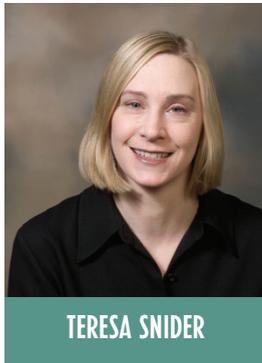


Knowing The Rules

Do you know the rules? By “rules” in this question I mean not just the applicable statutes, regulations, case law or procedural rules that govern the issues you face, but also the practical rules imposed by your clients or the circumstances. The



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problem is that most lawyers take for granted that they know the rules, either because they have practiced for a number of years or because they have confronted similar issues at some point in the past. This assumption can lead to problems for both lawyers and their clients. To avoid this complacency, you might consider reviewing The Rules listed below and

adapting them to your own practice. Although The Rules were prepared for litigators, many if not all of The Rules apply equally to transactional lawyers. And, certainly, corporate counsel can use The Rules within their job environment, as well as to assess outside counsel’s performance.

RULE 1: The FIRST RULE of practice is “Read the Rules.” This is not a reference to THE RULES (although they must certainly be mastered), but rather to the applicable procedural rules. This is such an obvious and fundamental RULE that that we are constantly surprised at how frequently it is ignored. Lawyers initiate actions, file motions, and show up in court or in an alternative dispute resolution forum without having paid the slightest attention to the applicable procedural rules. The failure to follow this FIRST RULE inevitably leads to chaos, consternation, frustration, failure, and, in extreme cases, to famine, pestilence, war, and death.

RULE 2: The SECOND RULE of practice is “Investigate the Facts.” Like RULE 1, the importance of this RULE ought to be self-evident. However, lawyers frequently put off investigating the facts until after they have initiated or responded to an action. Also, lawyers

too frequently accept as the facts those statements of “fact” delivered by their clients. What this RULE requires is that the lawyer undertake a careful, independent investigation of the facts before any action is taken so that the action is based on a sound understanding of what has actually occurred.

RULE 3: The THIRD RULE of practice is “Understand the Law.” This means that before any serious action is undertaken on behalf of a client the lawyer must have more than a fundamental understanding of the law and of how the law relates to the facts as they are understood. In every area and application, the law exists as a fundamental proposition, but with exceptions, and exceptions to exceptions. A lawyer who tries to get by in reliance on the fundamental proposition is doomed. This RULE, like RULE 2 above, needs to be followed even in cases where clients cannot afford or are reluctant to pay for lawyers to carefully research the issues. In this circumstance, the lawyer must either undertake the necessary investigation without the hope of immediate payment or forego undertaking the assignment from the client. There is no excuse for initiating an action or responding to one without an understanding of both the facts and the applicable law.

RULE 4: The FOURTH RULE of practice is “Understand that the Facts Change.” This means that the investigation that you undertook initially is not the final word. It is inevitable that new facts come to light in the course of litigation, and that facts you initially thought were unimportant turn out to be fundamental. Be sensitive to the evolutionary nature of the facts and open to challenging the basis for your perceptions. With the FOURTH RULE firmly in mind, the facts will work for you.

RULE 5: The FIFTH RULE of practice is “Be Prepared.” This is not intended to restate the first four RULES; rather, it is intended to focus attention on the natural arrogance of those who practice law. This RULE applies, incidentally, to marketing your skills as well as applying them. Lawyers have an incredible capacity for believing they can “wing” it; that is, rely on memory, experience, skill, and bravado to substitute for simple,

hard work. What they fail to understand is how truly effective they would be if they also prepared. Almost no one follows this RULE. As a consequence, an attorney who does follow RULE 5 will find that most of his professional success is a result of the fact that he was the only attorney in the case who was prepared.

RULE 6: The SIXTH RULE of practice is “You Are Responsible.” Younger partners and associates have a tendency to think that they are only responsible for that part of the matter to which they have been assigned. Even senior lawyers sometimes make the mistake of believing they are responsible for only the case assigned to them by the client. The truth is that senior lawyers are responsible for advising their clients, which means understanding their clients’ business and interests so that they can add value to the clients’ consideration of the issues. Likewise, younger lawyers need to appreciate that senior lawyers want, and, in fact need them to think about the entire matter.

RULE 7: The SEVENTH RULE of practice is “Trust No One.” Recall that you aren’t paranoid if they really are out to get you. Opposing counsel is determined to take advantage of you. You need to hone your sixth sense for tricks, traps, and fakes. Constantly ask yourself how the opposition might take advantage of the circumstances, then determine how to prevent that from happening. Be civil, but Trust No One.

RULE 8: The EIGHTH RULE of practice is “Document Everything.” The EIGHTH RULE is a corollary to the SEVENTH RULE. If you have reached agreement with opposing counsel (or a client) on a point – put the agreement in writing. This is true whether the agreement involves mutual behavior, that of opposing counsel, or your own commitment. Make clear exactly what is agreed, or risk wishing you had.

RULE 9: The NINTH RULE is “Know Who You Are Playing With.” Know your client by understanding its business and, particularly, its goals in the immediate litigation. Know the opposition by understanding the basic motivation driving its position, and whether there is an opportunity to exploit its motivation. Know the experience, reputation, and skill of opposing counsel so that, perhaps, you can anticipate their behavior. Know the arbitrators by researching their background, experience, and reputations. Know

your judge by collecting prior decisions and reviewing special procedural rules that may apply. The better informed you are, the better you will perform.

RULE 10: The TENTH RULE of practice is “Keep Your Perspective.” Litigation has its ups and downs. Not every bad fact is the end of the world and no single admission ensures victory. Focus on the big picture while understanding that litigation generates a lot of sound and fury that signifies precious little, if not nothing. Chose fights that make sense in light of the big picture.

Now you too know THE RULES. Over time, applying THE RULES will become second nature and you will wonder how you ever managed without them. Until then you would be well advised to keep a copy of THE RULES easily accessible.

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