

SYLLABUS

(You can also find a lot of supplemental information on the website for this course, at <http://147.222.27.5/people/dewolf/torts/fall04/default.htm>)

1. Text

The text for this class is DeWolf, *Cases and Materials on the Law of Torts* (2004 Classroom edition), available at the bookstore.<sup>1</sup> I will hand out a computer disk with a number of useful files.<sup>2</sup>

If you are looking for a general overview of tort law from a substantive standpoint, you can find it in the introductory materials in the casebook. What follows here is a series of procedural guidelines that will help you understand my objectives and methods in teaching the course. I recommend that you reread it periodically throughout the first semester in order to pick up things you might have missed the first time through.

2. Class Participation

I like to use student recitation to encourage more active participation in the class. As a result, I call on students to "recite": either to summarize the case we are discussing or to answer questions that follow from the initial summary. Because I believe in the Socratic dialogue, I try to avoid giving you answers. You should come to class already with lots of "answers": information you have gleaned from the cases and from your analysis of them. I will assume that when you come to class you have already absorbed a great deal of information about the cases and that you are attempting to piece 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 demonstrate your mastery of the material you are studying, and helping you evaluate your performance. 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.

It is inevitable that, because you are just beginning the study of law and practicing the skills that will make you a lawyer, there will be inadequacies in your analysis of the case or the issues involved. Please do not become discouraged when that fact becomes apparent. As in other life experiences, no pain—no gain. When your turn comes to perform, please accept the opportunity for what it is. 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.

*Volunteering.* I call on students because it helps those who are shy to get some "quality time" along with those who are more extroverted. Because the class is large, it is difficult to give

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1. I recommend that you get the updated version of the text, rather than an earlier version, even though they are very similar, because the pagination may be slightly different. If you choose to get an earlier version, please check it against the version that is online (<http://147.222.27.5/people/dewolf/torts/fall04/text/text.htm>)

2. You can also find the substance of the disk on line, at <http://147.222.27.5/people/dewolf/torts.htm>

you more than a brief moment in the sun. 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 during the week 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 Wednesdays at the review session.

### 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 you will receive 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. (The attendance sheet form is also available on line: [http://147.222.27.5/people/dewolf/torts/fall04/att\\_04.pdf](http://147.222.27.5/people/dewolf/torts/fall04/att_04.pdf).) 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. There may even be days when you need to take a vacation for the sake of your mental health. Since part of your task as a lawyer will be making similar determinations, please don't ask me for permission. I will trust you to make good decisions. By the same token, you are responsible to attend class regularly.<sup>3</sup>

### 4. Preparation

To prepare for class each day you should do the following:

- (1) Read the casebook materials at least 20 pages ahead of where we finished the last

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3. I try to record each class as an .mp3 audio file. Shortly after the class I will post that day's audio on line (*see* <http://147.222.27.5/people/dewolf/torts.htm>). The recording is from a lapel mike, so it doesn't pick up the student comments very well, but the recording of my voice is quite clear. The torts disk included with your text also contains a complete set of audio files from previous years (most are from 2001-02 but some missing classes had substitute files from a different year.) They are indexed according to the text we were covering in class that day. I encourage you to listen to them if you have missed a class, or if you want to go over something that wasn't clear the first time around. However, I do *not* recommend that you listen to them in advance. Only use them if you can't attend class in person.

class.<sup>4</sup> If 20 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.

- (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>5</sup>) in a notebook separate from the case materials. It should include the following headings:<sup>6</sup>
- (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 a "canned briefs" prepared by someone else before writing your own brief. They are like narcotics. Initially they make you feel good (by taking away your anxiety), but precisely for that reason they have a corrosive effect upon your learning. It is as though you were taking violin lessons, and instead of playing the scales you were assigned by your teacher, you bought a tape of Itzak Perlman playing those scales. Sure, your own playing will grate on your

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4. Our progress will vary enormously depending upon the materials we are covering. In the beginning we will cover only a few pages per day. However, you should aim for about 20 pages ahead will since it will insure that you have erred on the side of caution.

5. I suggest typing because it helps to clarify your thinking. If you have the skill of touch-typing, it is worthwhile to make an effort to incorporate that skill into your study habits. A statistic has been quoted (I can't vouch for the source) that 90% of applicants who type their bar examinations pass the first time. That may simply reflect the fact that those who type already have some characteristic that inclines them toward success; but it also may reflect the fact that the same words look more impressive if typed rather than written. I suspect there is a little of both. 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 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.

I should also say a word about the Examiner program that is being used for taking exams. It allows students to use a laptop computer to take exams. 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 load the Examiner software, go to <http://www.examsoft.com>.

6. The basic technique of brief-writing should be covered in the orientation session the week before classes begin.

neighbors' ears much more than Perlman's, but it is by listening carefully to *your* work that you will gradually improve. Put bluntly, no pain, no gain. On occasion you may wish to consult a reputable hornbook, such as PROSSER & KEETON, or even a Nutshell if you like, but do so only *after* you have prepared your own brief, and then only sparingly. If you learn from the process of trying to figure things out yourself, rather than letting someone else figure it out for you, then you will be better prepared on the exam to figure out the sometimes confusing or ambiguous features of the exam.

(3) If the Notes after a case contain a question, write out an answer to the question. If you are called upon in class to summarize a case, please be prepared<sup>7</sup> to make a xerox copy of your case brief after class and put the copy in my mailbox.<sup>8</sup>

*Secondary sources.*<sup>9</sup> 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 may be dangerous to boot. The major benefit to be obtained from a secondary source is if you read it 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; PROSSER & KEETON's<sup>10</sup> aim 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. When it comes time to write the exam answer, I will be much more impressed by your familiarity with my views than with PROSSER & KEETON's. 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 when they have

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7. I have rarely needed to see a brief in recent years. Most students appear to be reasonably well prepared. However, I reserve the right, in case a student falters badly in the "recitation" of a case, to see whether it was just stage fright (which is understandable) or a student's choice to fake preparation rather than admit being prepared.

8. Again, this only applies if I have asked for your brief. If I do, please make a xerox copy in the library and drop it in my mailbox on the 4th floor or bring it to me the next class. The important thing is that I get a chance to see your unretouched brief. Again, this is only to insure that, if your classroom performance was dismal, I can be reassured that you were being honest in representing yourself as having been prepared.

9. I have several recommendations if you are in the market 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 Keller Allen, entitled WASHINGTON TORT PRACTICE (West Publishing, 2nd edition 2000). The library has several copies on reserve; it may also provide you with some insight on how tort law is practiced in a specific jurisdiction.

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

not taken the steps outlined above.

5. Grading

Your grade will be based entirely upon the examinations;<sup>11</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>12</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. There will be a "mini"-exam on Monday, October 4, to help you prepare for the "midterm" (first semester) exam. The mini-exam counts 10%. The midterm (Thursday, December 16, 2004) will count for 50% of your final grade. The "final" exam (Saturday, April 30, 2005) counts 40%.<sup>13</sup> I read each exam answer, grade it, and supply brief comments about what was good (or not so good) about it, along with a checklist that gives you an idea of what I was looking for and what I found.<sup>14</sup> Old exams (and sample answers) are all on-line

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11. I do, however, reserve the right to lower the grade of a student who has been absent so many times in the semester (regardless of the good reasons therefor) that the ABA requirement of frequent attendance at class has not been met.

12. 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.

13. In all of your first-year courses where you have a two-semester, year-long course, you receive a single grade for the entire year. Although you'll get a grade at the end of the first semester, that won't appear on your permanent transcript. The transcript will show an "in-progress" notation for the first-semester, and then a grade at the end of the second semester for the whole year.

14. 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 with 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

([http://147.222.27.5/people/dewolf/torts/exams/exam\\_ind.htm](http://147.222.27.5/people/dewolf/torts/exams/exam_ind.htm)), and they can be found on your torts disk. 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.

Another resource you may find helpful is a video that shows me grading a mini-exam. The video is on line at <http://147.222.27.5/people/dewolf/torts/video.htm>.

The exams you will find on line are typical of law school exams: they 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 often find it difficult to say much with finality. You will often be forced to phrase your answer in conditional terms: "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.*: "If this jurisdiction follows Cardozo's version of *negligence per se*, then the jury will be instructed to treat an unexcused statutory violation as negligence in itself." 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 at a serious disadvantage. 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

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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. The majority of students benefit from this imperfect system of feedback for everyone. 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).

remember that your job as a lawyer will be *persuading others*—frequently those who are either inclined not to agree with you, or are handicapped by lack of time or ability. Your presentation(s) in practice must be forceful, clear, and succinct. The same is required of your law school examinations.

You can improve your writing dramatically by *practice*. Your daily practice at preparing case briefs, in addition to helping you understand the legal principles, will help you become a better legal writer. Go back and look at what you wrote one week ago, two weeks ago, and ask yourself whether someone reading your brief would get a clear picture of what was at stake. Learn to correct and redraft your writing. Further, when you complete a section of the case materials you should try to synthesize and summarize it before moving on to the next. In the exam 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 will be much easier to re-explain a concept or doctrine than to struggle with it for the first time.

Study groups 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. Your fellow study group members can be a good way to hold you accountable in staying current in your work, and may provide a much needed corrective to feelings of inadequacy and isolation. But there is a potential hazard from belong to a study group: you may be tempted to let your fellow study group members do your thinking for you. It seems logical to think that the members of a study group could divide up the subject and have different individuals prepare a discrete part of the "outline" of the course. This would work except that the study group won't go with you into the exam room—at least they won't be able to help you analyze the problems. 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. Even then, 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 close to) your wit's end, please make an appointment to see me. Do so by calling my office (323-3767; or my assistant, Sue Faraca, 323-3920), or catch me after class. My office hours are Mondays, Wednesdays, and Thursdays, noon to 1 pm., and Wednesdays 2 pm to 3 pm. My office is located in Room 409. 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) Do not ask me to review material from classes you have missed. It is your responsibility to establish a network among your classmates so that you can get someone else's notes. I strongly recommend that when you miss a class you do the following: (a) read the material, brief the cases, and get prepared as if you were attending that class; (b) spend 10-15 minutes with another student reviewing what was covered in class and answer those kinds of questions for one another.<sup>15</sup>
- (2) Do not call me to tell me that you will be gone for some reason, or that you were

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15. As an alternative or as a supplement, you can listen to the audio file for that class; see footnote 3, *supra*.

gone because you had the flu. It's not up to me to rule on the reasonableness of your absence from class or for being unprepared. You are responsible for making those choices, and you must manage your time so that you can meet the 80% rule (see § 3, above).

- (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>16</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 take that settlement offer or should I take the case to trial?" "Should I let my client plead guilty and get life imprisonment or should we take a chance on 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 in the end 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. However, that goal is in conflict with the desire to teach you to handle ambiguity.

In addition, 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 want me to explain the difference between negligence per se and *res ipsa loquitur*, or the different kinds of wrongful death statutes, I am afraid I must decline. Instead, I will have a one-hour session *each week*, Mondays from 2 pm to 3 pm, in the Moot Court Room. If you have questions that you want answered, but you don't feel they warrant the time of the entire class, please come to that session and ask me then.

- (4) If it is not an emergency, please call me (x3767 on campus, off-campus 323-3767) or catch me after class to set an appointment. If it is truly an emergency and after hours, my number is listed in the phone book. 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.

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16. 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 irate 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.



8. Miscellaneous

I don't mind if you tape record the class (on the other hand, your torts disk contains an .mp3 version of prior classes).

I don't mind if you come in late for some good reason, 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.

I don't care what you wear to class, 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.<sup>17</sup> 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, it need not be unpleasant. 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.

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### 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.

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17. One source of humor I will refer to in the casebook is A.P. Herbert's UNCOMMON LAW. If you enjoy British humour you will find it amusing. The book is available on reserve at the circulation desk. You may want to xerox the pages that I refer to in the text. For convenience, here are the pages that I make use of: 1-6; 124-132; 237-242; 279-284; 346-351; and 360-364.

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 nor 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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