

Bridge the Gap Mentoring Program
Dealing with Others on Behalf of Your Client
Resource 35

Resource 35 is intended to facilitate a discussion about appropriate ways (including ethical concerns, etiquette, etc.) for dealing with others on behalf of your client.

- Discuss a lawyer's particular ethical obligations in dealing with:
- Opposing party and counsel. See Rule 16-304 NMRA (find at <http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0> or <http://www.law.cornell.edu/ethics/nm/code/>) and in the *The Lawyer's Creed*. (Resource 2)
 - The tribunal. See Rule 16-303 NMRA.
 - The media. See Rule 16-306 NMRA.
 - A legislative body or administrative agency in a non-adjudicative hearing. See Rule 16-309 NMRA.
 - A person represented by counsel. See Rule 16-304 NMRA and Rule 16-402 NMRA.
 - A person unrepresented by counsel. See Rule 16-403 NMRA.
 - A third party. See Rule 16-404(A) NMRA.
- Discuss a lawyer's duty to be honest with other parties and the court in all dealings with them. See Rule 16-401 NMRA and Rule 16-303 NMRA.
- Discuss the importance of dignified, honest, and considerate transactions. Discuss the importance of reputation and how a lawyer's conduct dealing with others in a case affects his or her reputation. See *The Lawyer's Creed* (Resource 2).
- Discuss what to do if you receive a document relating to the representation of other counsel that you should not have received. See Rule 16-404 (B) NMRA.
- Share "best practices" with the new lawyer on how to appropriately deal with others on behalf of your client.
- Talk about the importance of civility in communications with others. Abeshouse, David J. "Civility in Negotiations." *GPSolo Magazine* (2005); and Levine, Stewart. "Developing the Attitude of Resolution." *Law Practice Today* (2005):
- Share with the new lawyer "war" stories of attorneys who have ultimately harmed their client because of their incivility and lack of consideration in dealing with opposing counsel, the judge, or the jury.
- If the new lawyer spends time in court, discuss the attached excerpt from Walton, Kimm. *What Law School Doesn't Teach You: But you Really Need to Know*. Chicago: Harcourt Legal & Professional Publications, Inc., 2000.

Resource 35

[Home](#)
[Calendar](#)
[Committees](#)
[Contact the Division](#)
[Sponsors](#)
[Periodicals Publications](#)
[Resources](#)

GPSolo Magazine - October/November 2005

Civility and Negotiations

Resource 35

Copyright year 2005 ABA

By David J. Abeshouse

Civility is—and should be—a core negotiation issue. The degree to which one employs ordinary civility in negotiations often has a marked effect on the bottom-line result. It also can make life more pleasant, even in fundamentally adversarial situations, essentially the norm for business litigators and transactional lawyers. An example of what *not* to do is the opposing counsel who—instead of working together to resolve a dispute or problem in customized, mutually acceptable fashion—prematurely blurts out, “I’ll see you in court.” This knee-jerk reaction usually fails as a negotiation tactic, for many reasons:

- It reflects a lack of analytic forethought and a tendency for emotional outbursts, two aspects that make this lawyer a less-than-formidable adversary.
- It essentially obliterates the possibility of counsel working together for the mutual benefit of the clients, who likely could achieve through a tailored settlement a result far better for both sides than any court would order. Because the vast majority of business litigations settle before trial, it is a fair bet that the parties will end up in some sort of settlement negotiations, regardless.
- Over time, this lawyer will develop a reputation as a loose cannon and a temperamental, petulant, unprofessional person to whom others would not refer clients. Opposing counsel often serve as a good referral source for future business because they have seen firsthand what the lawyer can do in the trenches.
- Finally, to the extent that this lawyer’s own client learns of his reaction, the client may become dissatisfied with a lawyer who seems out of control and willing to put his own emotional needs ahead of the client’s best interests.

In a hearing before an arbitrator, the less civil party often merely is endeavoring to overcompensate for unfavorable facts or law, whereas the more civil party in a dispute often feels no need to descend into incivility. Indeed, obstreperous counsel thus inadvertently acknowledges implicitly that he or she likely has a less than wholly legitimate case on the facts and/or law—not something a lawyer seeks to communicate to the one who is judging the case and will issue the final determination.

Don’t lose your temper. Rather, lose the temper, yelling, and foul language. Although “venting” might improve your mood, it rarely works to your advantage in negotiations. Yes, occasionally it may tend to intimidate; however, the same result likely could be achieved in those instances without the expletive-laden, high-decibel diatribe. Most often, it will cause a diminution in credibility and respect.

Resource 35

Copyright year 2005 ABA

[Back to Top](#)

And that's a price not worth paying for the occasional negotiation advantage it arguably might afford. Indeed, a prompt apology for an emotional outburst might gain more ground toward a good working relationship and achieving the negotiated goal.

Employ common courtesy and civility as a matter of routine. Make it a part of your natural way of dealing with others, and you will see how effective it is, both in terms of results and in your quality of life. Sure, there are times when the need for some more forceful language and volume may be indicated, but this should be the exception rather than the rule. (The rarity of your outbursts will also increase their impact.) And by refusing to respond in kind when someone personally offends you by words or actions, you refrain from lowering yourself to their level, and that in itself is a laudable goal. Even the matter of responding to e-mails and telephone voice mail messages encompasses these tenets of common courtesy and civility—prompt response by you encourages similar treatment by your counterpart. The more the enlightened use these means of conducting legal and business negotiations, the more likely their use will spread. How much better things would be if this became the usual mode for the majority.

David J. Abeshouse practices business litigation and alternative dispute resolution in Uniondale, Long Island, New York. He is an arbitrator and mediator as well as an advocate. Visit his website at www.bizlawny.com or contact him at david@bizlawny.com.

< /

Connect
with other
young legal
professionals



ABA Young
Lawyers
Division
Learn More ▶

myABA | Contact Us | Join the ABA | Calendar | Member Directory | ABA Store | Sign In



Law Practice Today

ABA LAW PRACTICE MANAGEMENT SECTION
MARKETING • MANAGEMENT • TECHNOLOGY • FINANCE

Law Practice TODAY

Management by Agreement

Resolutionary View: 10 Principles for Developing the Attitude of Resolution

by Stewart Levine

September 2006

A resolutionarySM looks at the situation, and from the perspective of standing in the clients' shoes, tries to design the best process--a process that will get to resolution quickly without making things worse. Learn more about how your firm can incorporate these 10 principles into its culture. It should result in more satisfied clients and employees.

Very few firms or law departments have the luxury of a lawyer operating as a full time manager. One of the occupational hazards, especially of litigators, is to bring the adversary mind set into the management process. This can lead to some very poor results. In this column my aim is to provide 10 principles that make up the "Attitude of Resolution." This attitude is much better suited to managing, motivating, empowering and getting the most out of others. I have also come to believe that in most situations this attitude will engender satisfied clients and more satisfactory relationships, the key to all accomplishment and productivity.

During my second year of law school I had my first "real" lawyer's job. I was an intern at a local legal services clinic. On my first day I was handed 25 cases "to work on." This would be my "job" for the semester. Three weeks later I asked the managing attorney for more cases. When he asked about the first 25 he gave me, I told him I resolved them.

He was very surprised--and very curious. He asked how I did it. I told him I reviewed the files, spoke to the clients, thought about a fair outcome and what needed to be done, called the attorney or agency on the other side and reached a satisfactory resolution.

I knew nothing about being a lawyer! I had no idea whether the cases were difficult, needed to take a long time or had to be handled in any particular way. With a beginner's mind, I found the solution that worked best for all concerned. Simple? It was for me.

I spent the next 12 years becoming a successful lawyer--and becoming less effective at resolving matters. Then, feeling frustrated, anxious and fearful, I stopped practicing law. I spent the next 15 years unlearning--recovering what I knew about resolution when I started, discovering its component parts and learning how to teach and model it for others.

I found that the most effective judges and lawyers understand people's real concerns. They know what to honor and what to respect. They know how to frame situations and condition people's expectations. They embody a tradition that accommodates competing concerns and builds consensus. Winning or losing is not the point of their work. Their game is resolution, and getting people back to their lives. They are "resolutionariesSM."

Developing the Attitude of Resolution

The 10 principles that follow reflect the values that make up the attitude of resolution. This attitude is the place of beginning, a critical first step. It is not enough to go through the motions of any dispute resolution process mechanically, without first cultivating an attitude of resolution.

It will take time to change the way lawyers think. The beliefs and patterns you have about conflict took a long time to develop. They are embedded deeply and operate in unconscious ways. It will require reflection, intention and repetition to change our thinking habits about collaboration and conflict. Faith and trust in yourself and others is called for. You can accomplish it.

This is a foundational step. The goal is internalizing the principles.

Principle 1: Abundance. One of the primary contributors to adversity is the belief that "if you get yours, then there won't be enough for me." This is a scarcity mentality. But the most powerful negotiating tactic is to find out what the other side wants and figure out how they can have it. The likelihood is that they will try to do the same for you. In most situations there is enough for everyone to get what they need. Rather than fighting about dividing a small pie, we need to focus on how to make the pie bigger.

8. What future relationships are essential? Who will continue together? (They are thinking of the long term.)
 9. What is acute and needs immediate attention? (They are concerned with others' resources and damage control.)
 10. What's the best action plan? Who will do what, by when? (They understand that the best way to get to a place is to get to the process and become collaborators and facilitators.)
- Stewart Levine, Esq.** is the author of the award winning "Getting to Resolution: Turning Conflict Into Collaboration" and the recently released "Book of Agreement" that has been called "more practical than getting to yes." www.resolutionworks.org.

When you probe and listen to the underlying concerns of the other side, accommodation and satisfaction for everyone is possible. Solutions can be invented to accommodate the interests of both sides. Sometimes, strong partisan advocating for each side is the best way to understand all parameters of a situation.

You must know the difference between advocating strongly and being adversarial. Many lawyers operating today ignore the difference. Remember that effective resolution comes from relationships created from an honorable attitude. Unfortunately, over the past few years "Rambo" tactics have become commonplace. We all would be well advised to read the best-seller "Everything I Need to Know I Learned in Kindergarten."

The core competency of the resolutionary is the ability to lead people to a new vision that returns them to the real business of their lives, without the ongoing internal chatter of continuing conflict. The job of the resolutionary is to lead the client to resume collaboration and cooperation.

The solutions of the resolutionary reestablish the working relationships that are essential for business, family or government activity. They provide options that contribute to the present and future quality of our lives.

Conclusion

Your initial, automatic reaction may be that law is based on an adversarial model, and to suggest otherwise would undermine the system. I suggest that lawyers exist to facilitate the machinery of our institutions-- commercial, governmental, political and charitable. If we are better able to facilitate through collaboration, then that is the way to proceed.

Given the levels of professional unhappiness, client complaints, citizen frustration and costs of conflict, we have little to lose and a huge upside potential. In the great majority of situations, clients will be happier, societal transactions will move forward with less friction, and lawyers will reap the benefit of deeper levels of personal and professional satisfaction as they accomplish their work with, not against, other lawyers.

We have an opportunity to reposition ourselves as conflict resolvers. We can be the solution, not part of the problem. In so doing we will restore pride in the calling we answered.

Shifting a basic premise on which a system is based is no simple matter. But if we miss what people are asking for, we will miss a golden opportunity.

What a Resolutionary Embodies

Resolutionaries have the following qualities and abilities. If you aspire to being a resolutionary, it's time to start cultivating these qualities.

- **Collaboration** --They treat everyone respectfully and are always open to learning.
- **Sense** --They make the complex simple.
- **Confidence** --They know the value they contribute; they act on their assessments.
- **Creativeness and innovativeness** --They design what they need to get the job done.
- **Empathy** --They have compassion; they honor and legitimize everyone's concerns.
- **Fairness** --They understand that tomorrow is another day; winning is not everything.
- **Faith and trust** --They know the situation will be resolved.
- **Open** --They create trust and the presence for people to open up into.
- **Getting to the core** --They have an uncanny ability to see the core of the conflict.
- **Honesty and integrity** --This generates trust in everyone; they walk their talk.
- **Intelligence** --They are smart and aware of what's really going on.
- **Judgment** --They have experience and a sixth sense of what will work.
- **Life experience** --They have high mileage (bald, gray or possessing an old soul!).
- **Listening skills** --They listen with their entire presence and hear what isn't said.
- **Control of the process** --They know process is integral to resolution.
- **Open mind** --They are not committed to a particular resolution.
- **Practicality** --They try whatever works.
- **Care for people** --They know it's always a relationship problem.
- **Tolerance for conflict** --They remain centered, grounded and fair in the storm.

Author's Note: Resolutionary SM is a service mark of Stewart Levine. The term was first articulated by a satisfied client in 1991 who, after a very delicate matter, looked at me and exclaimed "you are a resolutionary."



Take the matter to someone more senior and ask them how to handle it."

B. ADVICE FOR EVERYBODY WHO SPENDS TIME IN COURT, WHETHER YOU REPRESENT THE UNITED STATES, "THE PEOPLE," THE STATE, OR CLIENTS

1. Handling judges. Get out your kid gloves!

a. Get to know judges' styles.

All judges are different! Ask other lawyers in the firm (or other prosecutors in the office) for their impression *before* you argue a case before a judge with whom you're not familiar. As Jones Vargas' Karl Nielson says, "Knowing the judge's likes and dislikes, his or her requirements, pet peeves, and the like, is so much more critical than you can imagine just coming out of law school. Knowing the judge will help you avoid the many pitfalls involved in learning the ropes of practice before the courts."

It may be that some judges require you to call and conference a case before you make a motion. Perhaps the judge insists that you use his middle name when you speak with him. One lawyer talked about a judge who always, in matrimonial cases, had a policy of interviewing the family and then taking the lawyers to lunch at his house to discuss the family. Whatever a judge wants to do in his or her court, that's the way it is! Adapt your style and strategy accordingly. It's like that line from *To Kill A Mockingbird* about guests: "If he wants to pour syrup on the tablecloth and eat it, he can."

It also makes sense to get friendly with court reporters. Because they see judges all the time, they can clue you in to the judge's mood and anything that seems to be impressing or riling him/her on any given day.

b. Handle judges with kid gloves!

Always treat judges with respect, no matter *how* you feel about them or how they treat you. What does that mean?

Resource 35

Copyright year 2000 Harcourt
Legal & Professional Publications

Always speak deferentially to them. Regardless of how you feel about them personally, they're judges, for chrissakes. Don't question their judgment, their intelligence, their perception—**nothing**. One lawyer told me about a case where the judge asked opposing counsel a question, and the guy responded, "Judge, I think you're a little off-focus." The lawyer laughs, "The court went dead quiet—and in that moment, he lost the case."

Be respectful of their time. As Hofstra's Caroline Levy recommends, "You're sometimes expected to be in three courtrooms at once to hear their calendars. If so, let them know where you'll be so they can find you." And if you're going to be late for court due to something out of your control, **call** both your judge and the adversary and let them know! People are more understanding than you think they'll be.

Finally, if a judge upsets you, don't let it show. Take deep breaths. Count to ten. Maintain a professional composure **all** the time. Blow off steam once you're out of the courthouse!

2. **Always be civil and professional, no matter how much of a butt-munch you're dealing with.**

One lawyer recommends that "You need to maintain the highest level of civility and professionalism because (1) no matter the arena, you're always an attorney in terms of your ethical and professional responsibilities, and (2) all you have in the end is your name and reputation, so keep both clean!" Golden Gate's Susanne Aronowitz adds, "Don't assume people are out to get you. Be collegial. Be accommodating, grant extensions in discovery, as long as they won't impact your case. You'll need favors down the road and won't get them if you're a jerk when **other** people need favors from you."

3. **Remember *everybody* is a potential juror.**

As Arkansas' Claudia Driver says, "You might want to shout an obscenity at that jerk forcing you onto the shoulder of the road, but next week you could be asking your dire questions of that same person! For all you know, they were trying to remove the dog from the baby at 45 miles

an hour in four lanes of traffic on a bad day when you decided to hurl colourful language at them. They'll have a very bad feeling about you. The odds are against you even more in a small town!" If you flip the bird at somebody when they beat you out for a parking space, you don't know where that person will pop up again. The watchword here? Be civil. It's good advice for **everybody**. If you spend time in the courtroom, it can save your bacon!

4. **Act more confidently than you feel!**

If you're new, being in a courtroom can make you feel the way Dorothy felt when she first approached the Wizard of Oz: **Everybody** feels the same way! That feeling is exacerbated by the fact that law school doesn't really leave you prepared for court. As a lawyer for the United Mine Workers of America points out, "Even with three grueling years of law school under your belt, you don't know how to be a lawyer yet, even if you've participated in clinical programs, competed in moot court competitions, and taken trial practice courses." Relax! As the old saying goes, "This too shall pass." Hofstra's Caroline Levy points out that "It can be tough and tiring, but pretty quickly you find that cases repeat themselves." Lawyers at the Federal Defender's Office in Chicago say, "You'll **never** know as much as you wish you did, but with time, it all gets easier and less nerve-wracking!"

In the meantime, **fake** it. **Nobody** knows how nervous you really are. If your voice is steady, you're prepared, and you speak with confidence while looking people in the eye, they'll never realize you're quaking on the inside. As Minnesota's Nora Klaphake says, "Remember confidence before competence! If you look professional, your clients and opposing counsel will treat you as competent, even if you don't feel that way. Never let them see you sweat!"



SMART HUMAN TRICK . . .

Litigator, small firm: "I arrived at my first court trial to find that the arresting officer who was my key witness had never testified in court before. Needless to say, I didn't tell him that I had never tried a case

before! I acted as if I had done this a million times. He gained confidence from my attitude, I put him on the stand, and we won."

5. Be nice to court personnel.

Being a nice person is good advice in every aspect of your life. It's just a much happier life if you smile at people and they smile back to you. When it comes to dealing with court personnel, it's crucial to be pleasant. Because, let's face it—OK, you've got a law degree. Congratulations. But when you're dealing with court personnel, they may not have your education, but they've got a *lot* of power, and if you don't treat them with respect, you'll discover that in a *hurry*. One litigator points out that "People at the courthouse won't do what you want them to do just because you're a lawyer. They can make your life a living hell."

If you're at the courthouse for the first time, don't be afraid to say to court personnel, "This is my first time here. Can you help me out?" As one lawyer points out, "If you're deferential to them, they'll help you. They help get your case through the system!" Another lawyer points out that "If you're at the courthouse frequently, you get a reputation fast. You don't get a second chance to make a first impression on court clerks, docket clerks, court reporters. You can get a lot of breaks from them if you're nice!" One litigator said that "I always make a point of being nice to folks at court. It really does pay you back. I got stuck in traffic, and I was racing to court because I wanted a motion heard the following week. I missed the deadline. I explained the traffic situation to the clerk, and she put it on the calendar for me anyway. She didn't *have* to. If you're nasty to clerks, things can easily go the other way. If you file your document on time, you find out that oops, it got dropped, and it didn't get filed until two days later and you missed your Statute of Limitations."

6. Preparation beats skill. Do your homework!

As Loyola's Pam Occhipinti points out, "Remember that when you go to court, preparation beats skill 90 out of 100 times. You can't get *too* confident. Be conscious of trying to give your best!" Cover *all* your bases.

As Jolley Unga's Brian Tanko says, "The quickest way to earn respect is reading the Rules of Civil Procedure."

You may not be the most experienced lawyer on the planet, but good preparation can make up for that. Lawyers at Wyatt Tarrant point out that "Preparation will put a new attorney on the same playing field as a seasoned attorney. Furthermore, it'll go a long way toward alleviating the butterflies you get appearing in court!" Being prepared also impresses judges. As one prosecutor comments, "If you're right on the law and the judge sees that you know what you're doing, they won't question you as much. It makes your life easier."

If you're conscious of being well-prepared, you'll think of contingencies that other people might overlook. One new litigator talked about preparing for court the way she'd prepped for interviews and final exams. "When I came to my firm, a partner gave me a case to handle and said, 'It's very unlikely you'll win this, but it's a good way for you to get experience.' I thought back on how I'd worked on preparing for interviews, trying to think of every question an interviewer could ask me. I thought about final exams, where I thought about every issue the professor could ask about. I really busted my butt to cover my bases. And we won!"

7. Be alert to times when it's best to shut up!

Many litigators pointed out to me that it's easy to get into court and have your common sense jump right out of your head. No matter how preoccupied you are with the points you want to make, be alert to what's going on. Remember your goal is to put on your best case, and sometimes that means shutting up. As Dickstein Shapiro's Paul Bran points out, "If a judge says to you, 'I'm inclined to rule in your favour. Do you want to add anything?' the answer is 'No! Don't mess it up!'"

8. You'll stumble. It's your recovery that counts.

As Dickinson's Elaine Bourne points out, "Learn to laugh at yourself. You'll stumble over a question. It happens. The recovery is important. Maintain your composure and get over it!"

I remember watching ESPN late one night. The announcer was giving an injury report on college football players. He's running down this list,

and he gets to this one quarterback. He *means* to say that this guy had been unable to play because of a slipped disk in his neck. But instead of saying "disk," he leaves out the "s." He immediately realizes his mistake, and says, "That is to say, slipped *disk*." You could hear the crew in the background just collapsing with laughter, and the look on the announcer's face suggested that he just wanted to explode. But he didn't. He calmly gave the rest of the injury report. I don't know *how*, mind you, but he did it.

Similarly, when I dance in shows, it's very easy to make a mistake and grimace. My teacher, Jody Foster, always says, "Nobody in the audience knows you made a mistake. *You're* the only one who knows. But if you make a face, *everybody* will know something's wrong." He's absolutely right. And the same goes when you're in court. If you make a mistake, laugh briefly if it's funny, and then move on. People will take their cue from you. Nobody else will make a big deal out of it if you don't!

9. You can't control what you can't control. Remember that the law is unpredictable.

No matter how well you prepare, no matter how good your case is, sometimes you won't win. As Lisa Lesage says, "You never know how cases will come out." Juries, witnesses, and judges are unpredictable. As one prosecutor points out, "Some judges are pro state, some are pro defense, some are clueless. You just have to make your best case." So do your best, and remember the serenity prayer: have the serenity to accept the things you can't change.

Similarly, when you win, be gracious. Save your victory dance for later. As Bart Schorsch writes in *The Student Lawyer*, "In every single lawsuit, somebody eats it and somebody feeds it. If you are feeding it today, you might be eating it tomorrow. Be gracious in victory as well as defeat."

10. More tips for you if you're a prosecutor

If you're starting your career as a prosecutor, you're in a unique position. Unlike lawyers for law firms, you don't have to worry about billable hours or soliciting business. And unlike new associates at large firms, you

don't have to do any writing. As one prosecutor points out, "In advocacy competitions in school, you have to do a brief. You don't have to memorize anything in prosecutors' offices. Appellate teams do that. You don't have to do any long briefs the way you do in moot court." But there are other issues you face, like handling defense lawyers and victims, knowing how to change a case. Let's see what you need to know . . .

a. Learn by observation!

When you become a prosecutor, be a sponge and soak up as much expertise as you can from your colleagues. Go to the courthouse before you even start work, if you have the chance, and watch your soon-to-be-colleagues presenting cases. See how they deal with the judge, with juries, with defendants. There's no better way to get your feet wet!

When you start work, you will get some training. You'll go to "baby prosecutor school," and you'll have seminars on different kinds of crimes and different elements of your job. And there are books you can turn to, including the "prosecutor's book," which gives you, among other things, elements of crimes. Also, depending on where you work, you have access to databases; for instance, U.S. Attorneys have their own database where they swap information. And when you start to work, they won't throw you to the wolves. As Assistant State's Attorney Rich Colangelo says, "They look over your shoulder. They want you to get your dispositions in line with everybody else in the office. They don't want you to be the 'weak link'—the one defense attorneys perceive as 'softer' than everybody else."

But the fact remains, much of what you learn is through observation. Rich Colangelo points out that "It's *all* about dealing with people. *Watch*. See what a case is worth. Law school doesn't tell you the elements you need to prove. You don't come out knowing the possible disposition of cases. You only learn that by watching."

b. Ask lots of questions. You're not alone!

As one prosecutor says, "Never let yourself feel isolated. You don't know everything." Another prosecutor points out that since

you don't have any billing pressure as a prosecutor, you've got more leeway to bat around questions with your colleagues. Rich Colangelo says that "You need to ask more experienced attorneys to understand many things you don't learn in school. For instance, in a drug case, you've got a guy with a prior conviction, he sells drugs to an undercover cop—what's it worth?" Keep in mind that when you ask questions, "Be sure to have a strategy in mind before you ask," he adds. "If you ask a prosecutor, 'I'm not too familiar with this. What would you do?' they're likely to say, 'Well, what do *you* think?' Don't be caught off-guard. They're testing you! Have a strategy ready."

c. Speak with confidence!

When you start out in *any* new job, you're unlikely to feel very confident. As you should in any other job—*fake* it. Nobody sees how you feel. They only hear how you sound, see how you look. You'll develop *real* confidence soon enough, but in the meantime, don't let people see your nerves! As one prosecutor points out, "It gets a lot easier pretty quickly. But the first time you stand up in court, asking for even something as simple as a continuance is intimidating!"

Don't let your voice quaver. Speak calmly and firmly. Stand up straight. Look people in the eye. As Rich Colangelo says, "You're on center stage! You have to speak with confidence. You don't want to be the small fish. You don't want people to push you around." Another prosecutor points out that "If you feel anxious when you're in court, *tell* yourself 'I'm smart, I can think and talk my way out of anything.' Because you *can*."

d. Keep up with new cases. It's easy! You've only got one subject: Criminal Law.

As is true for every other lawyer, you've got to keep up with developments in the law. In almost every prosecutor's office, when there are big new cases that come down, they'll be circulated around. You'll see them. As one prosecutor explains, "If something huge came out, like a change in the standard for probable cause,

someone in the office will research it and present it to everybody else." On top of that, every state has a legal publication that outlines new cases. Rich Colangelo recommends that you "scan that, and look for criminal cases pertaining to what you're doing. Flag the case. Search for issues. For instance, if you're handling sexual assault cases, you might find one that involves proving the risk of injury. Then keep a small notebook in which you cite the case and why it's important to you. It's a trick that I learned from my boss, and it creates a great reference tool."

e. Be aware that in some very political offices, there can be a lot of pressure on you to win your cases.

I didn't talk to any prosecutors who felt that they were under serious pressure to win, although some of them said that they'd heard from other prosecutors about that kind of pressure. No matter *where* you are, resolve to put on the best case you can, and ignore any other pressure. As one prosecutor points out, "Frankly, once a case makes it through the grand jury process, it's a pretty good case for the prosecution. There's no pressure to win at all costs, but you know that you've got a good case." Another adds that "Trials are competitive, it's just the way they are. But you create your own pressure!"

f. When you make arguments in a case, have a list of cases written up in advance to hand to the judge in support of your arguments.

g. Get familiar with the styles of different judges, and change your strategy accordingly.

Before you argue a case before a judge, get with your colleagues to learn the judge's style. As one prosecutor explains it, "All judges are different. Some of them want to 'split the baby.' So you offer a longer sentence, knowing that the judge will knock it down to what you originally wanted. Other judges come up with their own left-field guess about what the penalty should be, and for those judges, you manipulate the charges with a mandatory sentence so that their

discretion is removed. Sometimes you'll find judges who hate mandatory sentences, they hate having their hands tied. For them, you *never* talk about mandatory sentences; they don't want to hear it."

h. Don't overcharge the case just because the defendant is a real creep.

One prosecutor warns you against "overcharging the case. Maybe the guy is a scumbag, and maybe he should go away for thirty years even though the crime he committed was a five-year crime. Don't succumb to the temptation to overcharge it. You'll just piss off the jury—which is getting a few bucks a day, so they're *already* not very happy."

i. When you start out, remember that your DMV violator today might be in your jury pool tomorrow.

As one prosecutor explains it, "When you start out as a prosecutor, you handle small things, DMV-type work. You get two minutes per person. Some of them cop an attitude, and you're tempted to cop one right back. I did. Then one day I realized, 'Wait a minute. These people, they're just *speeders*. They're just like my friends and me. Jurors come from the DMV docket.' So I dropped the attitude. It's possible to smile and still do the job. Treat people nicely, and they'll like you, even if you're technically on the other side."

j. Dealing with defense attorneys.

One prosecutor points out that "It's easy to develop an 'us' and 'them' mentality," but "You always have to remember: the defense attorney you hate today might represent your wife's divorce tomorrow. And if you're in a small town, you might have kids on the same soccer teams. Just deal with them professionally." Just as you do with judges, learn the different styles of defense attorneys. You'll see them over and over again. One prosecutor says that "Some defense attorneys are trustworthy. If they tell you 'There's a problem with this case,' you believe them. Others, if they said, 'It's daylight outside,' you'd look anyway. You can't trust them. But you learn that, and you ask other prosecutors about local personalities. They

develop reputations. We have one guy we call the drip. Working with him is like watching water drip onto a stone. Drip, drip, drip. He tries to wear you down. You're prepared for it, so it doesn't affect you. Others, they'll do a little dance, 'My guy's not a bad guy,' you've heard him say the same thing about his last fifty clients. So you can put it in perspective. You learn their tactics and you handle them accordingly."

Always be prepared when you deal with defense attorneys. Read the file! As one prosecutor points out, "Defense attorneys will challenge you. They won't even know what the person is charged with, but they'll challenge you, figuring you aren't familiar with the file. Know the potential penalty, the elements, be a step ahead! A lawyer will say to you, 'I'm representing Joe Gazatz. You can't prove the case.' You need to be able to say, 'Oh, really?'"

k. Dealing with witnesses.

One prosecutor advises that "When you deal with witnesses, be *very* businesslike. It's difficult, at best. You need to go over every detail they're going to say. Something can happen, you can have two witnesses three feet away from each other who see it, and they tell totally different stories—but they both believe they're telling the truth! People filter things so differently. What you have to do is to ask *exactly* the same question to every witness. Have the questions written down, and repeat them word for word to each witness. If you say to one, 'How fast was the car going when it hit the tree?' then that's what you've got to say to the other witness, as well. If you say, 'How fast was it going when it *smashed into* the tree?' you'll get a speed that's a lot faster, because of those words 'smashed into.' If you ask the same questions and the witnesses come up with different answers, and they're both saying the defendant didn't do it, you can say, 'They couldn't both have seen it. They're telling two different stories.'"

l. Handling victims.

One prosecutor points out that "even though you have clients when you're a prosecutor, victims are

clients." Most prosecutors' offices have a "victim and witness coordinator" who tells the victim where the case stands, for instance, "We've submitted this and we're asking for a court date." In other offices, you have more contact with victims. When you do deal with them, be sure that you speak calmly and with deliberation, so that they perceive you're in control. One female prosecutor says that "Many women say 'mm-hmm' when people talk. You don't want to do that with victims or even witnesses, for that matter. It makes them think you're agreeing with them when what you're really saying is, 'I'm listening. Go on.' You want to get *all* the facts. Victims sometimes try to leave out relevant facts, worrying that if they tell you everything, there won't be a conviction." Be aware that if the case doesn't get resolved to their satisfaction, "Victims will complain, but you understand it. They need to vent," says one prosecutor.

Depending on the crime, dealing with witnesses can be a terribly gut-wrenching process. As one prosecutor says, "When you deal with victims of child abuse, you learn about things you shouldn't have to know. You learn how to distinguish a splash scandal from an immersion scandal, and the difference between a twisting fracture and a clean snap. You learn the telltale signs of abuse. You have an immersion scandal, a twisting fracture—no kid gets those from an accident. You don't want to know this stuff. But if you believe in what you're doing, you can deal with it. Just focus on what you're doing: you're building a case."

m. Outside of work, remember your job!

One prosecutor laughingly said that "When you're out on the freeway, you're speeding, it's easy to think, 'Hey! I've got a free pass! I'm a prosecutor!' You have to fight that attitude! A prosecutor *does* represent the public. You want to represent the *best* of it." Another prosecutor added that "Whether you're a prosecutor or not, there are some nightclubs, you'd just be stupid to go there. You don't have to change your life outside of work just because of your job. But when you see people in a store, and you

know that they were in on a speeding ticket last week, and they look at you and say, 'Hmmm—where do I know you from?' don't take the bait. Tell them about something else in your life, 'Oh, maybe the YMCA,' or 'I teach at so-and-so college.'"

n. Lights! Camera! Handling the media.

As one prosecutor explains, "Some reporters are good, some aren't. When a case is pending, you can't say anything about it. Once you get into court, you need to know that everything you say in court is fair game. If you go into the facts on the record, you're giving them what they want to know. But if the reporter is a jerk, if you've had trouble with them before, you can just stipulate to the facts and reporters can't get anything. And don't buy that 'off the record' line. I've been burned a few times with that. If you don't want them to print it, don't say it."

11. More tips for you if you represent clients

a. Rely on other people in learning the ropes. You're *never* alone!

When you start out as a litigator, there's a *lot* to learn. As Susanne Aronowitz says, "You don't know how things get filed with the court. You don't know what pleadings look like. 'Meet and confer with opposing counsel'—what does that *mean*? Clinics in school help, but if you didn't do that, maybe you won't know what local rules are on stapling documents for court. What's a proof of service? Which deadlines are 'hard' and which are 'soft'? How do you count time on deadlines? The Federal Rules of Civil Procedure aren't the only rules you need to know!" It can be overwhelming!

Make things easier on yourself by relying on others. Start with people in your own office, who are just as vested in your clients' success as you are. As Oregon's Jane Steckbeck says, "You'll be asked to do a bunch of things you've never done before. Maybe you haven't, but somebody else *has*." One lawyer talked about how when he first started with his firm, his partner said, "You've got to do expert witness depositions in two days." He said, "I had *never* done it before and I had *no idea* where to start. I asked around the

office. Another associate gave me a book called the *Depositions Handbook*, and there was a chapter in there on expert depositions. Thank God! The fact is, you can't be cowed. I had a colleague who had to take on a lot of responsibility fast, and she sat in her office, crying. She didn't want to do it. I know how she felt, but it's like the old saying, 'Feel the fear and do it anyway.' Turn to other people who have expertise that you *don't* have. They'll help you through!"

Other than your colleagues, there are *lots* of resources at your disposal. Lisa Lesage recommends that you go to the local bar association and find lawyers who handle the kind of cases you just got. She says, "Lawyers *love* to talk about themselves and what they know, and they love to give advice about cases! The magic words are, 'I've got this case. Can I take you out to lunch to learn about criminal law?' You'll be amazed. They'll tell you what to do, they'll send pleadings. People are really helpful."

Susanne Aronowitz suggests contacting your clinical professor at law school, or the alumni association, or any other professor who might be helpful. "Graduation isn't divorce! Stay in touch with your professors. Always come back to ask for things. You paid a lot of money for school. Stay in touch!"

b. Be nice to sheriffs.

I've told you before, be nice to everybody. It's as true for sheriffs as it is for anybody else. As one litigator suggests, "If you want summonses served on time, be nice to sheriffs! It doesn't matter if you like them or not. My boss was appalled. He said to me, 'But he's *disgusting*!' He has tobacco dripping from his chin, he calls you Sweetie. How can you be nice to him?' I said, 'That's as may be, but my summonses get delivered on time. It doesn't take *anything* to be nice to people.'"

c. When it comes to dealing with opposing counsel, be cordial—but guarded. Being an advocate doesn't mean being a jerk!

As St. Louis University's Wendy Werner says, "Understand when you're being an advocate and when you're being a jerk. You may

get a much better deal for your client if you treat the other lawyer with courtesy and respect. You'll get a better outcome." What should you do?

- 1) Remember that you can accomplish more quietly than you can yelling.

As Georgetown's Anna Davis says, "In deposition training, you learn that you can be really friendly but ask some really deadly questions." Perhaps you saw the deposition in the Microsoft case, where David Boies, by most estimations, took apart Bill Gates. He didn't do it with bluster. If you read anything about Boies—and you should, he's an amazing lawyer—he prepares better than anybody, working phenomenal hours. He patiently draws out responses from witnesses on cross-examination or in depositions, allowing them to paint themselves into their own corner. He is charming, polite and respectful. His opponents have only good things to say about him.

- 2) Remember that no matter how big a city you work in, the world really is small. You *need* a good reputation, because you'll always need professional courtesies.

As Carlton Fields' Kevin Napper says, "Your reputation will precede you. If you're professional and your word is your bond, if you do what you say you're going to do or explain why you can't, you'll get professional courtesies. *Everyone* knows who's dishonest and a jerk and who practices close to the edge. They get treated accordingly." Another lawyer adds, "Some people are a pain in every case. They throw discovery at you. They're just jerks for the sake of being jerks. You just wait, knowing that sometime, you'll have an opportunity to get them back."

When it comes to professional courtesies, remember that there are lots of rules that aren't engraved in stone. When you're involved in a case, for instance, there are many times when deadlines can be stretched with the consent of the

opposition, where you can get more time for discovery or an adjournment if the other side agrees.

There will certainly be times when it's not in the best interest of your client to grant courtesies. If that's the case, **explain** to the opposing counsel why you can't do what they asked you to do. If you tell them why you can't comply, you won't look like a jerk.

If you're tough as nails and you **don't** grant those courtesies when you easily could, it'll come back to bite you—and your clients. Some time **you'll** be the one needing an extension, and if you have the reputation for not granting them yourself, nobody will give you the time of day. You'll find people filing motions against your client on the Wednesday before Thanksgiving, requiring that you respond within five days. That doesn't help **anybody**. There are plenty of ways to serve your clients without being a turd!

3) Have respect for your opponent's position, no matter how hare-brained it seems.

As lawyers at Morrison & Foerster suggest, "You need to understand and respect your opponent's position, no matter how hare-brained it seems at first. It makes resolution of the dispute more likely, and helps win the fight if one is necessary."

4) Keep in mind what your client's goal is. It might not be being the "winner."

As a lawyer at Morrison & Foerster points out, "If you can get what you need, then you don't have to be declared the 'winner.'" It's very easy to lose sight of that when you're locking horns with opposing counsel.

One matrimonial attorney told me this story: "I was representing a woman in a divorce case, and the husband and his lawyer were being real jerks. The guy had his own business, and he was clearly hiding assets somehow, although the wife didn't think he had much money. The wife had a very responsible full-time job. The husband's lawyer kept calling

me, demanding a ten-thousand-dollar cash settlement for his client. This guy really pissed me off, and I really wanted to fight him. The wife was spitting mad, as well. What they were asking for clearly wasn't fair. I was preparing the wife for a trial. But then I took a step back, and thought, wait a minute: if we go to trial, the fees are going to be a lot more than ten thousand dollars. It's going to eat up her entire nest egg. One of the toughest conversations I ever had with her was to point out that if she **didn't** challenge the ten thousand dollars, if she just paid it, she was really going to win. She was going to get this ugly divorce behind her and come out with more money, to boot. Neither one of us was happy about it but it was clearly the right thing to do. So, fine, technically the husband 'won.' He got my client to pay up. But my client and I both knew who was really the winner. He and his lawyer were both idiots."

d. Consider taking an 'Acting for Lawyers' class.

Elaine Bourne says that "Taking an 'Acting for Lawyers' class gives you greater confidence when you go into court. You'll find courses like it taught through adult ed most everywhere. It's a fun class! You'll learn things like getting your point across with more than words, mock openings and closings. It's kind of like mock interviews for lawyers."

C. NEVER AIR YOUR DIRTY LAUNDRY IN THE MEDIA!

Quick! If you had to choose between your boss liking you, and a reporter you don't know, and whom you'll never talk to again liking you, which would you choose? Hmm, let me guess. I don't know about you, but I think the idea of a paycheck is rather enticing. If you do, too, then **never ever ever say anything** unflattering about your employer to any reporter.

A *Wall Street Journal* article, detailing the grueling life of new associates at some law firms, included the following passage (I've changed the name of the firm and the associate named in the article):