

Learn the unwritten rules

By: F. Dennis Saylor IV and Daniel I. Small October 15, 2015

In every walk of life, there are unwritten rules that must be learned through experience, observation or training. So it is with trial practice. You can learn the rules of evidence and the rules of procedure, but much of what happens in court is governed either by how those rules are applied in practice or by unwritten rules.

There's no specific rule, for example, that says you must call the judge "your honor," but you nonetheless would be well advised to do so.

There are unwritten rules covering every aspect of trials and the courtroom. Some are hard and fast requirements; some are more flexible. Some are rules of protocol, such as where and how to sit or stand. Some are rules of courtesy, such as how and when to address the court, counsel or witnesses. Some involve control of the courtroom, or the process itself, and vary from judge to judge. Some are a matter of regional practice; for example, what is permissible closing argument varies considerably in different parts of the country.

Some are not really rules, but common-sense guidelines, incorporating practical advice based on long experience. Take, for example, the "rule" that you should never ask a non-leading question on cross-examination. Certainly you can violate it; it's sometimes desirable to do so. But you need to know that the "rule" exists, and the reasons for it, or troublesome consequences are likely to follow.

Some unwritten rules are idiosyncratic to a particular courtroom or judge. Two years out of law school, Dan was trying a criminal case as a federal prosecutor in Galveston, Texas. Standing at the podium in an old, wood-paneled courtroom, he was trying to question the first witness. He walked over to his table to pick up a document and leaned against the table to ask a few questions from there. Bam! Down came the gavel, and the judge ordered counsel to sidebar.

The judge leaned over and issued a stern warning: "Mr. Small, we don't lean in my courtroom!" Dan spent the rest of the month-long trial with both hands on the podium, having learned an important lesson: In that courtroom, you had to stand up straight.

How is any lawyer, especially a new one, supposed to learn all this?

For starters, there are some written guides. For the Massachusetts federal court, there is a helpful book called "The US District Court Speaks" (MCLE, 2015), in which every judge and magistrate judge responds to a long series of questions covering pre-trial matters and general courtroom practice. The answers are a helpful beginning to understanding some of the preferred procedures before a particular judge. If you're lucky, the judge you're interested in may have written articles on trials or related issues, or issued opinions on courtroom practice.

Of course, nothing can replace actual experience. If you don't have experience before a particular judge — which describes most lawyers, most of the time — ask. Ask around your office, ask colleagues and friends, ask lawyers who have appeared before the judge. Ask wherever you can find lawyers who have first-hand (or even second-hand) experience, both generally and in the particular courtroom you're interested in.

Listen and learn. Don't take every comment at face value. Lawyers can develop strong opinions about judges — good or bad — and that can seriously color the value of their insights. All the more reason to seek out as many different sources of experience as possible.

Every courthouse is open to the public. With rare exceptions, every courtroom has an available seat. Find out when your judge is conducting the type of proceeding you're interested in, and go observe. Watch the lawyers, the judge, everyone in the courtroom. How will your case compare? What can you learn that will benefit you?

A common expression among trial lawyers is that “judges can hurt you, but clerks can kill you!” Whether that’s true or not, it is surprising how many lawyers fail to see courtroom personnel as the important resources they are.

Clerks, court reporters and court officers have jobs to do and may have limited time to talk with you. And all have limits on what they can talk about. Yet all of them experience, on a daily basis, the same courtroom environment you are about to enter.

Of course, you should recognize that they have important jobs to do and deserve your courtesy and full respect. But don’t be shy about asking them questions based on their responsibilities, or even their observations or common-sense advice.

Years ago, in his book “All I Really Need to Know I Learned in Kindergarten,” Robert Fulghum talked about the many, sometimes mysterious and confusing, unwritten rules of life that we all learn at an early age. We learn them by watching, by listening and by asking. So it is with any new environment, including the courtroom. You cannot function effectively in court without knowing the unwritten rules.

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