LAWYER TO LAWYER MENTORING PROGRAM
WORKSHEET II
INTRODUCTION TO DEALING WITH OTHERS

Worksheet II is intended to facilitate a discussion about appropriate ways (including ethical concerns, etiquette, etc.) for dealing with others on behalf of your client.

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- Discuss a lawyer's particular ethical obligations in dealing with:
  - Opposing party and counsel. See Prof. Cond. Rule 1.2 and 3.4; *The Lawyer's Creed.*
  - The tribunal. See Prof. Cond. Rule 3.3, 3.5, and 8.2: *The Lawyer's Creed.*
  - The media. See Prof. Cond. Rule 3.6.
  - A legislative body or administrative agency in a nonadjudicative hearing. See Prof. Cond. Rule 3.9
  - A person represented by counsel. See Prof. Cond. Rule 4.2.
  - A person unrepresented by counsel. See Prof. Cond. Rule 4.3.

- Discuss a lawyer's duty to be honest with other parties and the court in all dealings with them. See Prof. Cond. Rule 4.1.

- Discuss the importance of dignified, honest, and considerate transactions. Discuss the importance of reputation and how a lawyer's conduct dealing with others in a case affects his or her reputation. See *The Lawyer's Creed.*

- Discuss what to do if you receive a document relating to the representation of other counsel that you should not have received. Prof. Cond. Rule 4.4.

- Review with the new lawyer the Commission on Professionalism's Professionalism Dos and Don'ts: Working with Opposing Counsel and Other Lawyers. Discuss situations that make following these rules challenging. Share "best practices" with the new lawyer on how to appropriately deal with others on behalf of your client.

- Talk about the importance of civility in communications with others. David J. Abeshouse, *Civility and Negotiations*, GPSOLO MAGAZINE, Oct./Nov. 2005.

- Share with the new lawyer "war" stories of attorneys who have ultimately harmed their client because of their incivility and lack of consideration in dealing with opposing counsel, the judge or the jury.

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- If the new lawyer spends time in court, discuss the attached excerpt from KIMM ALAYNE WALTON, WHAT LAW SCHOOL DOESN'T TEACH YOU…BUT YOU REALLY NEED TO KNOW at 411 - 427 (2000).

RESOURCES

OHIO RULES OF PROFESSIONAL CONDUCT

I. CLIENT-LAWYER RELATIONSHIP
RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to divisions (c), (d), and (e) of this rule, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive a jury trial, and whether the client will testify.

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View complete rule and comment at
http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1_2

III. ADVOCATE
RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly do any of the following:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

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(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable measures to remedy the situation, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person, including the client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable measures to remedy the situation, including, if necessary, disclosure to the tribunal.

(c) The duties stated in divisions (a) and (b) of this rule continue until the issue to which the duty relates is determined by the highest tribunal that may consider the issue, or the time has expired for such determination, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

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RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not do any of the following:

(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

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(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on a good faith assertion that no valid obligation exists;

(d) in pretrial procedure, intentionally or habitually make a frivolous motion or discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence or by a good-faith belief that such evidence may exist, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused;

(f) [RESERVED]

(g) advise or cause a person to hide or to leave the jurisdiction of a tribunal for the purpose of becoming unavailable as a witness.

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RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A lawyer shall not do any of the following:

(1) seek to influence a judicial officer, juror, prospective juror, or other official by means prohibited by law;

(2) lend anything of value or give anything of more than de minimis value to a judicial officer, official, or employee of a tribunal;

(3) communicate ex parte with either of the following:

(i) a judicial officer or other official as to the merits of the case during the proceeding unless authorized to do so by law or court order;

(ii) a juror or prospective juror during the proceeding unless otherwise authorized to do so by law or court order.

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(4) communicate with a juror or prospective juror after discharge of the jury if any of the following applies:

(i) the communication is prohibited by law or court order;

(ii) the juror has made known to the lawyer a desire not to communicate;

(iii) the communication involves misrepresentation, coercion, duress, or harassment;

(5) engage in conduct intended to disrupt a tribunal;

(6) engage in undignified or discourteous conduct that is degrading to a tribunal.

(b) A lawyer shall reveal promptly to the tribunal improper conduct by a juror or prospective juror, or by another toward a juror, prospective juror, or family member of a juror or prospective juror, of which the lawyer has knowledge.

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RULE 3.6: TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding division (a) of this rule and if permitted by Rule 1.6, a lawyer may state any of the following:

(1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

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(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest;

(7) in a criminal case, in addition to divisions (b)(1) to (6) of this rule, any of the following:

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time, and place of arrest;

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding division (a) of this rule, a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this division shall be limited to information necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to division (a) of this rule shall make a statement prohibited by division (a) of this rule.

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RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3 (a) to (c), 3.4 (a) to (c), and 3.5.

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IV. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS
RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly do either of the following:

(a) make a false statement of material fact or law to a third person;

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting an illegal or fraudulent act by a client.

View comment at
http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule4_1

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

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RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

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RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

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(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, harass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

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VII. MAINTAINING THE INTEGRITY OF THE PROFESSION
RULE 8.2: JUDICIAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judicial officer, or candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall not violate the provisions of the Ohio Code of Judicial Conduct applicable to judicial candidates.

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A LAWYER'S CREED

To the opposing parties and their counsel, I offer fairness, integrity, and civility. I shall not knowingly make misleading or untrue statements of fact or law. I shall endeavor to consult with and cooperate with you in scheduling meetings, depositions, and hearings. I shall avoid excessive and abusive discovery. I shall attempt to resolve differences and, if we fail, I shall strive to make our dispute a dignified one.

To the courts and other tribunals, and to those who assist them, I offer respect, candor, and courtesy. Where consistent with my client's interests, I shall communicate with opposing counsel in an effort to avoid or resolve litigation. I shall attempt to agree with other counsel on a voluntary exchange of information and on a plan for discovery. I shall do honor to the search for justice.

To my colleagues in the practice of law, I offer concern for your reputation and well-being. I shall extend to you the same courtesy, respect, candor, and dignity that I expect to be extended to me.

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Civility and Negotiations

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By David J. Abeshouse

Civility is—and should be—a core negotiation issue. The degree to which one employs ordinary civility in negotiations often has a marked effect on the bottom-line result. It also can make life more pleasant, even in fundamentally adversarial situations, essentially the norm for business litigators and transactional lawyers. An example of what *not* to do is the opposing counsel who—instead of working together to resolve a dispute or problem in customized, mutually acceptable fashion—prematurely blurts out, "I'll see you in court." This knee-jerk reaction usually fails as a negotiation tactic, for many reasons:

- It reflects a lack of analytic forethought and a tendency for emotional outbursts, two aspects that make this lawyer a less-than-formidable adversary.
- It essentially obliterates the possibility of counsel working together for the mutual benefit of the clients, who likely could achieve through a tailored settlement a result far better for both sides than any court would order. Because the vast majority of business litigations settle before trial, it is a fair bet that the parties will end up in some sort of settlement negotiations, regardless.
- Over time, this lawyer will develop a reputation as a loose cannon and a temperamental, petulant, unprofessional person to whom others would not refer clients. Opposing counsel often serve as a good referral source for future business because they have seen firsthand what the lawyer can do in the trenches.
- Finally, to the extent that this lawyer's own client learns of his reaction, the client may become dissatisfied with a lawyer who seems out of control and willing to put his own emotional needs ahead of the client's best interests.

In a hearing before an arbitrator, the less civil party often merely is endeavoring to overcompensate for unfavorable facts or law, whereas the more civil party in a dispute often feels no need to descend into incivility. Indeed, obstreperous counsel thus inadvertently acknowledges implicitly that he or she likely has a less than wholly legitimate case on the facts and/or law—not something a lawyer seeks to communicate to the one who is judging the case and will issue the final determination.

Don't lose your temper. Rather, lose the temper, yelling, and foul language. Although

"venting" might improve your mood, it rarely works to your advantage in negotiations. Yes, occasionally it may tend to intimidate; however, the same result likely could be achieved in those instances without the expletive-laden, high-decibel diatribe. Most often, it will cause a diminution in credibility and respect. And that's a price not worth paying for the occasional negotiation advantage it arguably might afford. Indeed, a prompt apology for an emotional outburst might gain more ground toward a good working relationship and achieving the negotiated goal.

Employ common courtesy and civility as a matter of routine.Make it a part of your natural way of dealing with others, and you will see how effective it is, both in terms of results and in your quality of life. Sure, there are times when the need for some more forceful language and volume may be indicated, but this should be the exception rather than the rule. (The rarity of your outbursts will also increase their impact.) And by refusing to respond in kind when someone personally offends you by words or actions, you refrain from lowering yourself to their level, and that in itself is a laudable goal. Even the matter of responding to e-mails and telephone voice mail messages encompasses these tenets of common courtesy and civility—prompt response by you encourages similar treatment by your counterpart. The more the enlightened use these means of conducting legal and business negotiations, the more likely their use will spread. How much better things would be if this became the usual mode for the majority.

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Take the matter to someone more senior and ask them how to handle it."

B. Advice For Everybody Who Spends Time In Court, Whether You Represent The United States, "The People," The State, Or Clients

1. Handling judges. Get out your kid gloves!

a. Get to know judges' styles.

All judges are different! Ask other lawyers in the firm (or other prosecutors in the office) for their impression ***before*** you argue a case before a judge with whom you're not familiar. As Jones Vargas' Karl Nielson says, "Knowing the judge's likes and dislikes, his or her requirements, pet peeves, and the like, is so much more critical than you can imagine just coming out of law school. Knowing the judge will help you avoid the many pitfalls involved in learning the ropes of practice before the courts."

It may be that some judges require you to call and conference a case before you make a motion. Perhaps the judge insists that you use his middle name when you speak with him. One lawyer talked about a judge who always, in matrimonial cases, had a policy of interviewing the family and then taking the lawyers to lunch at his house to discuss the family. Whatever a judge wants to do in his or her court, that's the way it is! Adapt your style and strategy accordingly. It's like that line from *To Kill A Mockingbird* about guests: "If he wants to pour syrup on the tablecloth and eat it, he can."

It also makes sense to get friendly with court reporters. Because they see judges all the time, they can clue you in to the judge's mood and anything that seems to be impressing or riling him/her on any given day.

b. Handle judges with kid gloves!

Always treat judges with respect, no matter ***how*** you feel about them or how they treat you. What does that mean?

Always speak deferentially to them. Regardless of how you feel about them personally, they're judges, for chrissakes. Don't question their judgment, their intelligence, their perception—***nothing***. One lawyer told me about a case where the judge asked opposing counsel a question, and the guy responded, "Judge, I think you're a little off-focus." The lawyer laughs, "The court went dead quiet—and in that moment, he lost the case."

Be respectful of their time. As Hofstra's Caroline Levy recommends, "You're sometimes expected to be in three courtrooms at once to hear their calendars. If so, let them know where you'll be so they can find you." And if you're going to be late for court due to something out of your control, ***call*** both your judge and the adversary and let them know! People are more understanding than you think they'll be.

Finally, if a judge upsets you, don't let it show. Take deep breaths. Count to ten. Maintain a professional composure ***all*** the time. Blow off steam once you're out of the courthouse!

2. *Always* be civil and professional, no matter how much of a buttmunch you're dealing with.

One lawyer recommends that "You need to maintain the highest level of civility and professionalism because (1) no matter the arena, you're always an attorney in terms of your ethical and professional responsibilities, and (2) all you have in the end is your name and reputation, so keep both clean!" Golden Gate's Susanne Aronowitz adds, "Don't assume people are out to get you. Be collegial. Be accommodating, grant extensions in discovery, as long as they won't impact your case. You'll need favors down the road and won't get them if you're a jerk when ***other*** people need favors from you."

3. Remember *everybody* is a potential juror.

As Arkansas' Claudia Driver says, "You might want to shout an obscenity at that jerk forcing you onto the shoulder of the road, but next week you could be asking voir dire questions of that same person! For all you know, they were trying to remove the dog from the baby at 45 miles an hour in four lanes of traffic on a bad day when you decided to hurl colourful language at them. They'll have a very bad feeling about you. The odds are against you even more in a small town!" If you flip the bird at somebody when they beat you out for a parking space, you don't know where that person will pop up again. The watchword here? Be civil. It's good advice for ***everybody***. If you spend time in the courtroom, it can save your bacon!

4. Act more confidently than you feel!

If you're new, being in a courtroom can make you feel the way Dorothy felt when she first approached the Wizard of Oz. ***Everybody*** feels the same way! That feeling is exacerbated by the fact that law school doesn't really leave you prepared for court. As a lawyer for the United Mine Workers of America points out, "Even with three grueling years of law school under your belt, you don't know how to be a lawyer yet, even if you've participated in clinical programs, competed in moot court competitions, and taken trial practice courses." Relax! As the old saying goes, "This too shall pass." Hofstra's Caroline Levy points out that "It can be tough and tiring, but pretty quickly you find that cases repeat themselves." Lawyers at the Federal Defender's Office in Chicago say, "You'll ***never*** know as much as you wish you did, but with time, it all gets easier and less nerve-wracking!"

In the meantime, ***fake*** it. ***Nobody*** knows how nervous you really are. If your voice is steady, you're prepared, and you speak with confidence while looking people in the eye, they'll never realize you're quaking on the inside. As Minnesota's Nora Klaphake says, "Remember confidence before competence! If you look professional, your clients and opposing counsel will treat you as competent, even if you don't feel that way. Never let them see you sweat!"

SMART HUMAN TRICK . . .

Litigator, small firm: "I arrived at my first court trial to find that the arresting officer who was my key witness had never testified in court before. Needless to say, I didn't tell him that I had never tried a case

before! I acted as if I had done this a million times. He gained confidence from my attitude, I put him on the stand, and we won."

5. Be nice to court personnel.

Being a nice person is good advice in every aspect of your life. It's just a much happier life if you smile at people and they smile back to you. When it comes to dealing with court personnel, it's crucial to be pleasant. Because, let's face it—OK, you've got a law degree. Congratulations. But when you're dealing with court personnel, they may not have your education, but they've got a ***lot*** of power, and if you don't treat them with respect, you'll discover that in a ***hurry***. One litigator points out that "People at the courthouse won't do what you want them to do just because you're a lawyer. They can make your life a living hell."

If you're at the courthouse for the first time, don't be afraid to say to court personnel, "This is my first time here. Can you help me out?" As one lawyer points out, "If you're deferential to them, they'll help you. They help get your case through the system!" Another lawyer points out that "If you're at the courthouse frequently, you get a reputation fast. You don't get a second chance to make a first impression on court clerks, docket clerks, court reporters. You can get a lot of breaks from them if you're nice." One litigator said that "I always make a point of being nice to folks at court. It really does pay you back. I got stuck in traffic, and I was racing to court because I wanted a motion heard the following week. I missed the deadline. I explained the traffic situation to the clerk, and she put it on the calendar for me anyway. She didn't ***have*** to. If you're nasty to clerks, things can easily go the other way. If you file your document on time, you find out that oops, it got dropped, and it didn't get filed until two days later and you missed your Statute of Limitations."

6. Preparation beats skill. Do your homework!

As Loyola's Pam Occhipinti points out, "Remember that when you go to court, preparation beats skill 90 out of 100 times. You can't get ***too*** confident. Be conscious of trying to give your best!" Cover ***all*** your bases.

As Jolley Urga's Brian Tanko says, "The quickest way to earn respect is reading the Rules of Civil Procedure."

You may not be the most experienced lawyer on the planet, but good preparation can make up for that. Lawyers at Wyatt Tarrant point out that "Preparation will put a new attorney on the same playing field as a seasoned attorney. Furthermore, it'll go a long way toward alleviating the butterflies you get appearing in court!" Being prepared also impresses judges. As one prosecutor comments, "If you're right on the law and the judge sees that you know what you're doing, they won't question you as much. It makes your life easier."

If you're conscious of being well-prepared, you'll think of contingencies that other people might overlook. One new litigator talked about preparing for court the way she'd prepped for interviews and final exams. "When I came to my firm, a partner gave me a case to handle and said, 'It's very unlikely you'll win this, but it's a good way for you to get experience.' I thought back on how I'd worked on preparing for interviews, trying to think of every question an interviewer could ask me. I thought about final exams, where I thought about every issue the professor could ask about. I really busted my butt to cover my bases. And we won!"

7. Be alert to times when it's best to shut up!

Many litigators pointed out to me that it's easy to get into court and have your common sense jump right out of your head. No matter how preoccupied you are with the points you want to make, be alert to what's going on. Remember your goal is to put on your best case, and sometimes that means shutting up. As Dickstein Shapiro's Paul Bran points out, "If a judge says to you, 'I'm inclined to rule in your favour. Do you want to add anything?' the answer is '***No***!' Don't mess it up!"

8. You'll stumble. It's your recovery that counts.

As Dickinson's Elaine Bourne points out, "Learn to laugh at yourself. You'll stumble over a question. It happens. The recovery is important." Maintain your composure and get over it!

I remember watching ESPN late one night. The announcer was giving an injury report on college football players. He's running down this list,

and he gets to this one quarterback. He ***means*** to say that this guy had been unable to play because of a slipped disk in his neck. But instead of saying "disk," he leaves out the "s." He immediately realizes his mistake, and says, "That is to say, slipped ***disk***." You could hear the crew in the background just collapsing with laughter, and the look on the announcer's face suggested that he just wanted to explode. But he didn't. He calmly gave the rest of the injury report. I don't know ***how***, mind you, but he did it.

Similarly, when I dance in shows, it's very easy to make a mistake and grimace. My teacher, Jody Foster, always says, "Nobody in the audience knows you made a mistake. ***You're*** the only one who knows. But if you make a face, ***everybody*** will know something's wrong." He's absolutely right. And the same goes when you're in court. If you make a mistake, laugh briefly if it's funny, and then move on. People will take their cue from you. Nobody else will make a big deal out of it if you don't!

9. You can't control what you can't control. Remember that the law is unpredictable.

No matter how well you prepare, no matter how good your case is, sometimes you won't win. As Lisa Lesage says, "You never know how cases will come out." Juries, witnesses, and judges are unpredictable. As one prosecutor points out, "Some judges are pro state, some are pro defense, some are clueless. You just have to make your best case." So do your best, and remember the serenity prayer: have the serenity to accept the things you can't change.

Similarly, when you win, be gracious. Save your victory dance for later. As Bart Schorsch writes in *The Student Lawyer*, "In every single lawsuit, somebody eats it and somebody feeds it. If you are feeding it today, you might be eating it tomorrow. Be gracious in victory as well as defeat."

10. More tips for you if you're a prosecutor

If you're starting your career as a prosecutor, you're in a unique position. Unlike lawyers for law firms, you don't have to worry about billable hours or soliciting business. And unlike new associates at large firms, you

don't have to do any writing. As one prosecutor points out, "In advocacy competitions in school, you have to do a brief. You don't have to memorialize anything in prosecutors' offices. Appellate teams do that. You don't have to do any long briefs the way you do in moot court." But there are other issues you face, like handling defense lawyers and victims, knowing how to charge a case. Let's see what you need to know . . .

a. Learn by observation!

When you become a prosecutor, be a sponge and soak up as much expertise as you can from your colleagues. Go to the courthouse before you even start work, if you have the chance, and watch your soon-to-be-colleagues presenting cases. See how they deal with the judge, with juries, with defendants. There's no better way to get your feet wet!

When you start work, you will get some training. You'll go to "baby prosecutor school," and you'll have seminars on different kinds of crimes and different elements of your job. And there are books you can turn to, including the "prosecutor's book," which gives you, among other things, elements of crimes. Also, depending on where you work, you have access to databases; for instance, U.S. Attorneys have their own database where they swap information. And when you start to work, they won't throw you to the wolves. As Assistant State's Attorney Rich Colangelo says, "They look over your shoulder. They want you to get your dispositions in line with everybody else in the office. They don't want you to be the 'weak link'—the one defense attorneys perceive as 'softer' than everybody else.'"

But the fact remains, much of what you learn is through observation. Rich Colangelo points out that "It's ***all*** about dealing with people. ***Watch***. See what a case is worth. Law school doesn't tell you the elements you need to prove. You don't come out knowing the possible disposition of cases. You only learn that by watching."

b. Ask *lots* of questions. You're not alone!

As one prosecutor says, "Never let yourself feel isolated. You don't know everything." Another prosecutor points out that since

you don't have any billing pressure as a prosecutor, you've got more leeway to bat around questions with your colleagues. Rich Colangelo says that "You need to ask more experienced attorneys to understand many things you don't learn in school. For instance, in a drug case, you've got a guy with a prior conviction, he sells drugs to an undercover cop—what's it worth?" Keep in mind that when you ask questions, "Be sure to have a strategy in mind before you ask," he adds. "If you ask a prosecutor, 'I'm not too familiar with this. What would you do?' they're likely to say, 'Well, what do ***you*** think?' Don't be caught off-guard. They're testing you! Have a strategy ready."

c. Speak with confidence!

When you start out in ***any*** new job, you're unlikely to feel very confident. As you should in any other job—***fake*** it. Nobody sees how you feel. They only hear how you sound, see how you look. You'll develop ***real*** confidence soon enough, but in the meantime, don't let people see your nerves! As one prosecutor points out, "It gets a lot easier pretty quickly. But the first time you stand up in court, asking for even something as simple as a continuance is intimidating!"

Don't let your voice quaver. Speak calmly and firmly. Stand up straight. Look people in the eye. As Rich Colangelo says, "You're on center stage! You have to speak with confidence. You don't want to be the small fish. You don't want people to push you around." Another prosecutor points out that "If you feel anxious when you're in court, ***tell*** yourself 'I'm smart, I can think and talk my way out of anything.' Because you ***can***."

d. Keep up with new cases. It's easy! You've only got one subject: Criminal Law.

As is true for every other lawyer, you've got to keep up with developments in the law. In almost every prosecutor's office, when there are big new cases that come down, they'll be circulated around. You'll see them. As one prosecutor explains, "If something huge came out, like a change in the standard for probable cause, someone in the office will research it and present it to everybody else." On top of that, every state has a legal publication that outlines new cases. Rich Colangelo recommends that you "Scan that, and look for criminal cases pertaining to what you're doing. Flag the case. Search for issues. For instance, if you're handling sexual assault cases, you might find one that involves proving the risk of injury. Then keep a small notebook in which you cite the case and why it's important to you. It's a trick that I learned from my boss, and it creates a great reference tool."

e. Be aware that in some very political offices, there can be a lot of pressure on you to win your cases.

I didn't talk to any prosecutors who felt that they were under serious pressure to win, although some of them said that they'd heard from other prosecutors about that kind of pressure. No matter ***where*** you are, resolve to put on the best case you can, and ignore any other pressure. As one prosecutor points out, "Frankly, once a case makes it through the grand jury process, it's a pretty good case for the prosecution. There's no pressure to 'win at all costs,' but you know that you've got a good case." Another adds that "Trials are competitive, it's just the way they are. But you create your own pressure!"

f. When you make arguments in a case, have a list of cases written up in advance to hand to the judge in support of your arguments.

g. Get familiar with the styles of different judges, and change your strategy accordingly.

Before you argue a case before a judge, get with your colleagues to learn the judge's style. As one prosecutor explains it, "All judges are different. Some of them want to 'split the baby.' So you offer a longer sentence, knowing that the judge will knock it down to what you originally wanted. Other judges come up with their own left-field guess about what the penalty should be, and for those judges, you manipulate the charges with a mandatory sentence so that their

discretion is removed. Sometimes you'll find judges who hate mandatory sentences, they hate having their hands tied. For them, you ***never*** talk about mandatory sentences; they don't want to hear it."

h. Don't overcharge the case just because the defendant is a real creep.

One prosecutor warns you against "overcharging the case. Maybe the guy is a scumbag, and maybe he should go away for thirty years even though the crime he committed was a five-year crime. Don't succumb to the temptation to overcharge it. You'll just piss off the jury—which is getting a few bucks a day, so they're ***already*** not very happy."

i. When you start out, remember that your DMV violator today might be in your jury pool tomorrow.

As one prosecutor explains it, "When you start out as a prosecutor, you handle small things, DMV-type work. You get two minutes per person. Some of them cop an attitude, and you're tempted to cop one right back. I did. Then one day I realized, 'Wait a minute. These people, they're just ***speeders***. They're just like my friends and me. Jurors come from the DMV docket.' So I dropped the attitude. It's possible to smile and still do the job. Treat people nicely, and they'll like you, even if you're technically on the other side."

j. Dealing with defense attorneys.

One prosecutor points out that "It's easy to develop an 'us' and 'them' mentality," but "You always have to remember: the defense attorney you hate today might represent your wife's divorce tomorrow. And if you're in a small town, you might have kids on the same soccer teams. Just deal with them professionally." Just as you do with judges, learn the different styles of defense attorneys. You'll see them over and over again. One prosecutor says that "Some defense attorney are trustworthy. If they tell you 'There's a problem with this case,' you believe them. Others, if they said, 'It's daylight outside,' you'd look anyway. You can't trust them. But you learn that, and you ask other prosecutors about local personalities. They

develop reputations. We have one guy we call the drip. Working with him is like watching water drip onto a stone. Drip, drip, drip. He tries to wear you down. You're prepared for it, so it doesn't affect you. Others, they'll do a little dance, 'My guy's not a bad guy,' you've heard him say the same thing about his last fifty clients. So you can put it in perspective. You learn their tactics and you handle them accordingly."

Always be prepared when you deal with defense attorneys. Read the file! As one prosecutor points out, "Defense attorneys will challenge you. They won't even know what the person is charged with, but they'll challenge you, figuring you aren't familiar with the file. Know the potential penalty, the elements, be a step ahead! A lawyer will say to you, 'I'm representing Joe Gazatz. You can't prove the case.' You need to be able to say, 'Oh, really?'"

k. Dealing with witnesses.

One prosecutor advises that "When you deal with witnesses, be ***very*** businesslike. It's difficult, at best. You need to go over every detail they're going to say. Something can happen, you can have two witnesses three feet away from each other who see it, and they tell totally different stories—but they both believe they're telling the truth! People filter things so differently. What you have to do is to ask ***exactly*** the same question to every witness. Have the questions written down, and repeat them word for word to each witness. If you say to one, 'How fast was the car going when it hit the tree?' then that's what you've got to say to the other witness, as well. If you say, 'How fast was it going when it ***smashed into*** the tree?' you'll get a speed that's a lot faster, because of those words 'smashed into.' If you ask the same questions and the witnesses come up with different answers, and they're both saying the defendant didn't do it, you can say, "They couldn't both have seen it. They're telling two different stories.'"

l. Handling victims.

One prosecutor points out that "even though you really don't have clients when you're a prosecutor, victims are ***kind*** of your

clients." Most prosecutors' offices have a "victim and witness coordinator" who tells the victim where the case stands, for instance, "We've submitted this and we're asking for a court date." In other offices, you have more contact with victims. When you do deal with them, be sure that you speak calmly and with deliberation, so that they perceive you're in control. One female prosecutor says that "Many women say 'mm-hmm' when people talk. You don't want to do that with victims or even witnesses, for that matter. It makes them think you're agreeing with them when what you're really saying is, 'I'm listening. Go on.' You want to get ***all*** the facts. Victims sometimes try to leave out relevant facts, worrying that if they tell you everything, there won't be a conviction." Be aware that if the case doesn't get resolved to their satisfaction, "Victims will complain, but you understand it. They need to vent," says one prosecutor.

Depending on the crime, dealing with witnesses can be a terribly gut-wrenching process. As one prosecutor says, "When you deal with victims of child abuse, you learn about things you shouldn't have to know. You learn how to distinguish a splash scald from an immersion scald, and the difference between a twisting fracture and a clean snap. You learn the telltale signs of abuse. You have an immersion scald, a twisting fracture—no kid gets those from an accident. You don't want to know this stuff. But if you believe in what you're doing, you can deal with it. Just focus on what you're doing: you're building a case."

m. Outside of work, remember your job!

One prosecutor laughingly said that "When you're out on the freeway, you're speeding, it's easy to think, 'Hey! I've got a free pass! I'm a prosecutor!' You have to fight that attitude! A prosecutor ***does*** represent the public. You want to represent the ***best*** of it." Another prosecutor added that "Whether you're a prosecutor or not, there are some nightclubs, you'd just be stupid to go there. You don't have to change your life outside of work just because of your job. But when you see people in a store, and you know that they were in on a speeding ticket last week, and they look at you and say, 'Hmm—where do I know you from?' don't take the bait. Tell them about something else in your life, 'Oh, maybe the YMCA,' or 'I teach at so-and-so college.'"

n. Lights! Camera! Handling the media.

As one prosecutor explains, "Some reporters are good, some aren't. When a case is pending, you can't say anything about it. Once you get into court, you need to know that everything you say in court is fair game. If you go into the facts on the record, you're giving them what they want to know. But if the reporter is a jerk, if you've had trouble with them before, you can just stipulate to the facts and reporters can't get anything. And don't buy that 'off the record' line. I've been burned a few times with that. If you don't want them to print it, don't say it."

11. More tips for you if you represent clients

a. Rely on other people in learning the ropes. You're *never* alone!

When you start out as a litigator, there's a ***lot*** to learn. As Susanne Aronowitz says, "You don't know how things get filed with the court. You don't know what pleadings look like. 'Meet and confer with opposing counsel'—what does that ***mean***? Clinics in school help, but if you didn't do that, maybe you won't know what local rules are on stapling documents for court. What's a proof of service? Which deadlines are 'hard' and which are 'soft'? How do you count time on deadlines? The Federal Rules of Civil Procedure aren't the only rules you need to know!" It can be overwhelming!

Make things easier on yourself by relying on others. Start with people in your own office, who are just as vested in your clients' success as you are. As Oregon's Jane Steckbeck says, "You'll be asked to do a bunch of things you've never done before. Maybe you haven't, but somebody else ***has***." One lawyer talked about how when he first started with his firm, his partner said, "You've got to do expert witness depositions in two days." He said, "I had ***never*** done it before and I had ***no idea*** where to start. I asked around the

office. Another associate gave me a book called the *Depositions Handbook*, and there was a chapter in there on expert depositions. Thank God! The fact is, you can't be cowed. I had a colleague who had to take on a lot of responsibility fast, and she sat in her office, crying. She didn't want to do it. I know how she felt, but it's like the old saying, 'Feel the fear and do it anyway.' Turn to other people who have expertise that you ***don't*** have. They'll help you through!"

Other than your colleagues, there are ***lots*** of resources at your disposal. Lisa Lesage recommends that you go to the local bar association and find lawyers who handle the kind of cases you just got. She says, "Lawyers ***love*** to talk about themselves and what they know, and they love to give advice about cases! The magic words are, 'I've got this case. Can I take you out to lunch to learn about criminal law?' You'll be amazed. They'll tell you what to do, they'll send pleadings. People are really helpful."

Susanne Aronowitz suggests contacting your clinical professor at law school, or the alumni association, or any other professor who might be helpful. "Graduation isn't divorce! Stay in touch with your professors. Always come back to ask for things. You paid a lot of money for school. Stay in touch!"

b. Be nice to sheriffs.

I've told you before, be nice to everybody. It's as true for sheriffs as it is for anybody else. As one litigator suggests, "If you want summonses served on time, be nice to sheriffs! It doesn't matter if you like them or not. My boss was appalled. He said to me, 'But he's ***disgusting***! He has tobacco dripping from his chin, he calls you Sweetie. How can you be nice to him?' I said, 'That's as may be, but my summonses get delivered on time. It doesn't take ***anything*** to be nice to people.'"

c. When it comes to dealing with opposing counsel, be cordial—but guarded. Being an advocate doesn't mean being a jerk!

As St. Louis University's Wendy Werner says, "Understand when you're being an advocate and when you're being a jerk. You may

get a much better deal for your client if you treat the other lawyer with courtesy and respect. You'll get a better outcome." What should you do?

1) Remember that you can accomplish more quietly than you can yelling.

As Georgetown's Anna Davis says, "In deposition training, you learn that you can be really friendly but ask some really deadly questions." Perhaps you saw the deposition in the Microsoft case, where David Boies, by most estimations, took apart Bill Gates. He didn't do it with bluster. If you read anything about Boies—and you should, he's an amazing lawyer—he prepares better than anybody, working phenomenal hours. He patiently draws out responses from witnesses on cross-examination or in depositions, allowing them to paint themselves into their own corner. He is charming, polite and respectful. His opponents have only good things to say about him.

2) Remember that no matter how big a city you work in, the world really is small. You *need* a good reputation, because you'll always need professional courtesies.

As Carlton Fields' Kevin Napper says, "Your reputation will precede you. If you're professional and your word is your bond, if you do what you say you're going to do or explain why you can't, you'll get professional courtesies. ***Everyone*** knows who's dishonest and a jerk and who practices close to the edge. They get treated accordingly." Another lawyer adds, "Some people are a pain in every case. They throw discovery at you. They're just jerks for the sake of being jerks. You just wait, knowing that sometime, you'll have an opportunity to get them back."

When it comes to professional courtesies, remember that there are lots of rules that aren't engraved in stone. When you're involved in a case, for instance, there are many times when deadlines can be stretched with the consent of the

opposition, where you can get more time for discovery or an adjournment if the other side agrees.

There will certainly be times when it's not in the best interest of your client to grant courtesies. If that's the case, ***explain*** to the opposing counsel why you can't do what they asked you to do. If you tell them why you can't comply, you won't look like a jerk.

If you're tough as nails and you ***don't*** grant those courtesies when you easily could, it'll come back to bite you—and your clients. Some time ***you'll*** be the one needing an extension, and if you have the reputation for not granting them yourself, nobody will give you the time of day. You'll find people filing motions against your client on the Wednesday before Thanksgiving, requiring that you respond within five days. That doesn't help ***anybody.*** There are plenty of ways to serve your clients without being a turd!

3) Have respect for your opponent's position, no matter how hare-brained it seems.

As lawyers at Morrison & Foerster suggest, "You need to understand and respect your opponent's position, no matter how hare-brained it seems at first. It makes resolution of the dispute more likely, and helps win the fight if one is necessary."

4) Keep in mind what your client's goal is. It might not be being the "winner."

As a lawyer at Morrison & Foerster points out, "If you can get what you need, then you don't have to be declared the 'winner.'" It's very easy to lose sight of that when you're locking horns with opposing counsel.

One matrimonial attorney told me this story: "I was representing a woman in a divorce case, and the husband and his lawyer were being real jerks. The guy had his own business, and he was clearly hiding assets somehow, although the wife didn't think he had much money. The wife had a very responsible full-time job. The husband's lawyer kept calling me, demanding a ten-thousand-dollar cash settlement for his client. This guy really pissed me off, and I really wanted to fight him. The wife was spitting mad, as well. What they were asking for clearly wasn't fair. I was preparing the wife for a trial. But then I took a step back, and thought, wait a minute: if we go to trial, the fees are going to be a lot more than ten thousand dollars. It's going to eat up her entire nest egg. One of the toughest conversations I ever had with her was to point out that if she ***didn't*** challenge the ten thousand dollars, if she just paid it, she was really going to win. She was going to get this ugly divorce behind her and come out with more money, to boot. Neither one of us was happy about it but it was clearly the right thing to do. So, fine, technically the husband 'won.' He got my client to pay up. But my client and I both knew who was really the winner. He and his lawyer were both idiots."

d. Consider taking an 'Acting for Lawyers' class.

Elaine Bourne says that "Taking an 'Acting for Lawyers' class gives you greater confidence when you go into court. You'll find courses like it taught through adult ed most everywhere. It's a fun class! You'll learn things like getting your point across with more than words, mock openings and closings. It's kind of like mock interviews for lawyers."

C. NEVER AIR YOUR DIRTY LAUNDRY IN THE MEDIA!

Quick! If you had to choose between your boss liking you, and a reporter you don't know and whom you'll never talk to again liking you, which would you choose? Hmm, let me guess. I don't know about you, but I think the idea of a paycheck is rather enticing. If you do, too, then ***never ever ever*** say anything unflattering about your employer to any reporter.

A *Wall Street Journal* article, detailing the grueling life of new associates at some law firms, included the following passage (I've changed the name of the firm and the associate named in the article):

THE SUPREME COURT *of* OHIO

PROFESSIONALISM DOs & DON'Ts:

WORKING WITH OPPOSING COUNSEL AND OTHER LAWYERS

Issued by the Commission on Professionalism:

Under "A Lawyer's Creed" issued by the Supreme Court of Ohio in February 1997, Ohio lawyers pledge to offer fairness, integrity, and civility to opposing parties and their counsel. The Supreme Court of Ohio Commission on Professionalism prepared this list of "dos and don'ts" to illustrate some of the ways lawyers can fulfill this pledge in their everyday communication with opposing counsel and other lawyers. In creating this list, it is not the commission's intention to regulate or to provide additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio's lawyers. By following these practices, lawyers will elevate the level of professionalism in their day-to-day interactions with other lawyers.

DO

- Maintain a courteous and cooperative working relationship with opposing counsel and other lawyers.
- Avoid motions about minor issues that should be worked out informally.
- Wait 24 hours before deciding to respond to an intemperate, untrue, or exasperating communication from another attorney.
- Discuss discovery disputes with opposing counsel in person, by phone, or by e-mail before sending a formal letter that stakes out your position.
- Consult in advance with other attorneys to avoid scheduling conflicts.
- Cooperate with other attorneys when you have obtained permission of the court to extend deadlines imposed by a court order.
- Extend professional courtesies regarding procedural formalities and scheduling when your client will not suffer prejudice, DO be fair-minded with respect to requests for stipulations, and DO agree to stipulate to facts that are not in dispute if they will not adversely affect your client.
- Keep your word. (OVER)

- Respond in a timely fashion to communications from opposing counsel and other attorneys.
- Identify the changes you made from previous drafts when exchanging document drafts.
- Promptly notify other counsel (and, where appropriate, the court or other persons who are affected) when hearings, depositions, meetings, or conferences must be cancelled or postponed.
- Conclude a matter with a handshake or an exchange of courteous messages.
- Require that persons under your supervision conduct themselves with courtesy and civility and that they adhere to these precepts when dealing with other attorneys and their staffs.

DON'T

- Respond in kind when confronted with unprofessional behavior by another attorney.
- Serve papers at a time or in a manner intended to inconvenience or take advantage of opposing counsel, such as late on a Friday afternoon, on the day preceding a holiday, or when you know counsel is absent or ill.
- Be belligerent, insulting, or demeaning in your communications with other attorneys or their staff.
- Use discovery as a means of harassment.
- Publicly disparage another attorney, either during or after a case concludes.