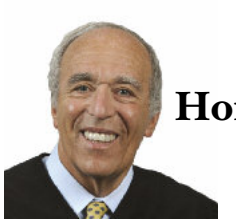

Hon. Anthony J. Mohr

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Common mistakes you can avoid

THE MASTER-CALENDAR CIVIL TRIAL COURTS OFFER THIS JUDGE A NEW PERSPECTIVE ON COMMON MISTAKES IN THE COURTROOM AND HOW TO AVOID THEM

I am now sitting in the master-calendar civil trial courts, from where I can offer a new perspective. For openers, no longer must I deal with demurrers and discovery motions. On the other hand, since independent calendar (IC) judges handle cases from cradle to grave, they have more ability to shape them for trial. I can't do that. A trial parachutes into my department with everyone but me familiar with the facts. The advice I offer comes from that context.

Most lawyers who appear before me follow our rules down to the punctilios. Their trial notebooks are complete. They have their proposed jury instructions, verdict forms, witness and exhibit lists, their brief statement of the case and their page and line designations for depositions and former testimony. In other words, there is not a lot to criticize, with the result that I had to hunt around for some common mistakes to address in this article. Here's hoping this potpourri of suggestions will make you even better.

Start with the orders

On the Los Angeles Superior Court's website, under the heading for the 'General Jurisdiction Personal Injury (PI) Court,' you will find a series of links to forms and general orders. Consult them before commencing a personal injury action. They articulate the basic information and procedures you need to know and follow in every personal injury case. Included are proposed orders for continuing a trial date and other events, guidelines for exempting a case from case management rules, and a list of frequently asked questions. There also are forms for, among other things, informal discovery conferences and transferring

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a complicated case to the individual calendar courts. These materials can be found at http://www.lacourt.org/division/civil/CI0030.aspx.

A final point: check this website from time to time. Orders can and do change, and from time to time we post supplemental information.

Scorn the small case

I'm talking about lawsuits that are worth at best a few thousand dollars. Far too many lawyers waste their time with them, certain they can score unrealistic verdicts despite their clients' trivial injuries. I've seen attorneys ask for six figures for problems that resolved after a visit or two to a chiropractor. In one trial, a rear-ender, the defense conceded liability. Three to five thousand dollars should have closed the file, but plaintiff's counsel wanted almost a million dollars. Rather quickly, the jury found for the defense.

What's the takeaway? Carefully analyze a case before taking it. Don't automatically believe your client. Don't assume you can settle with a few phone calls. Even if you need the work, a case with minor special damages isn't worth it. You will be happier spending a week on the beach.

A former business client of a colleague observed that in any matter, three percent of the effort, expended at the beginning, determines the outcome. I tend to believe this theory. Even if you end up not getting paid, spend a few hours poring over the medical records, interviewing witnesses, researching the law, gathering the proper jury instructions, and grilling your client. Scan the verdict sheets in to determine what juries award for that particular injury. Spend half a day or a full day with the potential client and carefully note how the injury impacts his life.

While I'm on the subject, stay away from litigation arising out of a non-event. One dispute that showed up in my court happened because a supermarket employee lightly bumped the plaintiff with his shopping cart. The incident should have ended with an apology, but it didn't, and two or three years later, the plaintiff lost. Pettifoggery is neither polite nor profitable.

Scorn not the questionnaire

If the case qualifies for the limited jurisdiction division, consider making use of the case questionnaire which is authorized by CCP section 93. True, you are voluntarily disclosing a lot of facts early and under oath. (You need to serve a completed copy with the summons and complaint along with a blank copy of the defendant's case questionnaire.) Think of it as answering interrogatories before you have to do so. But then consider the advantages.

First, you and your client have a sea of time within which to prepare your answers and ensure that every detail is correct. What a perfect opportunity to interview your client at length and suss out every detail about what happened. If your client does not cooperate in this process, that's a mammoth red flag, a warning that your client is going to be a problem, and you should think seriously about rejecting the case.

Second, visualize what is going to take place on the other end, when the defendant and her lawyer receive a blank questionnaire with only thirty days to answer it. You have ratcheted up the pressure on your defendant and opposing counsel. The defendant must answer the questionnaire at the same time that he answers the complaint. (Code Civ. Proc., § 93(b).). Depending on the statute of limitations, you have had weeks to carefully prepare your responses. The defendant has thirty days and needs your courtesy in order to obtain more time. Even if you grant an extension (which you should), the defense ends up preparing their responses under a more compressed time frame.

Venerate the estimate

Before you arrive in Department 1, carefully determine how long your trial will last. Too often counsel assure us they can try a case in four days only to find that the case lasts seven. One group of attorneys promised to try a malpractice case in a week even though they'd listed twenty people on their witness lists. Not surprisingly, the case ran way over, and the jury was not amused.

Figure that you have, at best, six hours a day for trial time. From that, back out time for at least two breaks a day and the inevitable sidebars. That's about forty-five minutes. Also factor in requests by jurors to come late or leave early because of doctor appointments and their children's soccer games. One such request may cost you up to three hours.

Finally, add in at least a day for the jurors to deliberate, two or more if the case is involved, like a medical malpractice action. If you estimate a three-day trial and finish your final arguments on the third day, the jurors will not be happy. Many will insist on returning to their lives instead of hashing through the facts, and a number of judges will let them go. On the other hand, if the jury chooses (or is ordered) to remain, you risk a slapdash deliberation in which the group races to a snap verdict.

Keep these points in mind, then talk with the other side and try to agree on how much time you will need to examine each witness. Be realistic. Nobody, especially you, wants to labor under the stress of a looming mistrial because you've run over and started losing jurors.

Share

Before you invest in your own projectors, computers, Elmos, and other technology, talk with your opposing counsel about using the same equipment. It's cheaper; you can use the same support staff and split the cost. Even if you don't share, you and your opponent may want to make your equipment compatible so that in case of a malfunction, you have a backup system. Jurors become frustrated and are quick to blame counsel when a computer or some other device breaks down and the trial is delayed.

Limit your in limines

A motion in limine is supposed to be used to exclude a specific piece of evidence or to admit a specific piece of evidence. The controlling word is 'specific.' You may

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not use such a motion to exclude unspecified facts and witnesses. Moreover, you don't need a motion in limine to force the other side to follow the law.

The seminal case on these points is *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, an instructive opinion detailing the "misuse and abuse of motions in limine which resulted in denial of due process for plaintiffs in a personal injury action."

One motion in *Kelly*, for example, "sought to '. . . exclude any testimony of the plaintiffs which is speculative.' No factual support or argument was presented to suggest the nature and type of speculative testimony which (the litigant) expected to be elicited from plaintiffs. Three other motions 'sought to exclude evidence of prior incidents unless an appropriate foundation was established to show the relevance of such evidence or that the prior incidents were similar in nature to the incident involved in the suit. Again, no factual support was presented in connection with the motions, meaning the court would have to rule in a vacuum.' Another motion 'sought to limit the opinions of plaintiffs' experts to those 'rendered at deposition and in written reports.' Again, there was no supporting evidence to suggest what opinions had been rendered at the depositions, leaving the court and the parties to guess what opinions during trial may be included within the scope of the ruling.' Yet another motion 'sought an order precluding plaintiffs from calling any witnesses 'not previously identified in plaintiffs' discovery responses.' Absent a meaningful and expressed belief that this may occur, this was a meaningless motion unless and until plaintiffs attempted to call such witnesses."

The author of the opinion, Justice Gary Hastings, went on to observe that "It is frequently more productive of court time, and the client's money, for counsel to address issues to be raised in motions in limine informally at a pretrial conference and present a stipulation to the court on non-contested issues. Matters of day-to-day trial logistics and common professional courtesy should not be the subject of motions in limine. For example, motion No. 15 sought an order that all counsel inform other counsel the day before which witnesses will be called the next day; motion No. 17 sought an order that no exhibits be shown to the jury without having first been seen by all counsel and the court. These are matters of common professional courtesy that should be accorded counsel in all trials. Also, procedural matters and items relating to jury selection most often can be addressed orally and informally with the court, and later preserved on the record if necessary."

Finally, make sure you include with your moving papers the evidence you are talking about. I've seen too many in limine motions that focus on an exhibit but fail to include a copy. I know; I know. You've lived with the case for so long you assume everybody is familiar with the document. Unfortunately, I'm not. I see your case for the first time on the day of trial.

Consider the juror

You've been told this before, but I'll say it again. Practice voir dire. Practice until you can cruise with alacrity through the process. You can practice anywhere. Start a conversation with your Uber driver, with the cashier at Ralph's, with the person waiting on you in a restaurant. Develop an arsenal of open-ended questions to ask potential jurors questions like, "What do you enjoy best about your job?" "What do you like least?" Don't just ask, "Can you be fair?" Ask, "What are the qualities of a fair juror?" Your goal is to start a conversation.

In a trial involving a motorcycle accident, plaintiff's counsel asked jurors what they thought about motorcycles sharing the road with cars. She varied her questions but always kept them open-ended, and after one juror answered, she'd gesture to someone else, usually several chairs away, and ask, "Ms. Smith, what do you think about what Mr. Jones just said?" Before long, she had the jurors debating the subject, a perfect way to sit back, listen, and learn their biases.

From time to time, you may have a case that turns on sensitive subjects such as discrimination or sexual harassment. If you would prefer not to ask questions that might offend potential jurors or invade their privacy, request that the judge put those questions to the panel. I'm happy to do so, and I know many of my colleagues are as well. It is helpful if you submit your questions in writing (copy to opposing counsel, of course), especially if you want them phrased in a particular way.

Consideration for the jury does not end with voir dire. I recently concluded a trial in which the jurors arrived on time, but the lawyers didn't. "I was in Department 500 for such and so a motion," one of them said. I'm glad you have a busy practice, but please let me know your conflicts in advance so I can tell the jury to arrive late. Jurors are not comfortable in a courtroom. It's a foreign environment for most of them. Think about how you feel in an emergency room. The longer you're kept waiting, the more anxious you become.

Always supplement

Technically, this is pre-trial advice, but I offer it because too few lawyers take advantage of the supplemental discovery procedures available to them. Often counsel will object to an exhibit because "they never produced it in discovery," only to be met with the reply, "We found it two months after we answered your request for production." If this is true, there is no basis to exclude the exhibit. Had counsel served a supplemental interrogatory and/or a supplemental request for production, this surprise would not have occurred. California doesn't have automatic continuing discovery, but the law gives you two opportunities to demand supplemental answers before the date a case is initially set for trial, followed by perhaps a third opportunity after the trial date is set. (Code Civ. Proc., §§ 2030.070, 2031.050)

Civility, the old canard

We cannot say it often enough. Even if you delight in belittling your opposition, you won't be delighted

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when jurors dislike you. Jurors don't appreciate name-calling and personal attacks. But you already know that. All I have to add that's possibly new is that civility applies to the parties as well as the lawyers. Jurors can become offended when a witness resorts to billingsgate. Last year I tried a case in which the defendant had accidentally tipped over a pallet loaded with boxes, injuring the plaintiff. The plaintiff's counsel acted professionally, but his client ranted from the stand, calling the defendant "stupid" and "a bastard." Not surprisingly, the plaintiff lost. With a different attitude, he possibly could have won; the case was close. I'm sure his behavior played the decisive role.

Work with your difficult clients. While we judges will say something if a lawyer acts unprofessionally, we will not admonish witnesses who become nasty on the stand. Jurors have a right to experience witnesses as they are, unedited. We just let them run, and if they fulminate and use foul language, so be it. Consequently it falls to you to train your witnesses to act politely.

I'll say it again: I have trouble thinking of criticisms to write about because the majority of attorneys who have tried cases before me know what they're doing. But everyone can learn, and perhaps some of the suggestions I've offered will be helpful.

Governor Pete Wilson appointed Anthony J. Mohr to the Los Angeles Municipal Court in 1994 and elevated him to the Superior Court on December 23, 1997. He now sits at the Stanley Mosk Courthouse. In the fall of 2009, he sat as a judge pro tem in Division 8 of the Court of Appeal, Second Appellate District. He currently is the Chair of the California Judges Association's Committee on Judicial Ethics and is an Adjunct Professor of Law at Southwestern Law School.