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Emily Post Goes to Court

Vincent S. Dalsimer*

LAWYERS, LIKE JUDGES, come in assorted sizes, shapes and sexes. Like judges, lawyers have varying techniques, tempos and temperaments. Still paralleling their judicial brethren, lawyers differ in mental equipment, legal knowledge and courtroom etiquette.

Neither lawyers nor judges have the ability (or even the desire) to do much, if anything, about their size or shape. Techniques, tempos and temperaments can possibly be altered or at least concealed by grim determination coupled with a stiff upper lip, but then who is dissatisfied with his own such attributes?

In this modern day a person's mental equipment is probably much more immutable than his sex. At any rate, most of us are smugly contented with our congenital status and not willing, let alone desirous, of any tampering therewith.

Most of us, lawyers and judges, have some haunting, albeit hidden, doubts concerning our legal knowledge. Fortunately, however, the Continuing Education of the Bar Program allows us to covertly learn, while we ostensibly augment, what our unappreciated professors tried to teach us years ago.

We come then to a consideration of that elusive collection of trivia designated as courtroom etiquette.

After a few years of observing attorneys from the other side, rather than the other end, of the counsel table, I have concluded that courtroom etiquette is the most rapidly declining of all of the social or professional graces. Perhaps this is because the fine points of the art *are* essentially trivia. Perhaps, on the other hand, the laudable modern trend away from the rigidity of procedure and the pre-trial sanctity of the opposing side's theory of the lawsuit has been carried to the point of dropping the facade of courtesy along with the penetration of the shield of the common counts and facts generally pleaded. Certainly for the profession to become proficient in the art of discovery, it is not prerequisite that we abandon the art of courtesy.

As alluded to above, judges like lawyers are inclined to possess individual proclivities, propensities and, indeed, eccentricities. There remains at all times, nevertheless, at least one marked distinction between the learned gentlemen at the bar and their erstwhile colleagues occupying the bench: judges are almost never called upon to please lawyers; and although too many seem not to be aware of it, it is almost never *required* of a lawyer that he by his conduct displease a judge.

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Most lawyers have at least a fair knowledge of world and local geography. Too few seem familiar with the territorial limits and limitations of the courtroom. There are lawyers still extant who are not conversant with the nature of the "well," that little piece of inviolable real estate bounded by the counsel table, the bench, the clerk's desk and the reporter's table. Pity the poor unfortunate who in the courtroom of Judge Thunderbolt blithely strolls into that hallowed ground only to be reduced in a brief few moments into a withered shell by a barrage of incisive invectives. Such a chastened young lawyer might thereafter doubt the triviality of this particular unwritten rule. Ah, but you say such tyranny should be abated. Perhaps it should. Some day, some brave (and I hope wealthy) young counsel will so advise Judge T. in open court. Meanwhile, the discreet practitioner will station himself on the lawyers' side of the counsel table, closest to the jury box if he is plaintiff, or on the other side, if for the defendant. He will never approach the witness nor the bench without first obtaining the permission of the court. He will rise when addressing, or addressed by, the court unless he is saying only a few words or is invited to be seated by the court. If addressing the jury, he will also rise, and he will refrain from joining them in the jury box. He will further resist the temptation to perform acts of gymnastics on the jury box railing.

Many of our learned brethren are courtroom prowlers. They display an inordinate compulsion to occupy every portion of the courtroom save the counsel table, and invariably wind up stationing themselves between the witness and opposing counsel with their back to the reporter, mumbling their questions.

The first-cousins to the prowlers are the table-tappers, the knuckle-crackers, and the pencil twirlers. Probably the only remedy for these latter is a goodly supply of tranquilizer pills, legally prescribed, of course.

Even the manner in which some counsel occupy their courtroom chair subjects them to the comments, restrained or otherwise, of some of the enrobed gentry. Lolling undoubtedly has its place, but just as undoubtedly the courtroom is not that place.

Some lawyers are seemingly unschooled in the manner of addressing the occupant of a judicial office. These latter persist in "Your Honor-ing" the judge in chambers or on the street and just as steadfastly calling him "Judge" in open court. Whether they are perverse or merely prone to get everything backward is not worth contemplating, but it is noteworthy that these same devotees of malapropism invariably substitute "if the court pleases" for "May it please the court"; they "direct" rather than "invite" the court's attention and they employ the pronoun "you" instead of the more polite reference to "the Court."

There is one select group of counsel who seldom address the court improperly for the sole reason that they ignore the court and direct all of their remarks to opposing counsel. Aside from the fact that such comments are usually snide, quarrelsome, or challenging, they cause some judges to feel unneeded and unappreciated. Surely the bar doesn't desire to thus wound the judiciary.

Of course, most judges prefer to be ignored rather than interrupted. As a matter of fact, some jurists have been known to go so far as to interrupt the interrupter and to point out in kindly terms that such conduct is likely to be against the pecuniary interest of the initial interrupter.

Certain counsel have a penchant for interrupting witnesses as well as opposing counsel. More than merely a breach of common courtesy, this delays the trial and complicates the task of the already heavily burdened reporter. This is not to suggest that the occasion does not arise where a witness must be interrupted because he is going into incompetent or prejudicial discourse. Such occurrences are comparatively rare and are usually as quickly recognized by the court as by counsel.

Then there is the lawyer who habitually offers comment, sage, witty or otherwise, concerning statements made by opposing counsel or the witness. I remember one attorney who had such a practice being admonished by the judge. Thereafter, he made an extremely funny remark which induced a paroxysm of laughter from the court. Brushing a tear from his cheek as he regained his composure, the judge informed the offender that he considered that to be a \$100.00 joke, but that it would cost counsel only \$50.00 on this occasion.

The subject of etiquette includes for the would-be-trial lawyer the accomplishing of the art of properly objecting to excludable evidence.

One of the first things an eager young attorney should master is the advisability of using the magic words "I object!" Often heard in the courtroom is a lawyer muttering something like "That calls for hearsay," or "That's leading," or some other such illuminating observation. At this juncture the trial judge is frequently perplexed. He is not sure whether he should admonish counsel for talking in his sleep or thank him for his editorial comment.

If you wish to object, do so, and announce your decision audibly and clearly. But be sure to also announce your grounds. Not surprisingly, unspecified grounds are not only not ruled upon but are deemed waived. No matter how you count them, there are no more than 20 or 21 possible grounds upon which you can object. That should not be hard to master for you nimble-witted bridge players. If when you rise you are not certain which grounds to use, make a general objection while you're thinking about it. Maybe your opponent will ask to be heard and thereby extend your time. Even after the judge has said "Overruled,"

you may properly say "I object on the further grounds that . . ." By the way, it is always well considered to listen to how the judge rules. After he says "Sustained," it is disconcerting to continue arguing, only to convince him to change his decision to "Overruled." Whenever the court has ruled, etiquette requires that counsel subside unless he first receives an affirmative reply to "May counsel be heard further?" If the court denies such a request, it is advisable to request the right to move to strike the answer.

Many lawyers persist in objecting to a question after the answer is in. At this point, the court may reply "There is nothing pending." The proper procedure of course is to move to strike the answer, "For the purpose of objecting to the question." Of course, if the question is not objectionable, you should move to strike the answer remembering again that you must correctly specify legal grounds.

Although this diatribe has been directed toward the bar, it is only fair to concede that the bench must bear a portion of the responsibility for any laxity in courtroom etiquette or procedure. To the point that counsel are remiss, the court should instruct or remind them accordingly, and of course courteously.

The purpose of this essay, which does not purport to be definitive, is to advocate the practice and perpetuation of these niceties of our profession because of the sincere belief that they make life more pleasant for the participants and engender more respect in the eyes of the beholders.