

SYLLABUS

1. Text

The text for this class is DeWolf, Cases and Materials on the Law of Torts (2013 ed.). Make sure you get the latest edition (any previous edition is out of date). You can obtain the textbook FREE if you download it from the Internet (as long as you pay for the cost of printing it out), or if you prefer, you can buy it from the bookstore for about \$45. To download it from the Internet, go to my website (<http://guweb2.gonzaga.edu/~dewolf/torts/Summer14>) The web page contains a lot of other useful information (such as past exams, a visual outline, etc.).

For my philosophy on the substance of tort law, see the introduction to the text. The following observations are designed to provide my educational philosophy, along with practical and housekeeping issues about how I conduct the class. I recommend that you reread this syllabus periodically through the course, because it will be more meaningful as the course progresses.

2. Class Participation

I usually call on several students each class period to "recite": either to summarize the next case or to answer questions that follow from the initial summary. Because I believe in the Socratic dialogue, I encourage you to come up with your own answers rather than spoon-feeding them to you. You should come to class already with lots of "answers": information you have gleaned from the cases and from your analysis of them. You will also have questions, I am sure, but one of the challenges of being a lawyer is to be clear about what you know and what you don't know. As Donald Rumsfeld put it, it's not the known unknowns that are dangerous – it's the unknown unknowns. So to the extent you have identified an unknown as a known unknown, you are ahead of the game. You will come to class having already absorbed a great deal of information about the cases and you will be in the process of piecing that information together into a coherent whole, to formulate the "rules" by which tort law operates. I will spend most of the time in class giving you opportunities to discover what you know about tort law – and at the same time what you don't know. In some cases there will be something you don't know because no one knows the answer to the question. At other times there will be gaps in your knowledge because you haven't yet studied a particular subject in depth. Learning to be cheerful about your ignorance of certain matters is a critical aspect of maturing as a lawyer. At the same time, you must learn to display mastery of the material you are studying, and I will help you to evaluate how far along that process you have traveled.<sup>1</sup> You will learn much more by doing than by listening. Consequently you should be prepared each day to participate fully in the discussion of the cases and the issues raised by the cases. The more familiar you are with the material, the less nervous you will be about being called on.

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1. It may seem strange to expect students only a few weeks into their first year of law school to display "mastery" of the material, but it is one of the characteristics of legal education that, from the beginning, students are expected to learn to "think like lawyers," and, correspondingly, to act like lawyers. By way of analogy to medical school, it is as though you began your study of medicine by being handed a scalpel and pointed toward a patient who needed a heart transplant. The happy difference in law school is that a mangled idea is no worse for wear, and it is fairly easy to clean up after we have made a mess of things. Assuming you had the same luxury in medical school, it would be a very sharp learning curve if you could learn medicine by doing rather than by studying theory. We exploit that luxury in law school by giving you a chance early on to function like a lawyer in mastering a little corner of the world and then testing out that mastery in the classroom.

It is inevitable that, because you are just beginning the study of law and practicing the skills that will make you a lawyer, you will experience anxiety about not being adequate to the task. Again, part of maturing as a lawyer is being cheerful in the face of your own inadequacy. Sometimes as a lawyer you will be hampered by a lack of time to prepare adequately, because your client (or your boss) delayed in bringing the matter to you, or you were thrown off by another matter that took priority. In addition to those situations where someone or something else bears the blame for your inadequacy, you may be at fault for having miscalculated how long it would take you to prepare, or your inexperience in handling the type of case, or for some other reason. Every lawyer has had that experience. What matters in such circumstances is that you do the best you can, neither apologizing for the difficulty nor attempting to bluster your way through. Make the most of what you do know and what you can do in order to illuminate the dark corner in which you may find yourself. Your priority should be to help your client rather than to make yourself look good. As in other life experiences, no pain—no gain. When your turn comes to perform, please make the most of the opportunity. As a result of the class participation you will do better in analyzing problems, which will help you greatly in your legal career. You will also profit from the fact that you have learned to face situations in which you were initially nervous but were able—as a result of prior preparation and growing experience—to become more at ease.

You also benefit from listening to other students as they are called on. At times you will feel superior—in part because you have the luxury of observing rather than being in the spotlight. But the student may miss things that you were on top of. On other occasions you may feel inferior—because the student was able to answer a question that would have stumped you. Rather than thinking about your relative position in the class, think about the way in which there is often more to the problem than at first appeared. One of the ideas behind “thinking like a lawyer” is that you take a situation and learn how to examine it from more than one viewpoint; by doing so you discover solutions to a problem that others thought was insoluble.

*Volunteering.* I call on students, rather than inviting volunteers, because it helps spread the wealth; otherwise those who are shy would not get as much “quality time” as those who are more extroverted. This summer, unlike most of the times I have taught this course, we are relatively few in number, and you will benefit from the frequency with which you are called on. Nonetheless, I will frequently ask a question that stumps the person I have called on. I will give that person time to think about the question, and see if they can come up with an answer. It will sometimes happen that you have an answer, and instinctively raise your hand to volunteer. I may or may not call on you at that moment; I would prefer your attempt to answer than mine, but best of all is to continue the dialogue with the student who was initially called on. Nonetheless, to move things along I may let the volunteer help. Please be sensitive to the fact that the student who is called on often suffers from stage fright, and the most obvious things slip from their mind.

I will also solicit questions at the beginning of class (more about that below, under “Conferences”), and as we finish a section. I welcome your contributions, but remember that we also have a special hour on Tuesdays (see § 7(4), below) devoted only to questions. If you have doubts about whether your contribution will be of value to the class as a whole, try it out on Tuesdays.

### 3. Attendance Policy

As an ABA-accredited institution, Gonzaga Law School is required to insure that you regularly attend class and come prepared to participate. To facilitate this process I will prepare for each of you a "shingle"—a nameplate—that you should bring to each class and "hang out" on the front edge of your table. I will also prepare a back-up in case the first one is lost. That will let me know that you are ready to participate, and also help me learn your names faster. I will also give each of you a class attendance sheet that will contain each of the days the class meets and a place for you to initial it. Each day that you attend class and are prepared (as indicated by placing your "shingle" out), you should initial the attendance sheet. At the end of the semester I will ask you to turn the sheet in, indicating your compliance with the attendance requirement.

I know there will be times during the semester when you are unable to attend, or unable to be prepared (for example: your father died and you go to attend the funeral; your child is in the hospital with appendicitis; you are stranded without transportation; etc.) I will assume that whenever you are absent (or present and unprepared) it is for a good cause, so it is unnecessary for you to tell me so. Some students may believe that a day off to golf is imperative for their mental health. You will face similar decisions when you become a practicing lawyer. Therefore I do not make judgments about why you are gone.<sup>2</sup> It is your responsibility to attend class regularly.

### 4. Preparation

To prepare for class each day (in order to consider yourself in attendance for that day) you should do the following:

- (1) Read the casebook materials at least 25 pages ahead of where we finished the last class.<sup>3</sup> If 25 pages falls in the middle of a case, read to the end of that case (and brief it). If time permits, you should read to the end of the section we are working on, so that when you brief the first cases your analysis will be as sharply focused as possible. Frequently you will not understand the issue(s) in the first cases until you have read later cases that treat the same subject.
- (2) Prepare a brief of each case, article or statute that is assigned. A brief is a written summary of a case, written (preferably typed<sup>4</sup>) in a notebook separate from the case

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2. Actually, there is an exception to this rule. In the rare case where a student has otherwise diligently attended class, but is struck down at the last minute by an illness or other circumstance preventing the student from fulfilling the requirement of 80% class attendance, I will consider some sort of dispensation, in consultation with the Academic Dean, if there is good cause for modifying the requirement. Otherwise, attendance at 80% of the scheduled class days is a prerequisite for sitting for the final exam.

3. Our progress will vary enormously depending upon the materials we are covering. In the beginning will cover only a few pages per day. However, you should aim for about 25 pages ahead will since it will insure that you have erred on the side of caution.

4. Nowadays virtually all law students have a laptop computer, and most use it to take notes in class (as well as for less admirable tasks, like instant messaging and online shopping). I recommend typing your notes only if that is the normal way that you record something of substance (e.g., longer than a grocery list). If you normally compose by hand, and use a computer only to prepare a final draft for submission, then it's fine to take reading notes by hand. However, I should say that there is a lot to be said for switching over to touch-typing. Most students ultimately become faster at a keyboard than writing by hand, particularly in a long exam. If you type you are forced to see your work a little more clearly, and you tend to make it better than if you are spared a direct confrontation by the fact that you

materials. It should include the following headings:

- (a) a summary of the critical facts of the case;
- (b) a short summary of the procedure leading up to the appeal;
- (c) the basis for the appeal (the issue(s) on appeal);
- (d) the holding(s) of the court as to the issue(s) addressed, and the accompanying reasoning;
- (e) the concurring or dissenting opinions, if any, with similar discussion of the reasoning; and
- (f) any questions or comments that you have on the case.

>>You must prepare the brief yourself!<< Do not consult hornbooks, and particularly do not make use of commercially prepared outlines or "canned briefs," before writing your own brief. They are like narcotics. Initially they make you feel good by sparing you pain you would otherwise experience, but precisely for that reason they have a corrosive effect upon your learning. If you want to learn to play the violin, it will do you little good to listen to a tape of Itzak Perlman playing violin exercises. To be sure, the tape will sound better than your own effort to play those exercises, but you have to do the hard (and sometimes tedious) training if you want to acquire a new skill. Put bluntly, no pain, no gain.

On the other hand, after you have done the hard work, you may want to compare notes with fellow students, or consult a reputable hornbook, such as DOBBS ON TORTS, or even a Nutshell if you like, in order to make sure you are on the right track, but it is important to do so only after you have prepared your own brief, and then only sparingly. As you increase your skill in taking complex cases and explaining them in your own words in more condensed fashion, you will be making progress toward the type of analysis and writing you will need to write good exam answers and perform well in Legal Research and Writing.

- (3) If questions are asked in the Notes after a case, write out an answer to the question. Oftentimes there is no "right" answer to the question, but it is designed to make you think.

If you are called upon in class to summarize a case, please be prepared to make a photocopy of your case brief immediately after class and give the copy to me. I say you should be prepared do that, but I rarely make such a request. I do so when I have concerns that a student I called upon in class was not really prepared and was trying to conceal the lack of preparation by stumbling through a recitation of

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can't read what you have written. Typing, in short, will force you to be clearer—a high order value in the first year of law school. Even if the effect of typing is "merely" cosmetic, typing has much to be said for it. Particularly now that computers are widely available, I encourage students to make the transition—if they can—from handwriting to typing.

Gonzaga Law School now uses a program called ExamSoft for taking exams with a laptop computer. About 95% of my students usually take their exams using ExamSoft. The others use a conventional bluebook. If you already are using a keyboard for your regular work, then it's probably worthwhile to make that your chosen method of taking exams. On the other hand, if you usually handwrite your notes, and only use a keyboard to do serious papers, then you would probably be better off writing your exams the old-fashioned way. The point is to produce your exam work product in the way that will be least distracting and allow you to focus on the substance. If you want to learn more about ExamSoft, go to <http://www.examsoft.com>.

the case. The fact that a student seems totally bewildered when called on, or gets the substance of the case wrong, does not necessarily mean that the student was unprepared. Sometimes a recitation will go poorly, and yet the student's brief will demonstrate that he or she was well prepared. (The explanation for the discrepancy is typically a bad case of stage-fright.<sup>5</sup>)

*Secondary sources.* You should spend the vast majority of your time reading the cases and other materials in the casebook, briefing them, preparing outlines of the law as you understand it, and practicing your exam-writing skills. Secondary sources are of limited value, and are dangerous to boot. Secondary sources may be helpful,<sup>6</sup> but I recommend that you read from them only in small doses after you have gone as far as you can with the primary materials I have given you. Here is why:

(1) As noted above, one of your primary tasks in this course is to learn how to extract rules of law from cases; the aim of DOBBS ON TORTS<sup>7</sup> is to describe the rules of law. If they do all the work for you, you won't learn very much. (2) PROSSER & KEETON are trying to provide a reference for practicing lawyers and judges. It is frequently cited in briefs and court opinions. It thus tends to provide a wealth of detail and sophistication that you may not be ready for. I only hold you to what we have covered in the materials and in class; by absorbing additional material from PROSSER & KEETON you will be taking on unnecessary baggage. (3) PROSSER & KEETON's conclusions are usually right, but not always. I reserve the right (which I will exercise on occasion) to disagree with them.<sup>8</sup> When it comes time to write the exam answer, I will be much more impressed by your familiarity with my views than with those of PROSSER & KEETON. As to other secondary sources, they tend to have fewer virtues and more vices than PROSSER & KEETON. I frankly do not understand why students spend time reading or listening to them as a substitute for taking the steps outlined above.

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5. Immediately after class I usually have students who want to ask me questions. There is usually plenty of time for you to check with me to see whether I want to see your brief, and then for you to go to the library, make a photocopy of your brief, and bring it back to me. If for some reason I have to rush away after class, you can drop it in my mailbox on the 4th Floor or bring it to me the next class. If from the recitation I can tell that you were well prepared, then there is no reason for you to copy the brief and bring it to me. The important thing is that, if I do need to verify that you were prepared, I get a chance to see your unretouched brief.

6. I have several recommendations for secondary sources. The traditional one is PROSSER & KEETON (PROSSER & KEETON ON THE LAW OF TORTS, 5th ed. 1984 (with a 1988 Supplement)), but there is a more recent (and heftier) publication, DOBBS, HORNBOOK ON THE LAW OF TORTS (2000) (both about \$50). A paperback with a lot of good information is DIAMOND, UNDERSTANDING TORTS (about \$30). While I don't recommend buying it, you may be interested in a treatise that I have written, with Kelly Allen, entitled WASHINGTON TORT PRACTICE 4<sup>th</sup> ed. (West Publishing, 2013). The library has several copies on reserve (it is also available online through Westlaw); it may also provide you with some insight on how tort law is practiced in a specific jurisdiction.

7. Or any of the other secondary sources I cited above.

8. Even if you read my treatise, for example, you may find my commentary on Washington law to be at odds with general principles practiced in other jurisdictions.

## 5. Grading

Your grade will be based entirely upon the examinations;<sup>9</sup> that is, class participation will not directly affect your grade (although your participation in class discussions will sharpen the skills you need to demonstrate on the exams).<sup>10</sup> The examination(s) are an opportunity for you to demonstrate your ability to provide responsible advice to a client based upon the legal principles and skills that you have learned. The midterm, Friday, July 10 [Check this!], will count for 30% of your final grade. The final exam (Monday, August 18, 9 am) counts 70%.

I will read your exam answer, mark up a checklist, assign a grade, and supply brief comments directed at those aspects of your exam either that I liked or that I thought in need of improvement.<sup>11</sup>

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9. That is, assuming you have faithfully attended class. If you do not meet the ABA requirement of 80% attendance, you may be disqualified from sitting for the exam.

10. I have a variety of reasons for not grading class participation on a qualitative basis (or a quantitative basis either, for that matter, although I do require that you come to class). First, I don't know how it is to be graded. Some students talk often, but not very well. Some talk seldom, but insightfully. Some ask apparently "dumb" questions that are really quite perceptive and very helpful to the class. Others ask very intelligent questions that are not helpful. But the most important reason I do not grade class participation is that I want the questions that you ask in class and your answers to my questions to be based upon a desire to learn, rather than a desire to impress me. If you know that I will base part of your grade upon how you appear in class, I am afraid it will have a negative effect upon how you participate. I also want you to know that your grade doesn't depend on whether I like you or not. You should feel absolutely confident that whether I agree with your ideas or not is irrelevant to how I evaluate your performance.

11. I should say by way of advance warning that the checklist is not always a perfect reflection of what was contained in your answer. I strive to be accurate, but occasionally, as Horace said, "quandoque bonus dormitat Homerus." If you feel that you covered an issue but it wasn't checked off, you should first ask the question, "Did I say this as well as it needed to be said?" Sometimes you were nosing around the answer, but you didn't complete your job as a lawyer—which is to communicate clearly. Nonetheless, there are times when, confronted with a student answer and a blank box on the checklist, I have to acknowledge that I should have checked it. You should feel free to ask me if you think this is the case and want to be sure. I should disclose, however, that judgmental (as opposed to purely computational) errors in grading your exams (that is, I should have given you more credit than I did in fact give) will not lead to an adjustment of your grade. That is for several reasons. First, the best assessment I can make is when I am grading tens of exams in a row, and I get a good feel for how one exam stacks up against the rest. Although I use the checklist (in part to keep myself awake), the grade is based upon my overall assessment of how well you have performed compared to what I think would be expected of you in the real world. I lose that nuanced comparative feel when I look at the exam in my office, in isolation, perhaps weeks later. Second, even if the failure to check that box may have played a role in assigning the grade, I don't know how much of a role it played. So I don't know what degree of correction is appropriate. Third, and perhaps most important, I try to be helpful in letting you see how I go about grading, but if I invite students to lobby me for changes, it would reward the most aggressive and argumentative. I quickly learned that to avoid such encounters I would be forced to be less revealing about how the grade was arrived at, or else do what I now do: like Ulysses lashing himself to the mast, I will entertain conversation about how I graded the exam only after foreclosing the possibility of changing my mind. The majority of students benefit from this imperfect system of feedback for everyone.

Old exams (and sample answers) are all available on my website,<sup>12</sup> I urge you to test yourself by taking a prior exam and then comparing it to the sample answer, since it will help you appreciate what it is you need to do in the course of taking the exam. Remember that any skill is improved by practice.

If you want to do well on exams, you must consciously try to improve your exam-writing skills, which include both analytical and writing components.

Most law school exams, including mine, consist of a recitation of hypothetical facts followed by a general question such as "You represent the plaintiff. How would you advise her?" The answer to that question will require an analysis of the issues that will have a bearing upon whether and how much she will recover. It is safe to assume that many (but not all) of the issues we have covered in class will be raised by the problem. Your job is to approach the problem intelligently, knowing when a particular doctrine (e.g. *res ipsa loquitur* or assumption of risk) will affect your client's status—make it more or less likely that he/she will win or lose. Just as in the "real world," you will find it difficult to say much with finality. You will rarely be able to tell your client, "You will win because . . . ." However, you can say: "If the jury finds that you did not act as a reasonable person would, then they may find you contributorily negligent, in which case your recovery would be reduced . . . ." It must also be recognized that jurisdictions differ in the rules they recognize, and in how they are applied; thus your answer will often need to be conditioned in a different way, e.g.: "Assuming this jurisdiction recognizes strict liability for ground damage caused by airplanes, then . . . ." I hope you will discover that by careful reading and analysis of the assigned cases you will acquire the ability to analyze new fact patterns and legal doctrines.

#### 6. Writing

A special word must be said about writing. Your performance will be directly related to how well you articulate the principles you have in your mind. If you cannot express yourself well, you will be lost. By "expressing yourself well" I do not mean eloquence; I simply mean grammatically correct, coherent, logical expression. If you cannot express a thought to me, I will assume you do not have it. If you express it incoherently, I will assume that you do not understand it correctly. The latter is frequently true, since most writing problems are ultimately problems of thinking as well. But even if you do understand something, you must remember that your job as a lawyer will be persuading others—frequently those who are either inclined not to agree with you, or who are handicapped by lack of time or ability. Your presentation(s) in practice must be forceful, clear, and succinct. The same is expected of your law school examinations.

Finally, we have to acknowledge that the process of testing and grading is a fallible one at best. If the ideal grade is one that accurately reflects how much you know and how well you can apply it, then there are a variety of "unfair" and arbitrary aspects to any exam: what I select to test on, how you're feeling on a given day, how I'm feeling at the moment I take your exam into my hands—these are variables just like the uneven ground on a baseball diamond. If the ground ball hits a rock and bounces over the head of the fielder, that's a lucky break for the batter—and an unfair break for the fielder or pitcher. But in the long run such things tend to even out.

I do, however, make adjustments where there has been an error in the mathematical computation of your grade (e.g., I average the scores incorrectly).

12. As noted above, you will need to translate past exams to the current year format. The "mini-exam" of the past is analogous to the practice exam this year, and the "fall semester" exam is analogous to this year's midterm. The Spring or Final Exam of prior years is analogous to this year's Final exam in December.

You can improve your writing dramatically by practice. Sadly, many students come to law school without good composition skills. Even if you have considered yourself a decent (even superior) writer, learn to be your own best critic in seeking ways to improve the clarity and accuracy of your writing. Pay attention to grammar, and spelling, and basic rules of good writing. As noted earlier, one advantage of writing good case briefs is that it is an opportunity to improve your writing skills. You should periodically look back at the briefs you wrote one week ago, two weeks ago, and ask whether someone reading your brief would get a clear picture of what was going on. You will often see how something that was clear to you at the time is now confusing—even to the person who wrote it, and only a short time after it was written. By becoming more sensitive to the potential for misunderstanding, you will learn to correct and polish your writing. Further, after you have completed a section of the case materials you will be in a better position to recognize the limitations in your first attempt to describe the principles you have learned. It is a good exercise to synthesize and summarize long sections before you move on to the next chapter in the material, because in writing your exam answers you will need to provide succinct explanations of how a particular doctrine operates, or how it is related to other tort concepts. You will find that during an examination it takes much less time to recall a description or explanation of a concept or doctrine than it does to formulate it for the first time.

Study groups are a traditional way that students facilitate one another's progress in law school. A study group can be helpful in clarifying your thinking, and providing feedback on your attempts to articulate what you have learned about the law. In a study group you can circulate drafts of your outline, and you can ask your study group members (or anyone else who is willing) to read your answers to practice exam questions. But if you do join or form a study group you need to be reflective about whether or not the study group is of benefit to you. One of the lessons in law school is in developing good bonds with other (future) lawyers. Partnerships that in the beginning look promising can turn sour along the way. Relationships that seemed like they would be supportive can wind up causing you added stress and anxiety. Make sure that each member of the study group feels free to stay only as long as he or she is receiving benefit from the group. In particular, don't think that there is something that you should depend on another study group member to do for you. Under the best circumstances you are getting a larger audience for your attempts at formulating answers to the questions you anticipate will appear on the exam. If your audience gets smaller, that shouldn't be a major blow to your preparation. In particular, I caution against thinking that a study group can divide up the subject and have different individuals prepare a discrete part of the "outline" of the course. This sounds like a sensible division of labor, but remember that the study group won't go with you into the exam room—at least they won't be able to write your answer for you. The hard thinking that you do in coming up with your own outline will be invaluable in later formulating an answer to a complex question. Once you've done your own work, try it out on your study group, and then find out if others have arrived at the same conclusion: if not, pursue that point of disagreement until you have satisfied yourself that the approach you are taking is correct. Remember also that there is only limited safety in numbers; frequently a whole study group will make the same mistake together. Again, if you have carefully thought out the issues beforehand you will be more likely to spot an error in someone else's thinking; if you simply latch onto someone else's formula you won't catch their error.

## 7. Conferences

If you feel at (or even close to) your wit's end, please make an appointment to see me. The most reliable way to get hold of me is by email ([ddewolf@lawschool.gonzaga.edu](mailto:ddewolf@lawschool.gonzaga.edu)). Or, call my office (313-3767); or my assistant, Vicky Daniels (313-3920) or stop by my office (Room 423 on the 4<sup>th</sup> Floor), or Vicky's (4th Floor, 402C). You can also catch me after class. You will find that I am



delighted to talk with my students about many topics; but to get the most out of individual conferences, I ask you to observe the following rules:

- (1) I do not review material from classes you have missed. For one thing, you can typically watch the video from any classes that you have missed. Even if something went awry with the video for a particular class, prior years' videos are available on the same website (<http://itunesu.gonzaga.edu>). Second, you should establish a network among your classmates so that you can confer with them about classes you have missed or ones where you were physically present but somehow got lost.
- (2) Do not call me to tell me that you will be gone for some reason, or that you were gone because you had the flu. I'm hardly in a position to grant you absolution for classes missed, or to deny it because your reasons aren't worthy. You are given a generous allowance for missing class (up to 20% of the classes in the semester). You are responsible for using that allowance wisely.
- (3) If you are having trouble grasping a particular doctrine, ask about it in class. I begin each class by asking for questions about housekeeping matters (such as what pages we are going to cover when, what the exam will cover, etc.) and then I invite substantive questions (e.g., what's negligence per se?). If you are puzzled by something, and you can't find an answer in the materials you are studying, chances are good that your classmates are puzzled as well, and you benefit all of us by asking.<sup>13</sup>
- (4) I don't conduct private tutoring sessions. I know it is helpful for you to come in and review outlines with me, and at one time I did so for students. However, you must recognize that part of law school is the lonely struggle with the uncertainty of not knowing whether you are okay or not. Remember that the practice of law is full of such uncertainty ("Should I accept that settlement offer or should I take the case to trial?" "Should I recommend that my client plead guilty and get life imprisonment or should we hope for an acquittal, with the risk that the death penalty will be imposed?") Law school is in part designed to give you a foretaste of that gnawing uncertainty. Uncertainty is to the practice of law what the sight of blood is to a surgeon: in the beginning it is terrifying, but later you will recognize that it is a sign that you are working with something important. As a matter of educational psychology, most people learn much more efficiently when they are frequently rewarded for being on the right track. Dolphins at Sea World learn to jump through hoops this way. However, our educational goals are more complex, and therefore a different approach is required.

Even if it were desirable to provide individual feedback, as a practical matter I cannot hope to be a private tutor to each student. I am more than happy to explore the many other issues that confront you (future career opportunities, questions about legal philosophy, or about the meaning of tort law, or about the meaning of life). But if you ask me to explain the difference between negligence per se and res ipsa loquitur, or

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13. That is, assuming that you have tried diligently to understand the materials that have been assigned to you. If you don't understand a doctrine simply because you haven't made the effort to synthesize the material, then you will do a disservice, because other students will be justifiably annoyed at having class time used for a private tutorial. However, if in your discussion with other students you find widespread confusion, even among those who (like you) have worked hard at understanding the material, the chances of your wasting class time are much smaller.

how a survival action differs from a wrongful death statute, I am afraid I must decline. Instead, I will have a one-hour session every other week, Tuesdays from 1-2, in Room 226. If you have questions that you want answered, but you are hesitant about taking up the time of the entire class by asking it at the beginning of class, please come to that session and ask me then.

- (5) If it is not an emergency, please call me (313-3767) or catch me after class to set an appointment. If it is truly an emergency and after hours, email works as well as any other method to track me down. Since I have many students and many advisees, if you simply knock on my door there is a substantial chance that someone else will be there. If you set an appointment in advance you can get a reservation and minimize the chance that you will have to wait.

8. Miscellaneous

I don't mind if you record the class. But my own system of recording classes will usually suffice. I don't mind if you come in late for some good reason (or if you must leave early), e.g., for a doctor's appointment), but out of courtesy to your fellow classmates and me, do your best to be in your seat and ready to go when the appointed hour arrives. If you do need to leave early, pick a seat near the door.

I don't care what you wear to class; perhaps I should.<sup>14</sup> But in other respects I like to pretend that we are in a courtroom; that you are an attorney prepared to make an argument on behalf of a client named in the case; and that I am a judge entitled to interrupt your presentation to ask probing questions. Since part of this experience is designed to make you feel at home in the role as lawyer, you should strive to speak grammatically, tastefully, and intelligently. I want you to be honest; I will solicit your personal opinions on many subjects; and I hope we will have lots of laughter during the semester. But take advantage of this opportunity to practice playing your role as lawyer.

Law school is designed in part to socialize you into a profession that has certain rules of etiquette. I am attaching a copy of an article that is not exactly on point, but has some interesting observations. It describes the etiquette for appearing before a judge. Aside from the dress requirements, and the obsequious deference shown to a judge, there are some interesting parallels. Most important is the concept that this is a civilized profession in which you are expected to enjoy the competition without hating your competitors. Think about law school as an opportunity to prepare for the combat later on with lawyers, where much more will be at stake and you may very well find it hard to be civil. Although you may find the law school environment much more competitive than other places you have been, that's not necessarily a bad thing. When someone describes an activity as "challenging," they often mean that it is difficult as well as rewarding. I like to think the practice of law is like that. I hope you find law school to be a foretaste of what is to come in your professional life.

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14. I had a student some years ago who persuaded me that what students wear to class has an effect on how seriously they take what they are doing. The reason I recommend that you dress appropriately is less because your teachers have some expectation, but because the way you dress will typically affect your expectation of yourself. I try to wear a tie to class, for the same reason -- it has the effect of making me behave with a little more formality, which is probably a good thing. Nonetheless, Koslov's remarks about what to wear to court are inapplicable to my classroom.

## COURTLY BEHAVIOR

Observing decorum is not just good manners—it's successful advocacy  
by JOHN KOSLOV

Fortunately, most law schools still concentrate on teaching law rather than technique. Unfortunately that leaves the courtroom as the only forum for teaching in-court behavior, an often inadequate classroom. The judge usually will not correct behavior unless it is egregious. And the examples set by older lawyers, who probably received no better training, are frequently wrong.

Learning by precept and example is valid only when both the precept and the example are correct. The courtroom as a teacher is always short on precept, and often long on the wrong example.

Early career appearances are often in law and motion court, where the seeds of both reputation and competence may be sown. A nice adherence to the rules of better conduct will serve a young lawyer (or an old one) well. Here, then, are some precepts for the law and motion courtroom that I have provided to my new associates over the years.

- Be early. Always plan to arrive half an hour before the scheduled appearance time. If you get there when planned, use the time to learn something about the court or about the matter on which you are appearing. (What you'll usually learn about the court is that the door is locked.) If you arrive later than planned, you will still be on time.

- Dress in a business suit or the equivalent. The "equivalent" applies only to women; there is no equivalent for men. A sports jacket with slacks is not appropriate. Jacket and slacks, or equivalent, may be proper for chambers conferences, but I'd hate to have my client see me in court that way.

- Use the firm's name. "Good morning, Your Honor. Doe, Roe and Moe, by Zack Zoe, for defendant Dodo, as moving party." It is always good to get the name of your firm into the courtroom where it will be heard and recognized by others. It's free publicity that will add to the firm's stature. Furthermore, associating with a good firm may give your arguments more weight than your words alone would warrant.

- Use "Your Honor" as a form of address only. Never use it as a personal pronoun and never as a possessive. The decisions, thoughts, feelings and acts of the judge should be referred to as those of "the court": "If the court feels . . ." or "In light of this court's ruling . . ." but never "In light of Your Honor's prior ruling . . ."

The form "His Honor" does not exist in the English language, except by mistake. Never address the judge as "judge" in court. The preferred practice is to use "Judge" as a form of address only on social occasions.

Nor should you address the judge as "you" or refer to "your" ruling. In open court, absent jurors and witnesses, there are first persons and third persons but no second persons; therefore, do not use second-person pronouns.

- Accept responsibility. Never respond to the court's criticism by saying you did not prepare the pleading or motion in question. The firm is responsible for everything its members and employees do; as the firm's representative, you must take that responsibility on your shoulders. If you don't know the cause of the problem, simply tell the court you have no explanation.

Don't be afraid to admit a failing where appropriate, but don't attempt to lay the blame on your secretary or an associate. To do so makes you look unprofessional and will earn the silent scorn of the court and other counsel present. Treat the mistake as though it were your fault, but use an editorial "we" where appropriate.

"Yes, Your Honor, I can see that our adherence to section 2034 may have been something less than perfect, for which I will offer no excuse." Or "Your Honor, I can offer no reason why we should not have complied with the court rules. If the court thinks our failure is determinative, then I can only ask that the matter be continued so we can remedy the failure." It is never wrong to accept blame on behalf of the firm where warranted; It is always wrong to try to distance yourself personally from the blame.

- Argue to the court, not with the court. Point out the failings in the other party's position, not the failings in the court's view: If they are the same, you need not bring that to the court's attention. The easiest way to get an adverse ruling is by suggesting that you think the judge is stupid or just plain wrong. If the judge is stupid or wrong he surely will not be inclined to reward you for calling it to everyone's attention.

Your job is not to show how smart you are but to come away with a favorable ruling. That means showing the court the error in the adverse party's position without suggesting that the court itself is wrong or misled. As a rule of thumb, the proper deference to be shown the court is the same as that shown the president of the United States.

- Never argue with opposing counsel; argue to the court. If opposing counsel addresses remarks to you wait courteously and then address the court. If opposing counsel

continues to address remarks to you, treat the remarks as though they were addressed to the court. If opposing counsel asks you a question respond neither to the other lawyer nor to the question specifically but rather to the court in the general form: "The court may have found reason to wonder why my client has never . . ."

The court will appreciate your efforts in keeping oral argument from degenerating into a free-for-all.

- Never impugn the motives or actions of opposing counsel. Attribute all acts and failings of the opposition to the adverse party, not to opposing counsel. There is nothing more immature than for two grown people to be calling each other names in open court.

If the opposing counsel takes a position in writing or in oral argument that cannot honestly be held, attribute the argument to the adverse party, not to counsel: "Your Honor, it seems to me that what the plaintiff is trying to say...."

- Never use emotional terms in denigrating the adverse party's argument. Words such as "ridiculous," "silly," "unbelievable" and "incredible" have no place in the practice of law. If you use them in court (or in papers), you will expose your inexperience and devalue the remainder of your argument. High school kids (and lawyers who have not accomplished the level of learning that should go with the title) use such terms.

If necessary, fall back on the old no-comment standard: "Your Honor I have a very difficult time finding appropriate words to describe in public the propriety of advancing any such position as that espoused by the plaintiff."

- Never refuse to waive notice on the court's request. Far too often young lawyers refuse to waive notice simply out of pique for an adverse

ruling. The entire audience—and the court—can recognize childishness for what it is. If you want notice given to ensure that the court file is complete offer to give notice yourself.

- Be polite. In court, out of court, in the halls, in your moving papers, in your opposition, in your thoughts and in your expressions (oral, written, facial and digital), always be polite. When the hearing is complete, no matter who receives the favorable ruling, thank the court. The thanks is not for ruling in your favor but for taking the time to hear you.

Of the traditional learned professions law is the only one that casts its adherents in adversarial roles. Doctors and clergy struggle against death and sin but they don't have to put up with opposing counsel. In the heat of battle, in the nervousness of an early career appearance, in the desire to look good to the client or the senior partner it is easy to concentrate on the adversarial role and forget the importance of the learnedness.

Deferential, prepared, principled, dispassionate, courteous----these are the adjectives that should describe you in law and motion court. Before a jury a little passion may be a useful thing. Before a jury, you may want to decry your opponent's tactics, perhaps even his character and his ancestry. But in law and motion cool is the tool.

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