



# How not to be an “asshat” in the courtroom

*Tips to assist you in making an effective, professional courtroom appearance.*

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Effective courtroom appearances, defined as getting what you want from the judge, require more than walking into court and regurgitating that which was already said in your papers. Appearing and arguing in court is similar to putting on a performance at the theater. You are the actor and the judge, clerk, and opposing counsel are the audience. Of course since the judge will be ruling on your matter, he or she is the theater critic whom you must sufficiently impress for him or her to rule in your favor (and in keeping with my theater analogy, to garner a positive review.)

This article will tell you some of what you need to know to make an effective and professional courtroom appearance. If you practice what is preached in here, I can't guarantee that you will convince the judge always to rule in your favor. But if you lose, it will *not* be because you were perceived by the court to be an “asshat.”<sup>1</sup> In other words, if your issue is a close call, you will have lost on the merits and not because the judge panned your courtroom performance.

## **Courtroom audience/participants**

When talking about courtroom methods, style, tips and tricks, you should first become familiar with courtroom participants. Most articles discussing court appearances focus on how to interact with the judge and neglect to go over

other details. However, understanding courtroom logistics and the roles of others in the court is critical to putting on a good performance in the courtroom.

- **The judge** – The judge will be discussed later in this article.
- **Judge's clerk** – Other than the judge, *this is the most important person in the courtroom.* The judge's clerk performs many functions before, during and after a court session. To name a few, the clerk fields phone calls, controls access to the judge, accepts and files documents and maintains the court's calendar.

When talking to the clerk on the phone, by e-mail, or in person, always be courteous, respectful, and cordial. Once obtained, make a note in the file on the clerk's first and last name. In future calls, it's acceptable to address the clerk by his or her first name, for example: “Hello Irene, this is attorney Mortimer on the City of San Francisco case. I was wondering if the judge might have time next week to hear an *ex parte* application we intend to file?”

If you want the clerk to exact revenge in the various ways he or she can, then talk down to the clerk, be snide, abrupt or condescending. Treat the judge's clerk like dirt and that clerk can make life really difficult for you. Anger the clerk and he or she might not let you

have access to the judge. Be rude and the clerk might not let you slide on an otherwise late filing. Be a jerk and the clerk might tell you that your requested hearing date is not available although it might be.

- **Court reporter** – This is the person who is taking everything down that is said by the judge and counsel. There is no interaction between you and the reporter in open court, albeit he or she might ask you for the spelling on a name or admonish you to slow down when talking.

Some tips on keeping the reporter happy:

- *Don't talk over each other.* This means don't talk at the same time that the judge or opposing counsel are talking.
- *Don't talk too fast.* While court reporters are usually the best of all reporters, they don't like it when people talk so fast that it is hard for them to keep up.
- **Law clerks** – I mention these people simply because they might appear in court. I don't want you wondering, “Who the hell are these people?”

In federal court, oftentimes the judge's clerks sit in the jury box and observe the proceedings of that day. While they do not interact with the court participants, they are important for one reason: most likely they have provided the legal research and tentative decision on your motion or proceeding. Judges can choose to accept the law clerk's decisions as their own, require further research, ask additional questions of them, etc.

<sup>1</sup> “Asshat” is from the slang expression “Having one's head up one's ass,” thus, wearing the ass as a hat. The term is extended to people who are clueless or bumbling, who don't understand what is going on.



• **Bailiff** – Usually a peace officer (sheriff in state courts, U. S. Marshall in federal courts.) Tick off the bailiff and he or she can make your visit inconvenient. They can grimace at you, not grant you courtesies or order you about the courtroom, telling you not to sit there, move over here, etc.

• **The judge** – A discussion about how to interact with the judge (or “the court”) would not be complete without first knowing how judges work, in other words, how they go about their daily business.

In most towns, counties, state and federal courts, *judges are extremely over-worked*. Their dockets are filled with insignificant cases, important high-stakes cases, criminal cases and hundreds of other daily tasks. An example of how overworked: in 2005, I had one federal judge tell us that he was limiting the number of days he was giving the parties to try the case because “we have over 500 cases on the docket.”

Judges have at least one law clerk to assist with research, writing decisions and even making decisions for the judge to adopt. Bigger courts, such as busy federal districts, provide each judge a minimum of three clerks, and some up to five. Regardless of this help, judges are still extremely busy with court and other functions.

### The bottom line

The reason I mention all this is because you must realize:

• Yours is not the only case the court is dealing with, so don’t expect the court to “get into” your case, for the judge to understand all its nuances and subtleties, nor to give your case special attention. *Unless your case is in the headlines, assume your matter is “one more hassle the court has to deal with.”*

• In all likelihood the judge does not have the time to read a significant portion of your pleadings. Judges usually have their law clerks do that. Some judges even admit that to cut to the

chase they skim the papers the day of the hearing.

• Because the courts are busy and over-worked, it pays off to make all your pleadings brief and to the point. This will help the judge in his or her work and also may be the factor that causes a ruling in your favor. If you *get right to the point in your papers, tell the court exactly what you want and provide the authority for a decision in your favor*, it’s all the more likely you will win, assuming there is merit to your position.

• Addressing the court correctly. The easiest way to tick off a judge is to call him or her names. Of course, you would never do that, right? Well, every time you address the court by calling him or her “judge,” you are calling the judge names and disrespecting the court. This is because in the courtroom you *never* address the court as “judge.” While you might see some idiots and old timers refer to the court as “judge,” that does not make their conduct proper.

Whenever addressing the court, the proper term is “Your Honor.” There are no exceptions although you may also use “the Court” in certain circumstances. Examples: *“Your Honor (if in writing, the title is in caps) I would like to request . . . ,” “Yes, that is how I recall the event, Your Honor.” “Your Honor, may I approach the bench?” “If the Court could provide me additional time to research . . . ,” “I was hoping the Court might extend the deadline to respond . . . ”*

Generally, each time you address the court with a request or when answering questions you start or end with a “Your Honor” in the sentence. For example, when answering a question: *“My recall of that case, Your Honor, was that the defendant waived the attorney/client privilege.”* Or, *“That would be the same as I remember, Your Honor,”* or as happened in one of my trials: *“Your Honor, I need to take a restroom break. My apologies to the Court, Your Honor.”* (Yes, I had two “Your Honors” and one “The Court” in what was really a statement that I am running to the restroom and not requesting a break.)

• **Know when to shut up.** Lawyers often do not know when to shut up when talking with the judge. Generally:

• If you are simply repeating yourself, **SHUT UP**.

• If you have the judge on your side and ruling in your favor, **SHUT UP**. If the judge says, “I have ruled,” or “That’s all, counselors,” **SHUT UP**.

• If the judge cuts you off mid sentence and asks a different question or moves on to something else, **SHUT UP** and move on to talking about what the judge wants to talk about.

• If the judge criticizes your argument or says, “I looked at that, there was no merit to the argument. Move on to your next point.” **SHUT UP** and move on to your next point.

• **Be organized.** Nothing will lead toward impending doom faster than being disorganized when appearing before the court. The easiest way to be logistically organized is to arrange all papers *before* leaving the office. When setting up on counsel table, you then lay out the materials for easy reference during your presentation.

• **Observe body language.** It is essential for you to observe, interpret and react to a judge’s signals that he or she is sending while you and opposing counsel are addressing the court. One could write a book on interpreting “judicial body language.” Due to space constraints, I can only give you a few tips on what to look for and what to do when seeing negative body language coming your way.

• *Does the judge appear angry or upset?*

Hopefully it’s not something you did.

But you take judges in the mood you find them. If the judge appears upset for reasons other than because of you, you still need to work around the situation. Be especially vigilant to not do anything that might upset the judge further. Moreover, be brief and to the point. Basically get in and get out as fast as you can.

• *Does the judge appear unprepared and unaware of what you said in your papers?*

If so, don’t say, “I said that in my pa-



pers, Your Honor.” Do not embarrass the judge by implying the judge did not read your papers. If you see the judge stumbling, guide him or her through your papers. Highlight your main points so the judge can see there is merit to your position and that ruling in your favor is proper.

- *Does the judge appear disinterested in your argument because he or she has made a decision?* For example, while making what you perceive is a brilliant argument the judge moves your file to what you have observed is the “matter concluded” stack or the judge is distracted and appears to have moved on to something else other than your case. Upon detecting such signals, this is the time to pull out all the stops to get the judge’s attention so he or she will reconsider a ruling not in your favor.

### **Bonus tips on interacting with the judge:**

- **Listen to every word!** A common lawyer gaffe is failing to listen to what the judge is saying and failing to answer the judge’s questions. Near as I can tell, this is because lawyers go into court with a prepared speech, typically an echo of what they said in their papers. These lawyers are unprepared to deviate from their prepared scripts, so it throws them off when the judge asks questions beyond what the lawyer has rehearsed or memorized.

While in court *always* listen to what the judge is telling or asking you. Pay attention to buzz words that might hint to what the judge is thinking. For example:

“Counselor, I am having trouble with that case you cited as authority because . . .” (This should tell you that the court does not agree with the case you provided in support of a point, the court may not be considering it and you better address that by, for example, discussing

the case or coming up with other cases to support your argument); or

“I saw that mentioned in your argument but did not see it supported by the declaration the witness submitted.” (This would be code for saying you did not provide admissible *evidence* to support a point made.)

“Mr. Mortimer, I don’t think that is the issue important to my making a decision . . .” (This comment by the court tells you that you need to convince the court otherwise or shift gears to talking about a different issue.)

- **Never lie to a judge!** Many lawyers lie to the court. They mislead the court on what an appellate case says, submit papers designed to mislead or confuse the court or tell lies in open court, to the judge’s face. Many lawyers justify their untruthfulness because “everyone does it,” or they are only telling “white lies.”

If you are new to the profession, don’t lie. If you have been telling lies for a long time, but have not been caught, *STOP*. Be assured that at some point you will get caught, whether in your first year of practice or as a 30-year veteran. It will happen, the getting caught part. The choice is yours.

- **Admit fault or ignorance.** If the judge says that something is your fault, accept blame and move on. Don’t argue with the judge nor try to excuse your behavior. Don’t try to blame others. Accept responsibility, fall on the sword, and move on. Oh, and *never* blame the secretary, paralegal, messenger, etc. Just like the captain of a ship, you are the attorney and have the ultimate responsibility. Judges dislike it when attorneys blame staff for their mistakes.

If a judge asks a question and you don’t know the answer, admit your lack of knowledge and request additional time to find the answer. A judge will think more of you for admitting ignorance rather than a feeble attempt to

cobble together a dumbass response. How do you ask for more time? Here’s an example:

The Court: *Mr. Mortimer, how does the IBM v. Widget Business Machines case square with your point about . . . ?*

Attorney Mortimer: *I apologize, Your Honor, I am unaware of that case. However, before the Court ruling on the matter I would appreciate the opportunity to review that case and provide additional briefing and to address the Court’s query.*

### **Conclusion**

You would be correct in concluding that a lot goes into avoiding looking like an asshat, moron or newbie when appearing before a judge in his or her domain, the courtroom. If you are overwhelmed by all of this, the best thing for you to overcome your fear is to visit your local courthouse law and motion department.

Learn by observing, especially if you don’t appear in court all that often. You can learn a lot by watching courtroom participants, especially when you are playing Timmy Tourist and not on the hot seat in your own cases. An especially nifty trick is to visit the judge’s courtroom in front of whom you will be appearing. You can learn all kinds of things by simply watching a morning of law and motion proceedings.

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