

## Let Us Keep Our Dignity

When first given this assignment, I leaped at the opportunity to talk to the judges. You might think it had something to do with turning the tables. And I will admit to a certain delight in that fact. But then I thought this was a real opportunity to give voice to some inchoate thoughts regarding the factors that make certain aspects of the practice so gratifying when the system is working on all cylinders and, alternatively, so distressing when we experienced lawyers walk away from an engagement ready to hang it all up.

Let me start by acknowledging up front that we are all participants in a process where members of the judiciary are but one actor – albeit a terribly important one. Yet our experience as lawyers is also very much defined by the nature and demands of our clients, the expectations of our professional colleagues, the conduct of our adversaries and their clients, and the contribution of court clerks, stenographers and a literal cast of hundreds.

I also acknowledge that this is hard stuff for all participants. We operate at the friction-filled edges of society's conflicts, providing an alternative to trial by ordeal that is supposed to be more rational and civilized, but that often wanders into the penumbra of chaos. Emotions run high, deadlines are always too short, witnesses prove unreliable, clients turn ungrateful, photocopying bills soar as a fortress of banker's boxes of documents march up the wall and depositions multiply like fruit flies, and their length is exceeded only by their boredom; tit for tat becomes weapons of mass destruction launched in response to anti-ballistic missiles.

All that having been said, there are days when our participation in the process makes us proud to be lawyers, reminds us why we went to law school and, like the shot out of the sand trap that miraculously rolls into the cup, brings us back to participate in the process yet another day. What are the events that come together to make that happen and, most important for this

exercise, what is it that judges do that either makes that occur or prevents it from happening?

Herewith a list of 13 items that contributes to the system of justice at its best.

**1. The judge treats everyone with dignity.**

In some ways this is the cornerstone of them all. In my humble opinion a process in which all of the parties and their lawyers keep their dignity throughout the proceeding is most likely to generate the respect for the courts and the sense of fairness that is so critical to making the system work. I often kid with young associates that I am at the stage of my career when I am more interested in preserving my dignity than winning, but there is more to this facetious statement than jest. So many bad things can happen in a courtroom and so many of them arise from the conduct of the judge who can steal this sense of dignity; by the same token, a heavy dollop of Solomonic TLC can have enormous restorative effects, even for those who leave the courtroom having lost this particular battle.

**2. The judge demonstrates that he or she is conversant with the matter.**

We spend enormous care and energy in our written work product. Is it too much to suggest that when we appear in chambers or the courtroom for you to consider the issues raised by that work product that the court has already reviewed – either directly or through the lens of the court's clerks – that which has already been submitted? There is something demoralizing about starting off from square one when we have worked so hard to paving the way to be much further down the roadway.

**3. Even if the judge is so much smarter than I, the judge gives me a chance to explain.**

We know you are smart and, even if we don't really know it, we are certainly prepared to testify to that fact. After all, you hold the fate of our clients in your hands. It is so much better to think that the person with all this power is truly intelligent.

We know that in many cases you have seen this all before. The number of cases that come before a judge in most instances vastly exceeds the number of cases any given lawyer has handled. That having been said, one of the most frustrating experiences is having the too smart judge, too experienced in these matters, jump too quickly to a conclusion before we have even had a chance to explain.

You are probably right. You have probably seen this matter before. You probably do not have to waste judicial resources taking a long time to consider the matter. But even when you are convinced that this is the case, why not take a little extra time to let us explain, so that when we walk out of the courtroom with our client in tow we have the sense of satisfaction that the court has heard our plea and then, after hearing our plea, reached a decision.

**4. The judge realizes that this matter is not my only matter; the judge treats my matter as if it were her only matter.**

I know. I know. This seems a contradiction. But it all actually makes a lot of sense. Far too often as we sit at your feet waiting for the pronouncements that will establish the schedule for this case, we have the feeling that those deadlines are established as if this were the only case on our platter. In rare situations that may be true, but more often than not, we practicing lawyers are dealing with lots of judges setting lots of deadlines, many of which coincide and all of which overlap. Therefore, your reasonable scheduling of 20 depositions in one working month – though consistent with the number of working days in a month – will not be consistent with our obligations to other courts and other clients.

On the other hand, when we need your attention, we really want your undivided attention. Too often judges will leave lawyers languishing in waiting rooms for long periods of time. This Chinese water torture treatment, perhaps every once in a while will lead to a settlement by frustration; it is, however, much more likely to evoke the same feeling of helplessness that judges and non-judges experience when a visit to the ophthalmologist results in a twelve noon meeting with a physician with whom we had a 9 a.m. appointment. Similarly, though we may well be in awe of your ability to multitask during our pretrial conferences, or to have side bar conferences while witnesses are being examined, the truth is that every time your attention is divided, you are symbolically depreciating the dignity of the parties before you.

**5. The judge makes me feel we are having a conversation.**

The very best oral arguments are those that most resemble a law school class. You are the professor. We are the students, and we are engaged in a dialogue designed to analyze the precedent and apply the facts of this matter to the existing body of case law.

**6. The judge remembers what it was like to be a lawyer.**

All judges are lawyers. Most practice law – some for very long periods of time. Yet sometimes it is hard to tell that is the case. The amnesia that accompanies the wearing of a black robe seems to blot out that part of a judge's experience when he or she was not called Your Honor. It is true you are doing a different job. It is true that other than answering to some court administrators your power is almost absolute. But remember that the poor supplicants before you are practicing lawyers, and remember what it was like when you were required to keep your head beneath the shoulders of a sitting judge. That memory, undoubtedly, will go a long way toward smoothing some of the rough edges in judicial/lawyer relationships. I know it must be delicious to never worry about having enough business, never having to keep time records, never

having to bill clients, never having to hire (and fire) colleagues and support staff, but we in the trenches are still stuck with all those responsibilities. And if you remember that fact, I am sure your empathy quotient will soar.

**7. The judge lets me try my case.**

When you were a lawyer, you never asked leading questions and always knew how to terminate a cross-examination before it got you in trouble. Compared with you, we appear fumbling, if not inept. Please resist the temptation to take over the courtroom. There just might be a method to our madness. In any event, our clients (poor souls) have hired us to conduct this trial. Please resist the temptation to demonstrate your championship skills at getting to the heart of the matter. This is not a call to resist moving things along or responding appropriately to objections. It is simply a plea for a little forbearance on the ground that maybe we have made a conscious decision to approach the matter in a way that we think is best for our clients.

**8. The judge does not embarrass me in front of my client.**

It is easy to hold us up to ridicule and scorn, mere mortals just getting through the day and maybe, just maybe, we are deserving of a dressing down or simply constructive criticism. We want to learn as much as the next lawyer and we welcome the views of the bench – ever knowing we have plenty of room for improvement. That is why they call it practicing law. But do us one favor; don't embarrass us in front of our clients. At the margins, perhaps that is required, but otherwise we think the proper place for such friendly admonitions is in the privacy of your chambers.

**9. The judge does not get cross simply because my opponent and I are having a dispute the judge thinks is below her dignity.**

It is true that my adversary and I will often get into disputes that you view as petty and that are totally inconsistent with the very dignity I am urging you to uphold. On the other hand, the pressures of the modern practice and the emotions that attend litigation often make the most trivial matters seem important to the parties, to the lawyers, or both. While one way of solving this problem might be to express contempt for the fact that the dispute has developed, in my judgment, it is far more productive for the court to resolve the dispute, fairly and quickly, than to scold the lawyers for finding themselves where they are in the first place.

**10. The judge addresses discovery disputes.**

A huge subsidiary area of the foregoing is the way the courts treat discovery disputes. Discovery is an essential part of the litigation process. In some cases it is all there ever is of the litigation, endless discovery and then settlement. There are litigation partners in major law firms who have never tried a case, but who are the Clarence Darrows of deposition taking and document production. A vast number of rules of civil procedure, are dedicated to discovery. All of which raises the question, why can't you treat discovery disputes as legitimate areas of disputation rather than as a reflection on the character and legitimacy of the lawyers appearing before you?

**11. Even when the judge, on the merits favors one side, the judge maintains an aura of impartiality so that my client and I come away convinced we lost, after a full and fair hearing, on the merits.**

When you write your brilliant decisions, regardless of which way you come out, one of the most enlightened things you can do is to reflect in your decision your understanding of the arguments raised, particularly by the losing party. Too often litigants and their lawyers walk away from a proceeding with a result, and even with a clear rationale for the result, but also the

haunted feeling that the court “didn’t hear” what the disappointed party had to say. It does not take much for the court to recite the substance of the losing side’s argument, the salutary effect of this act of generosity on the legitimacy of the decision cannot be overstated.

**12. The judge saves his or her temper tantrums for a golf ball.**

We know we drive you crazy. We ask for extensions you don’t think we are entitled to. We miss deadlines we should have had etched in our brain. We argue over issues you think we should have resolved as officers of the court. We get carried away with rhetorical excess. The list goes on and on.

None of that should ever be an excuse for a judicial temper tantrum. It does terrible damage to us. It disconcerts clients and, most important, as with all temper tantrums it hurts the person having one, and in this case the institution that person represents. So even though, by virtue of the authority of your office it might be argued that judges can have temper tantrums with impunity, the truth is that is not the case.

**13. We rise and call you “Your Honor” because we respect your position; we call you a great jurist because we respect and admire your demeanor.**

If you follow the foregoing – and any number of additional suggestions colleagues of mine at the bar might have – you will have achieved sainthood not just in your eyes but in ours right here on earth. Of course, no one can follow all of these and if they did, the world might not be such an interesting place. On the other hand, I hope these observations of just one lawyer who has practiced in the trenches a good many years will be taken in the spirit in which they are delivered, as a Valentine that just might provide some extra incentive to make the system of justice a little bit better.