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Winning Through Integrity and Professionalism

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By Charles L. Baum, Laura Bonanomi and Patrick A. Gaughan
Winning Through Integrity and Professionalism

Winning isn’t about being eloquent. The eloquent talk over the heads of busy and impatient judges and juries. Winning isn’t about being logical. Logicians fail to connect with the hearts of decision makers, who seek wisdom, not geometry. Winning isn’t about good looks or looking good. Many successful lawyers would come in last in a beauty contest. Winning is, rather, about projecting sincerity without vouching for a client’s credibility or the merits of a client’s case. Winning is about delivering on promises without overpromising. Winning is about zealous representation without being a zealot.

I learned about advocacy when I no longer wanted or needed to be an advocate. I learned about advocacy when I became a judge. I discovered that winning is about the messenger, not just the message and the media.

On my first day as a judge, a lawyer representing a landlord gave an unrepresented tenant a hard time in a simple nonpayment-of-rent case. The lawyer demeaned the tenant, spoke over the tenant, and ridiculed the tenant’s defenses. The lawyer had the good argument on the facts and on the law, and the lawyer eventually won. But I wanted to rule for the tenant. I gave the tenant as much time as he needed to make the best argument he could. I was solicitous to a fault to the tenant and his narrative. The lawyer put me in a position in which ruling for his client meant ganging up on a helpless, hapless pro se. Instead of making it easy for me to rule for his client, the lawyer made it hard. The lawyer made me bend over backward to help his adversary.

Had the lawyer been civil and professional, I would’ve ruled for his client in a heartbeat — and felt good about it. By being uncivil and unprofessional, the lawyer made me feel rotten ruling for his client. By disrespecting the pro se, the lawyer disrespected the fair administration of justice — and me, personally.

What happened on my first day as judge occurs every day in every American courthouse. It occurs when lawyers are accusatory, emotional, and hostile. It occurs when lawyers pound on the table and not on the evidence. It occurs because some lawyers don’t realize that civility and professionalism, not aggression and over-lawyer ing, win cases.

Being civil and professional doesn’t mean being a cuddly lap dog or a rabid pit bull. Being civil and professional means being satisfied with the practice of law; earning money and respect in our chosen, honorable profession; and not dying young of ulcers and heart attacks. Being civil and professional means imparting trustworthiness and qualifications — or, said another way, winning through integrity.

Lawyers must master the art of persuasion. Persuasion requires professionalism and integrity, not merely good arguments. The Greek rhetoricians called it projecting ethos. Winning comes down to persuading the judge that your argument is more compelling than the other side’s. “Compelling” signals inevitability: that your argument will prevail, either because it’s correct on the law and equities or because an appellate court will reverse the judge who decided against you. Lawyers’ presentations and how they conduct themselves are crucial in persuading judges to rule for their clients.

Integrity and professionalism aren’t only about winning cases. They’re also about winning in the long run. Being seen as professionals and gaining good reputations are essential to successful lawyering.

Dealing with unprofessional lawyers is unpleasant. They’re bullies who argue not about emotional facts but simply emotionally. Lawyers should know how to disagree without being disagreeable or allowing acrimony. The court and colleagues are more likely to listen and accommodate lawyers perceived as credible and well-mannered professionals. A lawyer who fights over small, irrelevant points will lose those points anyway, and the judge will recall in the next case the aggravation the lawyer caused. To win with integrity and professionalism, lawyers must be transparent. They mustn’t mislead or use tricky arguments. They must cooperate with other lawyers, court personnel, and judges. They must require those under their supervision to behave the same way.

The way to win is to be taken seriously by opposing counsel, clients, and judges. Lawyers are taken seriously when, in addition to representing their clients professionally, vigorously, and with undivided loyalty, they also do pro bono work and are involved in...
bar-association and community projects.

Here are 15 suggestions to guide lawyers in winning with integrity and professionalism.

1. Be Civil
Lawyers who are civil comply with the profession’s accepted practices. Civility means being polite. Lawyers don’t need to forgo civility to be dogged, persistent advocates for a cause. Good lawyers don’t whine or engage in histrionics and hissy fits. On the contrary, lawyers who aggressively defend their clients’ best interests while being well-mannered and charming are likely to win points with the judge, not lose them. Lawyers who conduct themselves civilly aren’t rude. They don’t engage in reprisals. They treat people like busy professionals. They respond only when necessary, and never in kind. Professionals never use vulgar or belittling language. Courtroom antics impress and influence no one; they distract. Ill feelings between clients, particularly during litigation, shouldn’t affect lawyers in their conduct toward opposing counsel. Civility requires lawyers not to obstruct. Civility requires lawyers not to attack judges or opposing counsel personally or to make false accusations about honesty, integrity, or industry. Civility requires lawyers not to disparage their own clients — as if doing so will score points with the judge.

2. Be Honest
Honesty isn’t only the best policy; it’s the only way to win. Lawyers who cite reversed or overruled principles will lose the court’s respect. Plagiarizing — even lengthy boilerplate — is another way to be discredited. Lawyers should always cite the sources they use and use what they cite. They mustn’t pass off a dissent or a concurrence for a holding. The best lawyers don’t cheat the system or cut corners. Lawyers shouldn’t falsely hold out the possibility of settlement to adjourn discovery or delay trial. They’re prohibited from helping a client engage in unlawful or fraudulent conduct. Lawyers should never try to hide. They win by stating the facts accurately and then by having good explanations and evidence to prove their conclusions.

3. Be Fair
Know the rules: Respect them, and play by them. A game can be won only if the winner plays by the rules. The practice of law is no different. Lawyers must use tactics consistent with these rules.

4. Be Courteous
Professionals know how best to represent their client within these boundaries of conduct. They respect precedent and follow court rules. They don’t cheat, exaggerate, fudge, or overstate — with writing style or with fact or law. They serve documents fairly; they don’t take advantage of the opposing counsel’s absence from their office or serve purposely to inconvenience their adversary. Nor should lawyers submit papers to the court without timely giving copies to opposing counsel. Professionals know that if they act fairly, opposing counsel and judges are likely to respond the same way. Most courts have rules on how legal documents should be drafted and what they must include. Narrowing the margins or changing the font of the brief is a cheap and obvious way to meet the page limit or word count. Professionals comply with technical rules, but they don’t complain when opposing counsel violates some hyper-technical rule that a court has the discretion to ignore and will ignore.

5. Be Respectful
Respect and you shall be respected. The best lawyers don’t demand respect. They earn it by continuously showing consideration for their colleagues and clients. They’re never rude. Engaging in irrelevant or ill-founded conduct exemplifies a lack of respect. Lawyers shouldn’t tell judges that their ingenuous adversaries egregiously mischaracterized the evidence. Instead of offering negative opinions, they should offer the grounds for their conclusions. Nor do good lawyers gossip about their colleagues’ personal and professional lives.

6. Be Credible
Credibility is hard to earn but easy to lose. To be considered credible, a lawyer must be worthy of confidence. The best lawyers never wing it; they’re prepared. To avoid under-preparation, the best lawyers do their homework and organize. Poor research wastes the court’s time and harms the client. Failing to find controlling or persuasive cases and statutes roughly on point reflects poorly on the lawyer’s skill as an advocate and jeopardizes the client’s claims. In addition to the ethical requirements that lawyers cite adverse binding caselaw precedent and statutory authority, citing adverse authority demonstrates that the lawyer is reasonable and honest. It also
offers an opportunity to explain why the authority isn’t binding or why the judge should overrule it. A thorough review of the record, accompanied by accurate and precise references to the record, adds credibility to the client’s claims. It shows that thought went into the lawyer’s work. Going outside the record is risky; doubt will fall upon the lawyer who gets caught. Professionals present the other side’s argument neutrally and then contradict it. Using this technique suggests that the lawyer is honest, but really it sets up a straw man for the lawyer to contradict the other side’s claims. Being candid with the court about facts adverse to the client’s position also gives credibility to the lawyer’s arguments. Making unverified statements might come easily, and often they go unchallenged, but bluffs when called lead to a loss of credibility.

7. Be Consistent
Consistency is key. Being consistent means always acting with integrity, not only when helpful. Consistency demonstrates that lawyers are genuine and not deceitful. Consistent lawyers are interested in improving their skills. As time permits, they take continuing legal education courses. Lawyers’ reputations are linked to the consistency of their actions. It takes one negative to taint the positive. Judges are observers; they’ll notice whether lawyers act professionally only when it helps them, and judges will be less likely to accommodate them.

8. Be Reasonable
The best lawyers use good judgment and common sense. Lawyers don’t attach unfair or extraneous conditions to an opponent’s request for an otherwise-legitimate and appropriate extension of time. They don’t prolong arguments or make motions designed to harass. They avoid unnecessary motions or judicial intervention. They try to negotiate in good faith and reach an agreement with the other party when possible and when it’s in their client’s interest to do so. They allow time to resolve disputes or disagreements and impose meaningful deadlines in light of the nature and status of the case. Negotiating reasonably can lead to an agreement that satisfies both sides — an outcome that might elude the parties if the judge decides the matter. Professionals aren’t pushovers; they stand their ground on large points but they know when to concede small points. Conceding when appropriate allows lawyers to concentrate their efforts on important arguments while appearing reasonable and fair.

9. Be Clear and Concise
Being clear and concise in writing and orally enhances the odds of getting the message across. Vague writing affects lawyers’ effectiveness and credibility. The best lawyers limit the number of arguments to their strongest: the ones most likely to succeed. But they address their weakest, most vulnerable contentions. Doing so ensures that they’re prepared to answer questions from the judge about those weak arguments and demonstrates their honesty. More important, this allows them to contradict the other side’s arguments: They know where the opposing counsel’s strong points lie. Professionals avoid distractions by keeping it simple. They limit adjectives. They avoid foreign or legalistic language. Written and oral persuasion are linked to clarity and concision. The best lawyers write clear, simple prose in plain English. They avoid confounding their readers with bureaucratic negatives (“this argument is not without support in the cases” rather than “the cases support this argument”) and nominalizations (“it is a violation of” rather than “it violates”). They also avoid the double passive, which hides the actor entirely. (Think: “Mistakes were made” rather than “[I made mistakes.]”) Professionals don’t obscure the truth; they explain why their argument is the best. They don’t write in a conclusory way but in a convincing manner offering details, not opinions. That way they bring their readers to the edge of the cliff without making their readers resist and push back. They don’t vouch for their clients’ credibility by using statements like “I believe,” “I feel,” or “I think”; they know that judges want to hear their arguments, not their beliefs. They don’t assume that the reader agrees with their point; they make sure that their argument is stated clearly and is easy to understand. Ensuring that arguments are clear and concise diminishes the chances that the court will err.

10. Be Accurate and Precise
The best lawyers are specific. Accuracy is crucial to maintaining credibility. Lawyers should avoid biased modifiers. Lawyers must quote and cite accurately and use quotation marks when they quote. Lawyers must use ellipses to note omissions and put alterations in brackets. They should also use pinpoint (jump) citations. Doing so demonstrates not only their honesty but also helps judges find what they’re referring to. They don’t use snippets out of context. When using citations, they should limit themselves to the ones that add weight to an argument rather than those that add bulk and impress only non-lawyers. Legal writing requires precision in citation to support factual and legal propositions in the form of logical argument.

11. Understate; Never Overstate
Less is more. Overstatement is unethical while quiet understatement persuades. Lawyers who are excessive about factual statements make their audience skeptical of everything. To avoid this problem, lawyers should not use “obviously” or “certainly” and shouldn’t emphasize by using bold, underlined, or italicized fonts and capitals. Nor should lawyers use qualifiers like “generally” or “usually” to avoid precision. By understating, lawyers naturally come upon the essence of powerful writing: They emphasize content, not style. While arguing to judges, lawyers should speak about passionate subjects without speaking passionately. Passionate performances might convince juries but not judges. This doesn’t mean that professionals should be boring. To the contrary, they should vary their tone and body language to make their arguments compelling and interesting. But they should avoid being overly expressive and distract-
tracts from the arguments and demonstrates that the lawyer doesn’t consider the proceeding important. Presentation extends beyond dress. During a trial, lawyers must be prepared; they must have a theme and a plan. They should present their arguments to persuade judges, not their clients. Their clients will want them to throw in the kitchen sink.

Presentation in writing is also essential. Judges won’t decipher or search for arguments. To effect a professional presentation, good lawyers revise written documents numerous times, verifying their arguments, citations, grammar, quotations, and spelling.

15. Accountability
The best lawyers don’t blame. Everyone loses cases. Good lawyers accept responsibility for their actions. That establishes honesty and humility. Accountability is an important duty toward clients. Lawyers must explain what happened in their case and why. Lawyers must return telephone calls and correspondence quickly. After a trial, professionals recognize where they erred and what they need to improve. Recognizing the areas needing perfecting demonstrates humility and taking work seriously. Accountability means not overpromising. When promising something to opposing counsel or judges, professionals will always fulfill their commitments.

The legal profession is an honorable profession. Courtesy and civility should be observed as a matter of course. Integrity and professionalism benefit judges, clients, opposing counsel, court personnel, and, most important, the public. Even more, integrity and professionalism accomplish the lawyers’ objective: winning.

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