument, probably three to four feet or so from the jury box. Sit yourself in the jury box when the courtroom is empty, and have a colleague talk to you as if he were giving an argument. You'll see my point. And please don't pace– counsel's pacing back and forth during argument is distracting. Learn to move purposefully.

7. **Clients**

Clients get to sit at counsel table, and that requires some counseling by you. First, I shouldn't have to tell you that they should be dressed appropriately, if not a tie and a jacket, at least something neat. Second, they need to be advised that this is a courtroom, not the Jerry Springer Show, and that their behavior is important– the judge and the jury will be watching them at all times. So no making faces, no slamming of pencils to the table, no audible sighs, and no loud comments on testimony. When I was starting out in practice, I asked clients to write down any additional questions they thought of during examinations, but I quickly stopped doing that. I now tell them I need to focus entirely on the witness in the proceedings, that my examinations are carefully planned, and that it's too late and too distracting for me to be harassed with additional questions when I'm just about ready to start my cross examination.

8. **How do I dress?**

Lawyers can be surprisingly unaware of the impression they make with their dress. Think back on the O.J. Simpson trial, and the impression the prosecutor made on the jury with her tight skirts, or at least as reported by the talking heads on the news every evening. Or the cowboy lawyer with fringe jackets. Dress conservatively, and dress appropriately: that means suits and ties for men, and business suits or pantsuits for women. I have a nice chalk-striped suit that I would never wear to court: it does not say "credible;" it says "expensive." And be yourself– my friend Colin King always wears cowboy boots and he has standing to do so, coming from Southern Utah. For me, a kid from New England, it's phony-- and people are very good at picking up on phoniness. The jury is continually instructed by the judge not to discuss *the case* during breaks, so you can imagine what they do discuss: *the attorneys*.

9. **What the judicial assistants want you to know**.

I've included an article in these materials called "The View From the Other Side," and please take the time to read it. Some years ago, I sat down with a dozen courtroom clerks, bailiffs, and court reporters and got their opinions on what they liked and what annoyed them about lawyers. I think it's worth reading.

10. **Making the court reporter (if you have one) love you**.

"The View From the Other Side" has some penetrating comments from court reporters. Whether you have a courtroom stenographer or only an audio record, please speak clearly, loudly (without shouting), and in your turn, not over your opponent. If you have a court reporter, make sure to get the court reporter the disks of the depositions so the vocabulary of the case can be entered in advance. And have a copy of exhibits for the reporter, especially those from which

any witness is going to be reading.

11. **What the bailiffs want you to know**.

The bailiffs are there to help you, in addition to providing courtroom security. They have names, learn them. The bailiff will tell you the judge's restrictions on courtroom movements. The bailiff will assist you in setting up overhead projectors, computer equipment, and advise you on the best way to do it. These people have seen many more trials than you or I have, so ask them for advice. Just don't ask them– or the judicial assistant– "how am I doing?" And don't ask them to get water for you or your client!

12. **The Litigation Section's "Judges' Benchbook."**

Fifteen years ago, we on the State Bar's Litigation Section Executive Committee created a webpage where we put interviews or questionnaire answers from the trial judges in the state. I personally interviewed over two dozen judges, and many more have submitted written answers to questionnaires. These are invaluable, giving you the trial judge's particular insights and preferences on practice in his or her courtroom. http://litigation.utahbar.org/benchbooks.html

13. **What Drives Judges Berserk-- and What Makes Them Smile**.

After thirty-five years of practice, and dozens of conversations with trial judges on this issue, I have to say that judges are most irritated by lack of preparation and unprofessionalism on the part of counsel. They and the jury want you to act like a professional and respect the dignity of the system. Part of being a professional is being thoroughly prepared, and being courteous. Nasty invective directed towards opposing counsel is *never* effective. As an arbitrator, I recently encountered a very experienced attorney who went through the hearing slamming his pencil down, rolling his eyes, and audibly sighing during the examination of his witnesses by opposing

counsel. I've seen the same thing from counsel in court. Trust me, judges and juries find it offensive.

The attorney who makes a judge smile is one that is a prepared, aggressive advocate for her client, but never mean, petty, or taking herself too seriously. This advocate speaks honestly and with integrity; this advocate admits her weaknesses; this advocate gets to the point; and this advocate knows what matters and what doesn't. She has the professional confidence to leave out the trivial and focus on the important.

The good person that is in most of us should be our courtroom "face" rather than the "lawyer-man" or "lawyer-woman" we've later constructed. Find that person and bring her to the fore– it will make your practice better, your life happier, and your esteem and credibility with the bench will ripen with the years.

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50 Tips

COURTROOM CONDUCT: 50 TIPS FROM THE BENCH
(Reprinted courtesy of the San Diego County Bar Association)

1. **Be On Time. Better yet, be early.** This will not only satisfy compliance with your obligation of punctuality to the court, but may have other side benefits (e.g., in certain circumstances this will get you to "the head of the line," and, sometimes you are able to learn things during those few minutes that will be of assistance once court goes into session). Where even a brief delay is inevitable, promptly communicate this fact to the court clerk.

2. **Stand Up.** Always stand when addressing the court; in the rarest of cases and for good cause (e.g., you have just broken your leg), request the court's permission to speak from a seated position.

3. **Stating Your Appearance.** Formally state your appearance, your name and the party you represent. (You may want to include your firm name, but this is optional.) Make sure you know exactly whom you are appearing for (without having to fumble with the caption). For example, "Good morning, Your Honor. Jones & Roe by Sally Smith, appearing for defendant ABC Company, the moving party."

4. **Time Constraints.** Recognize that the court has limited time to hear your matter. Be prepared to respond to a request for a time estimate , and be prepared to live with it. Make a good faith estimate. Be considerate of the court. Don't be greedy ("I want an hour") but don't short-change yourself. Once guidelines are given ("You have five minutes, counsel") make sure you comply. (There is a trend to imposing time limits for trials as well as motion hearings.)

5. **Introductory Remarks.** It is generally a good idea to begin every argument in the same way: "May it please the court, counsel. . ."

6. **Beware of Forbidden Spaces.** Entering the "well" (the area between counsel table and the bench), approaching a witness during examination, or, in some courts, even leaving the lectern. (No , it's not a "podium.") Be sensitive to the different requirements of each court, and adhere strictly unless relieved by express permission from the court. Even if "relieved" from any such constraints, you demonstrate competence by being aware that they exist.

7. **Address the Court, Not Your Opponent.** Address all remarks to the court (even those intended for your opponent). In rare circumstances where it is appropriate to address your opponent, be sure to obtain the court's advance permission to do so. However, in most cases the remark can, at least in form, be addressed to the court.

8. **Properly Address the Court.** It is usually safe to refer to "the Court." For example, "If the Court feels. . ." or "In light of the Court's ruling. . ." "Your Honor" should only be used as a form of address, not as a personal pronoun or a possessive. For example, do not say, "In light of Your Honor's ruling. . ." "Does Her Honor want to hear further argument on this point? Never address the court as "Judge" in court; this form of address should be restricted to social occasions. Never address the court as "you" or refer to "your" ruling. In open court, absent jurors and witnesses, there are first persons and third persons (but no second persons).

9. **Argue to the Court, Not With the Court.** Take the maxim "Attack the argument, not the speaker" one step further. Point out the defects in the other party's position or arguments, not the failings in the court's tentative opinion. It is rarely productive of any good to challenge the court's reasoning abilities.

10. **Don't Interrupt.** While this seems obvious, many lawyers interrupt the court. Similarly, with few exceptions (e.g., to interpose an objection), don't interrupt opposing counsel during argument.

11. **Accept Responsibility for Papers.** Don't try and dodge responsibility for a defect in the papers by pointing at another person in the firm. If the court seems inclined to rule against you based on a defect in the papers, consider asking for a continuance so the papers can be put in proper order (apologizing to the court and counsel for any imposition), or, at a minimum, seek to have an adverse ruling entered "without prejudice."

12. **"Invite," Don't "Direct".** If you want the court to look at something in the papers, proper form requires that you "invite the court's attention" rather than "directing" the court's attention.

13. **Respond Directly to the Court's Question.** Welcome questions, even though they appear unfavorable

to your position. (If you have done a good job of preparation, you will have anticipated all of the hard questions, and honed your responses.) Do not put off the question (e.g., "I am going to get to that a little bit later, Your Honor. . . ." or, "The answer to that question really has no bearing on resolution of this motion. . .")

14. **Stop Arguing After the Court's Ruling.** Don't persist in arguing a point after the court has ruled on the point. Once the court has ruled, it is considered discourteous to continue to argue. For this reason, try to make all your arguments, if possible, before the court rules; occasionally, a ruling is made before you complete getting what you wanted to get on the record, and appropriate explanatory remarks are required before you proceed. See generally *In re Grossman, 109 Cal. App. 625 (1930) for the proposition that once the oral ruling has been made, it is the duty of counsel to acquiesce at least for the time being, reserving reargument for appeal (or a proper motion for reconsideration).*

15. **Be Prepared to Show Prejudice of Adverse Ruling.** Frequently (e.g., when you represent a party opposing a TRO or preliminary injunction) the court will ask, "How will the defendant be hurt if this TRO is granted?" Resist the temptation to respond, "Who cares? C the proper test is that the burden is on plaintiff, and plaintiff has not carried the burden." If you want to gently remind the court of this fact, a possible response might be, "Your Honor, if the law in California required that prejudice be shown by the defendant, we certainly could satisfy such a burden, in that. . ." Be also prepared for the flip side of this, when the court asks, "Why can't the plaintiff wait 10 days so this matter can be heard with a little more notice?" Finally, don't make representations about theoretical harm that appear to be representations of harm that in fact is likely to occur.

16. **Listen and Learn.** It is difficult for the lawyer when there is no tentative ruling and no hint as to what the ruling might be. Even without a tentative ruling, once the court asks a question (or says anything), listen intently, you can often get a hint as to what the court views as the key issues. Pay close attention and adapt your argument. Be flexible. Don't get so wrapped up in what you are about to say that you miss what is being said in the courtroom (by the court, or juror).

17. **Be Delicate in Questioning the Court. Questions are intrusive.** They can put one --especially a judge-- in a defensive posture and possibly invite a rebuke (e.g., "I'm not here to answer your questions, counsel"). Be sensitive to this, and address questions, if any, delicately and indirectly (e.g., "Does the court have any questions on this point before I move on to the next point?").

18. **Clarification of Ruling.** Sometimes you may feel you need clarification of the terms of a ruling; however, don't abuse court's willingness to respond by attempting to reargue merits or improperly forcing court to commit to something not part of ruling or not essential to court's order.

19. **Bench Rulings, Further Requests.** Be prepared for a ruling from the bench (favorable or unfavorable) and plot your corresponding course of action in advance (e.g., you may need to promptly ask for further relief, such as a stay, or, seek a certification of an issue for an interlocutory appeal).

20. **Objections, Making a Record.** Especially if you lose, you must be careful to make a record (unless there is little possibility that review will be sought). For example, it is your responsibility to ensure that oral or written objections have been ruled on. Consider requesting rulings on objections (tactics change, depending upon how you did at the hearing). If appropriate, consider "Are my client's written objections to be considered as having been overruled?"

21. **Don't "Make A Record" Where Unimportant.** Little good is done by insisting on making a record on trivial points or those clearly within the court's discretion and which rarely will serve as a basis for appeal. On the other hand, where important, you may request permission to make an offer of proof.

22. **Form of Formal Order.** Understand if a formal order is required or if a minute order is sufficient. (Based on the ruling, decide what is best for you and be prepared to try to influence that result.) Understand who is to draft any order, when to submit it, and the approval procedure. In some cases, it is appropriate to have drafted an order in advance, so it can be presented at the hearing. Consider asking that an adverse ruling be "without prejudice" (e.g., if not on the merits, or, on limited record). If you draft an order, be punctilious, a sure way to damage your credibility and impair your effectiveness is to overreach in preparing an order.

23. **Be Prepared, and Show It.** Be able to put your hands on cases, record citations**,** documents, etc., without fumbling. Have the table in front of you neatly arranged so that it says to a viewer "This lawyer is prepared." Anticipate questions so as to be able to give a considered response, off-the-cuff remarks are seldom effective. Know the court's rules and be able to show you have followed them.

24. **Be Civil.** Be courteous and respectful to the court, but don't stop there. Civility should extend to courtroom attaches, counsel, parties, and witnesses. Vigorous advocacy and civility are not inconsistent. (In fact, civility can enhance advocacy, whereas incivility usually detracts from persuasiveness.)

25. **Avoid Visual Displays of Pique.** Avoid frowns or gestures that could be construed as disapproval of the court or its rulings. (Some lawyers may even be unaware they are manifesting displeasure, learn to control what messages your expression and body language are sending.) Proper respect doesn't allow you to demonstrate your disapproval of a ruling with either word or gesture. Have some sort of a response (even when you have just had a dagger planted between your shoulder blades) that smooths over the harm (e.g., "Very well, Your Honor") and move on to the next order of business. Don't forget that you will be before this judge on another day.

26. **Avoid Unnecessarily Challenging the Court.** Suggesting that the ruling is dumb is disrespectful and discourteous, as well as poor advocacy. Rather than arguing "No reasonable person could read the paragraph that way," consider an alternative, such as "That is certainly one way to read the paragraph (i.e., that is one possible interpretation) but let's examine the consequences of such a reading." Proper respect for the court doesn't require fawning. The judge has a job to do and you have yours, sometimes the court's goals and yours will be opposed (e.g., the judge want to minimize the prospects of having a challenged ruling reversed on appeal while your client's interests may be to maximize the same chances).

27. **Be Properly Attired.** The courtroom is not the place to "make a statement" with unorthodox or casual attire.

28. **Be Candid. Your word is, or should be, your bond.** If you use the technique of inviting the court to interrupt you and ask for authority for anything you say, be prepared to instantly deliver. When asked a question, give a straight response. If for some reason you feel you cannot give a straight response (e.g., privileged communications are sought), explain why you cannot respond directly. If you haven't anticipated a question or otherwise don't know the answer, be candid, don't fake it, instead ask, "May I have a minute to consider that, Your Honor?" or, "I don't know but I can sure find out and respond," or, "Could I have permission to file a (short) response to that within one day?" Preserving and enhancing your long-term credibility and good reputation are far more important than the perceived immediate advantage of shading the truth.

29. **Be Sparing With Emotion.** Sparing use of emotion can sometimes be effective, but the court must be prepared for the emotion in order for the emotion to have a chance of being well received. While pace, tempo, and volume must be varied to hold a listener's attention, avoid any hint of "raising your voice" at the court.

30. **Don't Attack Opposing Counsel.** Demonstrating unpleasant feelings toward opposing counsel by disparaging remarks or gestures will usually damage you in the court's eyes and will usually invite (or escalate) a counter-attack. At a minimum, engaging in personal attacks will distract the court from the points you need to make. If your opponent attacks you, meet your opponent's unreasonable conduct with dignity and reason.

31. **Meet and Confer, Honestly.** Statutes and court rules often require that lawyers attempt to resolve, by agreement, discovery and other procedural disputes and objections. Don't merely go through the motions, try in good faith to resolve such disputes. Courts don't like getting involved, especially where it appears the disputed matters are such that good lawyers should be able to resolve. Make sure it is important before having the court resolve a discovery dispute.

32. **Don't Seek Sanctions for an Improper Purpose.** Be sparing with requests for sanctions. Many judges (especially the senior judges who didn't practice in such an environment) are offended by automatic sanctions requests (to say nothing of the amounts sought).

33. **Don't Seek Disqualification for Improper Purpose.** Carefully weigh a decision to move to disqualify opposing counsel, especially if the motivation is primarily designed to obtain a tactical advantage or create a diversion from litigating the merits. Don't make or threaten such a motion unless you have carefully considered that it is justified and in your client's best interest.

34. **Concluding Remarks.** Even if you have just been hammered, it is appropriate to conclude the hearing with a genuine "Thank you, Your Honor." You aren't thanking the court for its ruling, but thanking the court for its attention (if you had it), for the opportunity to present oral argument (oral argument is usually in the

discretion of the court), or, at a minimum, for giving consideration to your papers. Judges know that one side will usually be unhappy with a ruling, they notice when their ruling is accepted with grace and style.

35. **Don't Privately Disparage the Judge or Jury.** Don't improperly blame or otherwise attack the court or jury to clients or witnesses when you receive an unfavorable result in an effort to absolve yourself of responsibility. Judges are particularly vulnerable, as they cannot properly respond or counter public attacks. (As a practical matter, even private and privileged communications sometimes come to light, and could haunt you in the future.)

36. **Get Even, Not Emotional.** Litigation often raises emotions, don't let yours show unless you want them to show (which is sometimes appropriate). Don't get mad, get even. Professionalism is not inconsistent with vigorous advocacy.

37. **Disclose Clearly Relevant Authorities.** If a case appears on point, disclose it and distinguish it or say it is wrong. Don't conceal it. Sometimes this can be difficult. On the other hand, most would agree that you needn't raise and then distinguish cases that aren't clearly relevant to the approach you are taking.

38. **Shepardize Cited Authorities.** A clear sign of sloppy, and untrustworthy, legal work is to cite cases that are no longer properly cited as authority. Almost nothing can get you off on the wrong foot quicker than citing an overruled case.

39. **No Unauthorized Ex Parte Communications With the Court.** Do not initiate ex parte communications with the court except as expressly authorized by court rules. Be particularly sensitive to not raising any pending matter with a judge in a social setting (or, for that matter, one that may come before the trial or appellate court).

40. **No Letters to the Court.** Avoid letters to the court except where specifically authorized by the court or court practice. (Federal rules include a specific proscription.) Only in rare cases are letters to the court appropriate, sending a copy to opposing counsel, while essential, doesn't necessarily cure the vice of such communications. Consider bringing procedural matters to the clerk's attention. In the rare instance of writing a letter to the court, there is a big difference between communicating an undisputed event (e.g., a later relevant decision bearing on a pending motion) as opposed to urging contested facts or making additional legal arguments. When your opponent writes such a letter, you often are compelled to promptly respond.

41. **Don't Unnecessarily Pick on a Party or Witness.** In general, treat every witness with respect. In rare cases, it becomes necessary to personally attack a party or witness C but the judge or jury had better feel such an attack is justified or it is likely to backfire.

42. **Use "Confirming Letters" Advisedly.** Sometimes it is desirable, and even necessary under a court rule, to embody an agreement, disagreement, or action in writing. However, don't automatically do this as a routine, and, when you feel it necessary to do so, be scrupulously accurate, don't overreach.

43. **Discuss Proposed Stipulations in Advance.** Don't "propose" stipulations to opposing counsel for the first time in front of court or jury, especially on controversial matters. Instead, have advance discussion with opposing counsel to agree on terms. If you can't agree, that is the end of it, there is the stipulation (unless you have been ordered to reach agreement).

44. **No "Rambo" Discovery.** Avoid using discovery to harass or inundate your opposing party or counsel. (They rarely go away due to this tactic, and you usually receive "boomerang" discovery requests.) Conducting yourself professionally will save your client money as well as often yielding better discovery responses. A good rule of thumb is to conduct discovery as if a judicial officer were present, your conduct may later be reviewed by the court, so be proud of it. See *Hall v. Clifton Precision Products, 150 F.R.D. 525 (E.D. Pa. 1993).*

45. **Don't Assert Meritless Claims.** Don't permit yourself to be used as a foil for advancing meritless arguments or causes of action. When arguing for an extension of existing law, make very clear this is what you are doing, and explain why.

46. **Don't Let Client's Feelings Override Professional Duties.** Client's emotions are often high during litigation, often justly so. But don't let that interfere with your duties as an officer of the court. While it is often a good idea not to appear cozy with your opponent, zealous advocacy doesn't require, or permit, a lawyer to disregard professional duties, including civility in the guise of identifying with the client's feelings.

47. **Honor Your Commitments.** Even if it seems that they were unwise with the perspective of hindsight,

honor your commitments. There may be rare situations where you may have to seek relief from an improvident stipulation, or other commitments, but don't confuse this with rewriting history by waffling on the commitment.

48. **Consider Reasonable Requests for Accommodation.** Don't refuse reasonable requests for accommodation simply to play "hard ball" where your client's rights are not prejudiced. This will get you off on the wrong foot with the court. (On the other hand, when your client's rights will be jeopardized, don't succumb to pleas veiled in the cloak of "professional courtesy.")

49. **The Fair Play Test, Beware of Getting Too Close to the Edge.** Be scrupulous of representations, and omissions. In matters of ethics, lawyers, and judges, often disagree. Accordingly, while your duty to the client requires pressing proper advantages, be mindful that your view of your conduct "close to the line" may be viewed as "across the line" by others. In testing close issues, ask, "Is it fair?" in addition to not appearing to violate the Rules of Professional Conduct.

50. **The Handshake Test.** While it is not always possible to accomplish, your goal should be to conduct yourself throughout the case, and inspire your opposing counsel to aspire to the same goal, so that you can conclude every matter with a handshake.

Contact the Section:
litigationsec@utahbar.org

THE VOIR DIRE INTERVIEW

The View From the Other Side

Editor's Note: *We were curious what the other side thinks of us; that is, the courtroom personnel other than judges. We hear enough from them. But what about from the reporters, the clerks, and the bailiffs? To find out, our reporter conducted a series of interviews in the halls and courtrooms of the Third District Court in Salt Lake City, asking whether lawyers are doing things that they shouldn't be doing, or contrariwise, aren't doing things they should. The comments we heard were enlightening.*

Courtroom Clerks

If a case set for trial is settled, call and tell me right away so it can be taken off the calendar. Don't leave this for the final settlement papers. There are many other people who want your spot on the trial calendar, and the sooner it is freed up, the better.

I am tired of being talked-down-to by lawyers. Just because someone has a law degree doesn't give them the right to turn up their nose at me. I feel like some attorneys use me when it serves their purposes and could care [sic] less about me otherwise. I will see them on the street and they refuse to recognize me.

When leaving a message for a clerk, always leave the case name and number, and tell me what it is you want. Don't just leave your name and number, leaving me no clue as to what you want or any opportunity to research it before calling you back.

Don't ask me how your case is going in trial. It puts me on the spot. Also, most of the time I am doing something else, and am not really listening to the evidence anyway.

I was a courtroom clerk for seventeen years and never felt that attorneys were not friendly. Some court personnel may get that impression because the attorneys are so very focused on the problem of the moment and lose track of the need to say hello.

I get annoyed by attorneys who just show up to see the judge without calling first to see if she's available. Some judges don't care about these interruptions but my judge does. They don't need to schedule an appointment, but they should at least find out when's a good time to show up.

It amazes me how rude–and stupid–some lawyers are in dealing with us. Don't they know that we talk with the judges? A little common courtesy goes a long way with me. The bad ones are only punishing themselves and their clients.

Lawyers should learn the exhibit marking system. Each judge is different, but all of them hate time being wasted on marking exhibits incorrectly or marking them during examination of a witness. It's easy to pre-mark exhibits before trial, and I will help you do so.

Don't put notices of hearings in the body of an order. I may not see them, and they won't get calendared.

Tell clients not to call me if you are their lawyer. If there's a lawyer on the case, he or she should call the court, not the client.

I am busy too, I don't always have time to visit or to be interrupted, and it's not because I am anti-social or rude. There's a lot to do and I am sorry that I can't always just stop to chat.

Don't try to schedule hearings before the allotted period under the rules.

I hate it when I give some lawyers a very tentative possible time to see the judge and then they treat it as if it were a guaranteed time period just for them.

Lawyers shouldn't impeach me in front of the judge. I dislike it when they say something like, "Well, your honor, your clerk told us this or that," and it's not true.

Most of the lawyers I see are very professional and very courteous to me. I really haven't had any problems, except with a few. They should know that the judge does not always want to be interrupted and is working in chambers, not just waiting for lawyers to stop by. That's the only problem I've noticed.

Court Reporters

It's amazing how some "big name" attorneys get a very poor record from the reporter because they don't know how to speak for the record or if they do, they don't pay attention to it. This is a real basic skill that's often overlooked.

Most attorneys need to learn to speak more slowly and distinctly, especially with the new "real-time" transcripts. There's only one chance to get it right.

I wish lawyers would slow down and not speak when the other attorney or the witness is speaking. Don't get so excited, and focus more on speaking slowly.

Eloquence is a lost art among the trial lawyers. They used to be better and now most of them don't speak as well. There's a tendency to speak in street talk, and I think juries like to see speech more formal and dressed-up in a courtroom.

Lawyers should watch someone like Dick Burbidge and notice what he does: speaks clearly, loud, but not too loud, and always makes a nice record by not interrupting or speaking over other people.

All lawyers need to remember that "this" or "that" doesn't work when reading a written transcript–you have to be clear and also make the witness be clear in referring to an exhibit.

It helps me to have a copy of the exhibits, particularly the ones from which there will be quoting by the lawyers or the witnesses.

Always act like a professional. I had an attorney in our court last week who chewed gum all week long. Or maybe it was a loose plate. But it sure looked terrible to everyone and we all talked about it.

Bailiffs

It drives me nuts to have attorneys and their clients who can't be on time, especially after breaks in a trial. Don't make the bailiff go looking for you while the judge and the jury wait!

Lawyers need to know that showing up on the morning of trial expecting to set up elaborate audio-visual equipment for the first time isn't going to be appreciated.

Lawyers, especially in domestic cases, need to remind clients and witnesses to dress appropriately for court. Some judges will not accept inappropriate attire and it can be embarrassing for the lawyer.

Attorneys need to know what each judge allows and doesn't allow. For example, some are very particular about approaching witnesses without permission.

Some clients need to be told not to talk in court, especially when in the audience, or to make faces at evidence they don't like. Where do they think they are? Babies and toddlers should not be brought to court.

Turn off the cell phones before coming into the courtroom! Some judges would like to ban them entirely, like they do over in the federal court. It's really annoying when they go off during a trial or hearing. The same goes with doctors and their beepers.

I wish lawyers wouldn't ask me how their case is going. It's not very professional and what am I supposed to say if they are doing poorly?

Learn to use your equipment before you try it out in court in front of a jury. It always looks bad when an attorney is fumbling around trying to get some piece of equipment to work. Better to leave it at the office unless you really need it and know how to use it.

Summary – Some Distilled Advice

1. Above all, be considerate of the people who work in the courtroom. They are doing a job and resent being treated as underlings. Learn their names and don't condescend. They have seen many more trials than you will ever see. It scarcely serves your client's cause or your professional reputation to ignore or patronize the courtroom personnel.

2. If a case set for trial is settled, call and advise the clerk that day, and, as always confirm it in writing.

3. A week before trial, provide the indexes to key depositions to the court reporter for inclusion into the reporter's "dictionary." Better still, give the reporter copies of the ASCII disks for the key depositions. Then the reporter doesn't have to "learn" all the proper names and technical terms peculiar to your case, and you'll get a better transcript, especially if "real-time" reporting is used for instant transcripts.

4. Give the reporter copies of the exhibits on which witnesses are expected to testify. This makes it much easier to prepare an accurate transcript.

5. Speak distinctly and slowly, and don't speak over the other attorney or the witness.

6. Learn to speak for the record. Don't use "this" or "that" or similar inexact words without clarifying the reference. Make witnesses do the same.

7. Check with the bailiff on where clients and witnesses may be seated. Many judges will only allow attorneys in front of "the bar" and clients at counsel table during trial. Everyone else must stay behind the bar.

8. Discuss the placement of blackboards, easels, or large exhibits with the bailiff before trial. Don't show up the morning of trial with an array of devices expecting to set up and get it right the first time.

9. Ask the bailiff or the clerk about the judge's preferences on courtroom protocol: for example, will the judge require attorneys to address the jury from behind the podium? Does the judge require attorneys to ask permission to approach a witness? Does the judge have any other preferences on attorney conduct or movements?

10. Learn the court's exhibit marking system (they vary from judge to judge) and pre-mark exhibits before the trial, if possible. Don't waste everyone's time marking exhibits while a witness is on the stand.

11. Resist the temptation to ask court personnel how your case is going. Aside from being amateurish, it puts them in an uncomfortable situation. Suppose they think your case is going poorly–what do you expect them to say?

12. Rehearse the use of audio-visual devices, such as overhead projectors. Nothing detracts more from your image as a professional than fumbling over presentation hardware in front of the jury.

13. If you want to speak with a judge, call the clerk and ask when the judge will be available. Some judges don't mind attorneys just showing up, but others think it's intrusive and rude to show up in court asking if the judge "has a minute." Judges are as busy as you are, and value their focused time in chambers without interruptions. On the other hand, a truly urgent problem can always be dealt with if necessary.

14. Ask the clerk for the judge's preferences on courtesy copies of motions papers. Most appreciate them but some don't want them. Keep in mind that your judge doesn't have a law library in chambers. Making copies of the motions papers from both sides, as well as the most important cases, neatly bound, is usually appreciated. Deliver them at least two days before the hearing, noting in your cover letter the date and time of the hearing.

Salt Lake Attorney, Ellen Maycock, Joins Mediation Company

Ellen Maycock, partner of the Salt Lake City law firm of Kruse, Landa & Maycock, recently contracted with Intermountain ADR (Alternative Dispute Resolution) Group to serve on its team as a Mediator and Early Neutral Evaluator. Maycock has been practicing law since 1975, and is chair of the Utah Supreme Court Advisory Committee on the Rules of Evidence. She has served as president of the University of Utah College of Law Alumni Association and as president of the A. Sherman Christensen chapter of the American Inns of Court. Her areas of practice include domestic, commercial litigation, contracts, construction and employment law.

Intermountain ADR Group assists individuals and businesses in resolving disputes outside of the courtroom. This alternative method for settling conflicts is increasing in popularity because it saves time and money. IADR was founded in 1995 by Connie Roth, and currently has twelve professional mediators under contract.

Local Federal Rule

DUCivR 43-1 COURTROOM PRACTICES AND PROTOCOL

(a) Conduct of Counsel.

(1) Only one (1) attorney for each party may examine or cross-examine a witness, and not more than two (2) attorneys for each party may argue the merits of the action unless the court otherwise permits.

(2) To maintain decorum in the courtroom, counsel will abide strictly by the following rules:

(A) Counsel will stand, if able, when addressing the court and when examining and cross-examining witnesses.

(B) Counsel will not address questions or remarks to opposing counsel without first obtaining permission from the court. Appropriate quiet and informal consultations among counsel off the record are permitted as long as they neither delay nor disrupt the proceedings.

(C) The examination and cross-examination of witnesses will be limited to questions addressed to the witnesses. Counsel must refrain from making statements, comments, or remarks prior to asking a question or after a question has been answered.

(D) In making an objection, counsel must state plainly and briefly the specific ground of objection and may not engage in argument unless requested or permitted by the court to do so.

(E) Only one (1) attorney for each party may make objections concerning the testimony of a witness when being questioned by an opposing party. The objections must be made by the attorney who has conducted or is to conduct the examination or cross-examination of the witness.

(F) The examination and cross-examination of witnesses must be conducted from the counsel's table or the lectern, except when necessary to approach the witness or the courtroom clerk's desk for the purpose of presenting or examining exhibits.

(b) Exclusion of Witnesses.

On its own motion or at the request of a party, the court may order witnesses excluded from the courtroom so they cannot hear the testimony of other witnesses. This section of this rule does not authorize exclusion of the following: (i) a party who is a natural person; (ii) an officer or employee of a party that is not a natural person and who is designated as that party's representative by its attorney; or (iii) a person whose presence is shown by a party to be essential to the presentation of the case. Witnesses excluded pursuant to Fed. R. Evid. 615 need not be sworn in advance, but may be ordered not to discuss their testimony with anyone except counsel during the progress of the case. Unless otherwise directed by the court for special reasons, witnesses who have testified may remain in the courtroom even though they may be recalled on

rebuttal. Unless otherwise directed by the court upon motion of counsel, witnesses once examined and permitted to step down from the stand will be deemed excused. Counsel are encouraged to make requests for exclusion only when necessary to ensure due process.

(c) Arguments.

The court will determine the length of time and the sequence of final arguments.

(d) Presence of Parties and Attorneys upon Receiving Verdict or Supplemental Instructions.

All parties and attorneys are obligated to be present in court when the jury returns its verdict or requests further instructions. Parties and attorneys in the immediate vicinity of the court will be notified, but the return of the verdict or the giving of supplemental instructions will not be delayed because of their absence. If, when notification is attempted, the parties and attorneys are not immediately available in the vicinity of the court, they will be deemed to have waived their presence at the return of the verdict or the giving of supplemental instructions requested by the jury.