Legal Summit

HELPING YOU REACH THE PEAK OF YOUR PRACTICE

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ASSIGNMENT: YOUR REPUTATION

by
John Day

In Part 1 of this multi-part series, we discussed the characteristics and importance of a good reputation. In Part 2, we discussed how periodic self-evaluation will help one to establish the foundation of a good reputation. Today, we begin to address some concrete steps to build and preserve your reputation.

Let's begin with **honesty**. It's simple, really: people like people who are honest, and do not like people who are dishonest. All other things being equal, honest people will have a better reputation than dishonest people.

So, how do you earn a reputation for being honest? Largely, by avoiding a reputation for being dishonest. Sound crazy? Not to me. I think most lawyers share the same view I do – most lawyers are assumed to be honest in their professional dealings in the absence of experience or information to the contrary. Thus, the mere fact that you passed the Bar will lead lawyers and judges to assume you are an honest person, and that you understand and will carry out your professional obligations.

So, how do lawyers get a reputation for being dishonest? By being caught in flat-out lies or being careless in their representations to one another or to the court.

In my experience, lawyers who routinely, intentionally lie are rare. But there are in fact lawyers who, it would appear, would rather climb a tree and tell a lie than stand on the ground and tell the truth. These lawyers seem to share a common personality trait – they assume every other lawyer is a liar. This may be their experience (but I doubt it). I think it more likely they hold this view to attempt to rationalize their own repetitive, deceptive behavior.

IN THIS EDITION:

Most lawyers branded as "dishonest" are lawyers careless in their representations to one another or to the court. These errors, even if innocent, can get one labeled as dishonest if they occur often enough.

For example, when you cite a decision in support of a legal argument, you are representing (a) the case stands for the stated proposition; and (b) the decision is still good law that is on point. Some lawyers make the mistake of assuming that judges and opposing lawyers don't read the law cited in briefs, and thus will take unfair liberties when citing case law. But, if your judge or adversary finds an error in your representation, you will be labeled as careless at best and dishonest at worst. Your error will more likely be viewed as careless if you have already established a reputation for honesty generally and for citing relevant case authority in particular. Your error will more likely be viewed as deliberate dishonesty if (a) you have done the same thing before in front of the same judge or opposing counsel; (b) if you do not readily acknowledge and apologize for your error when it is exposed; or (c) you have a reputation for carelessness or dishonesty. A reputation for

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carelessness increases the likelihood that subsequent carelessness will give rise to a reputation for dishonesty because inevitably, some will conclude that repeated errors cannot or should not be explained as carelessness.

You may be thinking, "Day, you have set an impossible standard. You're saying I can never make a mistake in citing a decision or a certain proposition of law, or I risk being labeled as dishonest. That's ridiculous – I'm human." That's not at all what I'm saying. People make mistakes. But if you consistently make similar mistakes, over time your carelessness will be viewed as crossing the line to intent. Every careless mistake you make increases the likelihood that you will be branded as dishonest, and your reputation will develop from there. It is reasonable to assume, especially in an adversary system, that some will always view a careless error as an intentional one. And it is a certainty that repeated, similar errors will be more likely viewed as acts of dishonesty. It may be unfair of your opponent or the judge to view your careless error as an intentional one, but remember that reputations are created in part by the perceptions of others about your actions (or inactions). Being viewed as a sloppy lawyer is bad enough, but being viewed as a dishonest lawyer will have an even greater negative impact on your career.

One can also get into trouble in oral arguments by misstatements of fact. The failure to know the facts of your case can give rise to misstatements at a hearing or in a brief, which demonstrates you are at best sloppy, and at worst, a liar.

How do you avoid these types of errors? Assume that your opponent and the judge will read every word of the brief and will check the accuracy of each factual and legal representation you make. Be prepared to demonstrate and defend the accuracy of each representation you make. Make sure that each factual representation you make based on deposition testimony has not been taken out of context. When citing legal authority, do not cite from a headnote, but read the opinion. Make sure the decision you're citing has not been over-ruled.

Avoid such errors at oral arguments by being prepared. Do not just be prepared to argue in support of your motion. Be prepared to argue questions of fact (and law) that may be raised by your opponent or the judge. And, if asked a question about a matter of fact or law, it is far better to say, "I am sorry but I do not know" than it is to speculate about the appropriate response.

You can also hurt your reputation for honesty in your dealings with other lawyers outside of the courtroom. Every day, lawyers exchange information with one another about a host of matters, and your representations should be true.

One way to avoid innocent misunderstandings of conversations with other lawyers is to document those conversations, either in your own file or, if appropriate, by follow-up email or letter to opposing counsel. Your confirming email should reflect your best effort to memorialize what was discussed in the interaction, and if your opponent has a different recollection, you will at least identify issues early and decrease the risk that you (a) will be labeled as dishonest or (b) have to argue that your opponent does not have an accurate memory of the conservation.

And, surprise, surprise, when you do make an error – I said *when* and not *if* – own up to it promptly and apologize. We all make mistakes. Most lawyers (and judges) understand that not every misstatement is an intentional one, and will be less likely to label you as dishonest (or careless) if you acknowledge the error and are appropriately contrite about it.

John Day is the founder and owner of the Law Offices of John Day, P.C. He is a Fellow of the American College of Trial Lawyers. He has authored four books, over fifty articles and given more than 300 speeches on legal topics. He represents plaintiffs in injury and wrongful death cases, and also accepts commercial litigation matters.

KEEPING UP WITH ERRORS
AT TRIAL

by
Liz Sitgreaves

Most lawyers in the midst of trial are not focused on the possibility of an appeal. Instead, lawyers are focused on the end result of the that trial, whether it is a monetary verdict for your client, or a contentious custody battle. However, in most cases, only one party wins that trial and the other party may decide to pursue an appeal. Much of my appellate experience comes from handling appeals in which I was not the attorney before the trial court. Inevitably, once I began reviewing the trial transcript or record, I determined that the trial had not played out identically to how it was described to me by either the referring trial level attorney or the client. This makes sense, your memory of an objection or the trial court's ruling may contain the slight tint of your feelings on that ruling or objection. So, how do you help yourself during the trial to prepare yourself for an appeal and in certain cases, the motion for new trial that must come first.

As recommended by John Day, dedicate one section of your trial notebook as an Error Section. This section is where you can write down a note when you believe the trial judge or your adverse counsel makes a reversible error. This section will assist you later in drafting that motion for new trial or preparing your brief.

What should the note in your Error Section contain? First, include the date and time. This is especially for lengthy trials where the trial transcript will be cumbersome. Of course, you should also include a note about the error itself. Was it evidence introduced in violation of a motion *in limine*?

This checklist can also make sure that you are appropriately preserving the issue of a possible reversible error for your appeal. For example, was there an evidentiary ruling that you believe was an abuse of discretion? Jotting this note down in your Error Section also hopefully reminds you or your co-counsel that an offer of proof may be needed (if the evidentiary ruling is one in which your evidence may have been improperly excluded).

Keeping a quick list of errors in a dedicated section of your trial notebook can also help you focus on the trial itself. Writing copious notes during the trial may shift your focus away from the actual events in the courtroom and can prove distracting to the judge or jury.

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"There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final."

- Robert H. Jackson,
Brown v. Allen, 344 U.S. 443, 540 (1953) (concurring).

Correction: The paragraph in "Of Note: Some Recent Statutory Changes" from our last newsletter should have read as follows:

2018 Public Chapter 965 as enacted with an effective date of May 15, 2018 states that an employer shall not require an employee or a prospective employee to execute or renew a non-disclosure agreement with respect to sexual harassment in the workplace as a condition of employment. (Note that the official certification of the final, official Tennessee Code has not been made available, though Westlaw currently cites to an unofficial classification of Tenn. Code Ann. 50-1-108).

FACEBOOK, TWITTER, AND INSTAGRAM
OH MY...OR REALLY, OH DEAR...

by
Liz Sitgreaves

After recently attending two separate CLEs that addressed the use of clients' social media accounts in litigation, I thought a timely article would be some tips on discussing social media with your clients.

- At the outset, remind your client not to erase or destroy anything that they have created, including posts on social media sites. If your client needs examples, remind them that for this purpose, posts, comments, messages, and tweets are all created equally.

- If you are served with relevant discovery questions, make sure to ask your client for a complete list of their social media accounts and profile names. Don't just assume that they are only on Facebook, or do not assume that just because they do not have a Facebook account, that they do not have another social media account that might be responsive to the discovery question.

- Ask your client not to participate in blogs, chat rooms, or probably more common these days, Facebook groups. This groups are often made private but just because you may not be able to see it does not mean that your client is not sharing to their heart's content.

- Going forward, tell your client not to put any information about their case on social media. Some clients love to "check-in" places, perhaps it would be best if they did not check in at certain locations after sustaining an injury or in the middle of their divorce.

- Sometimes a picture is the same, or worse, than words. Some clients may love to post memes or gifs that poke fun at former significant others even if not named. Remind them that the other party's counsel can have a great time cross-examining them with that post.

- Ask your client to be totally honest with you. A Facebook post or a Match.com account is not something that you want to learn about in the middle of a deposition.

While it is impossible to prevent your client's from ever posting on social media, a frank conversation early on in your representation can be helpful to quash future posts and identify any posts that may need to be preserved.

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