1. **Text**

   The text for this class is DeWolf, *Cases and Materials on the Law of Torts* (2d ed.). I will duplicate copies of the text for purchase on approximately June 1. I may make modest revisions of the text, but last year’s text is online. For this and for other helpful information, consult my web page, [http://guweb2.gonzaga.edu/~dewolf/torts](http://guweb2.gonzaga.edu/~dewolf/torts), and look for the link to Summer 2006). I will also supply you with a CD that contains much of the online material, including .mp3 files from past years and past exams. 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 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 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.

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 find that a day off to golf is imperative for their mental health. I do not want to spend my time making judgments about the validity of your excuse for being gone. It is your responsibility to make that decision. By the same token, you are responsible to attend class regularly.

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 class.¹ 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 typed²) in a notebook separate from the case

---

¹. Our progress will vary enormously depending upon the materials we are covering. In the beginning will 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.

². 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. Many students are now computer-literate and quite a few have laptop computers. Back when typewriters were still in common use, I heard a statistic (I can't vouch for the source) that 90% of applicants who typed 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.

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.
to insure that your briefing skills are improving at a satisfactory rate.3

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,4 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 Prosser & Keeton5 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.6 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.

3. 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 xerox copy 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.

4. 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 2d ed. (West Publishing, 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.

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

6. 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;\(^7\) 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).\(^8\) 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, June 26, to help you prepare for the "midterm" (first semester) exam. The mini-exam counts 10%. The midterm (Monday, July 10) will count for 30% of your final grade. The "final" exam (Wednesday, August 2) counts 60%. I read each exam answer, mark up a checklist, assign a grade, and supply brief comments about what was good (or not so good) about your answer.\(^9\) Old exams (and sample answers) are all available on my

7. 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.

8. 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.

9. 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. 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).
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 expected of your law school examinations.

You can improve your writing dramatically by practice. Your brief writing will help you enormously. 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 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 will be much easier to recall a description or explanation of a concept or doctrine, compared to trying 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 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). Or, call my office
10. 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.
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, Wednesday from 11 a.m. to noon in Room 143. 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.

8. Miscellaneous

I don't mind if you tape record the class. But there is an .mp3 file for previous years, and I will try to make an .mp3 file of each class and put it on line. See my home page for a schedule.

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. 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.

---

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 chat 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 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.

*John Koslov* is a partner in Koslov, Erickson & Cady in Los Angeles; Reprinted with permission from *California Lawyer*, July 1990, pp. 54-56.