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A New Take on the Top Ten Rules for Court and Professional Life

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A NEW TAKE ON THE TOP TEN RULES FOR COURT AND PROFESSIONAL LIFE

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INTRODUCTION

After the last brief is written, the final scrap of evidence considered, and the list of witnesses prepared, every litigator would be well-served to reflect on how his actions will impact him professionally and whether they will strengthen or lessen respect for our legal institutions. To be sure, the better nuanced his arguments and the more accurate his riposte, the greater the chance of a favorable outcome for his client. And while "favorable facts" and "favorable law" ultimately affect the success of a litigator's case, what of the myriad exchanges which do not deal with the legal issues per se, but with more ambiguous concepts like respect and integrity? What function do an attorney's choices in this area of form and procedure have on outcomes, if any, and what impact do they have on respect for the rule of law? How do the carefully choreographed interactions among the parties before and during the hearing influence our notion of a fair legal system of law whereby "justice" is served? What lingers beyond the particulars of the case at hand for the courtroom litigator who will be defined in part by his reputation as a guardian of the rule of law? Indeed, as the following discussion suggests, there is more than one way to successfully walk out of a courtroom.

This Article offers ten rules for court and professional life. Succinct, yet deceptive in their simplicity—the Article considers the hows and whys of their formulation. It explores these rules through both conventional and anecdotal research to examine the subtleties of courtroom relationships. While mastering these rules can take years, a concerted focus on some of the basic elements can assist a recently admitted attorney to command the focus of attention on the issues most advantageous to him and divert the focus away from unhelpful distractions. Moreover, adherence can build an enviable reputation for upholding the rule of law and thereby strengthen the American legal system.

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Nine of these ten rules fall loosely into three general categories. The first group emphasizes the importance of respecting the rule of law, our legal institutions, and the specifics of how best to demonstrate that respect to all the parties involved in the legal process. This group of rules deals with the attorney's role in our legal system and how his actions and the choices he makes influence whether the rule of law is upheld. They embody the philosophy that by upholding the rule of law, one shows respect for the court, one's colleagues, and ultimately all of those that are subject to it. The rules focus on maintaining courtroom decorum, following ordinary court rules and procedures, and refraining from conduct that questions the authority of the judge. These rules challenge practitioners to self-reflect.

The second group of rules focuses on the importance of effective communication, both written and oral. These rules emphasize that honesty, candor, and precision are critical components of effective communication. They suggest that attorney statements should tend to earn the trust of those with whom one practices. They also indicate that compliance supports respect for the rule of law.

The third set of rules focuses on how practitioners can exhibit respect for the time and resources of all involved in the legal process. These edicts acknowledge the value of judicial economy and evince the practical realities that many involved in the court system are today being asked to do much more with much less.

The final maxim set forth in this Article explores how failure to abide by the previous nine rules can result in a loss of professional reputation. It emphasizes that loss of reputation can result in a diminution of a lawyer's value in both professional stature and economic terms. It acknowledges that once lost, it is difficult, if not impossible, to regain one's professional reputation.

And now a word about how this Article came to be. United States Magistrate Judge Kristen L. Mix sits on the bench of the District Court in Colorado. As those who appear before her know, she is respected for her competence, revered for her exacting standards, and admired for her cutting wit. She sets forth her expectations unabashedly and demands adherence to the high standards that she seeks to uphold. Judge Mix began her legal career in the mid-80s and has witnessed a time of great upheaval in the legal profession, including the recent financial crisis, which has drastically altered fundamental aspects of the legal profession. What led her to set out written expectations reflected a very real concern that the legal profession was undergoing a crisis, which manifests itself in very concrete ways every day in court.

This Article offers Judge Mix's "Ten Rules" and explores each in the context of what it may reveal about a legal system in crisis. It raises threshold questions about whether the current crisis is really a new phe-

nomenon, and if so, speculates as to how it might have come about. It examines professionalism challenges in a variety of court contexts—from federal district court and administrative hearings to state court matters and international court proceedings. The Article examines the rules in the context of bar self-policing enforcement actions and considers how some judges are able to institute measures that tend to increase civility and decrease intemperate remarks. The Article concludes that careful adherence to Judge Mix's rules in all bar activities, including court appearances, will not only enhance an attorney's effectiveness in representing his client and result in a greater and more effective impression on the triers of law and fact. It will also enhance respect for our legal system as a whole. By following the spirit of the Ten Rules, attorneys can develop and maintain a high level of professional integrity amongst both their colleagues and the general public. As Judge Mix says, "Keep your eye on the prize: achieving a just, efficient and appropriate result."[1]

THE "RULE OF LAW" RULES

Judge Mix's first group of rules focuses on the importance of respecting the rule of law, our legal institutions, and the specifics of how best to demonstrate that respect to all the parties involved in the process. They calibrate the complexities of the attorney's role in the legal process, and how his actions and the choices he makes influence whether the rule of law is upheld. These rules embody the philosophy that by upholding the rule of law, one shows respect for the court, one's colleagues, and ultimately all of those that are subject to the rule of law.

United States District Court Judge Marcia S. Krieger has written about the importance of the rule of law and its benefits to American society.[2] She asserts that "public confidence in the law and legal institutions" is necessary if one is to break what she terms a "Cycle of Cynicism" that, she argues, threatens to jeopardize "our individual rights and freedoms."[3] She challenges attorneys to establish, as a core value, a reverence for the rule of law and an "ethos" that transcends the subjectivity of any particular case or individual client's interests.[4] Judge Mix's "rule of law" rules feature the importance of maintaining courtroom decorum and following ordinary court rules and procedures. They caution practitioners about engaging in conduct that appears to question the authority of the judge, because doing so undermines the integrity of the process and ultimately the rule of law. These rules challenge lawyers to be self-reflective, and to preemptively analyze how their conduct will be perceived by the judge.

1. Kristin L. Mix, U.S. Magistrate Judge, U.S. Dist. Court for the District of Colo., Presentation on Professionalism and Ethics at the Meeting of the Colorado Intellectual Property Inn of Court 1 (presentation on file with *Denver University Law Review*).

2. Marcia S. Krieger, *A Twenty-First Century Ethos for the Legal Profession: Why Bother?*, 86 DENV. U. L. REV. 865, 866–67 (2009).

3. *Id.* at 866.

4. *Id.* at 888–95.

In essence, these rules support the notion that belief in the rule of law serves to strengthen societal trust in our legal system as a whole.

Rule 1: Maintain Courtroom Decorum

The first step in maintaining courtroom decorum is being courteous, prompt, and prepared. Judge Mix suggests that a lawyer's default position should be to behave formally in the courtroom and any deviation from formal behavior should be upon invitation of the presiding judicial officer. Formality requires that a lawyer stand when addressing the court, direct all comments to the court, and refrain from speaking directly to opposing counsel. When addressing the court, she reminds practitioners to use the more formal salutation of "Your Honor" rather than "Judge."[5] She cautions that one should not "interrupt the court" or repeat one's self.[6] Indeed, a casual approach to the courtroom can demean the respect for the court and the professional integrity of its players. The informality to which we may all become susceptible, between a judge, court staff, and members of the bar, and which is a logical consequence of long hours spent together over weeks, months, and years, can erode the dignity of the proceedings for the parties that appear before it and who are subject to its rulings.

What Judge Mix has identified through this first rule is a nationwide and generalized trend of attorney behavior. Scholars write about the perception of a general decline of professionalism in the legal professional.[7] Professionalism has been considered a hallmark of the field, with William Shakespeare writing in the 1590s that one should "do as adversaries do in law, [s]trive mightily, but eat and drink as friends."[8] Proponents of this view have indicated that of late lawyers "engage in too much posturing and invective, too little cooperation and courtesy, too many unnecessary proceedings, and too much exaggeration or outright misstatement of fact and law."[9] In the courtroom, this can translate into a lack of civility among opposing attorneys and a lack of overall respect for both the legal profession and the legal system. An excellent example of egregious uncivil conduct was recounted by Bronson D. Bills in a recent article on this topic.[10] In a brief, but illustrative colloquy, the witness, an attorney being sued by a former client, employs profane language no less than seven times, directed at the attorney conducting the deposition.[11] District

5. Mix, *supra* note 1, at 1.

6. *Id.*

7. *See, e.g.*, Elliot L. Bien, *Toward a Community of Professionalism*, 3 J. APP. PRAC. & PROCESS 475, 493–95 (2001); William C. McMahon III, *Declining Professionalism in Court: A Comparative Look at the English Barrister*, 19 GEO. J. LEGAL ETHICS 845, 847–56 (2006); Deanell Reece Tacha, *Training the Whole Lawyer*, 96 IOWA L. REV. 1699, 1701–05 (2011).

8. WILLIAM SHAKESPEARE, THE TAMING OF THE SHREW act 1, sc. 2.

9. *See* Bien, *supra* note 7, at 475.

10. Bronson D. Bills, *To Be or Not to Be: Civility and the Young Lawyer*, 5 CONN. PUB. INT. L.J. 31, 32 n.5 (2005).

11. *Id.*

Court Judge Marvin E. Aspen relates another extreme example in a 1994 article in which he provides the following exchange regarding an evidentiary document, which occurred between experienced trial lawyers:

> Mr. V: Please don't throw it at me.
>
> Mr. A: Take it.
>
> Mr. V: Don't throw it at me.
>
> Mr. A: Don't be a child, Mr. V. You look like a slob the way you're dressed, but you don't have to act like a slob.
>
> . . .
>
> Mr. V: Stop yelling at me. Let's get on with it.
>
> Mr. A: Have you not? You deny I have given you a copy of every document?
>
> Mr. V: You just refused to give it to me.
>
> Mr. A: Do you deny it?
>
> Mr. V: Eventually you threw it at me.
>
> Mr. A: Oh, Mr. V, you're about as childish as you can get. You look like a slob, you act like a slob.
>
> Mr. V: Keep it up.
>
> Mr. A: Your mind belongs in the gutter.[12]

Moreover, the decrease in decorum has not been confined to attorney conduct. Scholars have observed that there is a general disrespect by judges for practitioners,[13] leading Chief Justice Warren to urge judges to take special care to set the proper tone and to respond to every provocation temperately.[14] He described the high standards of "truly great advocates of the past one hundred years," and to which all advocates should aspire:

> [T]hey were all intensely individualistic, but each was a lawyer for whom courtroom manners were a key weapon in his arsenal. Whether engaged in the destruction of adverse witnesses or undermining damaging evidence or final argument, the performance was charac-

12. Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513, 513–14 (1994).

13. *See, e.g.*, James A. George, *The "Rambo" Problem: Is Mandatory CLE the Way Back to Atticus?*, 62 LA. L. REV. 467, 486 (2002).

14. Warren E. Burger, *The Necessity for Civility*, 52 FED. RULES DECISIONS 211, 215 (1971).

> terized by coolness, poise and graphic clarity, without shouting or ranting, and without baiting witnesses, opponents or the judge.[15]

With these esteemed figures questioning the civility of courtroom conduct, the question arises as to whether this perceived decline in civility is really a modern phenomenon, where scholars are falsely mourning the loss of some fictional period of exemplary standards and conduct. There may be a strong argument that our present concerns are not novel, but rather reflect a phase significant only in terms of scale. Fifteen years ago, in a seminal address to law students, Dean Anthony T. Kronman[16] posed the question of whether the spirit of civility was declining in general, and not just in the courtroom.[17] He defined civility as the temperateness of speech, polite manner, and a "high-minded determination not to descend from principles to personalities."[18]

In fact, professionalism issues have haunted the legal profession since its inception. The fact that lawyers have had difficulty living up to the high standards expected of them has been a cause for complaint for almost 2,000 years. Writing in the early first century, Tacitus, generally considered Ancient Rome's greatest historian, states, "[i]f no one paid a fee for lawsuits, . . . there would be fewer of them. Now, however, hatred, strife, malice, and slander are fostered. Just as bodily sickness gives fees to doctors, so also a diseased legal system enriches lawyers."[19]

Quintilia, an early Roman rhetorician, declared, "[a] bad advocate can destroy a client's case just by arguing for it."[20] Apuleius even referred to lawyers as "vultures in a toga."[21] Historian James A. Brundage attributes the lengthy respite in criticism that spanned the period from the early-fifth through the twelfth century not to any improvements in the profession, but rather to its dismantling following the chaos that attended the collapse of the West Roman Empire.[22] These early advocates were criticized for taking on more work than they could competently handle.[23] Historians record the reemergence of references to lawyers in Western literature during the mid-twelfth century, a time which coincides with a

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15. Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 236 (1973).

16. Dean, Yale Law School, (1994–2004). *See* Anthony T. Kronman, *Curriculum Vitae*, YALE LAW SCHOOL 1 (Oct. 20, 2010), http://www.law.yale.edu/documents/pdf/TKronman_cv.pdf.

17. Anthony T. Kronman, *Civility*, 26 CUMB. L. REV. 727, 727 (1996).

18. *Id.*

19. TACITUS, ANNALES bk. XI, at 6 (n.p. 109 C.E.), *translated in* James A. Brundage, *Vultures, Whores, and Hypocrites: Images of Lawyers in Medieval Literature*, 1 ROMAN LEGAL TRADITION 56, 62 (2002).

20. Brundage, *supra* note 19, at 63 (citing QUINTILIAN, INSTITUTIO ORATORIA bk. XII, ch. I, at 13 (n.p. n.d.)).

21. APULEIUS, METAMORPHOSEON bk. X, at 33 (n.p. n.d.), *translated in* Brundage, *supra* note 19, at 61.

22. Brundage, *supra* note 19, at 64 (citing QUINTILIAN, INSTITUTIO ORATORIA bk. XII, ch. 7, at 8 (n.p. n.d.)).

23. *Id.* at 63.

revival in the study of Roman law.[24] With the emergence of law schools in medieval Europe, lawyers quickly garnered the ire of the French monk Bernard of Clairvaux, who complained, "These men have taught their tongues to speak lies. They are fluent against justice. They are schooled in falsehood."[25]

Nevertheless, there is a wealth of scholarly works expounding the decline of the profession in every respect. As proof, the American Bar Association's Center for Professional Responsibility lists more than 155 separate codes throughout the various legal systems in the United States, specifically addressing professionalism,[26] all of which were established between the late 1980s and the present.[27] He and others suggest that the problem is a relatively new one, or at minimum, more pronounced in recent decades.

Dean Kronman goes further, constructing a correlation between increased television-viewing and an attendant decline in group participation. He argues that with an increased focus on the primacy of personal needs, the result has been a general decrease of civility in America.[28] Of course, in the fifteen years since Dean Kronman's article was published, the world has undergone a dramatic transformation with staggering advances in technology, which would undoubtedly fan the flames of his discontent.[29] Moreover, social media has caused attorneys, like the general public, to become overly concerned with self-image and the portrayal of that image to a public increasingly accustomed to salacious newsfeeds. For example, constant blogging or tweeting about courtroom successes has become a tool of advertisement and a source of competition for attorneys of the twenty-first century.[30] Indeed, there is a general perception that a concern for the "bottom line" approach to law dominates

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24. *See* Stephan Kuttner, *The Revival of Jurisprudence*, *in* RENAISSANCE AND RENEWAL IN THE TWELFTH CENTURY 299 (Robert L. Benson & Giles Constable eds., 1982).

25. ST. BERNARD OF CLAIRVAUX, DE CONSIDERATIONE bk. I, ch. X, at 13 (n.p., n.d.), *translated in* Brundage, *supra* note 19, at 68.

26. *Professionalism Codes*, AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html (last visited Feb. 24, 2012).

27. *Id.*

28. Kronman, *supra* note 17, at 746.

29. *See* Kim Severson, *Seeing Social Graces as Waning in the South*, N.Y. TIMES, Nov. 2, 2011, at A18.

30. Bill Keller, executive editor of the New York Times articulated his concerns about social media, the evidence of its affect on the brain, and its impact on social interactions in our society as follows:

> My own anxiety is less about the cerebrum than about the soul, and is best summed up not by a neuroscientist but by a novelist. In Meg Wolitzer's charming new tale, "The Uncoupling," there is a wistful passage about the high-school cohort my daughter is about to join.
>
> Wolitzer describes them this way: "The generation that had information, but no context. Butter, but no bread. Craving, but no longing."

Bill Keller, *The Twitter Trap*, N.Y. TIMES, May 18, 2011, at MM11.

the profession today, where fierce competition to survive trumps ethical considerations and any notion of the law as a public service.[31]

For sure, the chasm between "winning for our clients" and "being nice to adversaries," lacks clarity, as does knowing when ardent representation has crossed over into unprofessional conduct. But as Judge Krieger comments, thoughtful reflection about one's actions has profound repercussions about societal respect for the rule of law and belief in the effectiveness of our legal institutions.[32] The difficulty in reconciling these conflicting objectives is likely compounded for new attorneys who lack experience. Whether the lack of civility is a new or old phenomenon—a reflection of the current decrease in the general standards of conduct and discourse, or rather a newly found focus on improving what has always existed—arguments in favor of civility before judges will logically outweigh those to the contrary, in that they enhance respect for our legal system as a whole. Civility enables cordiality with the bench and permits the subtle benefits that it inures. Ultimately, at least pertaining to practice before the court, "[i]t is enough for the ideas and positions of the parties to clash; the lawyers don't have to."[33]

Rule 2: Follow Ordinary Court Rules and Procedures

Judge Mix advises that attorneys follow local court rules and procedure because doing so enhances respect for the rule of law. When litigators fail to follow the rules, they seek to operate by exception, which undermines the notion of an even and orderly dispensation of fair-minded justice. In addition, any deviation from these norms may result in an ineffective use of the court's time and can potentially garner the ire of the court. Indeed, it stands to reason that the first tenet of courtroom practice is "know your judge," which naturally extrapolates to "know your court." The practice of law is a heavily regulated profession, with complex and interwoven "rules" by which an attorney navigates his practice and the courtroom. Some of these rules are fairly uniform across jurisdictions, e.g., the state rules of procedure, the Federal Rules of Professional Conduct, or court-specific filing guidelines. These rules are outlined in bar journals, accessible on court websites, and preached by professors or practicing attorneys in law school courses and continuing legal education seminars nationwide. However, other "governing" rules are amorphous, ever-changing, and focus on the interplay of contemporary mores and historical prestige. These rules, perhaps best classified as courtroom etiquette and local custom, are reminiscent of yesteryear and may bring to mind fictional attorneys such as Atticus Finch.

31. Sandra Day O'Connor, *Professionalism*, 76 WASH. U. L.Q. 5, 6 (1998).
32. Krieger, *supra* note 2, at 894.
33. O'Connor, *supra* note 31 at 9.

The system of codified rules is one with which the American-trained attorney feels relatively comfortable. Indeed, almost every American law school teaches the very skills required for comprehension of these rules in their first- and second-year curricula of civil and criminal procedure. As such, within months after graduating law school, most new attorneys are able to point to specific Federal Rules of Civil Procedure as the guiding "rules" for federal court practice or their state version of the Rules of Evidence for trial practice. Whether they are able to apply those rules, however, is often contingent on the new attorney's participation in a clinical program or other practical legal writing courses while in law school. Not surprisingly, Judge Mix identifies this as a key issue in the effective presentation of a case before any court.

Today, law schools have embraced the practical gap in the legal education of their students by enhancing their legal writing curriculum and supplementing courses on substantive issues with coursework in clinical studies and requirements for pro bono work.[34] It appears that law schools have realized that, in the words of Deanell Reece Tacha, a former Tenth Circuit judge, "lawyers are not, and should not be, simply an amalgam of the law-school courses they have taken."[35]

Clinical coursework is often the initial contact that a soon-to-be-attorney has with the more practical aspects of filing motions and briefs or with oral argument preparation from a procedural standpoint. Students in these courses are taught where to find local court rules or guidelines, and then are given the opportunity to apply those very rules and guidelines with the supervision of a licensed attorney. The University of Denver Sturm College of Law strategic plan for 2010 to 2015 has identified a major objective of better integrating legal education and the practice of law, and is modifying its curriculum to that end in both learning and assessment.[36] Although not every student is able to take advantage of this guided tour of local practice, these very skills can be self-taught.

Generally speaking, each court has its own set of local rules. For example, to practice before any immigration court across the country, an attorney must make himself familiar with the Immigration Court Practice Manual, which is available on the courts' web pages.[37] Similarly, the United States District Court of Colorado posts its local rules on the

34. *See* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 106–09, 138–39, 159–60 (2007). The Carnegie Foundation funded this study for the Advancement of Teaching, following a two-year study of legal education in American and Canadian law schools.

35. Tacha, *supra* note 7, at 1699.

36. *Strategic Plan 2010–2015*, UNIVERSITY OF DENVER STURM COLLEGE OF LAW 1, 4–5 (Dec. 14, 2009), http://www.law.du.edu/documents/about/SCOL-Strategic-PlanFinal.pdf.

37. *Immigration Court Practice Manual*, OFFICE OF THE CHIEF IMMIGRATION JUDGE, http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm (last visited Feb. 24, 2012).

court's webpage, as well as sample filings and fee schedules.[38] Indeed, the Internet has become a resource of undeniable and multi-tasked efficiency, providing a medium for courts to communicate rules and guidelines to attorneys.

Conversely, etiquette rules and local custom, unlike their codified counterpart, are learned not through study, but through observation, questioning, and imitation. This is because, distinct from a procedural regulation which clearly explains the proper technique and the sanctions for violations, proper etiquette is not written in a book, and discipline does not necessarily follow. In other words, one abides by the rules of procedure because he knows the ramifications for failing to adhere to them: for example, a rejected filing or a sustained objection in court. By contrast, one abides by the rules of courtroom etiquette not because of a potential sanction, but due to his respect for the court and for what it stands. Although over sixty years old and referencing the South African apartheid rather than the rule of law in the United States, Alan Paton eloquently described the significance of etiquette in a court of law. In *Cry, the Beloved Country*, the South African author observed that:

> You may not smoke in this Court, you may not whisper or speak or laugh. You must dress decently, and if you are a man, you may not wear your hat unless such is your religion. This is in honour of the Judge and in honour of the King whose officer he is; and in honour of the Law behind the Judge, and in honour of the People behind the Law. When the Judge enters you will stand, and you will not sit till he is seated. When the Judge leaves you will stand, and you will not move till he has left you. This is in honour of the Judge, and of the things behind the Judge.[39]

These "rules" that Paton references—appropriate dress, demeanor, and respect—are exactly the types of norms that are difficult to learn from paper, but easy to parrot.

Many courts across the country post courtroom etiquette guidelines on their web pages. For example, the Superior Court of California in the County of Alameda asks that observers "sit quietly and be respectful of court proceedings."[40] The Illinois Supreme Court reminds that attorneys should be "timely," and that when the marshal announces the members of court, all persons in the courtroom should "rise to their feet and remain standing until all members of the Court are seated."[41] For example, courts such as the Washtenaw County Court in Michigan instruct that

38. D. Colo. Civ./Crim. R., *available at* http://www.cod.uscourts.gov/Documents/LocalRules/2011_Complete_Local_Rules-FINAL.pdf.

39. ALAN PATON, CRY, THE BELOVED COUNTRY 157 (1948).

40. *Courtroom Etiquette*, SUPERIOR CT. OF CAL., CNTY. OF ALAMEDA, http://www.alameda.courts.ca.gov/Pages.aspx/pages-aspx-civil-trial-4 (last visited Feb. 24, 2012).

41. *Courtroom Etiquette*, ILLINOIS COURTS, http://www.state.il.us/court/supremecourt/Etiquette.asp(last visited Feb. 24, 2012).

"inappropriate attire" is prohibited.[42] However, even if written, these rules are not necessarily clear; for example, what does it mean to be "respectful of court proceedings" or to prohibit "inappropriate attire"? Thus, in the reality of courtroom practice, the only way to truly learn courtroom etiquette is through observation and imitation.

The two most popular forms that early observation and imitation take are through clinical programs at law schools and through mentorship opportunities once a new attorney enters practice. Through observation and parroting of one's mentor, an attorney can mimic appropriate attire and conduct, respectful means of addressing the court, and reasonable requests of courtroom staff.

The Colorado law schools combined offer fifteen clinics that help students transition their skills from theory to practice under the mentorship of professors who serve as legal supervisors.[43] By participating, students gain educational experience in client interviewing, witness examination, oral argument, field research, trial work, dispute resolution, negotiation management, and many other practical areas under the supervision of a seasoned attorney. Similarly, legal externships provide student placements with practitioners, and offer a unique opportunity to gain legal practice under supervision. In addition, some students meet with success when they are afforded an apprenticeship-style training, in which they are mentored by more-seasoned attorneys and from whom they learn through observation.[44]

Surprisingly, despite the immense value of these sorts of programs,[45] there is a growing concern for the lack of mentorship opportunities after graduation from law school.[46] The general decline in mentoring

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42. *Courtroom Etiquette and Attire*, WASHTENAW CNTY. TRIAL CT., http://washtenawtrialcourt.org/general/courtroom_etiquette-attire (last visited Feb. 24, 2012).

43. Examples of such clinics range from civil litigation and criminal law clinics to environmental clinics. In addition to providing an excellent opportunity for law students, these practical opportunities also serve an important public service need since the clinics provide free legal services to many indigent community members.

44. *See* Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to our System of Justice?* 42 FORDHAM L. REV. 227, 229–30 (1973).

45. The authors note that although there is a proliferation of clinical programs and the fact that they provide in serving a previously unmet need, they do have their critics. Last year, the New York Times reported that for the first time, clinics at universities across the country are finding their funding challenged, as they take on powerful interests that resource-starved nonprofit groups have not been able to pursue. *See* Ian Urbina, *School Law Clinics Face a Backlash*, N.Y. TIMES, Apr. 4, 2010, at A12.

46. Out of concern for this and a variety of issues facing the profession, Colorado Supreme Court Chief Justice Michael L. Bender, in February 2011, convened a Commission on the Legal Profession, comprised of leaders in academia, the legal bars, and state and federal courts. Chief Justice Bender identified many issues facing the legal profession, and chief among these was a concern about the lack of mentoring opportunities. Thus, the Commission on the Legal Profession is studying various mentoring programs for future implementation. Chief Justice Bender plans to institutionalize the Commission as a vehicle for developing ideas and policies that might lead to legislation, new ethics rules, and change in law school curriculum.

has curtailed the opportunity to learn through imitation.[47] Similarly, it has been acknowledged in the Colorado bar that gaining meaningful mentorship opportunities is challenging in today's legal environment. With the high debt that graduating law students often carry, coupled with the limited employment opportunities given the recent economic downturn, many are choosing to hang out a shingle and engage in solo-practice. Without adequate mentoring and supervision, and with the high start-up costs of establishing a law practice, new lawyers can find themselves under pressure to accept cases that they might not otherwise have chosen.

Similarly, local customs are also best learned through observation and imitation, including the

> systematic and persistent variations in local legal practices as a consequence of a complexity of perceptions and expectations shared by many practitioners and officials in a particularity, and differing in identifiable ways from the practices, perceptions, and expectations existing in other localities subject to the same or similar formal legal regime.[48]

In other words, while one might logically assume that two similar jurisdictions operating under similar local rules may conduct themselves in similar ways, that assumption may not in fact be true. For example, an empirical study of bankruptcy proceedings performed in two different states concluded that local custom regarding attorneys' fees and debtor incentives affected whether attorneys advised a debtor to file for bankruptcy under Chapter 7 or Chapter 13 of the Bankruptcy Code.[49] Therefore, even though the federal law is the same (the Bankruptcy Code) and the procedural system is the same (the Bankruptcy Courts) across the two jurisdictions, local customs affected the case outcome.[50]

But how does an attorney learn local customs? Courtroom observation is an obvious starting point; by performing "fieldwork" as an anthropologist might, an attorney is able to observe courtroom interactions and judicial impressions and interview the courtroom participants, i.e., staff and other attorneys.[51] All of these methods of learning acknowledge that new attorneys are "trained" and learn from experience.

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47. *See* Jack W. Burtch, Jr., *The Mentor Challenge in Changing Times*, 15 EXPERIENCE 10, 10 (2004); *see also* Thomas R. Mulroy, Jr. *Editorial, Civility, Mentors and the 'Good' Ole Days*, CHI. LAW., Sept. 1991, at 14.

48. Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801, 804 (1994).

49. Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 CLINICAL L. REV. 127, 145–49 (1999).

50. *Id.* at 149.

51. Seielstad, *supra* note 49, at 168–73.

Both types of rules, those relating to etiquette and local custom, as well as those that are codified, are equally important to the day-to-day operation of the American justice system, and therefore, attorneys are well advised by Judge Mix to be aware of these local nuances. This concept is illustrated by the broad powers of contempt held by the court and the powers of sanction held by the Bar, specifically the ability to discipline practitioners for offenses upon the court.[52] It is also illustrated in the significance that jurors place on perceived professionalism of the attorneys in a trial, often resulting in predictive outcomes. One state court judge observed that:

> Most jurors have little in the way of background or experience to draw upon in evaluating the work of judges, lawyers, or court staff except through their service during trial. The appearance and performance of all trial participants are [therefore] important to a jury's perceptions as the unfamiliar, and often stressful, judicial process unfolds before them.[53]

Venturing into the arena of social psychology, legal and psychology scholars have examined nonverbal communication in the courtroom, and determined that attorneys benefit by creating opportunities to send out positive verbal and non-verbal communication about their case.[54] Studies have shown that when individuals, including jurors, are placed in unfamiliar situations, they tend to seek out and observe an authoritative and experienced person.[55] Thus, the manner in which an attorney conducts his role in the proceedings has a significant impact on how the observations are perceived. This is known as the Rosenthal Effect,[56] and studies have observed that individuals gauge the verbal and non-verbal communication and draw conclusions about that communication.[57] Some successful attorneys send out nonverbal cues that are calculated to persuade and reflect an appearance of confidence. Indeed, newly admitted attorneys might choose to study the norms of attorney conduct in the tribunals in which they appear so that they can mirror successful approaches in that tribunal. In one court, an aggressive, adversarial approach might be appropriate and expected, while in another court the opposite might be

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52. *See, e.g.*, COLO. R. CIV. P. 107(a)(1) (Colorado courts have the power to hold in contempt those who exhibit "[d]isorderly or disruptive behavior, a breach of peace, boisterous conduct or violent disturbance toward the court, or conduct that unreasonably interrupts the due course of judicial proceedings . . . ."); *see also* 8 C.F.R. § 1003.102(n) (2011) ("It is deemed to be in the public interest for an adjudicating official or the Board to impose disciplinary sanctions against any practitioner who . . . engages in conduct that is prejudicial to the administration of justice or undermines the integrity of the adjudicative process.").

53. Hon. Daniel A. Procaccini, *First (and Lasting) Impressions*, R.I. BAR J., Sept./Oct. 2010, at 16.

54. Elizabeth A. LeVan, *Nonverbal Communication in the Courtroom: Attorney Beware*, 8 LAW & PSYCHOL. REV. 83, 94–97 (1984).

55. *Id.* at 84.

56. *Id.*

57. *Id.*

appropriate. Similarly, in some tribunals, the parties may have shared educational experiences that inform their behavior in court and have a subtle effect on the proceedings. Over time, with careful attention to courtroom behavior, attorneys may become aware of best practices in a variety of courtroom settings.

For the practicing attorney, it seems that developing a mastery of procedural requirements, ethical guidelines, *and* courtroom etiquette may result in more wins and greater and more effective impression on triers of law and fact. Albeit humorous, perhaps the best advice to attorneys is to "[l]eave it to the opposing counsel to be rude, argumentative, sarcastic, disrespectful, and inartful. Let the opposing counsel make it easy for you to look good."[58]

Rule 3: Do Not Question the Authority of the Judge

Judge Mix advises that attorneys should take particular care to balance advocacy with improper questioning of judicial authority. Legal practice is full of common sense idioms that rule the behavior of the various characters involved in any legal action. Perhaps the most significant of these is that "there is a time and place for everything." Attorneys would be well-served to remember that although judges must be subject to scrutiny and criticism, actual court proceedings are not the appropriate forum for such questioning.[59] Not only is judicial scrutiny during proceedings disrespectful and likely to lead to sanctions, it also undermines public confidence in the court system and the judge and diminishes respect for the rule of law.[60]

As a practical matter, attorneys may engage in ardent advocacy on behalf of their client. However, where one becomes over-ardent or otherwise improper in his dealings in the courtroom, he opens himself up to various consequences. Specifically, a showing of displeasure, disgust, or anger at a judge's ruling or at a case outcome is both childish and unprofessional and, more significantly, likely to be distasteful to the triers of fact and law. Undoubtedly, "[l]awyers whose intonations drip with sarcasm while saying, 'Thank you, Your Honor,' after a ruling against them . . . do not go unnoticed by judges or jurors."[61] Although this behavior does not necessarily subject the attorney to ethical violations or bar sanc-

58. Leonard I. Frieling, *Courtroom Etiquette: How to Set Yourself Apart*, COLO. LAW., Dec. 1998, at 77, 77–78.

59. *See* Catherine Therese Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945, 964 (1991).

60. *See* Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.").

61. Clarke, *supra* note 59, at 999–1000 (quoting Richard B. Klein, *A Dozen Ways to Anger a Judge*, LITIGATION, Winter 1987, at 62).

tions,[62] it may have an indirect effect on the course of the instant proceeding or future proceedings by the offending attorney before the same judge.

Behavior that undermines the ability of the court to proceed effectively or efficiently can be sanctioned harshly. For example, an attorney was suspended for "one year or until further order of the court" for accusing the court of

> collusion with the prosecution, cronyism, racism, permitting the proceedings to have a "carnival nature," conducting a kangaroo court, prejudging the case, conducting a "cockamamie charade of witnesses" and barring defense counsel from effectively participating in the proceedings, conducting a sham hearing, acting outside the law, being caught up in his "own little dream world," and ex-parte communications with the prosecutor . . . .[63]

In the immigration court context, attorneys who engage in improper behavior can be disciplined or even disbarred from appearing in immigration court for instances of "obnoxious and contumelious" behavior.[64]

Of particular concern to courts are suggestions that a judge has prejudged a particular case because such an accusation is antithetical to the justice system.[65] Of course, a hallmark of judicial ethics requires impartiality.[66] In the wide variety of tribunals in the United States, judges must abide by these ethical responsibilities and can be disqualified for bias or prejudice.[67] Due to the sensitive nature of such issues, attorneys ought to reflect on the advisability of lodging such a complaint if the decision to do so is actually a litigation strategy rather than a good faith concern about the extent to which judicial ethics are being upheld.

Those who are unfamiliar with courts and courtroom behavior frequently look to attorneys for appropriate behavioral cues. Therefore, an attorney's perception of respect for the authority and position of a judge is essential to the shaping and re-shaping of judicial authority in the

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62. *See, e.g.*, Losavio v. Dist. Court, 512 P.2d 266, 267 (Colo. 1973) (overturning contempt finding where a comment to opposition that "it must be nice to have [the judge] in your corner," was not overheard by judge and therefore not direct contempt); Moffatt v. Buano, 569 A.2d 968, 969–71 (Pa. Super. Ct. 1990) (holding that comment that a judge was an "asshole" heard by court administrator in lobby and then repeated for the judge is both childish and unprofessional but because it did not obstruct the administration of justice and did not support a conviction for contempt).

63. *In re* Vincenti, 458 A.2d 1268, 1269, 1275 (N.J. 1983).

64. *See, e.g., In re* De Anda, 17 I & N Dec. 54, 54–55, 58 (B.I.A. 1979); *see also* 8 C.F.R. § 292.3 (2011).

65. United States v. Meyer, 346 F. Supp. 973, 983 (D.C. Cir. 1972) (Attorney stated: "I am afraid of making this system rotten by not being able to do my job, and that is representing people, and that is what I am here for. I am not here to grease the wheels of the Court. I am terribly afraid that you have made up your mind that you are going to dispatch this case as expeditiously as possible. I am not here to expedite it.").

66. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES CANON 2 (2011).

67. Randall J. Litteneker, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 236 (1978).

minds of the public. In other words, "[h]ow much respect [attorneys] show for our judges is a fundamental concept upon which our entire legal system was founded."[68] One court specifically noted, "If trial lawyers by their courtroom conduct state their own disrespect for judges in clearly spoken words, no one can expect others to have respect for our judicial system."[69]

Consequently, attorneys should note that the public perception pertaining to judicial authority follows them beyond the doors of the courtroom. Not only are comments on judicial authority made in the courthouse influential on the minds of the public, but statements made beyond the immediate reach of the court are becoming more frequent and significant with the use of social media.[70] For example, an attorney was sanctioned for referring to the judge presiding over a case she was trying as "Judge Clueless" on her blog.[71] This attorney also referred to another judge as "a total asshole."[72] This attorney engaged in "conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute, in violation of Illinois Supreme Court Rule 770."[73] Another example is a Florida attorney who was fined $1,200 for blogging that a judge he appeared before was an "Evil, Unfair Witch."[74]

The takeaway for practicing attorneys is that an attorney can undermine a judge and the legal profession in a number of ways, and even though not all slights are actionable, every action and statement affects public perception of judicial authority.

Rule 4: Ask Yourself, "What Will the Judge Think?"

Judge Mix cautions that "[a] lawyer should avoid over-zealous advocacy."[75] Not all motions require opposition, especially if no prejudice will result from the requested relief. She suggests employing sound judgment and discretion in choosing when to fight and when to avoid wasting client money, attorney time and energy, and the court's limited time. For example, motions for reconsideration are very difficult to win and, according to Judge Mix, are frequently over-used. Therefore, an attorney should think carefully before filing one. A corollary to this responsibility is that lawyers should endeavor to keep their clients informed about the cost of litigation, the cost of pursuing a particular mo-

68. E. Spencer Walton, Jr., *Respect and Dignity*, 44 RES GESTAE, Feb. 2001, at 5, 5.
69. *Meyer*, 346 F. Supp. at 979.
70. Patricia E. Salkin, *Social Networking and Land Use Planning Regulation: Practical Benefits, Pitfalls, and Ethical Considerations*, 31 PACE L. REV. 54, 83–84 (2011).
71. Complaint, *In re* Peshek (Hearing Bd. of Ill. Att'y Registration & Disciplinary Comm'n Aug. 25, 2009) (No. 6201779), Sup. Ct. No. 23794, Comm'n No. 09 CH 89.
72. *Id.*
73. *Id.*
74. *Salkin, supra* note 70, at 70.
75. Mix, *supra* note 1, at 1.

tion or argument, and expectations regarding the amount of time, energy and non-monetary resources it can require to complete a case in the federal court system. This discussion should also include a realistic assessment of the likely outcome. It becomes a matter of setting realistic expectations early in a case and then managing those expectations throughout the proceeding.

Sometimes an attorney makes a choice about proceeding that harms his reputation before the judge, or, even worse, lands him on the receiving end of a bar ethics review. This can be, in some circumstances, an all-consuming, career-altering activity, and can even cause irreparable harm to one's reputation. Judge Mix's caution to think carefully about how one's actions, in all of the complex professional and ethical decisions one makes as an attorney, should be taken extremely seriously.

THE COMMUNICATION RULES

The second category of rules emphasize how written and oral communication, to be effective, must be honest and precise. Statements that fail to display a properly nuanced understanding of the issues can diminish trust in the communication.

Rule 5: Write with Precision and Clarity

Judge Mix joins a host of legal scholars, practitioners, and judicial officers calling for strong writing skills. Indeed, attorneys are hired specifically for their skill in communication, both written and spoken. At its best, legal argument is formal, clear, precise, and sensitive to nuance. A misjudgment of lexical choice can subtly shift meaning, undercut accuracy, and belie the true meaning of a complex argument.

The University of Denver Sturm College of Law, along with most, if not all, U.S. law schools, offers legal writing programs as part of the required academic curriculum. Across the nation, these programs vary, and can range from one to three years. The fact that the programs are often a critical part of the curriculum indicates that law schools recognize how skill in this area is essential not only to success in law school, but also in the legal profession. Legal academics understand that mastery of the analytic skills taught in substantive law courses must include articulating that analysis in writing. In the words of Justice Antonin Scalia, the skill of writing concisely, with precision and clarity, will assist the judge in the following important ways: (1) to have a clear idea of what the attorney is asking the court to do; (2) to be assured that what the attorney is asking is within the court's power to provide; and (3) to conclude that

what the attorney is asking is best—both in the attorney's case and in cases that will follow.[76]

In spite of the clarity and simplicity of this precept, compliance in the legal profession is often difficult. In the mid-1970s, Chief Judge Irving R. Kaufman convened a committee to "improve the quality of representation" in the federal courts in the Second Circuit. After two years of study, the committee released a report that concluded, "[t]here are deficiencies in our educational system in the areas of writing and logic which neither the law schools nor the courts can correct."[77] In response, law schools have used the past three decades to develop sophisticated legal writing and moot court programs.[78] They have added legal writing instructors to their ranks and implemented, in some cases, year-long programs to assist students in honing their legal analysis skills.[79] They support a wide variety of moot court competitions, which is thought to improve communication so that it is more clear and persuasive.[80] However, law schools recognize that the challenge still confounds the profession. At a recent roundtable discussion of the current deans of the five Chicago law schools, the deans expressed concern that students are graduating without having acquired the writing skills they will need.[81] Judge Warren Wolfson, Dean of DePaul University Law School stated, "I was on the appellate court for 15 years, and the state of writing among new lawyers and young lawyers is deplorable."[82] John Corkery, Dean of the John Marshall Law School, noted that law firms would like to see greater emphasis on legal writing.[83]

The significance of programs that improve legal writing has been identified by Judge J. Clifford Wallace, who has documented the increasing dependence of courts upon written argument.[84] He notes that given courts' ever-increasing workloads, judges rely increasingly on time-saving methods to speed the decision-making process, which have included a decrease in oral argument and a subsequent focus on written advocacy.[85] Judge Mark P. Painter of the Ohio First District Court of Appeals summed up the challenge in his tome on improving legal writing

76. JUSTICE ANTONIN SCALIA & BRYAN GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES, at xxi (2008).

77. Qualifications for Practice Before the U.S. Courts in the Second Circuit, 67 F.R.D. 159, 183 (2d Cir. 1976).

78. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 3 (2007).

79. *Id.*

80. *Id.*

81. Amanda Robert, *Law School Deans Discuss the State of Today's Legal Education*, CHI. LAW., Aug. 30, 2010, http://www.chicagolawyermagazine.com/Archives/2010/10/Law-school-deans.aspx.

82. *Id.*

83. *Id.*

84. J. Clifford Wallace, *Wanted: Advocates Who Can Argue in Writing*, 67 KY. L.J. 375, 376–78 (1978).

85. *Id.*

by suggesting that lawyers front-load the document so that you can educate the reader about what is forthcoming.[86] Specifically, attorneys should put information in context and relate each new piece of information to what has been presented previously. He cautions that one should not start writing until he is able to frame the issue in seventy-five words or less, and that these words should serve as a roadmap at the beginning of the written work, expanding on each point in the following pages. It is essential that attorneys aim to improve their legal writing by continually refining and practicing these skills. Consequently, Judge Mix is not alone in her request that attorneys develop proper legal writing skills and exercise those skills before the court.

Rule 6: Make Meaningful Efforts to Confer with Opposing Counsel

Judge Mix cautions that attorneys should take seriously the duty to confer pursuant to District Court Local Rule 7.1(A), which provides in pertinent part that "[t]he court will not consider any motion . . . unless counsel for the moving party or a pro se party, before filing the motion, has conferred or made reasonable, good faith efforts to confer with opposing counsel or a pro se party to resolve the disputed matter."[87] However, a corollary result is that doing so fosters communication between opposing counsel and encourages an atmosphere of civility and professionalism. This duty to confer is more generally about the effective use of the court's time and can take many shapes beyond motions: for example, joint stipulations or other less formal methods to narrow the issues in dispute before the court.

Court motions are devices used in litigation to bring a specific issue before the court and to request a ruling or other means to resolve contested issues. Because motions can be made at any time in a proceeding and can be used tactically to shape the direction of a case, they can be used to resolve many, if not all, issues. Joint "stipulations" or other manners of narrowing the issues are also significant tools to be used. For example, in the immigration court, a private attorney may confer with a government attorney before a hearing about narrowing the issues. In an immigration court cancellation of removal case, the government attorney may concede that there is sufficient documentation in the file to establish that deportation should be suspended because of ten years' continuous presence and good moral character, and inform the court that testimony need only focus on the "exceptional and extremely unusual hardship" prong of the analysis. Such a narrowing of the issues could mean the difference

86. Mark P. Painter, Legal Writing 201: 30 Suggestions to Improve Readability, or How to Write for Judges, Not Like Judges 8 (unpublished manuscript), http://www.plainlanguagenetwork.org/legal/legalwriting.pdf; *see also* STEPHEN V. ARMSTRONG & TIMOTHY P. TERRELL, THINKING LIKE A WRITER: A LAWYER'S GUIDE TO EFFECTIVE WRITING AND EDITING 151 (3d ed. 2009).

87. D. COLO. CIV. R. 7.1(A). This rule has a state analogue in COLO. R. CIV. P. 121 § 1-15(8).

between a four-hour hearing and a one-hour hearing. Moreover, in the state court setting, tools such as trial management orders are required to be filed with the court before a hearing and lay out the agreements made between the parties.

Efficiency is essential to court life. As discussed later, court dockets are at an all-time high and case receipts are growing.[88] This problem is compounded by the fact that judicial appointments to federal, state, and administrative courts are frequently tied up in political and budgetary battles, leaving a number of seats vacant on benches across the United States. For example, as of June 20, 2012, there were seventy-four vacancies in the Article III courts.[89] Consequently, communication between the parties before a hearing or trial is essential to the timely completion of court matters, not only so that the parties are in compliance with the rules, but also because pre-trial discussions assure that the court's time will not be wasted.

Rule 7: Do Not Refer to an Unopposed Motion as a "Stipulation"

Judge Mix instructs that attorneys should be candid with the court and particularly careful when informing the court that something has been resolved subject to a stipulation. Specifically, she explains that attorneys should fairly and accurately represent opposing counsel's position before the court on all pending matters. Black's Law Dictionary defines a "stipulation" as a "voluntary agreement between opposing parties concerning some relevant point."[90] Stipulations as to fact are binding on a court, absent an indication that the stipulation was not in accord with the intent of the parties.[91] Because of this binding nature, it is important to accurately and precisely reflect the nature of the motion or other request before the court, so as to properly inform the court of its ability to exercise its authority. Indeed, by referring to an unopposed motion as a stipulation, an attorney could be viewed as trying to prohibit the court from ruling on the dispute. For example, if an attorney moves the court for an extension of time to file a brief and, in submitting the motion reports to the judge that the motion is unopposed, this does not equate to a stipulation—the judge has the authority to control the proceedings. By presenting the motion as a stipulation, the attorney attempts to remove that authority.

Essentially, this seventh rule arises out of two competing underlying concepts: the importance of being candid with the court and the opposing attorney, and the avoidance of undermining the authority of the judge.

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88. *See* discussion *infra* Rule 7.

89. These vacancies include sixteen seats on the U.S. Court of Appeals and sixty-seven seats in the U.S. District Courts. *See Judicial Vacancies*, U.S. COURTS (Feb. 25, 2012), http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx.

90. BLACK'S LAW DICTIONARY 1455 (8th ed. 2004).

91. *See id.*

Moreover, this rule encapsulates the need not only to be honest with the court concerning a legal position as it pertains to a client, but also to accurately represent the other side's position. As Judge Mix's third rule encapsulated the discussion on judicial authority, it is clear that by knowingly miscategorizing actions or case holdings before the court, an attorney is demonstrating his lack of respect for the court, and, as such, undermining the authority of the court.

Speaking honestly and candidly with the court and opposing counsel is perhaps one of the most important roles of a practicing attorney. Indeed, the ability to "call a spade a spade" is a primary skill for an attorney, not only because it earns the attorney respect as a "straight-shooter," but also because to do otherwise opens the attorney to ethical violations. For example, an attorney should not knowingly make a false statement of fact or law to the court or offer evidence that the attorney knows to be false.[92]

In June 2011, the Ethics Committee of the Colorado Bar Association published a decision on candor towards the tribunal and remedial measures in civil proceedings.[93] That decision makes clear that the knowing making of false statements, whether privileged or unprivileged, is sanctionable. Likewise, false exposition of the law to advance an argument is also actionable.[94] As an advocate navigates the line where ardent representation ends and the duty of candor begins on a particular issue, he may choose to engage a tactical position to advance a legal theory which, if successful, would mitigate his client's liability. For example, in litigation, a defense attorney might learn that the clearly precedential authority on point in his jurisdiction is not favorable to his client's case. If he ignores that line of authority and instead cites case law that has no precedential authority before the tribunal tasked with deciding the case, he would be in breach of his duty of candor. Litigation tactics must not be used to misinform the judge. Doing so undermines the general public's confidence in our court system of arriving at the truth by the exchange of logical arguments.[95] Thus, we see that this rule has at its foundation a need for respect for the rule of law.

Another illustration of this concept is in ex parte settings. These are matters involving multiple proceedings before different tribunals involving related causes of action. The duty of candor requires that a lawyer inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision.[96] Thus, an advocate

92. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2010).

93. Colo. Bar Ass'n Ethics Comm., Formal Op. 123 (2011).

94. *See* COLO. RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2008).

95. Robert J. Cindrich, *The Lawyer's Duty of Candor to the Tribunal*, JURIST (Oct. 23, 2000), http://jurist.law.pitt.edu/benchmark2.htm.

96. N.H. Bar Ass'n Ethics Comm., *Candor Toward The Tribunal: Duty to Inform The Court of Related Proceedings*, N.H. BAR ASS'N (Feb. 13, 1991), http://www.nhbar.org/pdfs/PEA2-91.pdf.

must inform the court of any related causes of action if the existence of such is a material fact and disclosure is mandatory for a judge to make an informed decision.[97]

We see that underlying this rule is the notion that advocates should not undermine the authority of the judge. In the immigration court context, judges have a responsibility to decide matters of law and fact, and then to determine whether a case should be granted or denied as a matter of discretion. When the parties are able to reach a stipulation that the facts support a favorable outcome under the law, they must still move the court to exercise its discretion. Failure to do so would undermine the authority of the court. Judges have an interest in an outcome that is just, accurate, and reasonably expeditious. They control the procedures which shape the institutional pressures that push lawyer conduct in certain directions. In comparing our system of advocacy to that of the English system, Chief Justice Burger wrote that the "English training in advocacy places great stress on ethics, manner and deportment, both in the courtroom and in relations with other barristers and solicitors. The effectiveness of this training is reflected in the very high standards of ethics and conduct."[98]

THE "RESPECT FOR RESOURCES" RULES

Rule 8: Do Not Ask a Judge (or His/Her Staff) to Get You Coffee

Judge Mix instructs that an attorney should never make ridiculous or inherently improper requests of the court. Court proceedings are formal events.[99] As such, both counsel and the parties should plan to abide by certain formalities while within the courthouse. These formalities include not only timely appearance and remaining until the matter is concluded by the judge or until excused, but also remembering that courts do not have the budget to accommodate certain requests. Therefore, the parties should plan accordingly and always arrive prepared.

As we reflect on how a request for coffee could come to pass, we are reminded that attorney preparation necessarily includes two types of preparedness: being ready to conduct the scheduled proceedings and informing clients of the process of being in court. For example, it is rare to find oneself leaving court at the time one had expected. Indeed, if an attorney has been told to anticipate a full morning of testimony, attorneys would be well served to expect to spend a full day. Attorneys must make

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97. Iowa State Bar Ass'n v. Zimmerman, 354 N.W. 2d 235, 235, 237 (Iowa 1984) (lack of disclosure evinces "indefensible irresponsibility"); Garcia v. Silverman, 334 N.Y.S. 2d 474, 476 (N.Y. Civ. Ct. 1972) (the failure to disclose another proceeding involving related causes of action constitutes "reprehensible conduct" and action that "cannot be countenanced or condoned").

98. Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 229 (1973).

99. *See* discussion *supra* Rule 1.

appropriate arrangements with various competing commitments to other clients, colleagues, and family. Otherwise, an attorney may become tense as he watches the clock and fears for the impact of the delay on these alternate responsibilities.

These authors respectfully suggest that since a significant portion of your time may be spent waiting, consider the following: (1) bring a snack, but do not eat it in the courtroom; (2) bring extra work, once again, not for reviewing during courtroom proceedings; and (3) take care to manage your affairs realistically. This preparation will show through in terms of impression management.

Of course, while asking the court or court staff for coffee is an improper request, certain requests are appropriate and within the guidelines of the court. For example, good faith requests for a reasonable continuance can be appropriate. In the immigration court context, moving the court to provide a court-certified interpreter is appropriate. And, moving the court for rulings on legal issues is certainly within the responsibility of the court. However, neither requests that reflect a lack of preparation nor last minute requests which threaten to contravene judicial economy are ever well-received by the court. While a request for an interpreter when made at a scheduling hearing will likely be well-received, the same request made on the day of a merits hearing, for example, will likely not be.

In recent years, most courts at the federal and state level have been reporting severe underfunding at the same time that they have been seeing their dockets fill to unprecedented levels.[100] While in earlier times, where the judicial challenge to meet docket demands was not as dramatic, attorney requests that reflected lack of foresight and preparedness might be excused, today, they can be summarily denied. This is a problem not only for the client who wishes to be successful on the merits of his claim, but also for the attorney who may subject himself to a claim of breach of professional ethics and legal responsibilities.

Rule 9: Do Not Bug Court Staff

Judge Mix reminds attorneys that court staff are not extensions of the attorneys' law practices, but individuals whose goal is to ensure the effective management of the court. Underlying this concept is the idea of judicial economy. Judicial economy is a term that frequently gets mentioned in discussions about the efficiencies of the U.S. court system. Indeed, it is an "umbrella" term that encapsulates both judicial and attorney actions (or inaction) and abstractions such as capital, both monetary and

100. *See, e.g.*, Am. Bar Ass'n House of Delegates, *Crisis in the Courtrooms: Defining the Problem*, AM. BAR ASS'N 3 (Aug. 8–9, 2011), http://www.americanbar.org/content/dam/aba/ images/public_education/pub-ed-lawday_abaresolution_crisiscourtsdec2011.pdf.

human. Here, we focus on the human elements of judicial economy: specifically, the burden on court staff and security.

As an initial matter, it is clear that the number of court filings is growing exponentially. For example, as of March 31, 2010, the federal court system saw 76,748 pending criminal cases, 299,512 pending civil cases, and 1,596,994 pending bankruptcy cases.[101] In Colorado, 541,591 cases were filed in county courts during the 2010 fiscal year, nearly 100,000 more cases than 2001.[102] That astounding number of cases does not include those filed in Denver County Court.[103] Similarly, the U.S. Immigration Courts saw 392,888 receipts during 2010, roughly 110,000 more than ten years earlier.[104] While these numbers represent the sheer number of new cases filed in 2010, they are not representative of the number of evidentiary submissions, motions, briefs, and other requests filed, nor of the numerous telephonic questions made to court staff pertaining to each case. It is precisely these difficult-to-calculate strains upon court staff which led Judge Mix to establish this rule.

Often, the difference between a "normal" request of the court and "bugging" court staff is a question of simple preparation and common sense. It is acceptable, for example, to make requests for necessities, such as an interpreter, needed A/V equipment, or rescheduling issues. It is inappropriate, however, to make those requests on the day of the hearing. One Pennsylvania state judge opined that "[n]othing frosts me like having everyone wait while they make copies of something that should have been handed out weeks before. Or, worse yet, making my staff do it while we all sit around! I ought to start charging them five bucks a page!"[105] Indeed, while staff often will perform certain courtesies, such as making a copy or providing other assistance, those acts are just that: courtesies.

Understanding the internal procedures of the courts in which the attorney normally practices is immensely important. For example, knowing that a court closes its doors at 4 p.m., an attorney should not arrive five minutes prior expecting to perform a lengthy file review without severely annoying staff. Moreover, if a court assigns staff to a specific judge, an attorney should seek to learn that information so he does not needlessly burden a staff member assigned to a different judge. Additionally, learning local rules saves both the attorney and court staff tremendous

101. Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics*, U.S. CTS., apps. C, D & F (Mar. 31, 2010), http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx.

102. Colo. Judicial Branch, ANN. STAT. REP.: FISCAL YEAR 2010, 2010, at 1, 102 tbl.24.

103. *Id.*

104. Office of Planning, Analysis & Tech., FY 2010 STAT. Y.B., Jan. 2011, at A1; Office of Planning, Analysis & Tech., FY 2001 STAT. Y.B., Mar. 2002, at A1.

105. J. Michael Eakin, *What Really, Really Annoys Judges*, 32 PA. LAW., May/June 2010, at 30, 33.

amounts of time. Among other lessons, an attorney should ensure that a request of the court is not buried in a cover letter, but made abundantly clear so that the court staff need not read an entire motion, for example, to determine what it is that the attorney is seeking.

The reality of the matter is that courts across the country are making significant cuts in staff due to strained state and federal budgets. In more extreme cases, local courts are closing their doors and laying off hundreds of competent employees, redirecting litigants to already overcrowded dockets at other courts or into "holding patterns" of several years.[106] Moreover, these deep cuts are occurring at a time when the number of yearly filings is soaring. Thus, attorneys should be schooled in the differences between responsibilities of court staff owed to the attorney and the public and courtesies that staff will perform if time permits.

THE CATCH-ALL RULE

Rule 10: Guard Your Reputation

Finally, Judge Mix explains that "a lawyer should vigorously protect his/her reputation in the courthouse and in the legal community." Doing so requires careful and thorough preparation, including the preparation of thoughtful, concise, well-organized, well-edited, and proofread written materials. She reminds firms that all filings bear the firm name, and an errant filing by one associate will be attributed to the entire firm. It is important to avoid frivolous disputes and arguments.

She cautions new lawyers that one way to avoid the chances of damaging one's reputation is by practicing only in an area of expertise. In order to develop the expertise, it is indispensable to have good mentoring as one gains experience in the subject area. Experience can be gained through the *pro bono* mentoring programs and through courtroom observation. Dean Howard Krent of Chicago-Kent College of Law has noted that law firms put too much "of a premium on having new hires 'get it quickly.' Whereas firms in the past might give associates three years or so before deciding how they were doing in the law firm, now that period may be as short as six months."[107] With experience, a lawyer can assist his client to appropriately weigh potential costs and benefits so that he can make wise strategic decisions in litigation. Only then will a lawyer have the confidence to be concerned when a client does not wish to follow his legal advice, and know when to drop a problematic case.

In an intentionally cynical hypothetical regarding the importance of diligently guarding one's reputation, consider what could occur if an

106. *See, e.g.*, Julia Cheever, *SF Courts Cut Hours, Lay Off 200 Employees*, BAY CITY NEWS, Aug. 3, 2011, http:sfappeal.com/news/2011/08/sf-courts-cut-hours-lay-off-200-employees.php.

107. Eric Lipman, *Deans Roundtable: Law Schools Still Don't Teach Writing*, LEGAL BLOG WATCH (Sep. 17, 2010, 1:01 PM), http://legalblogwatch.typepad.com/legal_blog_watch/2010/09/deans-roundtable-law-schools-still-dont-teach-writing.html.

attorney attempted to forestall an unfavorable ruling by challenging, for purely tactical reasons, the legal work product of a prior counsel. The effect could be years of litigation and appellate review on the merits of the client's case, as well as thorough review of the attorney's conduct. Developing a record that is devoid of indicia of preparedness slips could negate the chance of a professional responsibility challenge.

CONCLUSION

The legal profession is an extremely small, close-knit, and well-informed community. All the major actors in the court system—opposing counsel, presiding judges, and court employees—are people with feelings, memories, and the ability to gossip. A misstep will be remembered and a larger blunder never forgotten. However, some rules are so fundamental that failure to abide by them carries serious formal sanctions. An attorney's behavior before a court is a reflection of his respect for the judge, his profession, the U.S. legal system, and his client. Moreover, the less experienced public observer takes cues from his behavior; therefore, attorneys are in the unique position to help shape both public opinion of and confidence in our legal system. Although these rules may seem humorous and common-sensical, they provide a useful roadmap for successful practice before the court wherein a new attorney can maintain his professional integrity and help restore public confidence in American courts. A courtroom victory does not only occur when the client "wins." Indeed, leaving a courtroom after a genuine effort to maintain respect for the court and with professional integrity intact is a victory in itself and worthy of celebration within the profession. Therefore, attorneys would do well to take Judge Mix's words to heart: "Tell the truth. Remain civil and courteous. Forgive trespasses when possible. Keep your eye on the prize: achieving a just, efficient and appropriate result."[108]

108. Mix, *supra* note 1, at 2.