Hon. Michelle Williams Court

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From the Bench: A guide to the presentation of your case

TRIAL LAWYER SKILLS FOR THE NEW ATTORNEY

Earlier this year, on a rainy Saturday afternoon, I had the pleasure of speaking to a group of new attorneys about the judicial perspective of trial. Speaking to such a large group of attorneys so dedicated to learning the craft of trying cases that they spent an entire Saturday learning about the intricacies of discovery, law and motion, dispositive motions and trial practice rather than sleeping in, brunching with friends, or (dare I say) heading into the office, was quite an honor. With this article, I have tried to summarize my advice to new attorneys who aspire to try civil cases.

In this article, I will try to answer many of the questions new attorneys frequently ask. In addition, it is important to state at the outset that it is important to seek out information, seek out mentors, and seek out opportunities to hone the skills necessary to become a successful trial lawyer. New litigators should welcome opportunities to try cases of the size and complexity appropriate to their level of experience. Any successful trial lawyer will tell you they started out handling and trying smaller cases and gradually moved on to trying cases of increased complexity.

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The most important tools in the trial lawyer's tool kit are civility, integrity, strategy, readiness and performance.

Civility

Civility across the aisle is crucial to the success of every lawyer. Why? Because the swift and smooth resolution of civil disputes is in the best interest of the litigants, the court and the community. In 2011, the Los Angeles Superior Court amended its local rules to include Guidelines for Civility in Civil Litigation. These rules cover everything from requests for continuances, to service of papers, to the content of pleadings, to discovery, settlement and trial. See LASC Local Rules, Ch. 3, App. 3.A. (the local rules can be found on the LASC website at http://www.lacourt.org/courtrules/ui/index.aspx?ch=Chap3&ct=TR&tab=2)

Trial lawyers are well-advised to understand that fidelity to the principles of civility is not only good for the client, but it is also good for the advocate. Once a lawyer gains a reputation for engaging in obstreperous tactics, unyielding manner, or dishonest or misleading advocacy, that reputation is difficult if not impossible to shed. Lawyers talk. Judges notice. Justice suffers.

At the beginning of every trial, I admonish the lawyers to display civility and respect for everyone in the courtroom. In jury trials, I remind them that from the moment the jury panel enters the courtroom for voir dire, the jurors are listening and observing all of the dynamics of the courtroom. Jurors are astute and take their civic duty seriously. Trial counsel employing uncivil tactics should tread lightly.

What about the lawyer's duty of zealous advocacy? It may come as a surprise to some that California's Rules of Professional Conduct do not expressly include a "zealous advocacy" requirement. Yes, lawyers have a professional responsibility to fully and faithfully represent the interests of their clients, but not at all costs. Zealous advocacy and civility are not mutually exclusive.

Indeed, civility and integrity are at the heart of every great trial lawyer's arsenal.

Integrity

Some attorneys make the mistake of practicing law as if there is no limit to zealous advocacy. Yes, attorneys are ethically required to represent their clients' interests. That advocacy, however, does *not* include misleading a judge or jury by false statement of fact or law, intentionally misquoting the language of a book, statement or decision, citing a decision that has been overruled or a statue that has been repealed or declared unconstitutional, or asserting personal knowledge of the facts at issue, except when testifying as a witness. (Cal. Rules of Prof. Conduct, Rule 5-200.)

Strategy

Preparation for trial begins long before the final status conference. In fact, trial preparation starts even before the complaint is filed.

While most cases settle before trial, the most efficient litigation occurs in cases where both sides work the case with an eye toward being completely ready for trial at the final status conference. This requires pre-filing investigation and research, careful drafting of the pleadings, and creation of a discovery plan. Creation of a discovery plan at the outset of a case enables the handling attorney to maintain control of the pace of the litigation.

Motions to continue trial on the ground that discovery has not been completed are generally disfavored and most judges will require a showing of diligence in completing discovery before granting a continuance to allow time for more discovery beyond the discovery cutoff.

Discovery plan

Well planned discovery takes the surprise out of trial preparation by enabling parties to obtain the evidence needed to effectively evaluate and resolve disputes without the need for trial. (*Greyhound Corp. v. Sup. Ct.* (1961) 56 Cal.2d 355, 376; *Emerson Elec. Co. v. Sup. Ct.* (1997) 16 Cal.4th 1101, 1107.) In addition to preserving evidence and providing the information needed to effectively argue pretrial motions and assess settlement, discovery also enables the parties to evaluate the merits of various claims and defenses and reach agreements resulting in the narrowing of issues to be tried.

Pretrial law and motion

Rules governing pretrial law and motion are found in the Code of Civil Procedure, California Rules of Court and the Los Angeles Superior Court Local Rules. In addition, the Los Angeles Superior Court has issued several General Orders governing motion practice in personal injury cases. Attorneys should familiarize themselves with all of these rules to avoid common pitfalls in pretrial law and motion practice. All General Orders are posted on the Court's website at: http://www.lacourt.org/division/civil/civil.aspx

First, comply with any pre-filing requirements, like a requirement to engage in a meaningful meet and confer.

Second, even if not required, ask the judge whether he or she conducts Informal Discovery Conferences (IDCs). IDCs are an effective way to resolve existing discovery disputes and to head off future disputes without the time and expense of filing a motion.

Third, when making or opposing a motion, take a practical approach to filing evidentiary objections. Excessive or unfounded evidentiary objections are not productive and can obscure the arguments presented to the judge.

Fourth, appear for oral argument prepared to respond to any questions asked. Assume your judge has read the papers and has considered all the arguments presented. There is no need to repeat what is presented in the papers unless the judge has a specific

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question about your position. Many judges post tentative rulings or announce tentative rulings from the bench at the beginning of argument. If you choose to argue, be respectful, concise, and responsive.

Your appearance and performance at oral argument is very important. It is usually the first time the judge assigned to the case will have experience with you. Making a good first impression is important not only to your case but also to your reputation. Most motions are accompanied by an attorney declaration and points and authorities. If you make the mistake of misleading the court in your papers or at oral argument, not only will the judge remember for purposes of future proceedings in that case, but the judge's impression about you (and your firm) will travel with you throughout your legal career.

Unless the judge instructs otherwise, stand to argue. Treat everyone in the courtroom with respect. Do not interrupt opposing counsel or the court. And refrain from disrespectful conduct, like rolling your eyes, making rude gestures or sounds, or heavy sighs. While it seems like this should go without mentioning, this behavior is much more common than it should be and tends to distract from the matters the litigants seek to raise with the court.

Readiness

After discovery and pretrial law and motion has closed, the court will hold a final status conference (FSC), about 10 days before trial. By the time of the FSC, the motions in limine (and oppositions and replies), joint witness list, joint exhibit list, proposed jury instructions, and proposed special verdict form should be completed and filed and/or lodged. Counsel should have completed an extensive meet and confer to discuss stipulations to evidence and designation of deposition testimony.

This is the time to ask questions about the trial judge's preferences. Must counsel stand when making objections? Would the judge like electronic copies of the trial documents? May counsel use electronic trial presentation technology and, if so, what arrangements should be made to equip the courtroom? Does the judge impose time guidelines for voir dire, opening statements or closing arguments? Does the judge allow counsel to have water or coffee at counsel table? Are there any other parameters the judge expects trial counsel to adhere to? These are the details that tend to get lost in the heat of the run up to trial, but if they are addressed and planned for will alleviate much of the stress associated with the commencement of trial.

Performance

The judge controls the trial, but the attorneys control their presentation of the case.

One of the first opportunities a trial lawyer has to shape the presentation of the case is at the hearing on the motions in limine. The rule of thumb here is simple: know your case well enough to file and oppose the appropriate motions. A common mistake lawyers of all levels of experience make is to file improper motions in limine. A motion in limine is a procedural tool to request an advance ruling to limit testimony or other evidence in a particular area. It is *not* a tool to seek a dispositive ruling on a claim. (See *Hana Financial, Inc. v. Hana Bank*, 735 F.3d 1158 (9th Cir. 2013), aff'd, 135 S.Ct. 907 (2015).) Motions in limine should be targeted to specific witnesses and/or evidence. The judge is not likely to grant a motion in limine if the request for exclusion is not specific enough to support making the necessary factual and legal findings upon which to base an enforceable order.

In jury trials, the next opportunity the trial lawyer has to guide the presentation of the case is at voir dire. This brings us back to the earlier points of civility and integrity. While the lawyers are trying to absorb as much as they can about the prospective jurors, trial counsel should be aware that the jurors are also absorbing everything counsel, the parties, and the judge are doing. The trial judge will be mindful of conducting the proceedings so as to provide an equal playing field to all of the parties. This includes controlling everything that happens in the presence of the jury to hold trial counsel to their ethical responsibilities. The successful trial lawyer conducts themself well within their ethical responsibilities and is free to focus on selecting the best jury for their case. The same holds true for opening statements.

Next comes the presentation of evidence. It is the trial lawyer's responsibility to offer the evidence and to protect the record. As I recently told one lawyer trying a case before me, if you don't state the objection, I cannot rule on it. Be vigilant, but not overzealous. This is particularly true concerning jury trials. Jurors quickly become impatient with frequent sidebar conversations and breaks in the proceedings. If your opponent asks an objectionable question, stand, state the legal grounds for your objection and wait for a ruling. Speaking objections (narrative objections that are not anchored in the law) are disfavored and are not a productive use of your precious trial time.

For example, if your opponent asks a question calling for hearsay, simply rise and state, "Objection. Hearsay." The judge in all likelihood will anticipate the objection and will be ready to swiftly rule. If instead you say something like "Judge, that is an improper question because . . ." the judge may interrupt you and ask for a properly presented objection or worse, ask you to refrain from repeating that behavior again.

A word about objections: Failure to timely state an objection on the record generally waives the objection. If there are valid grounds for objection, it is counsel's responsibility to raise them.

Your last chance to address the jury will be during closing argument. It is counsel's opportunity to use the evidence presented to tell a compelling story to convince the jury to reach the desired verdict. The jury is your trier of fact. Argue the evidence truthfully as it is; argue with integrity; argue with sincerity. And importantly, be yourself.

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Conclusion

Civility, integrity, strategy, readiness and performance. These traits make up the foundation of the practice of every trial lawyer. If you practice with civility and integrity, diligently employ strategy, organize your plan to be prepared and apply all of this preparedness to your performance, you will undoubtedly enjoy an exciting career as a trial lawyer.

Judge Michelle Williams Court serves in an Individual Calendar court in the Civil division of Los Angeles Superior Court where she presides over general jurisdiction civil cases. Prior to her current assignment, Judge Court served in the civil division's Personal Injury Hub, in which she presided over more than 6,000 civil cases each year. Prior to that, Judge Court served in the central Family Law division, where she heard a wide variety of custody, visitation, property, domestic violence and other family law matters. Judge Court is a member of the Judicial Council Language Access Implementation Plan Taskforce and also served as a member of the Commission on the Future of California's Court System which was tasked with making recommendations regarding future initiatives of the judicial branch to the Chief Justice of the California Supreme Court. Judge Court is a member of the Executive Committee of the Litigation Section of the Los Angeles County Bar Association, sits on the Board of Trustees of the Los Angeles Law Library and serves on several Los Angeles Superior Court committees, including serving as Co-Chair of the Technology Committee. Judge Court is an elected member of the American Law Institute (ALI), is a Fellow of the American Bar Foundation, serves as faculty for the Center for Judiciary Education and Research, and has lectured at UCLA School of Law, Loyola Law School and Southwestern School of Law. Judge Court also serves as faculty for The Rutter Group annual updates. While in private practice, Judge Court specialized in civil rights and public interest litigation. Judge Court is a graduate of Pomona College and Loyola Law School.