WINNER

HUMOR

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JOHN M. CURTIN is a shareholder in Robbins & Curtin, pllc, who tries very hard not to offend anyone unintentionally. This is a *humor* article. John will viciously mock and abuse anyone who attempts to quote this article back to him in a motion or oral argument (unless it is a judge, in which case he will pretend to laugh heartily). John limits his practice to plaintiff's medical malpractice cases because that is the only thing he knows how to do without screwing up.

BY JOHN M. CURTIN

The (Exquisitely) Civil Litigator

Unfailing courtesy is the distinguishing mark of the very best and most successful of attorneys.[1] Sadly, many members of our profession fall short of this ideal. All too often, the worst offenders are unaware of their failings. In this sense, good manners are akin to good hygiene. Each individual believes his or her own to be satisfactory, if not always exemplary—but often wishes that the other guy would put in a little more effort.[2] The purpose of this essay is to provide some basic guidelines that will assist members of the bar in the basics.[3]

The Concept of Professional Courtesy

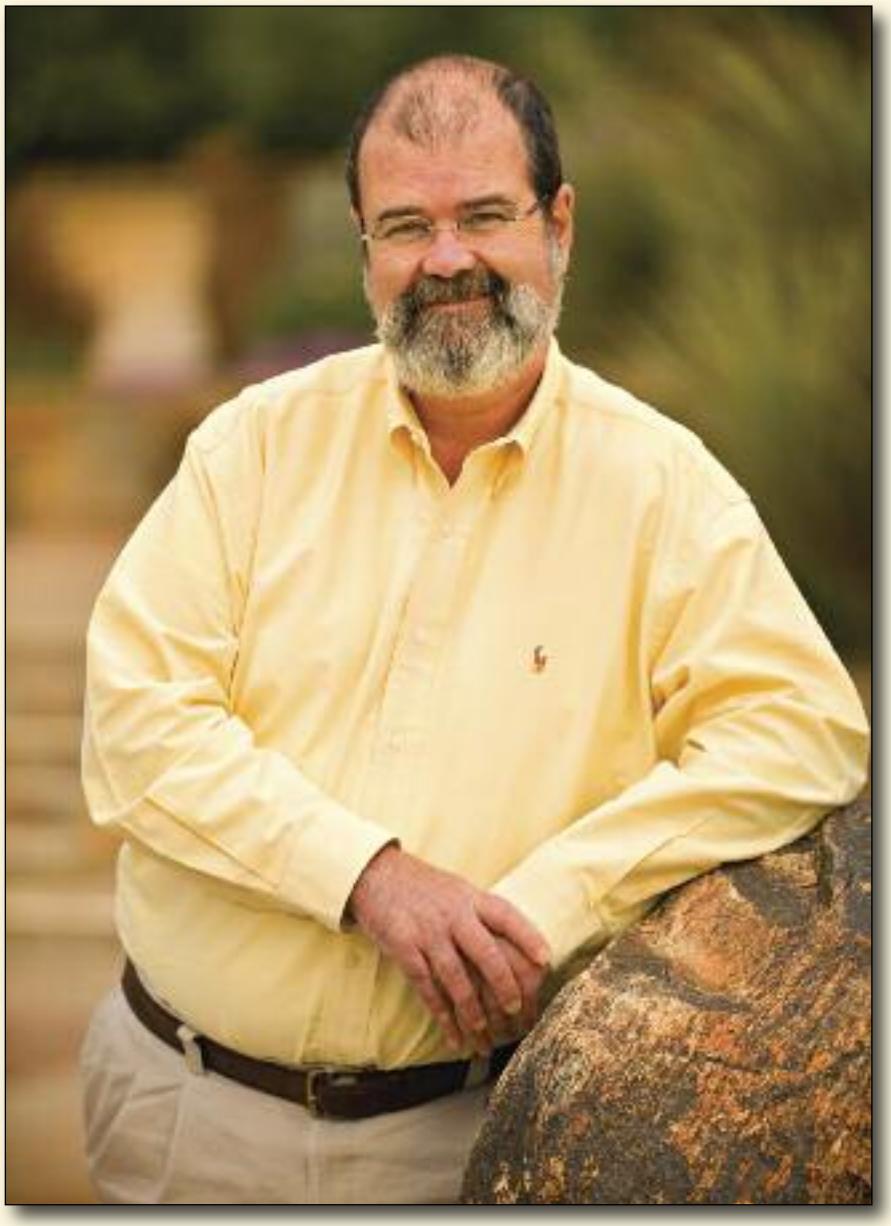
"Law is a dirty business, conducted by gentlemen."[4] Professional courtesy, in its essence, means making a big deal out of granting extensions of time that cost you nothing, in the hopes that someone will "do you a solid" in the future. That, and always closing a perfectly clear letter with a suitable and yet subtly insulting platitude like "If you have any questions please feel free to call" (implying that the recipient might require some assistance with deciphering simple and direct sentences in his or her native tongue). "With all due respect" is also a phrase that sounds impeccably polite and yet begs the question of how much respect, if any, is due to the opponent's ludicrous position.

Professional courtesy is, after all, the exercise of good manners toward someone who is trying desperately to humiliate you publicly, in order to plunder your client's assets like a Visigoth with a no-limits American Express card. In this sense, professional courtesy resembles the ancient *code duello*.[5] It exists to mask the underlying breaches of basic human decency that make up our daily existence as lawyers.[6] Much like duct tape, professional courtesy holds things together, without actually fixing them.

The main thing to understand about professional courtesy is that it is *reciprocal.* This means that "what goes around comes around," a lovely Darwinian phrase that, taken in context, suggests it is perfectly appropriate to screw over those who deserve it. Those who offer no courtesies deserve none, and should be pounded into the ground like big, dumb fence posts.[7]

It is for this reason that one must always endeavor to maintain the moral high

1. This of course is a meaningless platitude, which is used to appease savage senior attorneys. Actual human decency, much less politeness, in prominent lawyers is about as common as altruism amongst moray eels. But they believe it, and that's the important thing.
2. Sometimes a lot more effort.
3. Of COURTESY—you'll have to work out your own personal hygiene issues.
4. Or gentlewomen. One cardinal aspect of courtesy for distaff members of the bar is pretending not to notice the pervasive sexism of judges, clients and senior partners. In return for this discretion, female lawyers are promised that taking time off for a family life will not have a detrimental effect on their careers. Of course, this is not true—but it is a nice thought, isn't it?
5. A set of rules dating back to Roman times, which established the etiquette for stabbing people with long pointy things.
6. Some of you will protest loudly that this is a bit harsh. Get a grip. You are arguing with a magazine article in a public place. People are starting to stare.
7. Figuratively, of course. See A.R.S. § 13-1204 regarding Aggravated Assault.



ground in extending or denying courtesies. One should not, for example, actually say "You owe me a big one for this, Skippy …" when agreeing to some meaningless concession. Rather, one should assume a tone of *noblesse oblige*[8] when granting a requested courtesy.

Likewise, when it becomes necessary to oppress another professional viciously—say, by denying an extension on an appeals brief that falls due the day after Christmas, in the hopes that your opponent will be forced to spend his holiday chained to a desk like a modern-day Bob Cratchit, scribbling away with a quill pen, in poor light, and the heat turned off, haunted by the lonely cries of his wife and children—it is always wise to spend some time dreaming up some reason why he or she richly *deserves* this kind of abuse.[9] This ensures that your cruelty will have the morally instructive effect of encouraging your opponent to be nicer to you in the future.

Professionalism in Pleadings

Maintain a dignified tone in addressing the court in all written materials.

It is vital to remember that "pleading" is a figure of speech. Therefore, one should avoid annoying, whiny repetitions such as "Please, please, please can we have some money" or "Pretty please with sugar on top."

Likewise, in motion practice, it is poor form to engage in name-calling, aspersion-casting, parentage-questioning or accusations of vile and unnatural practices.[10] Legal authority should be cited for all propositions of law, assuming some colorable legal authority exists. If no legal support can be found, fall back on "It is axiomatic that …" and hope that it passes. Factual allegations should be supported by reference to the record, because no one believes *you*.

Remember: It is not an official pleading if you don't use either "egregious" or "disingenuous" at least once.

Before filing a motion, attorneys are required to confer and attempt to resolve the dispute. This is because the judge has far more important things to do than assist in resolving disputes between litigants.[11] Thus, the ritual of writing self-serving letters to attach to pleadings has become enshrined in the rules as well as custom. These present an opportunity for great creativity. Unlike lawsuits, which are sadly constrained by their necessary relationship to parties, facts and the laws of nature,[12] self-serving letters are relatively unfettered by reality, because nobody who actually reads them believes what they say. Freed of the crippling restraints imposed by excessive veracity, these missives have become a literary art form unto themselves, often providing a richness of narrative, plot and psychological subtext far beyond the meager facts of the case. Like great poetry, the purpose of the self-serving letter is not so much to describe what happened, as

8. Snotty condescension.
9. If you cannot identify any specific act of discourtesy that merits retaliation, it is just as effective to offer vague criticisms. Many lawyers carry a crushing load of guilt, which can be invoked with a few well-chosen generalities about lack of diligence or substandard professionalism.
10. Except in footnotes. Anything is fair game in footnotes.
11. I know what you're thinking. Don't ask.
12. Bear in mind that "relationship" is a flexible term. For example, a drunken and abusive stepfather can be said to have a "relationship" with his red-headed stepchild.

to provoke a response in the reader.[13]

Courtesy at Depositions

Decorum is the basic ingredient of politeness at all depositions. Absent a specific invitation,[14] both witnesses and attorneys should avoid the display of intimate body parts.[15] Similarly, staring at opposing counsel's naughty bits for an extended period of time is considered tacky, even if the deposition is very, very boring. One is permitted to doodle on a legal pad to pass the time, but it is considered excessive to engage in water-color landscape painting. Do *not* hum the theme from *Jeopardy*, no matter what the provocation.

One must always pretend to treat the witness's lies as if they were deserving of serious consideration. Repeatedly jumping to one's feet and shouting "Aha!" or *"J'accuse!"* is to be avoided.[16] For that matter, even if it seems funny to you, assuming a fake foreign accent is inconsiderate to the court reporter.

The advent of laptop computers has done much to alleviate the soul-crushing boredom of depositions, and to accommodate ADD, which is apparently now universal amongst young lawyers. However, basic consideration must be exercised. You should know better than to open e-mail attachments from certain friends during a deposition.[17] Turn *off* the sound on video games. Nothing disrupts a deposition more than the periodic outburst of tinny "touchdown" music. It is not ethical to work on other legal matters in order to "double bill" the time spent in deposition. Your client is paying you for these hours. He, she or it is entitled to the full benefit of your drowsing, doodling, revising your grocery list, and surfing the Web for weekend travel bargains.

It is generally best to think up some questions *before* you start taking the deposition.

Restricting objections to "form" and "foundation" has done much to take the fun out of defending depositions. Prior to the advent of these limits, lawyers were free to make speaking objections. This allowed for a freer exchange of ideas and constructive criticism, and helped the witnesses to better understand their role as sock puppet for the lawyer's strategic position.[18] Speaking objections were good for the legal economy, as they frequently generated arguments that went on for pages, and stretched depositions out over the course of days and even weeks. Unfortunately, the change in the rule means that lawyers are not allowed to engage in these tactics, unless they really, really want to.

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Order in the Court

Our courts are temples of justice. As such, it is to be expected that much of what goes on there will be ritualized, antiquated, confusing or boring, and contain inexplicable passages in dead languages.[19] As with any sacred and traditional proceeding, the appropriate response is to maintain a pious demeanor at all times while surreptitiously checking your watch from time to time.

Courtesy requires you to address the judiciary with proper respect as "Your Honor," and not "Hey, Judge" or "Big Fella." On the other hand, excessive obsequiousness, such as ring-kissing, genuflecting or outright groveling should be reserved for situations where you have well and truly screwed up. Also, remember that all judges are funny.[20]

You should laugh heartily at any demonstration of judicial "wit." Or else.

All too often, oral argument is where the gloves come off.[21] Much of contemporary oral advocacy resembles operatic dueling—two heavyset actors bellowing and flailing at each other, with very little blood spilled, to the yawning disappointment of the audience. While this seems largely unproductive, very few lawyers recognize that this is precisely the result intended. Oral

13. Apoplexy, for example.
14. This is not meant to suggest that an invitation to "slip into something more comfortable" should be routinely given.
15. Except for strategic advantage.
16. On the other hand, a snort of disbelief is sometimes indicated, and is almost impossible to record stenographically.
17. You know which ones I'm talking about.
18. *E.g.,* "Objection—the question is misleading in that it might trick the witness into saying something I don't want her to say, instead of repeating the script we practiced, which goes like this …"
19. Quantum materiae materietur marmota monax si marmota monax materiam possit materiari?
20. C'mon—for the most part, we're talking about men in black dresses. Milton Berle and Monty Python built comedic empires around this gag.
21. This is a figure of speech. For the most part, you should avoid wearing gloves unless you have some kind of horrible, contagious skin condition.

argument is not *supposed* to provide the court with information to support an effective resolution. It is intended to irritate the judge, and then focus his wrath on the opposing party. The party who files the motion acts like the *picador* at a bullfight. He deftly pricks the judge with pointed arguments and whiny complaints, to enrage the judge so that he will charge the opponent. The wily opponent responds like a brilliant *matador*, distracting the judge with rhetorical flourishes and a cloud of incomprehensible detail. Much like a bullfight, most oral arguments end with capitulation of the frustrated and exhausted judge.[22] As the great beast's fury abates, and it sinks to its knees in dazed and helpless confusion before its tormentors, one can reflect on the fact that this is considered a good ending in oral argument and in bullfights—plenty of noisy entertainment, and in the end no one gets hurt.

On the other hand, it is wise to remember that sometimes *the bull wins.*

The Etiquette of Trial

Today's jurors' expectations are shaped by what they see on television. Unless you are unbelievably good-looking[23] and can finish two trials in an hour (with commercial breaks), you will inevitably disappoint and annoy them. Get used to it.

Because it has become apparent that there is no way to make a jury happy, except for sending them home, the focus of courtroom etiquette has shifted over the years. Gone are the emphasis on 18th-century formality, the "courtly" manners, and the graceful modes of address. Lengthy, tightly-reasoned "arguments" and painstakingly persuasive "evidence" are likewise a thing of the past. Out of respect for the jury's desire to be anywhere else, most judges have adopted strict limits on *voir dire*, openings, closings, testimony, bodily functions and justice itself. While it is not apparent that this produces happier jurors or better verdicts, it does have the salutary effect of getting the damn thing over with.

It has been said that "brevity is the soul of wit." In trial this is certainly true, because nothing is funnier than watching a squadron of really smart lawyers who have spent two years learning every technical detail of a complicated factual and legal problem attempt to cram their presentations into three five-and-half-hour days (less time for *voir dire*, arguments and jury instructions). It's kind of like watching a group of really stuck-up fat guys trying to put on pants that are impossibly small. While the inherent humor of the situation might be lost on the fat guys, it is truly hilarious for the observer.[24]

One might think that the abbreviation of trials would require a species of courtesy that focuses on cooperating and getting through the process smoothly and efficiently. And indeed it does *require* this. It just doesn't *produce* it.

Instead, the strategy of the time-limited trial is to launch a vicious personal attack on some minute aspect of your opponent's conduct, in the hopes that it will distract him or her into a complicated and time-consuming refutation.[25] Properly done, this will consume all of the time allotted for your opponent's presentation, and leave you free to present your client's side of the story unopposed.

With your opponent's case time-limited into nonexistence, it is an opportune moment to address the final and most important aspect of trial etiquette: *sucking up.* This represents an important and disconcerting gear change for many attorneys, who spend their non-courtroom hours in more traditional legal pursuits such as bullying associates, threatening, extorting settlements, threatening, accusing others of misconduct, threatening, bluffing, chest-pounding and of course, threatening. Trial requires a chameleon-like transformation into something that a jury might like.[26]

Suck up to everyone. Suck up to the judge so that she doesn't humiliate you in front of the jury.[27] Suck up to the bailiff, and the clerk, who will nevertheless make fun of you and imitate your odd personal mannerisms when you are not in the room. Give a buck to the guy pretending to be a disabled veteran in front of the courthouse, in case someone is looking. Be gracious to the people who serve your lunch. Tip heavily. Let everybody else get on the elevator first. Be courteous to your opponent whenever anyone is watching. Think happy thoughts. Hum the *Barney* song. Exude niceness though your very pores. Who knows? It might work.

A Parting Thought on Courtesy

Attorneys will always be attorneys. As we all learned in Criminal Law 101, conduct that cannot be justified by a plea of self-defense can often be mitigated as arising in the heat of passion.[28] There is always an excuse for rude behavior, and generally that excuse will involve the rank discourtesies and egregious outrages to which we are subjected by other attorneys. Like a virus, one lawyer's lack of common courtesy propagates through the entire legal community. It's the Circle of Life.

Thank you for taking the time to read this. With all due respect, if you have any questions, please feel free to call my office … .

22. Again, we must caution against excessive literalism. You are not permitted to cut off a judge's ears or other parts as a trophy.
23. You're not.
24. It also cracks 'em up pretty reliably at the annual Judicial Conference.
25. There is an old Texas story about Lyndon Johnson's early congressional campaign against an opponent who operated a large pig farming operation. Lyndon suggested to his aides that they plant the story that the pig-rancher enjoyed regular and enthusiastic carnal knowledge of his swine. When the horrified aides protested, "Lyndon, you can't call that man a pig-____er in the press," Lyndon smiled and responded, "No—but I can make him deny it."
26. Or at least tolerate. If likeability is beyond your scope, do not despair. It is not necessary to be genuinely likeable. Imagine you and the other lawyer are trying to run away from a bear. You don't need to outrun the bear—you just have to outrun the other lawyer. Same deal with likeability.
27. It's your choice. Humiliation can either occur in chambers or in open court, in front of your client, the jury, opposing counsel and those weird guys who like to hang out in the back of courtrooms for no apparent reason.
28. Or temporary insanity.