

On Litigation Skills

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I'm often surprised how many lawyers — even ones that aren't very good — regard themselves as finished products. Great athletes like Michael Jordan are known for working on their game; the best are ruthless at identifying, correcting and compensating for their weaknesses. Lawyers should try to do the same.

Working On Your Game

Litigators get more feedback about their work — and more opportunity to respond to that feedback — than most people. Not all criticism is constructive, but all is worth considering.

The Delphic Oracle perplexed Socrates by calling him the wisest of men. But he talked to the most famous and successful Athenians and was surprised that all of them pretended to know and understand more than they truly did. Socrates concluded that the Delphic Oracle had been praising him only for knowing what he did not know. That's a good reminder for all of us not to be too smug. We all have work to do.

Talking Too Much

My biggest weakness, like a lot of other litigators, is that I talk too much. My father used to accuse me of loving the sound of my own voice; most litigators have the same love for their own voices and want to share that love with others. But that really isn't what we are paid to do.

Litigators are supposed to influence events by persuading judges, juries and even opponents to think our way. Sometimes, that means letting other people have some airtime and showing them that you are listening and that you care about what they think. And silence is often the best way to emphasize anything. Nothing will get an inattentive judge (or anyone else) to look up when you are speaking than to stop speaking until they do.

I've had to learn a lot about the time, place and manner of speaking. Being a litigator is not an exercise in authenticity. You can't just say whatever pops into your head. I have embarrassed myself and others more times than I would like to admit by saying the wrong thing at the wrong time in the wrong place.

Like most other litigators, I also can get carried away by my own momentum. When I was a very young lawyer, a judge stopped me from beating a dead horse by telling me, "Counselor, if you will sit down, I will rule in your favor." Exercising all of the self-discipline that I could muster, I sat down without telling the judge all of the other reasons that I was right. I'm a lot older now, but it still takes conscious effort to shut up when I am winning.

Finally, it is especially dangerous to speak up only to display your intelligence or wit. We all have egos, so such displays can be counterproductive — especially in front of a judge or jury. The most effective lawyers I know are particularly good at not showing off.

My colleagues won't be surprised that I know that I talk too much. They tell me so. But they may be surprised to hear that I am actually trying to change. I still have a ways to go, but I'm not finished working on myself yet.

Timing Issues

Having confessed one of my own weaknesses, I'll switch to one of my pet peeves: lawyers with no sense of timing. Every case has a critical path. Some things, like document production, usually have to be done before others, like depositions. A good litigator will make sure that each action and decision is taken at exactly the right time, but many litigators let their own issues about timing get in the way of doing their job.

We all have seen litigators who seem to be avoiding a file or a fact as though it will go away. Papers sink to the bottom of the inbox, and projects don't get done. Then, when the pace picks up because of a motion or trial, the undone project is blocking everything. Litigators have to keep asking themselves what they are avoiding — and why — and then make sure that none of their cases fall off the critical path.

But rushing things can be bad too. Sometimes, we force decisions and actions because we or our clients want to end the anxiety that comes from uncertainty. A good litigator must have a tolerance for ambiguity and make sure that no decision is made and no action is taken too soon. It's usually best to wait as long as possible before making any particular decision so that you will have more information and time to consider it. At some point, the disadvantages of delay will outweigh the advantages, but litigators must not be misled by their own personal issues of avoidance or need for closure. Reason, not instinct, should determine the moment for pulling the trigger.

Conclusion

Confession is good for the soul, and even better for the practice. I know you're good, but I'm sure that you could be better. What do you need to work on?