Hon. Holly Fujie
SUPERIOR COURT OF LOS ANGELES COUNTY

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
July 2017 Issue

Twenty "don't say-ems"

A GUIDE ON WHAT NOT TO SAY IN ORAL ARGUMENT

Recently in Advocate, I addressed some "Best Practices" and some "Not So Good Practices" in motion practice, particularly in written submissions to the Court. This article contains a similar list relating primarily to oral arguments. As a relative "newbie" to the Los Angeles Superior Court, with only a little more than five years on the bench – four in Family Law and one in the Personal Injury Hub, I can't say that I am an expert on what is the best way to present your argument to a judge in our court. I have, however, had some interesting statements made to me by lawyers that *probably* were not the best way to present an argument. Here are a few of them:

"In all my ___ years of practice, I have never seen/always done/never been asked to do [something you are telling me to do or not to do]" – This is never a good argument. What you have or have not seen or done or been required to do in the past is not valid authority for any position. Also, whatever the number you insert in that blank, it does not make your argument better. If the number is less than the number of years I practiced before I went on the bench (34), it sounds amusing to me. I have had lawyers tell me that "In all my FIVE years of practice, I have never seen…" And even if the number is the same as or more than the number of years I have been a lawyer/judge (and it seldom is!), I think "Really? In all those years you were never told to prepare a proposed order with a motion?" Either way, you sound condescending and like you are telling me the "correct" way to do things without giving me proper legal authority. Not a way to endear yourself to the judge.

"I'm just the appearance attorney, so…" We all recognize that you can't always be where you need to be, but if an appearance requires knowledge, whether it is of the facts or of the trial attorney or the parties or the experts' schedules, the appearance attorney needs to have that information at the hearing. And if authority is necessary – for example, to agree to provide supplemental responses or to bind a party – it is not fair to appearance attorneys for you not to have given them that authority for the hearing. Even if it is an ex parte application for a trial continuance that is stipulated to by all parties (see below), the appearing attorney needs all relevant information to adequately represent your client at the hearing.

"The attorney who appeared at the prior hearing did not have the authority to promise what she did, so I am not bound by that promise." If the attorney appeared on behalf of your client as your representative, we will assume that she had the authority to promise whatever she said she was promising. This is especially true at Informal Discovery Conferences, where the point of the conference is to reach a resolution which almost always involves an agreement either to provide further responses or to agree to accept previous responses. Attempting to renege on such an agreement based upon the appearing attorney's

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purported lack of authority says that you improperly sent an attorney without the necessary authority to a meeting with the judge. If the attorney lacks authority to bind you and the client, do not bother sending that attorney because it will be a waste of everyone's time.

"No, don't interrupt me – wait until I'm finished…" Believe it or not, this has been said in court more than once. Never, ever, say that or anything like it. This is a courtroom, and you are not the one who decides when the judge may speak. We try not to interrupt you unnecessarily, and we do understand that you want to complete your thought, but generally speaking, we will not interrupt you unless you are either being unresponsive to a question posed by us, you are repeating yourself or you are going off on a tangent that is not helpful to our understanding of the relevant issue. Even if you feel that none of these circumstances exist to justify a particular interruption by the judge, this language is still unacceptable.

"It appears from your tentative that you just didn't understand…" Or "I can tell from your tentative that you didn't read my brief…" There are ways to disagree with the Court's tentative ruling in a respectful way. This is not one of them. You can say "I wanted to clarify an issue that was raised in the tentative on page 3 in the second paragraph…" or "The tentative states that the declaration of Mr. Doe admits that he was not present at the time of the incident. Actually, in paragraph 5 of Mr. Doe's declaration, it states that he was in fact present at the time of the incident…" or "I would like to draw the Court's attention to the following [short] quote from [exact page cite] of the ____ case cited in my opening brief at page __..." Statements like this will cause me to look at the specific reference and at the statement in the tentative, and if you are correct that the tentative needs correction, I will generally first allow opposing counsel to comment on this perceived discrepancy and then possibly take the matter under submission to allow further briefing and/or perform more legal research and/or review all of the documents to see if I need to change the final order from the published tentative.

[Said in response to a question from the Court] – "Huh? Oh, yeah…" Formal speech is the only way to speak in court. We recognize that sometimes you slip into informal speech by accident, especially when on Court Call. If you do, though, apologize immediately (don't wait until the judge reacts) and start again. And please, if you are on Court Call and you are not in a quiet, private office space, do not let random sounds (dogs barking, people talking) be heard – when we are listening to you from the courtroom, those sounds are extremely distracting and prevent you from presenting your argument in a professional manner.

"Whatever…" and "I'm good." These are Millennial-speak words which are virtually incomprehensible to many of us Baby Boomer and even Gen-X judges and staff. Please say "Yes" or "No." Otherwise, you may find that an order has been entered against your client because the judge or the clerk thought that "Whatever" indicated assent to it. This has actually happened in my court, and resulted in much wasted time and effort in fixing the situation.

"Yes, ma'am" or "Yes, sir." Recognizing that the attorney's intent is to be respectful (and finding this preferable to the "OK, honey!" or, "Sure, Holly!" which I have heard from the occasional self- represented litigant), the proper way to address a judge is either as "Your Honor" or "Judge [insert last name]." I still remember an argument I had many years ago in the Ninth Circuit Court of Appeals where an out of state attorney who was extremely nervous at appearing before that court responded to one of the Circuit Court judge's questions with "Yes, Judge!" The judge stopped the argument to chastise him, saying "You must address the judges on this panel either as Your Honor or as Judge X." The lawyer, now completely flustered, blurted out "Yes, Judge!" – to the amusement of the entire audience.

"I'm going to appeal your order!" Oddly enough, this is often said in response to a non-appealable order. Terminology aside, we are always cognizant of the fact that the Court of Appeal may reverse our decisions and that it is your right to seek recourse in that arena. Whether intended or not, this statement sounds like a threat; however, it is one that is unlikely to make us change our opinion absent other reasons to do so. In fact, where this is a case of first impression, we welcome guidance from the appellate courts and are consequently far from threatened by this statement. If you believe that the order is not proper and you want to appeal it and are entitled to do so, you are certainly free to do so. But there is no need to tell us that you intend to do so, and saying this lends no weight to your argument.

"Ok, I know that the other side's trial attorney on today's trial is engaged in another trial today but I oppose the requested continuance because there is at least one other attorney in that firm, so someone else can just handle the trial." Now, we all know that attorneys are not interchangeable, so this argument does not work with me. I always wonder what would happen if I told the attorney who makes this argument: "All right, I will order some other attorney in the engaged attorney's firm to try the case today, but only if you also agree that I can order that *you* are to step aside and have another random attorney in your firm – preferably someone who only handles corporate transactions try the case in your place." I never actually say that, but I am also never persuaded by this argument.

"I need a continuance of the trial date [which I specifically requested and stipulated to last time] because I have a pre-paid vacation during that time." When you request a specific trial date, our assumption is that you have cleared your calendar for trial to go forward on that date. Unless your significant other has surprised you with a pre-paid vacation without your prior knowledge (and even then this argument may not work), your setting a vacation for a time when you have requested a trial date is not "good cause" for continuing trial. I also note that if you have one or more good reasons for obtaining a trial continuance and you also have one bad reason, like

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this, then leave the bad one off of the application. It is best not to lead the judge to believe that the real reason is the bad one, and possibly deny the request because you have stated one invalid or improper reason in your request.

"I need a continuance of the trial date [which I specifically requested and stipulated to] because I just learned that my expert/client/witness is unavailable for deposition or trial." Before you request a specific date for trial, or when you learn of a new trial date, you are expected to immediately notify all parties, witnesses and experts of the date and ensure that they are available for that trial date. Recognizing that sometimes unexpected things happen after the new trial date has been set, failing to notify them immediately and learning of their unavailability for depositions and/or trial immediately before that trial date is not "good cause" for a continuance. And stating that you have only recently determined that your expert is unavailable for the next six months may result in an admonition from the Court that you should retain another expert with better availability.

"I need a continuance of the trial date because I just substituted into the case and I have five other trials scheduled for that date." We recognize that sometimes new counsel has to step in at the last minute, and we also recognize the value of having experienced trial counsel try a case rather than an unprepared, self-represented litigant. My thought in this circumstance, however, is that you should not have taken on this case if you were unable to try it on the scheduled trial date.

"I need another continuance of the trial because we haven't done any of the discovery that we said we needed and which we said we had scheduled when we asked for the last continuance you granted, because as soon as we got that continuance we took everything off calendar and concentrated on other cases with trial dates we couldn't get continuances for." OK, so no one is that honest, but this is what we are reading between the lines when you ask for an additional continuance on exactly the same grounds as you presented in your previous request. I have often called up the previous request from our electronic filing system only to see that the ex parte papers you have just submitted are identical to your last papers with nothing changed except the requested continued trial date and sometimes by error not even that! For that reason, I will often condition a trial continuance requested on this ground upon an order that "Failure to complete discovery, including expert discovery, and failure to complete mediation shall not constitute good cause for a further continuance." If for reasons outside your control, you still do have discovery to complete, you must explain why you were unable to complete the discovery on the schedule you represented in your last application despite diligent efforts, and how you are going to overcome these difficulties to bring the case to trial by the next ordered trial date, if the application is granted.

"I need a continuance of the trial because the other side has been stalling discovery for over a year and I haven't been able to [take the other side's deposition/obtain documents/get a response to written discovery]." While we understand and appreciate the requesting party's desire to obtain discovery without resorting to motion practice, allowing the other side to have endless extensions of time without ever proceeding to a motion to compel may not be considered "good cause" for a continuance of trial. At some point, you have to file a motion to compel or request an Informal Discovery Conference to justify additional time to complete discovery and take the case to trial.

"This is an ex parte application for Pro Haec Vice admission of an out of state attorney." Pro Haec Vice applications are governed by California Rule of Court 9.40, which requires a motion with notice under section 1005 of the Code of Civil Procedure. Section 1005 provides that a court may shorten time upon application, but the statutes do not allow ex parte applications for admission to be granted. If you want to seek Pro Haec Vice admission for the attorney on shortened time, you may bring an ex parte application for an order shortening time for the hearing, but not an ex parte application for admission itself. And when you make your motion, be sure to comply with the requirement that you give notice to the State Bar of California as well as your client and opposing counsel.

"Oh! So what you are *trying* to tell me is [supposedly outrageous legal position]! Is *that* what you are saying?" There are ways of questioning the judge's statement without resorting to broad sarcasm. This is not one of them. It is disrespectful and rude and will not aid your client's position.

"Yes, I know I didn't file a written opposition, but I am entitled to raise these issues at the hearing." Not a good move. Even if I were to allow you to argue, which many judges will not, I cannot give your argument the attention which it would receive if it were in writing, so no matter what you are not properly representing your client's interests.

"But all the other judges [grant any requested continuance, approve inadequate petitions…]!" First, this argument is no more effective than when your teenaged child argues that "All the other kids are allowed to [drink alcohol, attend co-ed sleepovers…]." Each individual judge is required to exercise his or her own discretion as permitted by law, and we do not rule by consensus. Second, judges do talk to one another, and we have a fairly good idea how we each rule on common issues. I am always personally amused by attorneys who try this argument when they know that I actually share a courtroom as well as adjoining chambers with my colleague in the PI Hub and good friend, Judge Michelle Williams Court. We discuss all attorney claims that "all the other judges" rule in a manner that is different from our own rulings, and we almost always find that we agree as to the correct decision. And even on the rare occasions when we respectfully disagree, it is our obligation to exercise our discretion as we each see fit.

"I don't have any of the Final Status Conference documents because the other

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side has not cooperated/will not return my messages." Each party has an independent obligation to prepare and file the required pre-trial documents before the FSC. The Court does have the discretion to impose sanctions for any unexcused failure to comply, ranging from monetary sanctions to exclusion of evidence, issue preclusion, denial of a claim or defense, dismissal or default. If you can't prepare documents together with opposing counsel, then prepare your own, file them and bring them to the FSC to discuss with the judge.

And a couple of bonus observations: Don't say, "I want to state this for the record" or "I know you are not ruling my way, but I want to make sure this is on the record" when there is no court reporter for the proceedings. If you want to make a record, then bring a court reporter to prepare a transcript "for the record."

Do *not* read your argument. We know that new lawyers sometimes lack the confidence to argue without extensive notes, and we understand when you read citations (although these probably should have been in your briefs), but when a lawyer reads an entire argument, it is never as effective as one that is extemporaneous or based upon brief notes. The judge wants a succinct statement of your position, not a treatise, and even the best oral argument is not a substitute for good written papers. I have had lawyers start their argument by opening up what is clearly over ten pages of single spaced text and commencing to read it verbatim. When I see that, I generally will ask that counsel please summarize their points, but often to my dismay they decline to do so, which tells me that they do not really know their material and are relying entirely upon those densely-written pages to attempt to make their point. This is not an effective use of the limited amount of time we have for oral argument, and does not serve your client well.

On a serious note, it has been a privilege and, for the most part, a pleasure, to preside over matters in the PI Hub of the Los Angeles Superior Court. The vast majority of attorneys who appear before us are well-prepared, respectful and professional, as well as patient in the face of the Court's current financial and staffing limitations. We thank you for your cooperation, your dedication to the best interests of your clients and your support of the Superior Court and the judicial system.

Holly J. Fujie is a judge on the Superior Court of Los Angeles County *in California. She was appointed by Governor Jerry Brown in Dec. 2011.She was elected in 2014 for a term that expires in Jan. 2021.*