DOS and DON'TS for Lawyers in a Changing World

by Huey Cotton

IF you could see a dialogue bubble above the judge's head showing what the judge is thinking while certain events unfold in the courtroom, you would be surprised at how often it would read, "Have you lost your mind?" or "What is this lawyer thinking?" or "Did that lawyer bother to think at all?"

This is the dialogue bubble I will explore with you as we review some 'Dos' and 'Don'ts' for lawyers. Initially, you may assume by these questions that the lawyer must have done something wrong to prompt the dialogue bubble. Such an assumption is not necessarily correct. It is true that questionably wrong behavior could provoke a judge to ask these questions. That is why we will explore some 'Don'ts' for lawyers. However, in our ever-changing world of technological evolution, cultural diversity, and aging baby-boomers (especially those on the bench), those same questions in the dialogue bubble (e.g., "Have you lost your mind?") are asked when lawyers introduce new, innovative, and often creative practices that, initially, upset the traditionalists on the bench who want to do things the way they've "always" been done. Examples from this trend of innovation are captured in the list of 'Dos' for lawyers set forth below.

First, let's address some problematic practices.

1. DON'T LOSE TRACK OF YOUR LOCATION

In this era of global positioning systems we have all become quite adept at moving from point A to point B by following the directions voiced by our electronic devices or automobiles. Thus even the newest lawyer knows how to find the courthouse. But once inside, some lawyers seem to lose track of their location. Their case is called for hearing. They stand up, look professional, introduce themselves on the record, then, at the first opportunity, they attack the opposing attorney:

> Attorney #1: "If you had checked your voicemail this morning, you'd know that I took this motion off calendar. This is what is wrong with the practice of law. Lawyers like you don't pay attention to your cases. I can't believe you've wasted my time this morning."
>
> Attorney #2: "Your Honor, I have to address these ad hominem attacks on my character. Then I'll get back to why we are here."

And so it goes. The dialogue bubble above the judge's head probably says, "Have you lost your mind?", even as the judge says only, "Counsel, address the court, not each other." Judges will not tolerate incivility of this type. Both attorneys must understand that things will end poorly for them. Lawyers can avoid these problems by simply remembering their location. When in court, address the court, unless instructed by the judge to do otherwise.

2. DON'T TRUST WITHOUT VERIFYING

As the lead attorney on a case, you will be making the oral argument on substantial motions. As an experienced litigator, you are confident you can cover any shortfall in the briefing you've entrusted to your senior associate or co-counsel. The night before oral argument, you review the papers, declarations, and briefs. You find a catchphrase in the brief that will serve as the

theme for your argument. You think, "This sounds sort of like Justice Antonin Scalia wrote it. But, there are no quotation marks. It must be 'our' original work product." You conclude that you've selected well in the hiring process. The younger attorney has delivered.

In court, you begin argument with your catchphrase. You speak eloquently about the issues presented. The judge thanks you for citing a catchphrase from Wikipedia.

The lead attorney should verify the substance of any writing submitted to the court, before it is submitted. The court deserves your best work. You cannot trust that the associate met your standards, or that of the court, until and unless you verify. (I gladly attribute this practice point to former Pres. Ronald Reagan who admonished us all, "Trust, but verify.")

3.

DON'T PICK POCKETS

Lawyers generally appreciate the need to dress professionally for court appearances. Fashion, however, is one of those ever-changing cultural activities that can affect what you wear to court and how you act. Currently, suit jackets are shorter and tighter for men and women. When wearing the shorter and tighter jackets, do not give way to keeping your jacket buttoned, then lifting your jacket from the bottom, anchoring your hands into your pants pockets, and proceeding to address the court without removing your hands from your pockets. There is no rule of court proscribing the practice. It is, however, one of those nuances that can make the judge wonder, "What is this lawyer thinking?" At minimum, it is distracting; at maximum, it can be viewed as disrespectful.

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4.

DON'T DISOWN YOUR CLIENT

Criminal lawyers cannot always pick their clients. And sometimes a lawyer may be repulsed by the charges against the client or by the client's appearance or background. I have seen lawyer resentment of clients manifest in a number of ways. For example, the parties and counsel appear in a civil case for a settlement conference:

> Attorney: "Your Honor, Bill here is looking for a lot of money in this case. His wife Sally is [insert any ethnic minority different from the judge], so she'll go along with whatever Bill wants. Bill, did I get that right?"
>
> Mr. Client: "My wife and I talk about these things . . ."
>
> Attorney: Interrupting his client, "Your Honor, I've represented people like this for years. I know what it will take to resolve their case."

The attorney may be convinced his or her actions are in the client's best interest. But, as lawyers, you must consider that you are asking the court to respect your client and your client's cause, even as you disrespect them. Aside from the fact that this form of bias runs afoul of Codes of Professional Conduct and civility, it makes you look bad.

5.

DON'T IGNORE A LIFELINE

Oral argument is still viewed as the point at which skilled advocates can win or lose their case. But you must use time for oral argument wisely. A few years ago, attorneys came before me to argue a substantial motion to dismiss and related issues in a high-profile matter that would have far-reaching ramifications for some of the careers involved. The briefs and documents supporting the motion filled a half-dozen Banker's Boxes. The resolution of the issues could go either way. The lawyers on both sides were exceptionally well qualified.

Once oral argument began, one attorney emphasized an argument that had not been a substantial part of the written briefing. The other attorney collected himself, started making his pre-planned argument, but failed to address the nuances of the newly emphasized point from the opposition. Sensing that counsel was struggling to find traction, I threw him a lifeline. I suggested that counsel might want to spend the remainder of his time on the footnote in a particular case that was on point. In response, he said, "Your Honor, if I could just finish the points on my outline, then I will address whatever additional issues the court suggests."

Thereafter, my only question was, "Have you lost your mind?"

NOW there are some wonderful practices evolving with the times in our courtrooms. Here are some things you should definitely DO, even if it requires you to drag your judge along.

1.

DO LIVEN UP THE BRIEFING

In this age of paperless court filings and YouTube tapings of just about everything, there is no reason why motions and appeals should be so boring. Baby Boomers are perhaps the last generation to be wedded to yellow legal pads and ink.

Recently, a young lawyer told me he was repulsed by the feel of paper. He thought, to help save the planet, everything we do should be paperless. His brief included links to video clips of deposition testimony and accident reconstruction. Initially, I had declared that I would have none of it. The brief would be deemed incomplete. But later I relented. I dared tread into this new way of receiving information. This use of technology helped bring the case to life. It helped to remind the court of the human drama unfolding behind the briefs and exhibits. Indeed, it helped make the case matter even more than usual.

Judges, like everyone else, receive information through different media in our personal lives. Lawyers should continue to challenge us to expand our consideration of

evidence and argument to include new and evolving media sources.

2.

DO TEXT OR TWEET OR EVEN EMAIL

In the Summer 2014 issue of *The Bench*, the official journal of the California Judges Association, my colleague Judge Katherine Mader wrote an excellent article titled "Texting in the Courtroom: Curse or Advantage." I borrow liberally from that article to make this point. We cannot live without technology. Smartphones and iPads are as commonplace as briefcases and day planners were 25 years ago. As Judge Mader's article states, lawyers can use these devices in court to confirm future appearance dates for lead counsel, appear via Skype or Facetime (or have witnesses or clients so appear, except for trial), and thereby aid the court in more efficiently managing the court's docket.

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3.

DO SERVE AS CLIENT AMBASSADORS

In contrast to my Don't No. 4, there is a positive trend in lawyer representation that should be further encouraged. Lawyers should continue taking the time to learn and appreciate the cultural differences of their clients. For example, police and citizen interaction has been a hot topic in both civil and criminal cases for years now. In these cases, lawyers for both sides serve their clients best when they introduce the culture of the police force, or the culture of the relevant community to the court and jury.

How and why police officers are trained to react a certain way is relevant. How and why they adjust those reactions given the cultural differences of the situation in which they find themselves is relevant. Similarly, how and why people react or act a certain way toward police authority may be explained, at least in part, by cultural differences. The lawyers who serve as ambassadors for their clients' cultural sector will best serve the justice system and society.

Admittedly, traditionalist judges are reluctant (read, too impatient) to afford lawyers the time needed to present culture in the courtroom. Too often we just want to know who shot whom, when, where, and how. Lawyer-ambassadors will continue to press judges to allow for asking and answering 'why.'

4.

DO KNOW THE LATEST LAW

You can avoid a "gotcha" moment, or create one, by staying informed. Once upon a time, a lawyer was well advised to Shepardize or cite-check all cases referenced in a brief before coming to court, to ensure that the cases relied upon were still good law. Judges and clerks are similarly trained to check their own citations. But, now lawyers have access to instant messaging services that will send case updates to your smartphone or computer as they are reported.

Win a brownie point with any court, trial or appellate, by offering a real-time update on the law relevant to your case. A traditionalist judge or justice may hesitate to receive your case update, to which you refer by pointing to an iPad or smartphone. But, I assure you, they will appreciate it.

5.

DO KNOW WHEN TO RETIRE

In case you haven't noticed, generational tension is a recurring theme. However, I applaud the lawyers who know when to retire old habits. For example, a well-known trial lawyer became legend because of his expert use of blow-up poster board exhibits at trial. Young lawyers were told how the legend would have a van pull up to the courthouse where lawyers would unload blow-ups in front of opposing counsel, who might have a few 8.5x11-inch photos for use. The opposing side would become concerned and cases would settle at the courthouse steps. The lore was that this legend used the same blow-ups in the van for every major case but rarely had his bluff been called in court.

Today, lawyers put their exhibits on zip drives and scan them into computers, provide iPads to each juror for ease of reference, and, on occasion, use audio and video depictions, smart TVs and other updated display monitors. Hearing of the legend's use of a blow-up, these lawyers will ask, "What was that lawyer thinking?"