

ETHICS ISSUES 2019

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Fall Seminar
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*For the Eastern District
For Justice and Service
For Service to the Community
For Loyalty to our Clients
For our Courts and our Colleagues
For we Defense Lawyers
as Officers of the Court*

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ETHICS DEFINED

*The first, and perhaps the most important
thing to be said
about ethics is that they
cannot adequately be reduced to rules.*

*Ethics are not what a lawyer knows he or she
should do: ethics are what a lawyer does.*

*Ethics are not so much learned, as lived. Ethics
are the hallmark of our profession, imposing
obligations
more exacting than any imposed by law and
incapable
of adequate enforcement by legal process.*

*If ethics were reduced merely to rules, a
spiritless
compliance would soon be replaced by skillful
evasion.*

Sir Gerard Brennan, Bar of Queensland, 1992

PART ONE - THE WAYPOINTS OF ETHICS

I. JUSTICE AND SERVICE

Lawyers occupy a critical position in the administration of justice and the rule of law. So critical is the role we play in the proper functioning of civil society that mere legal qualifications or membership in professional organization are not enough to equip us to practice law.

As officers of the Court lawyers have a fundamental duty to assist and promote the administration of justice and to serve the community to that end. That is why the practice of law is unlike any other business and will always be far more than a mere 'industry'.

Critical questions:

- A. Do my actions serve the administration of justice and uphold the rule of law?**
- B. Do my actions encourage the public confidence in the administration of justice and in the legal profession?**
- C. Do my actions serve the best interests of my client?**

II. THE STAKEHOLDERS

A. The Court.

As officers of the court our first duty is to the court and the law it upholds. If ever the instructions of our client conflict with the requirements of the court, those instructions should be refused.

B. The Client.

Within parameters set by our duties as offices of the court, we are duty bound to defend and advance the best interests of our client without regard to any other influence.

C. Colleagues.

In an adversarial system we can lose sight of the fact that those representing the other side are, nonetheless, our colleagues and our client is best served when we maintain a good working relationship with them.

D. Community.

The functioning of civil society is dependent upon its lawyers ensuring public confidence in the rule of law and in the legal profession is maintained. Our primary duty to the community is to ensure we do nothing to jeopardize that confidence. Beyond this, lawyers share a collective responsibility to ensure access to justice is maintained for all people. For many lawyers and law firms this involves providing some services pro bono.

III. FUNDAMENTAL ETHICAL PRINCIPLES

A. Fidelity.

Usually defined as "undivided loyalty" or faithfulness, fidelity is related to the noun, fiduciary. As such is primarily describes the loyalty owed to our client. A lawyer must ensure that the advice and served offered to clients serves the best interests uninfluenced by any other motivation.

In dealing with the Court a lawyer is bound to remain faithful to the law and to the court's requirements. In dealing with colleagues, be they legal practitioners or staff working with you or representing the other side, a lawyer must ensure they keep their undertakings (faithfulness to their word) and maintain a relationship conducive to the proper administration of justice. A lawyer's fidelity to the community is most clearly seen in the commitment shown to enhancing public confidence in the law and the legal profession.

Critical questions.

A. Am I acting in my client's best interests?

B. Is my advice influenced by any factors unrelated to my client's best interests?

B. Honesty.

Sometimes, honesty can simply mean telling the truth. The emphasis is on what is said. At other times it mean an absence of deceit with an emphasis on what

is not said. In situations where the prosecution must prove its case beyond a reasonable doubt, there is no compulsion on the part of the defense to assist the prosecution to do this. Consequently, defense counsel need not correct the mistake of a prosecutor where to do so would be a breach of confidentiality or place the defendant in jeopardy. On the other hand, we cannot positively assert as correct an error made by the prosecution, as this would amount to misleading the Court.

It is clear that is not permissible for a lawyer to deliberately lie or to mislead either by statement or action or even by silence.

Critical question:

Are my statements, actions or omissions intended to deceive or convey something I know to be false?

Note: Years ago I was driving cross-country from Louisburg to Halifax for court and passed an old white frame country church, with a hand-built marquee on the roadside advertising the pastor and the subject of the upcoming Sermon:

"THERE ARE NO DEGREES OF HONESTY"

C. Propriety

In order to be admitted to practice, the Bar conducts extensive background information gathering, and an live interview with members of

the Bar. 'Propriety' is derived from the same root as 'proper' and relates to how you conduct yourself in relation to all four C's. Clearly, civility and respect for others plays a significant part in this.

Critical question:

Am I treating others as I would like to be treated by them?

D. Competence

There is no compulsion on any lawyer to take on every matter which presents itself, and the matter in question needs to be accepted only if the lawyer is confident in his or her competence in regard to the matter. It is plainly of great importance for a lawyer not to take work beyond his or her capacity, but that should not give rise to undue timidity where the capacity exists. Where the capacity is lacking, it is not only potentially negligent, but probably unethical as well, for the practitioner to act.

The lawyer should inform the client of his or her lack of experience in the field, and should consult with or associate senior counsel who have knowledge and experience in the field to assist and advise him, at the very least.

The principle of competency has most clear application to clients and to the Court, though an incompetent practitioner will negatively impact colleagues and also the public's perceptions of that

lawyer and confidence in the profession.

Critical questions:

- A. Do I have sufficient knowledge and experience to provide appropriate legal advice in this area of the law?**
- B. If not, can I obtain adequate counsel or support from colleagues to ensure the client's legal needs are met?**

PART TWO:
ETHICS AND TIME
MAKING TIME FOR ETHICS
BEING ETHICAL ALL THE TIME

**I. INTRODUCTION - FINANCIAL PRESSURE ON
OUR PROFESSIONALISM**

The red-hot, molten core of every competent lawyer consists of character driven and informed by ethics. Taking the time and effort to become and remain a competent lawyer requires an essentially unconscious and rigorous adherence to immutable ethical standards in defending and representing clients.

Being ethical all of the time requires constant analysis of the process of your representation and the ethical course and fidelity of your actions through the conduct of your work in behalf of clients, and the responsibility you have to clients, the law, our courts and the profession.

In recent years, the financial problems associated with the funding of indigent defense resources has placed an especially difficult burden on lawyers who represent indigent and functionally indigent persons. The fallout of this financial insufficiency comes in two primary areas, each of which directly intersects with professionalism and ethics in criminal defense.

A. The first area is the chronic under-funding of public defender services and allied necessities,. Our courts, both federal and state, are increasingly cinching down on fees, writing down time and fee applications, and placing unrealistic financial limits on necessary and critical expert or allied assets (expert witnesses, investigation) which limit our effectiveness in providing the most effective defense to our clients. Seeking funding or defending the necessity for services is now a major roadblock and time-consuming aspect of our collective defense effort.

In my view, the cumulative effect, over time, is increased pressure on the Bar to process cases in a way which reduces overall preparedness and thoroughness of process of investigation, preparation and mitigation. There are no data yet, but there is a generalized impression my view and experience of 42 years in the trenches day to day an year to year, that closing cases and processing the work more expediently is becoming commonplace, with the consequence being the increasing likelihood of failure to fully analyze and prosecute legal challenges to police conduct (suppression motions, motions to dismiss, trials, even). This leads to the danger of eliminating a prevalent despair, there is apparently no incentive, except for professionalism and the compulsion of the Canons of Ethics, to pursue these remedies in the face of withering resistance to requests for tools we need

to provide competent representation. It is particularly galling in light of the unlimited resources of the prosecution side of things to investigate, test, double check and interview and gather information willy-nilly without apparent regard for expense, as the burden is spread over investigative agencies' budgets and prosecution budgets, and not left entirely on the shoulders of the Court bureaucracy for funding the indigent defense effort.

The slow and inexorable economic strangulation of indigent services has caused massive defections of larger private criminal defense firms from committing time and resources to indigent work, decreasing the critical mass of talent and horsepower to shoulder the overall effort, and placing additional burdens on the Public Defender offices and small defense firms hamstrung by inadequate funding to shoulder the burden and responsibility.

This is not merely a criminal defense problem; it is a professional and ethical problem for the entire Bar in our District and others. We as criminal defense lawyers should enlist the aid and assistance of our civil, corporate and office practitioner colleagues, our County Bar Associations, the N.C. Bar Association and the State Bar, to put pressure on our congressional delegation to recognize, evaluate and remedy the chronic underfunding of the court system and the public defense effort on an emergency footing.

B. The financial pressure of practicing law, either in the context of indigent defense or in representing private clients, creates a recurring and nagging issue in criminal defense. Taking the time to analyze each client's situation, to identify issues which need to be pursued, to research the law on technical points which might be or could be case-dispositive, are constantly competing with the necessity of making overhead in the private sector, or with completing the cases assigned as a public defender or a Panel member.

How much attention to an issue is enough?

Is there a point where financial self-preservation supervenes the needs of an individual client's circumstances?

Is it ethical to introduce and/or practice some type of stop-loss protocol in a case, where you as a lawyer simply stop work on a matter because it has become too time-consuming?

We all know that the answer to each of these rhetorical questions is a resounding **NO**.

We have all heard that "The Law is a jealous mistress". These issues are at the intersection of our profession's quality of life issues, our professionalism issues and our economic well-being issues.

Ethically speaking, there can be no balance. Duty to the client, loyalty to the client's cause, duty of

thorough preparation and execution of competent and thorough representation of the client, supervene competing considerations

In other words, bottom line, you have to find the time and take the time to protect, promote and execute the representation. But this doesn't mean you and the client need suffer in silence. We must be proactive, and noisy about it. It's not just about us.

II. ETHICS IN RELATION TO THE UTILIZATION OF EXPERT WITNESSES AND SPECIALIZED ASSISTANCE IN A CASE.

In *ANTONY RAY HINTON vs. ALABAMA*, 571 U.S. 263, 134 S.Ct. 1081 (2014), the Supreme Court spoke with regard to selection and utilization of experts, and counsel's obligations regarding selection and use in cases of collateral assistance, and ethical obligations involved. *Hinton* is a useful example of the intersection of funding, accurate and appropriate analysis of the needs of a client's case, and the ethical obligations of counsel to the case and client.

In *Hinton*, counsel determined that an expert ballistics witness was necessary. Defense counsel was of the mistaken belief that Alabama only allowed a low sum for retention of experts, and so went shopping for a low-cost expert. The expert he found was, in the lawyer's estimation, inadequate for the work required, but he obtained funding and did not seek to retain a more qualified, more expensive expert, based on the

mistaken belief that he would not be able to pay the more-qualified, more relevant expert. Hinton was convicted.

In post-conviction proceedings, it was determined that there were, in fact, several experts whose work would have been more relevant and more likely to affect the outcome of the case.

The United States Supreme Court did not decide the case on the basis of the existence of better experts' availability; the Court decided the case on a *Strickland v. Washington* analysis, on the question whether the trial counsel, by **not knowing that more funding was available for experts**, provided constitutionally ineffective representation, and remanded for a determination whether this was unconstitutionally ineffective assistance of counsel.

In today's context of under-funding of indigent services budgets, this financial pressure on counsel seems to be read-made for a Hinton-type dilemma.

However, in our current IDS funding scheme, in non-capital cases, application can be made to a trial-level judge seeking funds to hire an expert for an issue. Estimate of the probable cost of the funding can be made by consulting with the expert and preparing adequate information to the judge as to the probable interim and possible trial use of the expert, and obtaining interim funding permission to obtain the expert. In capital cases, these applications for expert

funding are made directly to the Capital Defender's Office in conjunction with IDS consultation with Capital Defender staff.

Since reviewing *Hinton* recently, I have taken to appending a copy of the opinion to my funding requests in my State case, or citing it in my application when submitting requests to judges I've already acquainted with the opinion. *Hinton's* ruling would appear to be self-evident, but don't assume all of our judges are aware of its scope. In a situation where a request is approved, but at a level below the requested expert indicated would be necessary, pushback using *Hinton* is recommended.

Following *Hinton*, we should never have an expert funding issue, or not have a solid foundation for an extended discussion or even a hearing in the event of diminution or denial of funding request for an expert. Stay vigilant.

III. ETHICAL CONSIDERATIONS IN RELATION TO ADVISING CLIENTS AND HANDLING MATTERS WHERE INVOCATION OF RIGHT AGAINST SELF-INCRIMINATION ARE EVIDENT OR LIKELY

Ethical considerations on structure of advice to clients on invocation and waiver of counsel in interrogation situations. Discussion of invocation of right to counsel, inadvertent and incorrect/ineffective invocation of right to counsel, inadvertent or

mistaken waiver of counsel in light of Supreme Court decision in *BERGHUIS, WARDEN vs THOMPkins*, 560 U.S. 370 (2010), and progeny.

We are often presented with calls from clients, who are in various situations involving law enforcement or who are anticipating arrest or surrender and arrest on outstanding warrants. The question which inevitably arises is the advice to be given to a client who is in the moment of an interrogation or is anticipating and interrogation in the immediate future.

Advice of a blanket refusal to answer questions is no longer an adequate invocation of the right to counsel.

A. In pre-arrest situations, the situation is usually fluid. Critical to remember, whether the investigation is local or federal, is that unprotected statements, even made in the heat of the moment when law enforcement is "friendly" and wanting cooperation, none of what the client tells them is protected against counting against him or her if the matter goes south, or if it goes federal and lands in a presentence report causing increase in the Guidelines, etc. A proffer agreement, authorized by a prosecutor, is the only hedge against the use of a statement against the client later. A trip to the interrogation, a call to an assistant D.A. or Assistant U.S. Attorney, a fax machine or email, and the client can sing, and whatever the police don't already know is protected, and the

client begins to ring up credits for sentence mitigation or reduction later.

B. Likewise, when the client is already in custody, and has been charged or is under arrest awaiting formal charging, then a proffer agreement or plea agreement with the protections contained in it regarding disclosure, is the preferred method. The key item is that, whatever the client shares, he must be protected against it hurting him later, and the agreements cement in time the disclosure date and substance of the disclosure against the "scope of knowledge creep" which inevitably occurs in widening investigations. It also gives you a temporal reference in the event you have to pull out the pickaxe and shovel and litigate a *Kastigar* hearing.

C. In either of the above situations, and you can't physically get to the client, or can't read the tea leaves on the cops' intentions, or the prosecutor is unavailable or unwilling to commit to a proffer or plea agreement, then the wisest course is to advise the client to remain silent, and ask for counsel. However, in light of *Thompkins* and North Carolina progeny, simply refusing to speak is not sufficient to invoke silence or right to counsel. The client needs to be instructed to affirmatively invoke the right to remain silent on Fifth Amendment grounds, and then **REMAIN**

SILENT. If the client thereafter decides to speak, the case law will find that there has been waiver. The client must remain silent until you instruct him to do otherwise. Your instructions must be clear: instruct the client to inform the police that he has counsel, that he is choosing to remain silent upon advice of counsel, and then remain silent until instructed to do otherwise by you.

IV. RESPONSIBILITY TO INVESTIGATE FACTS OF CLIENT CASES; RESPONSIBILITY TO ANALYZE CLIENT FACTUAL SITUATIONS TO DETERMINE THE EXISTENCE OF BASES FOR MOTIONS TO DISMISS, MOTIONS TO SUPPRESS EVIDENCE, MOTIONS TO DISCLOSE EVIDENCE LIKELY IN POSSESSION OF PROSECUTION BUT NOT PROVIDED; DUTY TO INVESTIGATE LAW OF SITUATION.

Criminal defense representation is, to use an old Latin term, a

"SUCCESSUS"

Successus: An armed assault, at night, up hill, in the rain, against an entrenched enemy.

The only way to survive a successus to:

1. Find out and determine the facts of the client's matter;
2. Review the criminal statutes implicated, check elements of proof required for conviction; review case law for changes; review pattern jury instructions.

3. Review facts for possible bases for motions to suppress evidence, statements, or motions to dismiss based on errors in pleadings;
4. Check for the existence of any affirmative defenses and investigate existence of witnesses or documents to corroborate affirmative defenses, if any;
5. Go to the scene if possible and walk it, with client if possible, to get bearings and to sharpen preparation for cross-examination and defense case-in-chief.

As you review this abbreviated list of pre-trial and case preparation routines, we come back to the commodity most needed in order to perform those tasks: TIME.

As experienced as some of us are, as vigorous in our willingness to throw our energies and intellects at a client's case and issues as we are, we still have to make the time to do those things. Some of us can analyze things quicker, others can cover more ground or read faster than others, some of us possess intuition when it comes to the location of evidence or the ability to frame the right inquiry or question to unlock a witness' memory, but we still have to find the time to ruminate, plan, ponder or brainstorm, consult with other lawyers, sit with the client and sift the facts and the situation, to grind out the facts and sift the evidence and review until the irreducible

truth of the case is known. Only then can we be sure that we've got it right.

In my view, that certitude constitutes ethically sufficient representation. That degree of certainty and reckoning is the goal in every case.

Whatever time it takes for each of us to reach that point in each case, is the time we need to put in.

PART THREE:

COURTROOM PROFESSIONALISM (MANNERS FOR LAWYERS 101)

I. INTRODUCTION

Criminal jury trials, motion hearings, sentencing hearings, bond hearings, revocation hearings, bench trials: all are integral components to our practice as defense lawyers. Much of the time, prevailing on an issue of law, carrying the burden of persuasion with a trial judge, winning over the minds of jurors, getting a heads-up from a clerk or bailiff, or catching a bit of forbearance from a judge, ends up being a matter of inches, and many times a matter narrower than a hair's breadth.

I am convinced that knowing what to do, and how to do it, and doing it in the most professional manner possible, can give all of us an edge, and sometimes the margin of victory. Taking a longer view, professionalism in all things builds reputations, and adhering to the highest standards in all matters reminds us that character is our touchstone. And the foundation of it is developing a feeling of goodwill towards yourself with the court, courtroom personnel and even prosecutors and their assistants. Whether we call it professionalism, smart lawyering, or just plain

old-fashioned courtesy and good manners, these concepts pay dividends long and short term for us and our clients.

A. COURT PERSONNEL

My first job after law school was as law clerk to Chief U.S. District Judge John D. Larkins, Jr. of Trenton, in the Eastern District of North Carolina. He had been a trial lawyer, State Senator and candidate for Governor before being appointed by President Kennedy in 1961. In Jones County, he made his living trying cases in Jones Superior Court and in the then Recorder's Court for his county, handling all manner of trial work. Judge Larkins' first lesson for me and Stuart Popkin of Jacksonville, fresh law clerk cannon fodder for an experienced Judge, was the question, standing in the well of the New Bern federal courtroom, "Who's the most important person in the courtroom?". Present were the courtroom deputy clerk, the court reporter and the United States Marshal. Our answer was, of course, "the Judge".

After telling us about how very ignorant we were and how very much we had to learn, he started to teach. The pecking order he laid out I have found to be invaluable my entire career. It was, and remains for me, the following:

A. The Courtroom Clerk.

In any courtroom, the courtroom deputy clerk always has the ear of the judge, regardless of who that judge

may be for the day, week, term or six-month period. In any courtroom, in any courthouse, in any county, or in any federal court in any jurisdiction, I seek out the criminal deputy clerks, and then ask for the courtroom deputy who is going to be in the courtroom for my hearing, trial or other matter. Particularly if you are going into a courthouse which is foreign to you, get there as early as you can to orient yourself where your courtroom will be, where the bathrooms are, where the clerk's office is, and where the criminal deputy clerks' desks are.

I make sure to introduce myself, where I'm from, and what case I'm here for, and ask his/her name, and shake their hand. Ask him/her how she prefers to be addressed. First name, Mr. Mrs. Ms., or by last name. Most clerks you see every day will tell you to use their first names. In smaller counties I don't visit often, and in some federal courts Clerks' Offices, they prefer to be addressed formally. **Never** presume to address a clerk by his/her first name. They appreciate and remember lawyers who honor this convention, and it is amazing the difference in their reaction to you over time. If the day comes when a courtroom clerk invites you to address them by their first name, you have made a friend. Also, never, ever, forget a name. Write it down and make sure you have it right on the tip of your tongue the next time you seen them, or email or call them on the phone for any matter.

I always ask about the courtroom, the Judge or Magistrate Judge, my opponent, and if there are any special things the Judge or MJ likes, doesn't like, or any other procedural things (in private I call those "things" quirks) which the clerk mentions are important or usually done in his or her courtroom. It's amazing what people will tell you if you just take the time to be polite, and profess ignorance. Admitting ignorance also reminds one to remain humble. Courthouse folks love a lawyer in need, but only if that lawyer is humble and polite, and **NEVER demanding**.

And always remember, first impressions, just like any other first, are so important and lasting. If the prosecutors snipe about the "Raleigh lawyer" in their midst, I have found time and time again that the groundwork with the deputy clerk has helped defuse all of that nonsense, just with the whispered phrase to the judge, bailiff, or offending prosecutor about how "nice" the lawyer (you) "is"(*sic*).

A courtroom clerk who likes you will give you a warning about an impending attempted bushwhacking by a prosecutor, or give you a heads-up about the mood of the judge, or other things which I categorize as "atmospheric" matters swirling about; these inchoate issues are ones which, if you are not a daily insider at that courtroom or courthouse, you would have no idea about, and stumble inadvertently into a situation which you will otherwise be able to plan for or avoid.

Courtroom clerks are a constant when you're doing jury work. His/her facial expressions and body language are picked up on by juries. Your interaction with the clerk, and the clerk's reaction to you, are noticed and absorbed by juries, even if they are not overtly aware of it. And, as we all know, every @#%*&!! thing which happens in a courtroom is noticed and absorbed by jurors.

A clerk who takes a dislike to you can really hurt you, daily and over time. One who likes you is an asset and a confidential source of information for general and early-warning material. Never in your life should you utter a critical or negative word to a clerk or to anyone about a clerk. Quick reflection upon whatever you think was the clerk's fault inevitably resulted from *your* screw-up or failure to anticipate.

In a hearing or trial before a judge, if there is information you need from the clerk, always stand, and ask the court's permission to *approach the clerk*. "Your Honor, may I approach the Clerk about a matter?", is all you need. The Judge will appreciate it, as it is a genuflection to his/her authority over the court proceeding, and the clerk will love it because it elevates his/her importance and significance in the proceeding, and it places you in the position of suppliant for his/her assistance. Remember, clerks love a helpless/needy lawyer. More than judges, they despise arrogance and being barked at or ordered

around. It's always best to "ask 'em nicely". And, it is the professional thing to do. Following forgotten protocol and adhering to the basics will serve you well over time.

B. Courtroom Bailiff or Deputy Marshal.

As with the courtroom clerk, the bailiff(s) are a rich source of information about the processes of the presiding judge, prosecutor you'll be dealing with, and the way "his" courtroom works. Getting in to see an incarcerated client before court, getting your water jug refilled, borrowing a pen, all of these things are within the power and discretion of the courtroom bailiff to grant, deny or make difficult for you.

You can make it impossible for them to dislike you if you introduce yourself, tell them the same background information and why you're in their courtroom. They like knowing, and when you get their name, you can refer to them as "sheriff", or by their last name, but be sure you ask him/her how he/she wants to be addressed, and then remember that, and stick to it. Asking the bailiff about how the presiding judge runs the courtroom and is invaluable. Bailiffs are usually on a first name, or casual basis in terms of communication, with the judge. You better believe that they communicate their impressions of you to the judge before court. Taking the time to honor the conventions of courtesy pays off.

It's also nice when the bailiff greets you in

court, in front of the jury, with a smile and the use of your name in a friendly manner. It's all in the atmospherics.

C. The Court Reporters.

Court reporters are a strange breed. What winds of fate and personality bring them to the profession are a profound mystery. I have never met two who were alike in temperament, which in my experience means that they are all quirky and unpredictable. It really doesn't matter if they are in private practice taking depositions all day long, whether they work in civil courtrooms, criminal courtrooms, administrative law courtrooms or in federal court. They are always to be approached out of necessity, but always with trepidation, extreme caution, and with supreme respect cloaking your very real fear and trepidation.

A court reporter who doesn't like you will interrupt your cross-examination to ask you to speak more slowly, will interrupt your witnesses and complain he/she can't understand what they are saying, and make faces about the content of answers if she doesn't like your case. None of this finds its way in the record, but all of this reaction is noticed and remembered by the jury and trial judge.

Court reporters can transcribe your words, and they come out like Aristotle; they can transcribe your words where they come out like the stuttering, bumbling, illiterate hick you are, or might be if it is "true"

transcription with every "uh", "umm", "er", pause, wrong-tensed word or phrase, or wrong word. We all know that drill. Slack-jawed and drooling looks terrible on the printed page. I prefer the former. Whatever it takes to make the court reporter happy and in love with you is the order of the day.

There are a couple of things which I have found tend, in some instances, to break the ice with court reporters. First, I introduce myself again, even if I know them, and always give them my business card. Second, I hand them a sheet of paper with the caption of the case on it, with the file numbers, client's name, my name as defense attorney, and the name of the prosecuting attorney. They actually appreciate that. If the subject matter is technical or the language is scientific or technical, I have a cheat sheet of terms which I give them, with spellings and with anticipated technical terms; don't forget to interrupt or stop the witness and get them to spell words without being asked. It's a small matter, but the court reporters appreciate it, and remember your effort to accommodate and ease the work they do. Also, you are contributing to an accurate record of the proceeding, which your client may benefit from down the road. And, occasionally, you might need an overnight copy of some critical testimony, it helps to have that history with the court reporter, as they will find the time to help you out when they could simply say it is impossible.

Finally, in state superior courts or in small counties, the court reporters are usually joined at the hip with the resident judges, and are often close personal friends, or even relatives or inlaws. Cocktail party compliments are great if you're the recipient.....! Goodwill is always good to have in reserve.

B. BE ON TIME!!!!!!

NEVER BE LATE to court. If you're going to be late, ALWAYS let the court know, or make sure a lawyer you know lets the court know the situation. NEVER be a "no show" if you have a case on the docket. I don't mean to be always "on time". I mean be early. I have never seen a lawyer get placed at a disadvantage for being early to court. I have witnessed many, many unfortunate outcomes when lawyers are late or absent. It is unprofessional and discourteous. You never get "branded" for being early but you will if you're late. This especially applies when going out of county and to federal court. If the distance is far and court is early, spend the night and get to know your surroundings, etc.

NOTE: *My father, a trial lawyer who practiced law until he died at the young age of 88, told me when I started as an AUSA in Raleigh, that if my court appearance was out of town, I needed to leave early enough to have and fix and 2 flat tires, and still be early to court!!!!*

Also, if you're going outside of your usual geographical area, call a colleague in that area and find out what's what about the court and your opponent. I also try to meet the sheriff of the county, or the case agent, especially in rural areas, as they can make a world of difference how you're treated, especially if your client is in jail and it is a bad case. Finally, the lawyer should ALWAYS stand when addressing the court, even in a state district court. Always address any judicial officer, from a County Magistrate, to a state District Judge, Superior Court Judge, and any federal Judge or Magistrate Judge, as **YOUR HONOR**. I hear lawyers in courts every day speaking colloquially to the presiding judge as "JUDGE" this and "JUDGE" that, and I cringe. It's "YOUR HONOR,"

Regardless of local custom, **GET ON YOUR FEET** every time a judge comes into court, rises from his/her chair, takes a recess or ends court for the day, even if the judge calls out 'remain seated'.

PRESIDING JUDGE

Judge Larkins called dealing with presiding judges, including himself, "The Care and Feeding of Judges". He had a great sense of humor, but it stopped at the line entitled "The Dignity of the Office of Judge". He was the first to admit that judges can be idiots, ignorant, mean-spirited or generous of spirit, unprepared, uncaring, bored, behave like pricks or bullies, and everything else not mentioned. However, the Office of

judge, when it comes to the public, the bar, court personnel and all others having dealings with the court, must maintain appropriate and immediate respect for The Office. This is a primary responsibility of the Bar.

A. General Professional Behavior in court

When court opens in the morning, or takes a recess, or reconvenes after a recess, or takes evening recess, get on your feet and **STAND UP**, and remain standing until the Judge is seated, regardless of what the bailiff says, or even if the Judge says to remain seated. It is the signal sign of respect for the office which lawyers must always take care to do. Judge George Greene, who was a great district court and superior court judge for Wake County, and my father, who practiced law for over sixty years, and Judge James H. Pou Bailey, another great judge of our county, always stressed the opening and closing of court, and recesses, with the bailiff crying out, "All rise". In Judge Larkins' court, and still in federal courts, the marshals say "Everyone stand in the presence of the Court" at every occasion of the Judge taking to the bench.

Informality and too much familiarity on the part of lawyers in courtrooms, and particularly in the district courts, is distinctly unprofessional, and engenders disrespect and suspicion from clients, spectators, and jurors. Some attorneys' conduct

towards our judges, including insolence, rudeness, interruption when a judge or opposing counsel is speaking, and other instances of bad manners are indications of the general lack of respect for judicial power and the dignity of the courtroom, and shows off the arrogance or obtuseness of the offending lawyer. Many of us are guilty of sins of omission. I strongly believe that if we, as defense attorneys, get on our feet and **STAND UP** every time a Judge come in, stand when he/she rises, and stand when he/she returns to the bench, the appreciation will be evident that day and every session. We need to set the standard and maintain it, even if our opponents fail to do so. It's the professional way to behave, and elevates the Bar, just as a rising tide raises all ships.

Never turn your back to the presiding judge when appearing before the court. If you must, to call a witness or to confer with a client or investigator, the best practice is to seek leave of court. Some examples:

"Your Honor, may I approach the Clerk?"

"Your Honor, may I take a moment to (retrieve a document, call a witness, confer with the client, confer with cocounsel, confer with opposing counsel, speak with your investigator, etc.)"

If you are examining or cross-examining a witness, and need to stand or move to demonstrate distance, approach the witness with an exhibit, etc., ask leave of court and explain what you want to do while seeking

leave. This informs the Judge and jury, and that warning and explanation is appreciated and prepares your audience, be it judge or judge and jury, of your intentions.

For example:

"Your Honor, may I stand and move to (wherever) before I proceed with my next question?"

"Your Honor, may I approach the witness with an exhibit?"

"Your Honor, may I _____ (whatever it is you need to do not sitting down)?"

I've never had a judge say no, and I have had judges stop me when I forget to ask leave, to question me before the jury, 'What are you doing?, etc., etc.' It's not good, and it's humiliating. And unprofessional.

B. Addressing the court during colloquies.

In making arguments regarding matters of law, where either statutes are being discussed/argued, or case law, or jury instructions, always have a copy of the statute/case/instruction available for the presiding judge AND your opponent. Nothing should be handed to a judge without a copy being given or offered to opposing counsel. This includes district court practice. This requires preparation and forethought. If the issue is worth the argument, it's worth making the preparations to win it.

Short memoranda are nice, as well. It gives you a

chance to make bullet-point issue presentation, or annotated references to cases. It doesn't have to be formal or even captioned. You can ask the court for leave to mark it as a hearing exhibit for the record, and then punctuate it with a copy of the applicable case, statute or rule. If citing cases, taking it slow on the citation so that the court reporter gets it, is a plus, and needs to be forethought in order to make it a seamless part of your presentation.

When addressing the Judge, there is a professional way to draw the court's attention to your point, case or statute. NEVER say, "If you will look at the case/statute," or worse, "If you will just read/look/&*&# at the case/statute." Lawyers should ALWAYS "invite the court's attention" (or "We respectfully invite the Court to examine page two), to the matter we wish the judge to focus on. For instance, "If it please the court, I respectfully invite the Court's attention to page two of the Smith decision, which I've handed up, and make specific reference to the second paragraph which begins with ".....", and then continue with the point you are making.

When a Judge makes a pronouncement about the matter under discussion, and you disagree or feel he/she is not on the point, instead of implying or outright saying that the court is mistaken in its view/belief/interpretation of the law under discussion,

consider making your response to the effect, "Your Honor, we respectfully suggest that a more appropriate interpretation/analysis of the matter is to conclude that (fill in with your suggested analysis and recommended conclusion), which is consistent with the holding in the Smith case and the Jones case, both of which are very close to the fact pattern we have in the case bar, and which interpret the statute, etc., in a way consistent with our argument." This approach avoids direct conflict with the Judge's preliminary analysis, leaves him/her room to change, without direct confrontation or the use of other "you're wrong" insinuation, and continues the discussion.

Having the text of a proposed Order prepared, written and ready to hand up is a powerful trump card. If the issue is close, and you have an Order prepared, you can proffer it as a proposed order for the court's consideration, or if the judge is going with you, you have removed the work of the judge having to fashion an order, particularly if it is a close issue, thereby removing the possibility of the judge taking it under advisement, thereby giving your opponent time to find other cases or a different stream of argument. Having a proposed order ready also telegraphs your inchoate confidence in the correctness of your position regarding the issue.

C. Addressing the Court and Opposing Counsel.

If a hearing has commenced, and the judge is in

listening mode, **NEVER talk across the aisle to opposing counsel without asking leave of the judge to do so.** I see this frequently in district court, where arguments of law and other points end up being a quip-fest across the aisle between prosecution counsel and defense counsel, particularly where there is personal animosity between the lawyers. It doesn't matter about the prosecutor having the manners of a swine and turning to address you directly. **ALWAYS LOOK FORWARD AT THE JUDGE, and ALWAYS ADDRESS YOUR REMARKS TO THE COURT.** You won't be ignoring your opponent or being rude; you'll be conducting yourself in a totally professional manner. Infuriating your opponent by ignoring them when they're talking across the aisle is the only correct and professional way to handle their breach of decorum.

If you need to speak to opposing counsel, **ASK LEAVE OF COURT TO DO SO,** but never seek leave to respond to a personal attack. It must be to move the work/issue before the Court along. If you want to crawl in the gutter with your opponent, do it after court and outside of the courtroom. It's better leave it alone, unless you have sustained an accusation of unprofessional or illegal conduct. In that event, you can seek leave of court to have a conference with the court and opposing counsel in chambers, and hash it out in then and there, with the court reporter present.

Never refer to the presiding Judge in addressing

him/her as "Judge". Always address the court as "Your Honor", or say, "May it Please the Court, the next point/matter/etc. is....."

D. Wait your turn.

Your business is no more important than that of any other lawyer who appears. This is particularly true if you are in a foreign (to you) court. Your busy schedule or drive time back to your office or home means no more to other lawyers or the court than their own busy schedules. Better to spend your time making a few acquaintances than creating the appearance of being a "buttinski", or worse, "pushy". Again, good manners trumps pushy every time. And, finally on this point, if you have a scheduling issue or conflict in our court, you'll know it far enough in advance to call your opponent and the courtroom deputy clerk and inform them of the conflict or necessity, and ask nicely whether your matter could be heard (depending on the need) first, last or in a succeeding day or the Term if the needs be. If not, then you have time to address the conflict in the schedule on the other obligation or make arrangements for a colleague to cover it or move the time. **Never show up for a calendar call and start lobbying for a different position on the docket.**

E. Turn off your cell phone in the courtroom.

Don't mute it; don't put it on "silent" or "vibrate". **TURN IT OFF. PERIOD.**

F. If you don't know, ASK.

Ask the clerk; ask the Bailiff; ask the oldest lawyer in the courtroom; keep asking until you get the answer. Don't ask WIKIPEDIA or GOOGLE.

G. Jurors notice everything.

Not all pay attention all the time, but between the twelve and the alternates, you can count on 8 or 9 of those present, possibly more than that, seeing, hearing and evaluating everything which goes on the courtroom, and outside during breaks and recesses. Most of the jurors are first-timers, in a place they've never been, and it's all new, confusing and somewhat exciting for them to be there. Like all people, new situations generally inspire hyper-vigilant behaviors. Your conduct at all times has to be consistent, professional and correct. Even at breaks. When a juror sees you, wherever you are, they need to see the same person. Not a "courtroom face" or "courtroom demeanor" one minute, and then a clown in the lobby the next. Present the same demeanor at all times: correct, professional and all business. Be yourself, but maintain a poker face, particularly in light of surprising evidence (given preparation, there shouldn't be any, or many, "gotcha" moments.

I honestly and strongly believe that being the same person outside of court is the best way to behave in court. If you're consistent all the time, there's no "game face" and nothing artificial about your demeanor.

Also, when you're under pressure of trial, or pressure of any kind, if you have to "put on" a facade, it'll crack and your underlying personality will come out. Why add more stress to your courtroom self?

FINAL THOUGHTS

Trying your best to be your most professional in appearance and actions at all times gives you an advantage moment to moment and over time. Judges and courtroom personnel remember those attributes over time. Reputation for professionalism in court is, to me, worth more than an "av" rating or a Best Lawyer or Superlawyer designation, because my audiences are trial judges, prosecutors and jurors. My clients are seeking the best outcome possible for their cases, and don't give a hang about peer review. Whatever gets them the best outcome is what they want.

After all, they're the ones we're trying to help, right?

Finis.

Postscript

Friends and Colleagues,

We criminal defense lawyers must ever hold ourselves to the highest ethical standards and standards of decorum and conduct. The nature of the practice and the general unpopularity of the clients demands that defense counsel studiously avoid becoming a collateral or principal issue in

any matter. You will find, unfortunately, throughout your career as a criminal defense lawyer that law enforcement officers, prosecutors, "other" lawyers, judges and most of your clients will almost automatically assume that you are shady or untrustworthy because you are a criminal defense lawyer. You have to immediately dispel any "insider" or "fixer" image with the clients. In your dealings with prosecutors, law enforcement officers and judges, your conduct and approach to the work must be done with look-em-in-the-eye forthrightness. Over time you will overcome this prejudice, but you have to make and earn the respect and the reputation, because none of us start out with it. And we have to keep earning it every day of our careers.

This goes into personal and social situations as well. One of my pet peeves is lawyer jokes, especially where the operating hypothesis is that lawyers are crooked or unscrupulous. Every time I hear someone begin to tell one, I interrupt, rudely most of the time, and tell that person I don't appreciate the humor. When I hear other lawyers start it, I really get angry and lose all pretense of civility. To me, lawyer jokes are the same thing as what my Grandmother Taylor used to describe "fouling your own nest", i.e., running down your family or yourself. It simply isn't done, and you should never condone it, and never join in.

Where your professionalism and professional conduct is concerned, there can be no humor, and you must keep and maintain a zero tolerance attitude toward attacks and slurs to your reputation, even ones made in jest.

Likewise, when you hear snide comments from district attorneys or law enforcement types about those "rich criminal lawyers" or "those crooked lawyers", you should jump right in and dispute the point with them, and back them down. You'd be surprised at the reactions you get, especially from police and other law enforcement officers.

They don't know how to handle your reaction to the jokes and slurs they've been saying by habit for years. Some of my best professional friends (now) are police officers whose throats I jumped down ten years ago because of this "sleazy lawyer" thing. Don't ever stand silent while your profession is run down, and especially never when you even think the remarks are directed, even obliquely, at you. I have even jumped on judges who were about their business running down criminal defense lawyers. Your vociferous feelings about the matter will begin the process of gaining and earning the respect of your opponents and your peers.

At the core of this mind set and way of being is adherence to the strictest ethical standards. We need to think, live, and breathe awareness of our ethical obligations. In the criminal defense field, the ethics of the matter closely track what is legal and sometimes brings us right up to the brink of the law. It is therefore of the utmost importance to know and remain within the ethical borders of every situation, and never on over them. There is no case so important, no issue so relevant, no client so crucial that you have to cross over into unethical conduct in order to gain advantage or to win. Zealous representation requires us to go to the edge, but not over it. We have a compelling obligation to know the border well, and to stay on the right side of it at all times. We must be vigilant.

Best Wishes!

Tommy

APPENDIX

THE LAWYER AS OFFICER OF THE COURT

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**E. W. TIMBERLAKE
PROFESSOR OF LAW
WAKE FOREST COLLEGE
1925**