

FEBRUARY 2019

The Things They Don't Teach You in Law School



Just over a century ago the study of law migrated from young lawyers apprenticing at the feet of their wise elders to academic study in a three-year law school curriculum. See S. Kotcher, *Legal Training in the United States: A Brief History*, Winter 2009 *Wisconsin International Law Journal* 335.¹ And just maybe we left something behind: the torch of lawyerly wisdom passing from generation to generation.

Now entering my fortieth year of practice, I am keenly struck by the large number of things they don't teach in law school. You will forgive me if, based on these forty years of litigation and trials, combined with simultaneously teaching civil procedure and writing practice guides, I choose here to share my 25 maxims for a successful and fulfilling legal career.

It Starts with The Client—Always

As lawyers we must never forget that we are in a service profession based on guiding, counseling and representing our clients. My first five “wise old lawyer” maxims appropriately are directed towards the care and feeding of clients.

1. In the first client interview always ask, “Tell me the worst fact that if I learn it 6 months from now I'll be unhappy I didn't know it”.
2. Also, in the initial client interview always say and mean “We will take care of you.”
3. When interviewing clients trust but verify.
4. When selecting clients (and getting hired) remember the maxim: “Don't borrow money from someone who cried at the end of the movie *Scarface*”.
5. When evaluating clients beware large red flags: (i) fired prior lawyers, (ii) has money to pay you but it is currently in escrow, and (iii) it's everyone else's fault.

Talking About Money Sensibly

While lawyering is also a business, it is interesting that in law

school virtually nobody talks about money or fee agreements. My next three maxims highlight ways to have the money issues not interfere with good client relations.

6. Write your fee agreements clearly so that a 10-year-old could understand them.
7. Never let clients get behind in payments—arrange generous retainers, insist on full and timely payment of the first bills and engage in realistic contingency fee analyses.
8. Be generous with pro bono work (but when you don't get paid have it be by choice).

Getting Off to a Good Start

It is important to successfully transform the client interview into the initial phases of the lawsuit. Getting started could mean telling a story in pleadings or settling the case at the outset. Here are my next four maxims.

9. Jurisdiction first! Figure out subject matter and personal jurisdiction at the outset to avoid big wastes of time and money later.
10. Tell a story with your pleadings but don't outrun your factual and legal narrative.
11. Motions to dismiss can be playpens for infant lawyers—dismiss-proof your complaints and file motions to dismiss only if there's a reasonable chance you'll win.
12. Think fair settlement early because there will always be other cases and clients.

Figure It Out with Discovery

Discovery in lawsuits is frankly the most important and sometimes the most tedious part of the case. Maybe it bores law professors but it is the lifeblood of figuring out the case so it can be settled or tried. Here are the next five maxims.

13. Utilize GPS-like tools to guide your litigation, especially, may I say, The Wagstaffe Group's Federal Practice Guide.
14. Don't be caught with your "new case or rule" pants down—follow Current Awareness in The Wagstaffe Group Practice Guide.
15. Plan your discovery with an eye toward economy, future motions and trial—don't be like an ant aimlessly walking on the kitchen floor.
16. Get and master the documents—all of them--from your client in advance so you're ahead of the other side at the outset.
17. Use written discovery (e.g. interrogatories) sparingly and only when the answers will absolutely help you (e.g. for details not for contentions).

Essential to Survival is Getting Along

Law school is filled with fighting and war metaphors for litigation (e.g. litigation battles). Perhaps ironically in real life it is just the opposite because getting along is the key to survival. Here are four maxims for civility.

18. Particularly with discovery (and in settlement discussions) apply the golden rule with opposing counsel—meaning keep a civil tongue in your head.
19. Interact with the opposing counsel like raising a teenager: listen through tone.
20. When speaking with opposing counsel or participating in mediation, listen! You are given two ears and one mouth for the right ratio.
21. When approaching settlement, pay attention to both sides' interests and realistically assess risks and benefits.

Cases Rarely Go to Trial—Depositions Are Where It's At

My brother the district attorney teases me that I am not a trial lawyer but a "litigator". The statistics generally prove him

right. Thus, another thing they don't teach you in law school is how to handle depositions. Here are some maxims for success.

22. Spend more time preparing witnesses for deposition than the deposition will last itself.
23. In preparing deposition witnesses, hold a pen and ask: "Do you know what this is?" When they say a pen, inform them of the lesson of only answering the question asked.
24. Make sure the witness in the deposition knows you don't win cases at that point, only lose them.
25. In defending witnesses, you are a potted plant except for privilege, harassment prevention and enforcing court-orders limiting discovery.

Some Bonus Maxims in Case You Do Go to Trial

In these last 40 years, I have proved my brother slightly wrong as I have tried many, many jury and court trials (to say nothing of lengthy arbitrations). Here are some bonus maxims in case you get that far.

Extra Credit 1: Twelve jurors rarely miss anything: so, no sleight of hand and shine your shoes.

Extra Credit 2: The trial system almost always works: justice is done even if you must appeal immediately.

The most important part of practicing law is to replace the fear with fun. I often share the story of the great Irish poet Seamus Heaney's passing away some years ago in Ireland. He was in the hospital in what proved to be his deathbed. While awaiting an immediate surgery that was not to be and almost certainly knowing that he was going to die, Heaney texted his wife moments before passing. He posted the phrase "Noli Timere". In that most graceful way he reminded his wife, as he reminds all young and old lawyers, be not afraid.



Authority you can trust, James M. Wagstaffe

Renowned author James M. Wagstaffe is a preeminent litigator, law professor and expert on pretrial federal civil procedure. He has authored and co-authored a number of publications, including *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, which includes embedded videos directly within the content on Lexis Advance. As one of the nation's top authorities on federal civil procedure, Jim has been responsible for the development and delivery of federal law, and regularly educates federal judges and their respective clerk staffs. Jim also currently serves as the Chair of the Federal Judicial Center Foundation Board—a position appointed by the Chief Justice of the United States Supreme Court.