

# How To Practice Law By the Rules

**Helpful Hints by David M. Ellis  
(with Mark A. Shank)**

These rules, when followed, will make the practice of law simple (though not, of course, easy). Most of these rules were distilled from other people who are given their due credit. The rules *always* work. Here they are:

## 1. My Mama's Rule

More precisely, this should be called My Mama's Rhetorical Question. Here's how I discovered this first rule.

In 1973, Anne from Virginia wrote to invite herself to come visit. My affair with Anne in 1969 ended abruptly when the Navy ordered me from Virginia to the Western Pacific. I was relieved. Anne was not. Four years later, she was ready to begin where we left off. I had no interest in Anne, nor did my new sweetie, Patty Jo, about whom Anne knew nothing. Patty Jo and I devised an elaborate story designed to spare Anne hurt feelings and to spare me Anne's visit. The story required participation by my Mama, so we ran it past her for approval. She listened politely, without a trace of disapproval, and at the end asked:

**Why not just tell the truth?**

This was a completely novel thought to Patty Jo and me, not immediately comprehensible. Slowly though, like a light being increased from a glow to a beacon, the idea took hold: it just might work. I called Anne, told her that my heart no longer belonged to her, and a visit would be awkward for P.J. Anne said she thought that would be the case, and had no regrets.

The punch line of this anecdote (that Anne easily accepted the truth when it was offered) does not define

the importance of My Mama's Rule. This rule works even when it does not work. If Anne had reacted with screaming and wailing (I had a mental image of her grabbing my ankle and never letting loose), My Mama's Rule still pointed the correct direction for *me*. Of course, I could not control Anne's reaction; and if she had dealt with the truth by resisting it, that would be her problem, not mine. (See, however, David's Corollary below as to one's responsibility in such event).

It is not by coincidence that My Mama's Rule appears here first. Not only is it far and away the most important, but some other rules flow directly from it. Thus, we begin with the truth: always tell the truth. Assuming you are not a gangster or a diplomat, whose occupation requires you to lie, this rule will always work for you.

Note that lawyering is not among those occupations the duties of which require lying. This may, at first, be puzzling. If, for example, you are negotiating a settlement and have \$100,000 authority from your client, you will likely want the other side to conclude that you have less. One obvious way to accomplish this is to lie. Another, ultimately more effective, always more satisfying, eminently more professional, is not to lie — to use common sense, finesse, even guile, and the truth.

If you lie, even for a commendable reason like representing a client, you will become known as one who lies; and your word will be devalued even when you tell the truth. Worse, if you adopt as your own the good reputation of your law firm, and then tarnish it, you have devalued the word of all your partners. We all know lawyers (even prominent lawyers in big skyscraper firms) about whom we say, "Always get it in writing, and never turn your back." Even when we punctuate that statement with an ironic laugh, it is not funny.

## 2. David's Corollary to My Mama's Rule

**You gotta tell them everything  
and you gotta make them hear.**

This rule is focused on protecting the client from himself. It begins with the assumption that you know your proper role, and also know your client's.

Remember Anne? Just suppose, when I told her to buzz off, she had ignored what I said, or protested, or begged. My positive duty at that point would have escalated to ensure that she understood *clearly* that no way was she coming to visit. I had to take the initiative to tell the truth, and accept the responsibility for getting it heard.

If My Mama's Rule is somewhat passive (i.e., given a choice between truth and not truth, choose truth), this corollary is active: there comes a time when your duty is to shove some truth on someone (often your client) who may be a trifle reluctant to hear it.

This test question will illustrate: if your best client is absolutely convinced that his or her product is the safest possible, but you are concerned that there is some significant product liability exposure, when is the best time (for you and for your client) to tell him or her — during preparation for trial or after the jury has rendered its \$1 million verdict? If you tell your client earlier, he or she will get furious and perhaps fire you. If you do not tell your client until later (or not at all), he or she will still get furious, probably still fire you, and be right: you have failed in your duty to share your professional judgment (for which you are being duly paid). This example leads to the comforting Addendum to David's Corollary to My Mama's Rule:

**There are worse things than being fired.**

Of course, in order to follow this rule, you must know just what it is that you have to tell. Let's start with what you do not need to tell: you do not need to tell your client how to do his or her job. Most corporate clients have executives (some lawyers, some not) who translate that company's policy into action. Some companies capitulate easily; some always stonewall. They do not need you to tell them what their policy should be. Indeed, if your idea is different from theirs, they likely will not be grateful.

In fact, you can emphasize that you do not tread on your client's turf. Here's one way: state that you view your job to be preparing the case and evaluating it, and certainly not making the management judgment of how much risk to take or when principle may be more important than principal. That (you can say with a wink and a smile) is why your client gets paid so much money. You can state that is why you will never come crying that he or she ought to settle the case because there is a risk of losing. Your job is to accept the marching orders you get. If your client wants to accept the risk of trying a marginal case, that is exactly what you want to do. Clients universally love to hear this, partly because it confirms their importance, and partly because they are probably sick of lawyers who chicken out right before every trial or confrontation.

What clients will not necessarily love to hear is what you have to tell them to enable them to do their jobs properly. Every client likes his or her case and hates the other guy's case. Therein lies the problem: they enjoy

hearing only good things about their cases and bad things about the other guy's case; and because they are paying you (and maybe you have become friends), that is what you want to tell them.

It won't work that way. Here is David's Corollary restated:

**You gotta tell them everything  
and you gotta make them hear.**

Is your key witness a bozo? Tell your client. Is there a basis for the jury to find the product defective? Tell your client. Do you have an evidentiary problem? Tell your client. Is opposing counsel a silver-tongued jury persuader? Tell your client. Tell your client everything, truthfully.

Do it factually, objectively and, of course, tactfully. Do it in writing if necessary, but tell him or her everything. If the client resists hearing ("Whose side are you on anyway? Maybe our product is unsafe, but the plaintiff was drunk..."), then tell him or her bigger. Insist that the client listen; require the client to hear. If, because you do your duty and follow this corollary, things get a bit rocky between you and your client, just remember the addendum to the corollary.

The more a client resists letting you tell him or her everything, the more important it is to do so. If you never make the client hear you, then three things may happen, all of them bad:

- a. The client's original evaluation (his or her case is good; the other guy's case is bad) never changes, and the client never makes an informed judgment based on what you have been paid to develop. In other words, you have not represented the client fully or well.
- b. No one evaluates the case; no judgment is made. Everyone shuns responsibility, and assumes the buck has been passed to someone else (maybe you).
- c. You evaluate the case, and undertake to make business judgments — including instructing the client whether to settle and for how much. This approach is generally welcome only when you predict, guarantee and achieve total victory.

The good things that will happen when you follow David's Corollary are: you focus on doing only your job, your client gets the representation that has been paid for, and the two of you work together as the team God intended you to be.

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## 3. Mark's Daddy's Rule

**The more unpleasant the task,  
the more immediately you need to do it.**

You do not need a PhD in psychology to discern the common sense behind this rule. If you have something unpleasant to do, it will weigh heavily on you — sometimes to the point of becoming an obsession. Only one action can remove the gloom of impending unpleasantness — doing it, getting it behind you, and the quicker the better.

The reason it is important to state Mark's Daddy's Rule as a rule is because everybody always resists following it every single time an unpleasant task asserts itself. And because following David's Corollary to My Mama's Rule often seems to be an unpleasant task, following Mark's Daddy's Rule is the only way you can be sure to comply with the corollary.

Two truly amazing things happen when you do the unpleasant things first. Almost always you discover that

things are not as bad as they seem. Then you discover that the unpleasant things get less unpleasant. When you tell a client everything, good and bad, he or she may resist it at first (unpleasant), then comes to expect it (neutral), and finally, welcomes the teamwork and assistance you offer to the client performing the job (pleasant!).

Of course, Mark's Daddy's Rule also works on the small things as well. Put your phone messages in order of best to worst, and then return them in reverse order. When presented with a personnel (or personal) problem with others on the staff, face it without delay.

## 4. Barefoot's Rule

Early on I fell prey to the common misunderstanding among young lawyers that, because opposing counsel is the enemy, he should be treated like dirt. This was long before I knew or could comprehend the sage and practical business observation, "He who sues my client is my friend." So, when a lawyer asked me to consent to an extension of time for something or other, I instinctively said "no," but could give no reason. I sought Barefoot's affirmation. He said:

**Whenever opposing counsel asks for something,  
do it if you can, unless it will hurt your client.**

There is, he pointed out, a very practical encouragement for following this rule: you will be practicing law in this town with this attorney for the next 50 years or so; and if you create problems for him now, he will create problems for you later (and often sooner rather than later).

The beauty of this rule is that it keeps your attention focused away from the one factor you would instinctively (and incorrectly) be inclined to let guide your decision: your ego. This is especially important when the counsel opposite is a jerk and you would love the opportunity to emulate him or her. Whether your opposing counsel has "earned" the right to a favor from you is never the issue. The only relevant concern is your client's interest. To the extent that attorneys can do things by agreement, they save time and clients save money. Even when you differ, you can do so by agreement: you can acknowledge the fact of different positions without questioning your adversary's legitimacy, and let resolution of the fuss take its due course.

## 5. My Daddy's Telephone Rules

My Daddy was busy, successful, rich, and important — the same qualities that almost all attorneys attribute to themselves. The way he treated telephones can guide us.

Telephones almost govern our existence. We know many of our best clients only over the telephone, and all of our clients we know primarily over the telephone. The voices the client encounters are yours and your secretary's, and you have both got to do it right.

It is easy to do it wrong. Do you ever get irritated when you are interrogated by a secretary screening someone's calls? Once, when I would reveal to a gestapo-cloned secretary only that I was calling her boss about a personal favor, she took my number only to call back and ask my secretary to provide more information. Perhaps I would have been less miffed if I had been requesting, rather than

**MISSING  
HEIRS?**

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offering, the favor. To this day I believe that the person I was calling — who was responsible for and presumably instructed his secretary's actions — is a pompous, ego-inflated buffoon who thinks he is more important than anyone trying to penetrate his shield.

Thus, this advice for people who aspire to the status of totally screened calls: do not do it unless you actually want people to believe that you are a pompous, ego-inflated buffoon who thinks that you are more important than anyone who would be calling you. (Puzzle through this one: if you are so important, why do only unimportant people call you?) My Daddy's Telephone Rules are designed for those of us who cannot afford (and do not want) to offend our callers (many of whom may be paying us to answer), and yet who cannot always take our calls. There are two rules:

**Answer your own phone often enough  
to confuse your callers.  
Always return calls.**

Following the first telephone rule will ensure that callers never know whether they will speak first to you or your secretary. If it is your secretary (even if it is usually your secretary), your caller can be confident that you could not answer because of your schedule, and not because you are a pompous buffoon. And, during times when you need only to "semi-hide" from calls, your secretary can put through your good clients without quizzing them, thereby silently communicating your esteem for them.

The first telephone rule does no good unless you also follow the second. If they cannot get through to you at once, they will always know that you will get back to them without fail. You can never permit a client to conclude that you were ducking calls — even if you want to. (Note: If you want to duck a call because it is unpleasant, see Mark's Daddy's Rule.)

It is also important to return calls to unknown callers. You can quickly ditch the stockbrokers. You will find an occasional new client in the slush pool of messages who will be gratified that you did not fancy yourself too important to return the call. Return all calls, no matter how late. If they are still there, they will be impressed. If they are gone, you can tell them later (truthfully: do not lie) that you missed them. If you must go for a few days without returning calls, ask your secretary to call everybody and tell them.

## **6. Joe Canterbury's Observation**

This is not so much a rule as a universal truth. Joe once told me the war story of a complicated case that he and Bill Keller won in the U.S. Supreme Court. He confessed that when he first filed the case, he did not believe it had great merit. However, he observed:

**There is a point in every case when  
a lawyer begins to believe his own bull.**

Joe is earthy, and the quote is somewhat incomplete, but the message is there. The more deeply involved you get with a case, the more firmly you believe you are right. This can be somewhat dangerous (you may lose objectivity) and very helpful (you become the righteous advocate). Thus, it is inevitable that you believe justice is

accomplished when you win, often with an intensity inverse to the likelihood of that result.

## **7. Smokey's Rule**

Smokey is an expert witness, experienced with juries. One day we were developing our theory, and I got a little far afield. Smokey reined me in:

**Don't lay any bull on the jury.**

Smokey is as earthy as Joe, but you get the idea. Juries have built-in common sense. They do not always follow it, but we would be playing against the odds if we offended their common sense by laying on them some bull.

I have a theory about myself, particularly in technical matters: if I can understand it, so can the jury, and vice versa. The vice versa is what is important here. If you have any doubt or question concerning what you are trying to sell to the jury, try another tack.

Incidentally, the same thing that applies to juries also applies to human beings in general.

## **8. Bill Keller's Admonition**

Once again, we have cleaned up a quote, but you will understand:

**You cannot stir up a bucket full of mud  
without getting a little on you.**

Consider a typical divorce case. They *despise* each other, and require their lawyers to do so as well. Why so many divorce lawyers fall into this trap is one of the mysteries of the universe, but it serves to illustrate this warning. Too often, the lawyer consents to trudge through sleazy allegations solely for the purpose of satisfying his client's animal instincts for revenge, and inevitably some of that sleaze remains stuck to the lawyer and his client. The whole process turns out to be counterproductive, in addition to being unpleasant.

That is the point: what you do to represent your client should be of real assistance. If stirring mud will either dirty up your client or just create so much animosity as to hinder resolution of the fuss, then the best representation you can offer is not to do so.

For guidance on *how* not to do it, see the corollary and Mark's Daddy's Rule above.

## **9. The Chief Justice Burger Reply Rule**

He's been making speeches for years about incompetence in the courtroom. I have wondered how he knows what happens in the trial courts, having spent all of his recent years sitting in various appellate courts. Nonetheless, the chief justice says trial lawyers are awful and getting worse.

I wish, just once, one of my clients would get sued by one of the C.J.'s incompetent trial lawyers. I always seem to run up against the hot dogs. So here is my reply to the C.J.:

**Never assume your opposing counsel is a klutz.**

Maybe he or she is, of course. If so, you will have an

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advantage — but only if you prepare as if opposing counsel is as good as you. To assume that person is a klutz is to give away your advantage. More likely, your opposition is a good old guy or gal, just trying to make you think he or she is a klutz. Be careful.

### 10. The Office Assignments Rule

Although it is unfair, it is also a fact of this life that partners may direct associates, and both partners and associates may direct secretaries. Partners are directors; secretaries are directees; associates are both. Because the number of directors is almost always greater than one, directees are subject to conflicting demands. They can take comfort in this rule:

**You never have to be a victim of a conflict unless you so choose.**

All you have to do is follow a suitable variation of My Mama's Rule, the corollary and Mark's Daddy's Rule: *communicate*. Tell your directors who wants what and when, and then *require them to work it out*. If you do not tell, then you will have chosen to resolve the conflict yourself, by picking one of your directors over the other one. The other one will get mad at you. He or she may think that you are manipulating, or even choosing the work that you prefer.

### 11. Allen's Witness Rules

These two rules are always stated for witnesses immediately before testimony, and they work very well if the witness will agree to concentrate on them and follow them.

**Listen to the question**

Not only does this help the court reporter (as well as astonish him because he or she has become accustomed to two or three people talking at once), and not only does it permit you to state your question fully and with articulate grace, it also permits the witness to follow the second rule:

**Answer the question**

This is the tough one. Absolutely no one engages in day-to-day conversation by observing this rule, and it is a distinctly unnatural thing for a witness to do. The question asked may often be the wrong one (in the witness' opinion); or worse, it may request information which he or she would just as soon avoid. He or she may even prefer to furnish an explanation rather than an answer. Note that, by conforming his or her answer to the question asked, the witness does *not* follow the corollary. The witness is under no duty to "tell everything" unless specifically asked, and must not volunteer.

Of course, the witness should be told *how* to answer the question: with the truth (always following My Mama's Rule), with the facts as he or she knows them (no hearsay, no speculation), and without leaving a misleading impression (the witness cannot abandon common sense and be led to an absurd position). Once the witness is so prepared, he or she can respond to the traditional cross-examination with the equally traditional reply:

Q. Did your lawyer tell you what to say?  
A. Yes, he told me to tell the truth.

### THE PAYOFF

Here is what it is all about. If you follow the rules, these things will happen:

1. When you come to the office, you feel good.
2. When you talk to your client, you are both on the same team.
3. When you go to trial, everyone involved understands the case and the risks.
4. You do not get ulcers.
5. You sleep at night.
6. You do not burn out on the practice of law after only a few years.

If you want a bigger payoff, go back and reread all the rules without thinking of law practice in particular. You will find that they help in a broader area: life.



David Ellis and Mark Shank are partners in the Dallas firm of Clark, West, Keller, Butler & Ellis. They have tried a number of cases together, primarily in the areas of employment and product liability. The Rules evolved in their jousting with friends and foes (and each other) during trial preparation.

