

Some ideas on

**"WHAT NOT TO DO"**

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The legal duty of a lawyer to his client is clearly defined by jury instructions that would be used in a legal malpractice case. If you are unfamiliar with the content of those instructions, take a few minutes, open up your IPI Pattern Instruction book, and read the comments, notes on use, and instructions in section 105. The law in general and the instructions in particular, do not address specific duties or obligations under specific fact situations. Rather, they usually speak in generality. A lawyer is held to the duty of a reasonably careful professional in his field, a standard of care which is intended both to recognize and accommodate the necessary exercise of professional judgment.

Similarly, the rules regarding an attorney's ethical obligations to his client also accommodate the exercise of judgment. An attorney's ethical obligations virtually never obstruct the valid exercise of judgment in trial preparation or trial strategy. In general, if you don't lie, cheat, or steal, then your judgment and actions meet your ethical obligations. Obviously, one cannot withhold or destroy evidence, misrepresent the facts or the law to the Court, lie to a client, take what is not yours, or otherwise "cheat". The rules that prohibit that conduct and behavior are clear. (See Illinois Rules of Professional Conduct of 2010, Rule 1.0 - 8.5)

These two sets of rule - malpractice and ethics - give lawyers a reasonable framework to approach trial preparation. If one applies those rules to one's own practice, it is relatively easy to make a list of common mistakes to avoid. They can be summarized through some simple general rules. Don't lie, cheat, or steal. The truth should always be good enough for everyone and practice strategy or gamesmanship never justifies any alternative. The exercise of reasonable, professional judgment, supportable legal advice, and well-reasoned honest arguments are always defensible and always proper, but the failure to make them seldom is. A practitioner who makes a reasoned judgment which can be defended has met his duty. The practitioner, however, who procrastinates, who has overlooked decisions that need to be made, who makes judgments without "due diligence", who fails to prepare for contingencies, and who quite simply doesn't do the necessary work, has failed to do his job.

Another consideration a lawyer should make is to always place himself in a position where can show what he's done. Just as a lawyer should be able to justify and account for the bills he sends to his clients, he should be able to justify and account for the judgments he has made. A well-documented file clearly

articulating the activities you have engaged in, the judgments that you have made, and the advice that you offer is the best work you can do for your client and the best exhibit against any future challenge to the adequacy of your work. To do this, avoid some simple mistakes.

## **DON' T:**

**Procrastinate** - Everybody makes mistakes. If you make them early enough, you have time to recognize them and fix them.

**Get too close to, or past, a deadline** - Anyone with kids in composition class understands the reasons.

**Panic** - If you read the law, have talked to people, and didn't procrastinate, you can fix it.

**Be late** - Nothing will make a Judge, a witness, or a client more angry.

**Make or respond to disparaging remarks** - If you mud wrestle with a pig, you'll both get dirty and the pig likes it.

**Be coy** - Whether answering discovery or making a legal argument, don't try to be cute by misstating one premise or concealing another.

**Be somebody else** - Your co-workers, your clients, witnesses, Judges, and jurors expect preparation and efficiency. They don't expect Robert Redford or Sir Laurence Olivier. Real people stammer and stutter.

**Think you already know the law** - As my partner Bruce says, "Read the statute first, then think great thoughts."

**Think you already know the contract** - Insurance policies, employment handbooks, and medical records all can be helpful, harmful, or different. Have you ever read your client's UM/UIM coverage provisions?

**Be afraid to ask for help** - Your colleagues will be as willing to help you as you are to help them.

**Confer only with the experts** - The best and clearest jury trial advice sometimes comes from my wife and my friends. Sometimes the best legal analysis comes from my secretary and my paralegal.

**Rely on co-counsel** - In discovery, at a deposition, or in preparation for a motion hearing, always make sure you know what you need for your case. If co-counsel hasn't addressed it, make sure you do.

**Waste a discovery opportunity** - Remember Rule 213(g). Probe in your discovery deposition. Use them to find out if a witness can help your case in some unexpected way. Can you turn a Union electrician into your occurrence expert? Will a subsequent treating physician clear up Voykin issues or give you causal connection opinions?

**Forget about your file** - Everything that you have put in your file was put there for a reason. When preparing for a deposition or for trial, remember to read through your entire file.

**Forget where the first down marker is** - Don't run a play designed to gain 8 yards when you need 10 for the first down.

**Ignore your phone messages** - This will irritate your clients, your co-counsel, your receptionist, your secretary, your witnesses, your wife, your kids...

**Settle a case before you have authority** - Nothing will get you in hot water quicker, and there's no defense to a client who insists that you didn't have authority to resolve the case.

**Do anything important without documenting your file** - The best way to prove that you've given someone an evaluation, advised someone of a hearing or a deposition, informed them of your opinions and the legal risks that they confront, and obtained settlement authority, is to have in your file a copy of a letter you have sent.

**Forget to explain touchy areas of the law** - A letter to a client explaining a health insurer's right to subrogation repayment, the Common Fund Doctrine, the principle of comparative fault, your evaluation of a case, your authority to settle, and your accounting for costs and

settlement proceeds will help you remain strangers with your insurance adjuster and the ARDC investigator, and more importantly will inform and educate your clients.

**Ignore your mail** - Answer letters, correspondence, and e-mail. Even if your reply is to tell someone that it will take you some time to get them an answer, courtesy and good practice requires action.

**Leave your diary behind** - Nothing will make your secretary more frustrated than scheduling one thing that requires her to cancel another.

**Just put the mail in filing** - Every time something comes in it's a prompt for you to take some action on the file. If you always are either sending something out or waiting for something to come back on every file, then you can be assured you are moving the case forward.

**Keep a messy desk** - If you can lose things on your desk, then you will miss a deadline. If your counsel table in Court looks like a grade school boy's closet, you may irritate the jury.

**Forget your notebook** - We often do some of our best thinking when we're not trying. Write down ideas, tasks, or deadlines as they pop into your mind so that they don't pop right back out.

**Forget that the best answer is usually the most truthful and complete answer** - No one can criticize your discovery responses if they were truthful, complete, and accurate.

**Forget to supplement** - Every time some new information comes in, it should be reviewed and, unless privileged, should be disclosed.

**Try to coach your witnesses** - Witnesses will have a very difficult time remembering what you tell them to say. Doctors will resent it if you try to turn them into an advocate. The best witness is one who is honestly remembering what happened and honestly giving you their impressions and opinions. Coaching is much different from preparing.

**Ever stop working** - If you enjoy the practice, then it won't hurt you to think about ideas, strategies, plans, or a "to do" list while watching the game on TV or sitting on a beach with your spouse. Some of your best ideas might just be a gift.

**Forget your default position** - When in doubt in any circumstance, remember that "the truth should be good enough".

**Ever forget the rules you followed to get where you are.**

Do you remember the Scout laws? Your coaches canned speeches? Your sorority code? The beatitudes? The Elks Club rituals? Your catechism?